

**STATE OF MICHIGAN  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
FOR THE DEPARTMENT OF COMMUNITY HEALTH**  
P.O. Box 30763, Lansing, MI 48909  
(877) 833-0870; Fax: (517) 373-4147

IN THE MATTER OF:

**Docket No. 2013-43356 NHE**

██████████  
Appellant  
\_\_\_\_\_ /

**DECISION AND ORDER**

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37 upon the Appellant's request for a hearing.

After due notice, a hearing was held ██████████ ██████████ son, represented the Appellant. ██████████, the Appellant, was present. ██████████ Long Term Care Program Policy Specialist, represented the Department. ██████████ RN, Pacer Project Manager with Michigan Peer Review Organization ("MPRO") was present as a witness for the Department. ██████████ RN MDS Coordinator, ██████████ Administrator, ██████████, RN MDS Nurse, ██████████, Social Worker, and ██████████, RN MDS Nurse, all from ██████████ Nursing Home, appeared as witnesses for the Department.

**ISSUE**

Did the Department properly determine that the Appellant does not require Nursing Facility Level of Care?

**FINDINGS OF FACT**

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. The Appellant is an ██████-year-old Medicaid beneficiary and resident of ██████████ Nursing Home, a long-term care facility.
2. Medicaid policy requires nursing facility residents to meet the medical/functional criteria on an ongoing basis. The Michigan Medicaid Nursing Facility Level of Care Determination ("LOC") medical/functional criteria include seven Doors or domains of need: Activities of Daily Living, Cognitive Performance, Physician Involvement, Treatments and Conditions, Skilled Rehabilitation Therapies, Behavior, and Service Dependency.

*Medicaid Provider Manual, Nursing Facility Coverages, April 1, 2013, Pages 9-11.*

3. A subsequent LOC must be completed when there has been a significant change in condition that may affect the resident's current medical/functional eligibility status. *Medicaid Provider Manual, Nursing Facility Coverages, April 1, 2013, Page 11.*
4. On ██████████, an initial LOC assessment of the Appellant was completed and she was found to be eligible for nursing facility placement through Door 1. (Exhibit B)
5. On ██████████, the Appellant was re-assessed under the LOC evaluation tool and was found to be ineligible for nursing facility placement based upon failure to qualify via entry through one of the seven Doors. (Exhibit C)
6. On ██████████, the Appellant contacted MPRO and requested an Exception Process review for the Appellant. (Exhibit D)
7. On ██████████, MPRO issued a notice to the Appellant stating she no longer qualified for nursing facility level services based on the LOC and services would be terminated in ███ days. (Exhibit F)
8. On ██████████, the Michigan Administrative Hearing System received a Request for Hearing filed on the Appellant's behalf. On ██████████ the hearing request was re-submitted with the Appellant's signature. (Exhibit G)

### **CONCLUSIONS OF LAW**

The Medical Assistance Program is established pursuant to Title XIX of the Social Security Act and is implemented by Title 42 of the Code of Federal Regulations ("CFR"). It is administered in accordance with state statute, the Social Welfare Act, the Administrative Code, and the State Plan under Title XIX of the Social Security Act Medical Assistance Program.

Federal regulations require that Medicaid pay for services only for those beneficiaries who meet specified level of care criteria. In accordance with the federal regulations the Michigan Department of Community Health ("MDCH") implemented functional/medical eligibility criteria for Medicaid nursing facility, MI Choice, and PACE services. Nursing facility residents must also meet Pre-Admission Screening/Annual Resident Review requirements.

Section 5 of the Medicaid Provider Manual, Nursing Facilities Coverages Section, lists the policy for admission and continued eligibility process as well as outlines functional/medical criteria requirements for Medicaid-reimbursed nursing facility,

MI Choice, and PACE services. *Medicaid Provider Manual, Nursing Facility Coverages, April 1, 2013, Pages 7-15.*

Section 5.1.D.1 of the Medicaid Provider Manual Nursing Facility Coverages Section references the use of an online Michigan Medicaid Nursing Facility Level of Care Determination (“LOC”) tool. *Medicaid Provider Manual, Nursing Facility Coverages, April 1, 2013, Pages 9-11.* The LOC is mandated for all Medicaid-reimbursed admissions to nursing facilities or enrollments in MI Choice or PACE. A subsequent LOC must be completed when there has been a significant change in condition that may affect the resident’s current medical/functional eligibility status. *Medicaid Provider Manual, Nursing Facility Coverages, April 1, 2013, Page 11.* A written form of the LOC, as well as field guidelines are found in the *MDCH Nursing Facility Eligibility Level of Care Determination, Pages 1-9, 3/07/05* and *MDCH Nursing Facility Eligibility Level of Care Determination Field Definition Guidelines, Pages 1-19, 3/15/05.* (Exhibits E and F)

The LOC Assessment Tool consists of seven-service entry Doors or domains. The doors are: Activities of Daily Living, Cognition, Physician Involvement, Treatments and Conditions, Skilled Rehabilitative Therapies, Behavior, or Service Dependency. (Exhibit H)

The ██████████ LOC assessment was the basis for the action at issue in this case. In order to be found eligible for Medicaid nursing facility coverage the Appellant must meet the requirements of at least one Door:

**Door 1**  
**Activities of Daily Living (ADLs)**

Scoring Door 1: The applicant must score at least six points to qualify under Door 1.

(A) Bed Mobility, (B) Transfers, and (C) Toilet Use:

- Independent or Supervision = 1
- Limited Assistance = 3
- Extensive Assistance or Total Dependence = 4
- Activity Did Not Occur = 8

(D) Eating:

- Independent or Supervision = 1
- Limited Assistance = 2
- Extensive Assistance or Total Dependence = 3
- Activity Did Not Occur = 8

The review period for Door 1 is 7 days.

**Door 2**  
**Cognitive Performance**

Scoring Door 2: The applicant must score under one of the following three options to qualify under Door 2.

1. "Severely Impaired" in Decision Making.
2. "Yes" for Memory Problem, and Decision Making is "Moderately Impaired" or "Severely Impaired."
3. "Yes" for Memory Problem, and Making Self Understood is "Sometimes Understood" or "Rarely/Never Understood."

**Door 3**  
**Physician Involvement**

Scoring Door 3: The applicant must meet either of the following to qualify under Door 3

1. At least one Physician Visit exam AND at least four Physician Order changes in the last 14 days, OR
2. At least two Physician Visit exams AND at least two Physician Order changes in the last 14 days.

**Door 4**  
**Treatments and Conditions**

Scoring Door 4: The applicant must score "yes" in at least one of the nine categories above and have a continuing need to qualify under Door 4.

In order to qualify under Door 4 the applicant must receive, within 14 days of the assessment date, any of the following health treatments or demonstrated any of the following health conditions:

- A. Stage 3-4 pressure sores
- B. Intravenous or parenteral feedings
- C. Intravenous medications
- D. End-stage care
- E. Daily tracheostomy care, daily respiratory care, daily suctioning
- F. Pneumonia within the last 14 days
- G. Daily oxygen therapy
- H. Daily insulin with two order changes in last 14 days
- I. Peritoneal or hemodialysis

**Door 5**  
**Skilled Rehabilitation Therapies**

Scoring Door 5: The applicant must have required at least 45 minutes of active ST, OT or PT (scheduled or delivered) in the last 7 days and continues to require skilled rehabilitation therapies to qualify under Door 5.

**Door 6**  
**Behavior**

Scoring Door 6: The applicant must score under one of the following 2 options to qualify under Door 6.

1. A “Yes” for either delusions or hallucinations within the last 7 days.
2. The applicant must have exhibited any one of the following behaviors for at least 4 of the last 7 days (including daily):  
Wandering, Verbally Abusive, Physically Abusive, Socially Inappropriate/Disruptive, or Resisted Care.

**Door 7**  
**Service Dependency**

Scoring Door 7: The applicant must be a current participant and demonstrate service dependency under Door 7.

The assessment provides that the applicant could qualify under Door 7 if he is currently (and has been a participant for at least one (1) year) being served by either the MI Choice Program, PACE program, or Medicaid reimbursed nursing facility, requires ongoing services to maintain current functional status, and no other community, residential, or informal services are available to meet the applicant’s needs.

(Exhibit H, pages 1-7)

The Michigan Department of Community Health policy related to LOC exception eligibility for nursing facility services is found in its Medicaid Provider Manual:

**5.1.D.2 Nursing Facility Level Of Care Exception Process**

The Nursing Facility Level of Care (LOC) Exception Review is available for Medicaid financially pending or Medicaid financially eligible beneficiaries who do not meet medical/functional eligibility based on the web-based Michigan Medicaid Nursing Facility LOC Determination criteria, but demonstrate a significant level of long term care need. The Nursing Facility LOC Exception Review process is not available to private pay individuals. The Nursing Facility LOC Exception Review is initiated only when the provider telephones the MDCH designee on the date the online Michigan Medicaid Nursing Facility LOC Determination was conducted and requests the Nursing Facility LOC Exception Review on behalf of a medically/functionally ineligible

beneficiary. The Nursing Facility LOC Exception Criteria is available on the MDCH website. A beneficiary needs to trigger only one of the LOC Exception criteria to be considered as eligible under the Exception Review.

*Medicaid Provider Manual,  
Nursing Facility Coverages,  
April 1, 2013 Page 12.*

In this case, the nursing facility completed the LOC assessment on ██████████ and determined that the Appellant did not qualify due to failure to enter through any of the seven Doors. (Exhibit C) On ██████████ the Appellant contacted MPRO requesting an immediate review, which was completed ██████████ (Exhibit D)

At hearing, evidence of the Appellant's score for each Door was presented by the RN MDS Coordinator. The Appellant's son did not dispute the scores for any of the entry Doors. Rather, the Appellant's son's testimony indicated disagreement with the Exception Process criteria. (Son Testimony)

The Nursing Facility Level Of Care Exception Process criteria is set forth below:

Applicants who exhibit the following characteristics and behaviors may be admitted to programs requiring the Nursing Facility Level of Care definition. An applicant need trigger only one element to be considered for an exception.

### **Frailty**

The applicant has a significant level of frailty as demonstrated by at least one of the following categories:

- Applicant performs late loss ADLs (bed mobility, toileting, transferring and eating) independently but requires an unreasonable amount of time
- Applicant's performance is impacted by consistent shortness of breath, pain or debilitating weakness during any activity
- Applicant has experienced at least two falls in the home in the past month
- Applicant continues to have difficulties managing medications despite the receipt of medication set up services
- Applicant exhibits evidence of poor nutrition, such as continued weight loss, despite the receipt of meal preparation services

- Applicant meets criteria for Door 3 when emergency room visits for clearly unstable conditions are considered

### **Behaviors**

The applicant has at least a one month history of any of the following behaviors, and has exhibited two or more of any these behaviors in the last seven days, either singly or in combination:

- Wandering
- Verbal or physical abuse
- Socially inappropriate behavior
- Resists care

### **Treatments**

The applicant has demonstrated a need for complex treatments or nursing care.

(Exhibit E)

The MPRO RN went through each of the exception criteria and the summary notes of the MPRO review. MPRO determined that the Appellant did not meet any of the exception criteria based on the information provided by the nursing facility. (MPRO RN Testimony; and Exhibits D and E) The MPRO RN testified this review is a paper review of medical records from the nursing facility. (MPRO RN Testimony) However, the Michigan Medicaid Nursing Facility Level of Care Determination Nursing Facility Level of Care Exception Process policy submitted into the record does not state that the MPRO review is limited to only a paper review of medical records from the nursing facility. (Exhibit E) Further, the MPRO RN testified that if MPRO felt something was missing from the medical record they would ask the nursing facility that. (MPRO RN Testimony)

The Department did not provide copies of the records MPRO received from the nursing facility for this review in their hearing exhibit. The only documentation of what MPRO received for their review is a brief summary note. (Exhibit D) However, the MPRO RN's testimony acknowledged that the MPRO review note contains errors made by the nurse with MPRO that actually reviewed this case. The MRPO RN testified she believes that the nurse read a date wrong in the records and incorrectly noted there had been a physician visit in the MPRO review summary. Further, in reviewing the exception criterion for treatments, the MPRO review note states there was no PT/OT/ST/RT. It was uncontested that the Appellant was discharged from physical therapy just prior to the LOC assessment, which would have been within the one month look back period for the treatments criterion. Further, the MPRO RN noted that these skilled therapies are not considered in the exception review criterion addressing treatments, so there should not have been any notes addressing them in the MPRO review summary for this criterion. (MPRO RN Testimony; Exhibits D and E) In light of the acknowledged errors,

the MPRO review summary note cannot be considered an entirely reliable and accurate summary of the medical documentation received from the nursing facility for this exception review.

The Appellant's son contests the determinations regarding first two frailty exception criteria. (Son Testimony)

The first frailty exception criteria addresses performing late loss ADLs (bed mobility, toileting, transferring and eating) independently but requiring an unreasonable amount of time. (Exhibit E) The MPRO RN testified that the Appellant did not meet this criterion because there were no notes of how long it takes the Appellant to complete these activities. The MPRO RN testified they needed notes of specific actual times in minutes. (MPRO RN Testimony) The submitted evidence of the exception criterion, as written, only states that an unreasonable amount of time is required. (Exhibit E emphasis added by ALJ) The exception criterion itself makes no mention that actual times, in minutes, must be documented in the record. Further, MPRO had a copy of a ██████████ physical therapy note stating the Appellant is modified independent with transfers. The MPRO RN read part of the ██████████ physical therapy note into the record, which indicated the Appellant did not require physical assistance or verbal cues to transfer but may require external support or the use of an assistive device or may require more than a reasonable amount of time to complete the task. (MPRO RN Testimony; emphasis added by ALJ) As noted above, while the MPRO RN stated they only complete a paper review of the medical records received from the nursing facility, her testimony also indicated that if MPRO felt something was missing from the medical record they would ask the nursing facility that. (MPRO RN Testimony) In this case, despite ██████████ physical therapy note documenting the Appellant may require more than a reasonable amount of time to transfer, MPRO did not clarify with the nursing facility whether or not the Appellant actually requires an unreasonable amount of time to transfer.

A similar issue may exist with the second frailty exception criterion regarding performance being impacted by consistent shortness of breath, pain or debilitating weakness during any activity. The MPRO review note indicates that in the documentation received from the nursing facility it was noted that the Appellant has shortness of breath with exertion but not how long it takes the Appellant to recover. (Exhibit D) Again the MPRO RN testified that they needed notes of specific actual times in minutes it takes the Appellant to recover. (MPRO RN Testimony) However, submitted evidence of the exception criterion, as written, does not specify documentation of specific actual minutes is required. (Exhibit E) It does not appear that MPRO made any request was to obtain information from the nursing facility about recovery time if this was needed to establish the Appellant's performance was impacted by the shortness of breath. However, if the medical documentation submitted to MPRO was a single isolated note for a specific day, rather than a general note evaluating the Appellant's overall condition and abilities during the relevant time period, it would be understandable that no further information was sought. This frailty criterion requires the

performance to be consistently impacted by shortness of breath, pain or debilitating weakness during any activity.

The Appellant's son also testified that in ██████████ an attempt was made to place the Appellant in an AFC but the Appellant had to return to the nursing facility within ██████ weeks. The Appellant's son is concerned that the Appellant would not be able to survive without the nursing facility level of care, and would have to return to the nursing facility within a short period again like she did in ██████. Rather, the Appellant's son stated that the Appellant is doing everything she can do now based on the care she is receiving in the nursing facility. (Son Testimony) While these concerns are understandable, this ALJ is limited to reviewing whether or not the Appellant met the Department's criteria during the relevant time period for this determination and does not have any authority to consider what occurred in the past nor to change or override the criteria.

The Appellant also testified that she has made requests to see doctors and receive treatments but it does not happen. Examples described included a GERD medication, a foot problem, needing to be on continuous oxygen, and even feeling like she had a stroke in the past few months. The Appellant also testified she huffs and puffs with walking and has to sit. (Appellant Testimony) While the Appellant may have requested to see doctors, there is no evidence of actual doctor visits, order changes, or emergency room visits that occurred during the relevant two week time frame for this determination to establish that the Appellant met LOCD or exception criteria.

Based on the available information, it is decided that the Department incorrectly determined the Appellant did not meet the exception review criteria for a Medicaid Nursing Facility Level of Care Determination at the time the ██████████ review. The limited evidence from the MPRO review cannot be considered entirely reliable based on the acknowledged errors in the summary paragraph. Further, the MPRO RN read into the record part of the ██████████ physical therapy note received from the nursing facility for the exception review. This note indicated the Appellant did not require physical assistance or verbal cues to transfer but may require external support or the use of an assistive device or may require more than a reasonable amount of time to complete the task. (MPRO RN Testimony; emphasis added by ALJ) The criterion addressing performing late loss ADLs, which includes transferring, would be met if the Appellant was independent but required an unreasonable amount of time to transfer. MPRO did not clarify with the nursing facility whether or not the Appellant actually requires an unreasonable amount of time to transfer.

## **DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department incorrectly determined that the Appellant did not meet the exception criteria for a Medicaid Nursing Facility Level of Care Determination at the time the ██████████ review.

[REDACTED]  
Docket No. 2013-43356 NHE  
Decision and Order

**IT IS THEREFORE ORDERED** that:

The Department's decision is REVERSED. The Department must initiate re-assessment of the Appellant under the MPRO exception review criteria.

/s/ \_\_\_\_\_  
Colleen Lack  
Administrative Law Judge  
for James K. Haveman, Director  
Michigan Department of Community Health

Date Signed: [REDACTED]

Date Mailed: [REDACTED]

CL/db

cc: [REDACTED]

**\*\*\* NOTICE \*\*\***

The Michigan Administrative Hearing System may order a rehearing on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. The Michigan Administrative Hearing System will not order a rehearing on the Department's motion where the final decision or rehearing cannot be implemented within 90 days of the filing of the original request. The Appellant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt of the rehearing decision.