**STATE OF MICHIGAN**
**MICHIGAN ADMINISTRATIVE HEARING SYSTEM**
**FOR THE DEPARTMENT OF COMMUNITY HEALTH**
P.O. Box 30763, Lansing, MI 48909
(517) 335-2484; Fax: (517) 373-4147

**IN THE MATTER OF**:

**Docket No.** 14-008622 EDW

,

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 Appellant's Request for Hearing.

After due notice, a telephone hearing was held on , Appellant's ex-wife, appeared and testified on Appellant's behalf. Appellant also testified on his own behalf. , Director of Care Management Services, appeared and testified on behalf of the Department of Community Health's Waiver Agency, ("Waiver Agency" or , registered nurse/supports coordinator, also testified as a witness for the Waiver Agency.

## ISSUE

Did the Waiver Agency properly deny Appellant's request for 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 diabetes mellitus, an abscess in his foot, Meniere's disease, depression, and neuropathy. (Respondent's Exhibit D, page 1).

2. Appellant was previously living in a nursing facility and he applied for Nursing Facility Transition services through the Waiver Agency in order to assist him in transitioning into a home setting. (Testimony of Appellant's representative; Testimony of

3. The Waiver Agency and Appellant also discussed the possibility of services through the MI Choice Waiver Program once he had transitioned out of the nursing facility, and a screening was scheduled for both types of services. (Testimony of Appellant's representative; Testimony of .

4. The screening took place on , and, as part of the assessment for MI Choice services, the Waiver Agency performed a Medicaid Nursing Facility Level of Care Determination (LOCD). (Respondent's Exhibit A, pages 1-8; Testimony of ).

5. During that assessment, the Waiver Agency also determined that Appellant did not meet the criteria for waiver services as he did not pass through any of the seven doors of the LOCD. (Respondent's Exhibit A, pages 1-8; Testimony of ).

6. The Waiver Agency provided Appellant and his representative with written notice of the denial of the request for MI Choice services and their right to appeal that denial. (Petitioner's Exhibit 1, page 1).

7. On August 15, 2014, the Michigan Administrative Hearing System (MAHS) received the request for hearing filed by Appellant and his representative in this matter. (Petitioner's Exhibit 1, pages 1-2).

**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, federal regulations also require that Medicaid only pay for services for those beneficiaries who meet the specified criteria for the program, including both financial eligibility requirements and functional eligibility requirements. Both types of requirements will be addressed below.

**Financial Eligibility**

Here, Appellant and his representative assert that Appellant was improperly denied services because the Waiver Agency erred in finding that he was not financially eligible for the program. Regarding, financial eligibility, the applicable version of the Medicaid Provider Manual (MPM) states in part:

> **2.1 FINANCIAL ELIGIBILITY**
>
> Medicaid reimbursement for MI Choice services requires a determination of Medicaid financial eligibility for the applicant by the Michigan Department of Human Services (MDHS). As a provision of the waiver, MI Choice applicants benefit from an enhanced financial eligibility standard compared to basic Medicaid eligibility. Specifically, MI Choice is furnished to participants in the special home and community-based group under 42 CFR §435.217 with a special income level equal to 300% of the SSI Federal Benefit Rate. Medicaid eligibility rules stipulate that participants are not allowed to spend down to achieve an enhanced financial eligibility standard.

*MPM, July 1, 2014 version*
*MI Choice Waiver Chapter, page 1*

However, while there are financial eligibility requirements found in policy that must be met, there is no support for the Appellant's contention that the denial in this case was based on a determination that he failed to meet those requirements. The notice of denial expressly stated that the denial was based on Appellant's failure to qualify under any of the seven eligibility categories found in the LOCD while the above policy provides that the MDHS makes determinations of financial eligibility.

Given that the denial in this case was not based on financial eligibility, the undersigned Administrative Law Judge need not consider that issue or address Appellant's argument that he is financially eligible for the program. Instead, the undersigned Administrative Law Judge will simply presume for purposes of this hearing that Appellant is financially eligible.

**Functional Eligibility**

With respect to functional eligibility for the waiver program, the applicable version of the MPM provides in part:

> **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, 2014 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 denying the request for services. The intake was the basis for the action at issue in this case. In order to be found eligible for waiver services Appellant must have met the requirements of at least one of the seven doors identified in policy and the LOCD tool.

Here, Appellant's representative argues that Appellant passes through Door 1, Door 2, and Door 6 of the LOCD tool. However, for the reasons discussed below, the undersigned Administrative Law Judge finds that Appellant and his representative have failed to meet their burden of proof for any of those three doors.

**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

*Respondent's Exhibit A, page 3*

In this case, the Waiver Agency determined that Appellant did not pass through Door 1 because the medical records documenting the assistance provided to Appellant by the nursing facility staff did not identify any assistance with bed mobility, transfers, toilet use or eating in the relevant 7-day look-back period.

In response, Appellant's representative testified that, while Appellant is independent in eating and bed mobility, he sometimes needs assistance with transferring in general and transferring on-and-off the toilet.

However, the undersigned Administrative Law Judge finds testimony that both the nursing facility's charts and the reports of Appellant and his representative

during the LOCD failed to identify any such needs to be more credible than Appellant's representative's testimony during the hearing, especially in light of the fact that Appellant currently lives alone and did not identify any need for assistance with transferring. Moreover, given that credibility determination, the undersigned Administrative Law Judge also finds that Appellant's representative has failed to meet her burden of proving by a preponderance of the evidence that the Waiver Agency erred with respect to Door 1.

**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."

*Respondent's Exhibit A, page 4*

As described above, in order to qualify under Door 2, an applicant must be (1) "Severely Impaired" in Decision Making; (2) "Yes" for Memory Problem, and Decision Making is "Moderately Impaired" or "Severely Impaired."; or (3) "Yes" for Memory Problem, and Making Self Understood is "Sometimes Understood" or "Rarely/Never Understood."

Here, it is undisputed that Appellant has memory problems. Similarly, the Waiver Agency also determined and Appellant's representative concedes that Appellant does not have any difficulties making himself understood.

Accordingly, based on the above criteria, Appellant would only qualify under Door 2 if he is at least moderately impaired in decision making. Appellant's representative believes that he is while the Waiver Agency determined that Appellant is modified independent in that area.

With respect to Door 2 in general and the issue of daily decision making in particular, the Field Guidelines utilized by the Department provide in part:

> The Michigan nursing facility level of care definition is meant to include applicants who need assistance based on cognitive performance. Door 2 uses the Cognitive Performance Scale to identify applicants with cognitive difficulties, especially difficulties with short-term memory and

daily decision-making, both essential skills for residing safely in the community.

The applicant's ability to remember, think coherently, and organize daily self-care activities is very important. The focus is on performance, including a demonstrated ability to remember recent events and perform key decision-making skills.

Questions about cognitive function and memory can be sensitive issues for some applicants who may become defensive, agitated, or very emotional. These are common reactions to performance anxiety and feelings of being exposed, embarrassed, or frustrated when the applicant knows he/she cannot answer the questions cogently.

Be sure to interview the applicant in a private, quiet area without distraction (not in the presence of others, unless the applicant is too agitated to be left alone). Using a nonjudgmental approach to questioning will help create a needed sense of trust. Be cognizant of possible cultural differences that may affect your perception of the applicant's response. After eliciting the applicant's responses to questions, return to the family or specific caregivers as appropriate to clarify or validate information regarding cognitive function over the last 7 days. For applicants with limited communication skills or who are best understood by family or specific caregivers, you would need to carefully consider family insights in this area.

- Engage the applicant in general conversation to help establish rapport.

- Actively listen and observe for clues to help you structure your assessment. Remember: repetitiveness, inattention, rambling speech, defensiveness, or agitation may be challenging to deal with during an interview, but these behaviors also provide important information about cognitive function.

- Be open, supportive, and reassuring during your conversation with the applicant.

An accurate assessment of cognitive function can be difficult when the applicant is unable to verbally communicate. It is particularly difficult when the areas of cognitive function you want to assess require some kind of verbal response from the applicant (memory recall). It is certainly easier to perform an evaluation when you can converse with the applicant and hear responses that give you clues as to how the applicant is able to think, if he/she understands his/her strengths and weaknesses, whether he/she is repetitive, or if he/she has difficulty finding the right words to tell you what they want to say.

* * *

**Cognitive Skills for Daily Decision Making**

The intent of this section is to record the applicant's actual performance in making everyday decisions about the tasks or activities of daily living. This item is especially important for further assessment in that it can alert the assessor to a mismatch between the applicant's abilities and his/her current level of performance, or that the family may inadvertently be fostering the applicant's dependence.

**Process**

It is suggested that you consult with the applicant first, then, if possible, a family member. Observations of the applicant can also be helpful. Review events of the last 7 days. The 7-day look-back period is based on the date of the eligibility determination. The inquiry should focus on whether the applicant is actively making his/her decisions, and not whether there is a belief that the applicant might be capable of doing so. Remember, the intent of this item is to record what the applicant is doing. When a family member takes decision-making responsibility away from the applicant regarding tasks of everyday living, or the applicant does not participate in decision making, whatever his/her level of capability, the applicant should be considered to have impaired performance in decision making.

**<u>Examples of Decision Making</u>**

- Choosing appropriate items of clothing

- Knowing when to go to meals

- Knowing and using space in home appropriately
- Using environmental cues to organize and plan the day (clocks and calendars)
- Seeking information appropriately (not repetitively) from family or significant others in order to plan the day
- Using awareness of one’s own strengths and limitations in regulating the day's events (asks for help when necessary)
- Knowing when to go out of the house
- Acknowledging the need to use a walker, and using it faithfully

**Field 34: Independent**

Select this field when the applicant’s decisions were consistent and reasonable (reflecting lifestyle, culture, values); the applicant organized daily routine and made decisions in a consistent, reasonable, and organized fashion.

**Field 35: Modified Independent**

The applicant organized daily routines and made safe decisions in familiar situations, but experienced some difficulty in decision-making when faced with new tasks or situations.

**Field 36: Moderately Impaired**

The applicant's decisions were poor; the applicant required reminders, cues, and supervision in planning, organizing, and correcting daily routines.

**Field 37: Severely Impaired**

The applicant's decision-making was severely impaired; the applicant never (or rarely) made decisions.

Here, the only issue with decision making identified by Appellant's representative was a problem with medication administration and it is undisputed that Appellant is now living alone; picking up prescriptions and scheduling medical appointments on his own; choosing appropriate items of clothing to wear; and acknowledging the need to use adaptive equipment. Moreover, as testified to by [redacted] and undisputed by Appellant's representative, there is no evidence of any specific diagnosis affecting Appellant's decision making. Accordingly, Appellant's representative has failed to demonstrate that Appellant is moderately impaired in the area of daily decision making and the Waiver Agency's determination with respect to Door 2 must also be affirmed.

**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.
>
> *Respondent's Exhibit A, page 7*

Here, the Waiver Agency found that Appellant had not suffered from delusions or hallucinations and had not exhibited any of the listed behaviors during the week prior to the LOCD. As testified to by the Waiver Agency's witnesses, that determination was based on a review of Appellant's medical information and an interview with Appellant and his representative. Appellant's representative claims unspecified behaviors did occur, but her general claims are unsupported by any other evidence or any specific examples, and she has therefore failed to meet her burden of proving that the Waiver Agency erred with respect to Door 6.

Accordingly, given the evidence and testimony presented during the hearing, it is clear that the Waiver Agency's decision must be sustained as Appellant and his representative have failed to demonstrate that he met the functional eligibility requirements for the waiver program by passing through any of the seven doors identified in policy and the LOCD tool.

**DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly denied Appellant's request for services through the MI Choice Waiver Program on the basis that he was not functionally eligible for such services.

**IT IS THEREFORE ORDERED** that:

The Waiver Agency's decision is **AFFIRMED**.

Steven J. Kibit
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Community Health

Date Signed: _

Date Mailed: _

SK/db

cc:

***** 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.