

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. 2013-61799 EDW

██████████

██████████

██████████

Appellant

_____ /

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge (ALJ) pursuant to MCL 400.9 and 42 CFR 431.200 *et seq.*, and upon a Request for Hearing filed by Appellant.

After due notice, a hearing was held on ██████████. Appellant appeared and testified on her own behalf. ██████████, registered nurse/care manager, appeared and testified on behalf of the Department of Community Health's Waiver Agency, the ██████████ ("Waiver Agency" or "AAA"). ██████████ social worker/care manager, and ██████████ supervisor, also testified as witnesses for ██████████.

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 a pinched nerve in her back; chronic back pain; diabetes; asthma; and migraines. Appellant has also undergone surgeries on her knees and tendons. (Respondent's Exhibit B, page 2; Testimony of Appellant)
2. ██████ is a contract agent of the Department and the agency responsible for the provision of Appellant's MI Choice services.
3. Appellant has been receiving services through the Waiver Agency since ██████████. At the time, she was found to be eligible for the program because she passed through Door 1 of the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD). (Respondent's Exhibit B, pages 1-10; Testimony of ██████████).

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4. Specifically, Appellant has been receiving homemaker and personal care services three hours a day, three days a week. (Respondent's Exhibit F, page 1; Testimony of ██████████).
5. On or about ██████████ staff conducted a reassessment and new LOCD regarding Appellant's needs and services. (Respondent's Exhibit C, pages 1-8; Testimony of Wheeler).
6. In that new LOCD, Appellant was found to be independent in all Door 1 tasks and the Waiver Agency concluded that she no longer passed through that door. (Respondent's Exhibit C, page 3; Testimony of ██████████).
7. The LOCD was left blank with respect to Doors 2-5 and 7. The Waiver Agency's representative did testify that Appellant did not pass through any of those doors. (Respondent's Exhibit C, pages 3-7; Testimony of ██████████).
8. The Door 6 portion of the LOCD was completed and Respondent's representative testified that Appellant passed through that door. (Respondent's Exhibit C, pages 6-7; Testimony of ██████████).
9. According to Respondent's representative, while Appellant passed through Door 6, that door is only a temporary door and a beneficiary needs to pass through either Door 1 or Door 2 to remain eligible for the waiver program. (Testimony of ██████████).
10. Accordingly, on ██████████, the Waiver Agency sent Appellant an Advance Action Notice stating that her services would be terminated on ██████████ because she was not physically or mentally eligible for waiver services. (Respondent's Exhibit F, page 1).
11. The Waiver Agency sent another Advance Action Notice on ██████████. That notice indicated that Appellant's services would be terminated on ██████████ because she did not meet the eligibility requirements found in the LOCD. (Respondent's Exhibit I, pages 1-2).
12. On ██████████ the Waiver Agency also sent Appellant a closure letter and a referral to the ██████████. (Respondent's Exhibit J, page 1).
13. On ██████████, the Michigan Administrative Hearing System (MAHS) received a Request for Hearing filed on Appellant. (Petitioner's Exhibit 1, pages 1-5).

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 AAA, 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)

Here, Appellant was receiving homemaker and personal care services prior the Waiver Agency terminating those services on the basis that she no longer met the criteria for the program.

For the reasons discussed below, this Administrative Law Judge finds that the Waiver Agency's decision must be reversed as it provided inadequate notice of the negative action and failed to apply the proper criteria in this case. The Waiver Agency's own representative acknowledged that Appellant passed through Door 6 at the time of the termination and, given that undisputed finding, Appellant still qualified for the waiver program.

Notice

With respect to notices of termination and a beneficiary's right to appeal, the Michigan Medicaid Provider Manual (MPM) states:

SECTION 11 - APPEALS

The Michigan Department of Community Health has established participant and provider appeal processes that are applicable to MI Choice. The participant appeals process conforms to the Medicaid fair hearing requirements found at 42 CFR Part 431, Subpart E of the Code of Federal Regulations. Provider appeal rights conform to the requirements of Michigan law and rules found at MCL 400.1 et seq. and MACR 400.3401 et seq.

11.1 PARTICIPANT APPEALS

MI Choice has established notice and appeals requirements

to which waiver agencies must adhere when adverse action has been taken for program applicants or participants. According to 42 CFR 431.201 "Action" means a termination, suspension, or reduction of Medicaid eligibility or of covered services. This also includes determinations by the waiver agent that the applicant or participant does not meet the nursing facility level of care criteria and other denials of Medicaid eligibility or of covered services.

11.1.A. ADEQUATE ACTION NOTICES

MI Choice waiver agencies must send an Adequate Action Notice to applicants or participants informing them of adverse actions and determinations taken under the following circumstances:

- when the waiver agency is at operating capacity and unable to enroll MI Choice applicants who request a Michigan Medicaid Nursing Facility Level of Care Determination (LOCD).
- when the waiver agency determines applicants to be functionally ineligible for MI Choice services based on the results of a LOCD.
- when a participant requests additional services or additional amounts of services and the waiver agency denies the request
- when an existing benefit is reduced, suspended or terminated, and meets the requirements for an exception from an Advance Action Notice as specified in 42 CFR 431.213.

11.1.B. ADVANCE ACTION NOTICES

An Advance Action Notice must be sent to MI Choice participants when action is being taken to reduce, suspend, or terminate service(s) a participant currently receives. This notice must be provided at least 12 days in advance of the intended action.

An Advance Action Notice is also issued if it is determined that a reduction in level or number of

services is warranted based on the participant's current assessment. The notice must inform the participant that services will not be reduced until a formal decision has been rendered through the Medicaid Fair Hearings process if the participant formally requests a hearing before the specified date of the intended action.

*MPM, July 1, 2013 version
MI Choice Waiver Chapter, page 34*

Pursuant the above policy, a termination of waiver services requires advance written notice and that notice must be provided at least █ days in advance of the intended action

Here, the Waiver Agency did send written advance notice of the termination of services on █. However, the termination was to be effective █ and the notice was therefore insufficient as it was not provided at least █ days in advance of the intended termination. Similarly, while the Waiver Agency also sent an "Advance" notice of termination on █, that second notice also identified the effective termination date as █ and notice of a previous reduction is clearly insufficient. Accordingly, the Waiver Agency failed to adequate advance notice of the termination of Appellant's services.

Functional Eligibility

With respect to functional eligibility for the waiver program, the 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, July 1, 2013 version
MI Choice Waiver Chapter, pages 1-2
(Emphasis added)*

Pursuant to the policy highlighted above, “Applicants must qualify for functional eligibility through one of seven doors.” Here, Respondent’s representative expressly testified that Appellant passed through that Door 6 and, based on that undisputed finding, Appellant met the functional eligibility requirements for waiver services and her services should not have been terminated.

Respondent’s representative did testify that, while Appellant passed through Door 6, that door is only a temporary door and a beneficiary needs to pass through either Door 1 or Door 2 to remain eligible for the waiver program. However, that testimony has no support in the above policy and Respondent’s representative could not identify any basis for her assertions. Door 6 does only have a [REDACTED]-day look-back period, but that is no different from any other door as they all have look-back periods. Moreover, to the extent that Appellant’s circumstances may change and she might not pass through Door 6 in the future, that is also no different from any other door as any circumstances may change. At the time of any particular LOCD, however, the above policy clearly provides that an applicant must only pass through any one of the seven doors to qualify.

The Waiver Agency found that Appellant passes through Door 6 and, given that

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undisputed finding, Appellant met the functional eligibility requirements for waiver services. The Waiver Agency therefore clearly erred in terminating Appellant services and its decision must be reversed.¹

DECISION AND ORDER

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

IT IS THEREFORE ORDERED that:

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

Steven Kibit

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

Date Signed: [REDACTED]

Date Mailed: 1 [REDACTED]

SK/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.

¹ Appellant also testified that the Waiver Agency erred in concluding that she no longer passes through Door 1 and, given the portions of the LOCD left blank, there are questions regarding Doors 2-5 and 7. Nevertheless, given the undisputed finding regarding Door 6, the Waiver Agency clearly erred in terminating Appellant services and the other doors need not be addressed at this time.