

**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:**

██████████

Appellant

**Docket No.** 2013-53662 EDW

██████████

██████████

**DECISION AND ORDER**

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 42 CFR 431.200 *et seq.*, and upon the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████ ██████████ a paralegal at ██████████ appeared on Appellant's behalf. Appellant also testified on his own behalf. ██████████ Community Services Director, represented the Department of Community Health's Waiver Agency, the ██████████ ██████████ ("Waiver Agency" or ██████████). ██████████ social worker/supports coordinator; ██████████ registered nurse/supports coordinator; and ██████████, social worker/senior supports coordinator; also testified as witnesses for the Waiver Agency.

**ISSUE**

Did the Waiver Agency properly terminate Appellant's services through the MI Choice waiver program?

**FINDINGS OF FACT**

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

1. Appellant is a ██████ year-old male who has been diagnosed with multiple sclerosis; congestive heart failure; chronic obstructive pulmonary disease; hypertension; peripheral vascular disease; arthritis; hemiplegia; seizure disorder; anxiety; depression; diabetes mellitus; and chronic airway obstruction, not elsewhere classified. Appellant also suffered a stroke and renal failure in the past. (Respondent's Exhibit A, page 1; Respondent's Exhibit B, pages 8-9).
2. ██████ is a contract agent of the Michigan Department of Community Health and is responsible for waiver eligibility determinations and the provision of MI Choice waiver services.

3. Appellant has been enrolled in and receiving MI Choice waiver services through ██████. Specifically, he was receiving medication management, lawn care, snow removal, home delivered meals, a personal emergency response unit, an electric pill dispenser, homemaking services, personal care services, and non-emergency transportation. (Respondent's Exhibit C, page 1; Testimony of Appellant).
4. On ██████, ██████ and ██████ a registered nurse/supports coordinator at ██████ conducted a home visit with Appellant. (Respondent's Exhibit B, page 1; Testimony of ██████).
5. During that visit, the ██████ staff completed a reassessment of Appellant's services and a new Level of Care Determination (LOCD) regarding Appellant's needs. (Respondent's Exhibit A, pages 1-9; Respondent's Exhibit B, pages 1-16).
6. Based on that reassessment and LOCD, ██████ concluded that Appellant no longer qualified for the waiver program and his services had to be terminated. (Testimony of ██████).
7. On ██████ sent Appellant written notice that his services through the MI Choice waiver program would be terminated in ██████ days because he did not have a service dependency. (Respondent's Exhibit C, pages 1-2).
8. The notice also provided that Appellant has the right to request a Medicaid Fair Hearing with respect to the termination. (Respondent's Exhibit C, page 1).
9. The notice further provided that Appellant would continue to receive the affected services while his appeal was pending if his request for hearing was received prior to the effective date of the negative action. (Respondent's Exhibit C, page 1).
10. However, despite the effective date of action identified in the notice, ██████ implemented the termination of Appellant's services prior to the ██████ day period expiring. (Testimony of Appellant).
11. On ██████, the Michigan Administrative Hearing System (MAHS) received a Request for Hearing filed by Appellant. (Petitioner's Exhibit 1, pages 1).

### **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.

Appellant is claiming services through the Department's Home and Community Based Services for Elderly and Disabled. The waiver is called MI Choice in Michigan. The program is funded through the federal Centers for Medicare and Medicaid Services to the Michigan Department of Community Health (Department). Regional agencies, in this case ██████████, function as the Department's administrative agency.

Waivers are intended to provide the flexibility needed to enable States to try new or different approaches to the efficient and cost-effective delivery of health care services, or to adapt their Programs to the special needs of particular areas or groups of recipients. Waivers allow exceptions to State plan requirements and permit a State to implement innovative programs or activities on a time-limited basis, and subject to specific safeguards for the protection of recipients and the program. Detailed rules for waivers are set forth in subpart B of part 431, subpart A of part 440, and subpart G of part 441 of this chapter.

*42 CFR 430.25(b)*

A waiver under section 1915(c) of the [Social Security] Act allows a State to include as "medical assistance" under its plan, home and community based services furnished to recipients who would otherwise need inpatient care that is furnished in a hospital, SNF [Skilled Nursing Facility], ICF [Intermediate Care Facility], or ICF/MR [Intermediate Care Facility/Mentally Retarded], and is reimbursable under the State Plan. See 42 CFR 430.25(c)(2).

Types of services that may be offered include:

Home or community-based services may include the following services, as they are defined by the agency and approved by CMS:

- Case management services.
- Homemaker services.
- Home health aide services.
- Personal care services.
- Adult day health services
- Habilitation services.
- Respite care services.

- Day treatment or other partial hospitalization services, psychosocial rehabilitation services and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness, subject to the conditions specified in paragraph (d) of this section.

Other services requested by the agency and approved by CMS as cost effective and necessary to avoid institutionalization.

*42 CFR 440.180(b)*

However, with respect to the waiver program, federal regulations require that Medicaid pay for services only for those beneficiaries who meet specified level of care criteria. The Medicaid Provider Manual, Nursing Facilities Coverages Section, lists the policy for admission and continued eligibility as well as outlines functional/medical criteria requirements for Medicaid-reimbursed nursing facility, MI Choice, and ██████████ services.

Here, ██████████ decided to terminate Appellant's services after finding that he no longer met the criteria for the waiver program. With respect to functional eligibility for the waiver program, the Medicaid Provider Manual (MPM) provides:

## **2.2 FUNCTIONAL ELIGIBILITY**

The MI Choice waiver agency must verify applicant appropriateness for services by completing the online version of the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD) within 14 calendar days after the date of the participant's enrollment. (Refer to the Directory Appendix for website information.) The LOCD is discussed in the Michigan Medicaid Nursing Facility Level of Care Determination subsection of this chapter. Additional information can be found in the Nursing Facility Coverages Chapter and is applicable to MI Choice applicants and participants.

The applicant must also demonstrate a continuing need for and use of at least one covered MI Choice service. This need is originally established through the Initial Assessment using the process outlined in the Need For MI Choice Services subsection of this chapter.

### **2.2.A. MICHIGAN MEDICAID NURSING FACILITY LEVEL OF CARE DETERMINATION**

MI Choice applicants are evaluated for functional eligibility via the Michigan Medicaid Nursing Facility

Level of Care Determination. The LOCD is available online through Michigan's Single Sign-on System. (Refer to the Directory Appendix for website information.)

Applicants must qualify for functional eligibility through one of seven doors. These doors are:

- Door 1: Activities of Daily Living Dependency
- Door 2: Cognitive Performance
- Door 3: Physician Involvement
- Door 4: Treatments and Conditions
- Door 5: Skilled Rehabilitation Therapies
- Door 6: Behavioral Challenges
- Door 7: Service Dependency

The LOCD must be completed in person by a health care professional (physician, registered nurse (RN), licensed practical nurse (LPN), licensed social worker (BSW or MSW), or a physician assistant) or be completed by staff that have direct oversight by a health care professional.

The online version of the LOCD must be completed within 14 calendar days after the date of enrollment in MI Choice for the following:

- All new Medicaid-eligible enrollees
- Non-emergency transfers of Medicaid-eligible participants from their current MI Choice waiver agency to another MI Choice waiver agency
- Non-emergency transfers of Medicaid-eligible residents from a nursing facility that is undergoing a voluntary program closure and who are enrolling in MI Choice

Annual online LOCDs are not required, however, subsequent redeterminations, progress notes, or participant monitoring notes must demonstrate that the participant continues to meet the level of care criteria on a continuing basis. If waiver agency staff determines that the participant no longer meets the functional level of care criteria for participation (e.g., demonstrates a significant change in condition), another face-to-face online version of the LOCD must be conducted reflecting the change in functional status. This subsequent redetermination must be noted in the case record and signed by the individual conducting the determination.

Copies of the LOCD for participants must be retained by the waiver agency for a minimum period of six years. This information is also retained in the MDCH LOCD database for six years.

MPM, April 1, 2013 version  
MI Choice Waiver Chapter, pages 1-2

Pursuant to the above policy, the Waiver Agency determined that Appellant did not pass through any of the seven doors and was therefore ineligible for the program.

Appellant and his representative bear the burden of proving by a preponderance of the evidence that the Waiver Agency erred in terminating services.

Here, only Doors 2 and 7 are in dispute. Regarding Door 2, the LOCD tool states:

**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."

According to Appellant, he passes through Door 2 because he has short-term memory problems and cognitive issues affecting his daily decision making. Appellant also testified that those issues are extensively documented.

As discussed above, the burden is on Appellant and his representative to demonstrate by a preponderance of the evidence that he meets the criteria for the waiver program.

Here, Appellant has failed to meet that burden of proof. While Appellant testified that his memory problems and cognitive issues are extensively documented, no such evidence was presented during the assessment or at the hearing itself. Moreover, [REDACTED] credibly testified that Appellant passed a memory test during the assessment and was alert and oriented to person, place and time. It also appears that, while Appellant uses some reminders and cues, he is generally able to organize and make safe decisions regarding his daily routine. For example, Appellant knows when to eat and how to manage his diabetes; how to seek necessary information; and when and how to plan and schedule necessary appointments. Appellant also manages his own finances. Additionally, Appellant is clearly able to make himself understood, as he did during the hearing. Accordingly, Appellant failed to meet his burden of proof regarding Door 2.

Regarding Door 7, the LOCD tool states:

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

**Scoring Door 7:** The applicant must be a current participant [for at least one year] and demonstrate service dependency to qualify under Door 7.

It is undisputed that Appellant has been a participant in the Waiver Program for over a year and the only issue with respect to Door 7 is whether he was able to demonstrate a service dependency.

According to Appellant, he needs the waiver services or else he will have to go into a nursing home. In particular, Appellant testified that he cannot eat without having a care provider present due to issues he has with swallowing and his lack of gag reflex. Appellant also testified that he has issues with his immune system and is extremely sensitive to smells, and that the housekeeping services provided through the program are also medically necessary. Appellant further testified that his doctors have advised him that he cannot be left alone due to his seizures.

As discussed above, the burden is on Appellant and his representative to demonstrate by a preponderance of the evidence that he meets the criteria for the waiver program by passing through Door 7.

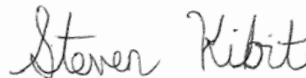
In this case, Appellant has also failed to meet that burden of proof with respect to Door 7. While Appellant asserts that his doctors have found that he cannot be left alone due to his seizures, he does live by himself and he is alone most of the time. He does have a trained dog that assists him with his seizures. In addition to his failure to demonstrate any cognitive issues, as discussed above, Appellant also fails to demonstrate any physical dependency on the program. Appellant transferred and ambulated up steps on his own during the assessment, while also controlling his large dog. Moreover, it is also undisputed that he can use the toilet and the shower on his own, with adaptive equipment. Appellant did indicate during the assessment that he has issues with swallowing, but it does not appear that he always eats with a provider present as ██████████ credibly testified that Appellant reported that he can make his own meals and that he went through the process of how he makes pancakes. Appellant also acknowledged that he does not eat the home delivered meals provided by ██████████. Accordingly, Appellant failed to meet his burden of proof regarding Door 7.

**DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly terminated Appellant's services.

**IT IS THEREFORE ORDERED** that:

The Waiver Agency's decision to terminate Appellant's waiver services is **AFFIRMED**.



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Steven J. Kibit  
Administrative Law Judge  
for James K. Haveman, Director  
Michigan Department of Community Health

Date Signed: ██████████

Date Mailed: ██████████

SK/db

cc: ██████████  
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[REDACTED]  
Docket No. 2013-53662 EDW  
Decision and Order

**\*\*\* 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.