

**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. 2013-55083 EDW
Case No.

Appellant
_____/

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 _____, Appellant's son, appeared and testified on Appellant's behalf. _____, Home Care Program Manager, represented the Department of Community Health's Waiver Agency, the _____ ("Waiver Agency" or "_____"). _____, registered nurse/supports coordinator, also testified as a witness 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 female who has been diagnosed with dementia of Alzheimer's type; hypertension; stress incontinence; cerebral artery occlusion with history of stroke; osteoarthritis; spinal stenosis; cardiac murmur; esophageal reflux; anxiety; and obsessive compulsive disorder. (Petitioner's Exhibit 2, page 1).
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 _____. Specially, she receives 12.5 hours of personal care and homemaking services each week. The 12.5 hours are spread out over _____.

three days a week. (Respondent's Exhibit B, pages 15, 18; Testimony of Appellant's representative).

4. On _____, _____ and _____, a social worker at _____, conducted a home visit with Appellant. Both Appellant and her son/representative were present. (Respondent's Exhibit C, page 1).
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 1-8; Respondent's Exhibit B, pages 1-18).
6. Based on that reassessment and LOCD, _____ concluded that Appellant no longer qualified for the waiver program and her services had to be terminated. (Respondent's Exhibit A, page 8).
7. On _____, _____ sent Appellant written notice that her services through the MI Choice waiver program would be terminated because she was not medically eligible. The notice also stated that she had been referred to the Home Help Program. (Petitioner's Exhibit 1, page 2).
8. On _____, the Michigan Administrative Hearing System (MAHS) received a Request for Hearing filed by Appellant. (Petitioner's Exhibit 1, pages 1-3).
9. _____ has continued providing Appellant's services while this appeal is pending. (Respondent's Exhibit C, page 1).

CONCLUSIONS OF LAW

As a preliminary matter, this Administrative Law Judge would note that, on _____, the day before the hearing, Appellant's representative filed a Request for Postponement of the Administrative Hearing. According to Appellant's representative, a postponement was necessary so that he could gather information to represent Appellant. However, Appellant failed to identify any specific, relevant information he was waiting for or explain why he waited so long to file his request, despite the fact that this appeal has been pending since _____. Accordingly, the request was denied. Given the timing of the request, this Administrative Law Judge did not issue a written order and MAHS staff had to communicate to the parties that the hearing would be proceeding as scheduled. Appellant's representative re-requested a postponement at the onset of the hearing, but the request was again denied, for the same reasons discussed above.

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 PACE services.

Here, _____ decided to terminate Appellant's services after finding that she 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:

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- 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, MI Choice Waiver Section, April 1, 2013, 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 her 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.”

found Appellant to be moderately impaired in decision making, but that Appellant did not have a memory problem and therefore did not pass through Door 2. ’s finding was based on the assessment and LOCD it performed in Appellant’s home. Appellant’s son reported during that assessment that Appellant’s memory comes-and-goes and that the day of the assessment was a good day, but, in general, found that Appellant’s cognition had improved over the quarter and that new medications had help improve Appellant’s memory. During that assessment itself, Appellant passed a short-term memory test and was able to recall three out of three words within five minutes. Appellant was also alert and oriented to person, place and time. Appellant was further able to recall who the president was and the date without difficulty. Overall, Appellant participated and answered questions appropriately during the assessment, so long as staff spoke loudly.

In response, Appellant's representative testified that Appellant has a memory problem and therefore passes through Door 2. It is undisputed that Appellant suffers from Alzheimer's disease and she passed through Door 2 previously. Appellant's representative, who was present during the home visit and LOCD, also takes issue with the memory test administered by _____ staff. According to Appellant's representative, the social worker giving the test physically cued Appellant to the answers and skewed the results. Appellant's representative again noted that Appellant was having a good day on the day of the assessment.

As discussed above, the burden is on Appellant and her representative to demonstrate by a preponderance of the evidence that she meets the criteria for the waiver program. Here, Appellant has failed to meet that burden of proof. Appellant has been diagnosed with Alzheimer's disease, but that diagnosis is not dispositive on its own and the Waiver Agency must assess Appellant's memory. The social worker who performed the memory test is a licensed professional and this Administrative Law Judge finds credible the testimony that there was no cueing during the test. Moreover, the rest of the assessment, where Appellant was undisputedly alert and oriented, also supports _____'s determination regarding memory. Even Appellant's doctor failed to identify any specific memory problem in his subsequent letter, even when he was discussing the memory test itself. It may have been a good day for Appellant, but the Waiver Agency used the proper look-back period and assessed Appellant as it found her. Based on that assessment, it properly found that she did not pass through 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.

In determining that Appellant did not pass through Door 7 and did not have a service dependency, _____ noted that Appellant only receives minimal services three days-a-week and that her needs can be met through the Adult Home Help Program.

In response, Appellant's representative questioned whether the Home Help Program could meet Appellant's needs given what he heard about the program. He also reiterated that the waiver program has been meeting Appellant's three most important needs: bathing assistance; socialization; and assistance with reminders for and supervision of Appellant's exercises.

"Home help services are non-specialized personal care service activities provided under the independent living services program to persons who meet eligibility requirements." Adult Services Manual 101(11-1-2011), page 1 of 4. Given that program and Appellant's needs, Appellant has failed to demonstrate that she has a service

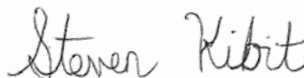
dependency on the waiver program and, therefore, passes through Door 7. Bathing, as well as the other personal care and homemaking assistance Appellant receives, are covered by both programs. Socialization and assistance with exercises are not covered by either program. The care providers through the waiver program may have been socializing with Appellant and assisting Appellant with her exercises, those are not authorized services. Accordingly, properly found that Appellant did not pass through Door 7 either.

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**.



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

Date Signed: 9/10/2013

Date Mailed: 9/10/2013

cc:

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***** 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.