

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

P.O. Box 30763, Lansing, MI 48909
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IN THE MATTER OF:

██████████,

Docket No. 2014-19402 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. upon the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████ ██████████, the Appellant's granddaughter, appeared and testified for the Appellant. ██████████ the Appellant's daughter-in-law was present but did not testify.

██████████, Clinical Manager, appeared and testified on behalf of the Department of Community Health's (Department) Waiver Agency, the ██████████ ██████████, RN, BSN, Nurse Supports Coordinator also testified on behalf of the Department of Community Health's (Department) Waiver Agency.

ISSUE

Did the Department's Waiver Agency properly reduce Appellant's MI Choice Waiver services?

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 a ██████-year-old, (DOB: ██████████), who is enrolled in the MI Choice Waiver Program. (Exhibit A and testimony).
2. The Department contracts with the Waiver Agency to provide MI Choice Waiver services to eligible beneficiaries. (Testimony).
3. On ██████████, RN, BSN, Nurse Supports Coordinator met with Appellant in her home along with the Appellant's

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daughter-in-law for a █████ month reassessment to determine the Appellant's current needs for services in the MI Choice Waiver Program. They completed a Michigan Medicaid Nursing Facility Level of Care Determination (LOCD). Nurse █████ found the Appellant continued to be eligible for the MI Choice Waiver program under Door 1, but determined that her MI Choice Waiver Services should be reduced from █████ hours per week to █████ hours per week to more accurately reflect the hands-on care needed by the Appellant. (Exhibit A, pp. 5-27 and testimony).

4. On █████, Appellant was sent an Advance Action notice advising her that her MI Choice Waiver Services would be reduced by █████ hours per week (from █████ hours per week down to █████ hours per week), █████ days from the date of the notice. Appellant was advised of her rights to a Medicaid Fair Hearing. (Exhibit A, pp. 3-4).
5. On █████, MAHS received the Appellant's request for an Administrative Hearing. (Exhibit 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.

This Appellant requested services through the Department's Home and Community Based Services for Elderly and Disabled (HCBS/ED). The waiver is called MI Choice in Michigan. The program is funded through the federal Centers for Medicare and Medicaid (CMS, formerly HCFA) to the Michigan Department of Community Health (Department). Regional agencies 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)].

The policy regarding enrollment in the MI Choice Waiver program is contained in the *Medicaid Provider Manual, MI Choice Waiver*, October 1, 2013, which provides in part:

SECTION 1 – GENERAL INFORMATION

MI Choice is a waiver program operated by the Michigan Department of Community Health (MDCH) to deliver home and community-based services to elderly persons and persons with physical disabilities who meet the Michigan nursing facility level of care criteria that supports required long-term care (as opposed to rehabilitative or limited term stay) provided in a nursing facility. The waiver is approved by the Centers for Medicare and Medicaid Service (CMS) under section 1915(c) of the Social Security Act. MDCH carries out its waiver obligations through a network of enrolled providers that operate as organized health care delivery systems (OHCDs). These entities are commonly referred to as waiver agencies. MDCH and its waiver agencies must abide by the terms and conditions set forth in the waiver.

MI Choice services are available to qualified participants throughout the state and all provisions of the program are available to each qualified participant unless otherwise noted in this policy and approved by CMS. (p. 1).

* * *

SECTION 2 - ELIGIBILITY

The MI Choice program is available to persons 18 years of age or older who meet each of three eligibility criteria:

- An applicant must establish his/her financial eligibility for Medicaid services as described in the Financial Eligibility subsection of this chapter.
- The applicant must meet functional eligibility requirements through the online version of the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD).
- It must be established that the applicant needs at least one waiver service and that the service needs of the applicant cannot be fully met by existing State Plan or other services.

All criteria must be met in order to establish eligibility for the MI Choice program. MI Choice participants must continue to meet these eligibility requirements on an ongoing basis to remain enrolled in the program. (p.1, emphasis added).

* * *

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 fourteen (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

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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. (pp. 1-2).

* * *

2.3.B. REASSESSMENT OF PARTICIPANTS

Reassessments are conducted by either a properly licensed registered nurse or a social worker, whichever is most appropriate to address the circumstances of the participant. A team approach that includes both disciplines is encouraged whenever feasible or necessary. Reassessments are done in person with the participant at the participant's home. (p. 4).

The Waiver Agency provided evidence that on [REDACTED], RN, BSN, Nurse Supports Coordinator met with Appellant in her home along with the Appellant's daughter-in-law for a six month reassessment to determine the Appellant's current needs for services in the MI Choice Waiver Program. Nurse [REDACTED] indicated in her notes that the Appellant's daughter-in-law translated for the reassessment as the Appellant only speaks [REDACTED]. Nurse [REDACTED] stated she completed a Michigan Medicaid Nursing Facility Level of Care Determination (LOCD). She found the Appellant continued to eligible for the MI Choice Waiver program under Door 1, but based on the reassessment decided the Appellant's MI Choice Waiver Services should be reduced from [REDACTED] hours per week to [REDACTED] hours per week to more accurately reflect the hands-on care needed by the Appellant.

Nurse [REDACTED] attempted to have the Appellant demonstrate transfers during the assessment, but Appellant refused to demonstrate transfers due to complaints of a headache. Nurse [REDACTED] indicated that she discussed the matter with the Appellant's daughter-in-law, and was able to determine that the Appellant remained eligible under Door 1 as she required limited assistance with transferring and toileting needs. (See Exhibit A, pp. 5, 11, 19).

Nurse [REDACTED] was then questioned by the Appellant's representative and asked why Nurse [REDACTED] did not bring a translator when she came to do the reassessment as this was the first time a translator was not used. Nurse [REDACTED] indicated she did not have a problem communicating with the Appellant's daughter-in-law on the phone when she called to arrange for the assessment, Nurse [REDACTED] further indicated that she believed that the Appellant's daughter-in-law was able to communicate just fine at the reassessment otherwise she would have rescheduled the assessment.

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Nurse ██████ stated she could not talk to the Appellant for the assessment so she had to rely on talking with the Appellant's daughter-in-law. Nurse ██████ stated she reduced the Appellant's services from ██████ hours per week down to ██████ hours per week, based on what she determined to be the Appellant's minimal needs for hands on assistance. Nurse ██████ stated that she also considered the fact that the Appellant was getting one meal per day delivered by meals on wheels and there would be less time needed for meal preparation by the Appellant's caregivers. She was also aware that the Appellant's caregivers were being paid extra by the family to provide additional care for the Appellant and the MI Choice Program could not replace the additional care being provided by the family.

Appellant's granddaughter testified that the Appellant's daughter-in-law, was her mother and her mother did not speak good English. The granddaughter stated her mother wasn't able to fully understand and properly translate for the assessment. The granddaughter stated her mother could not understand the questions that were asked as part of the reassessment. The granddaughter stated that the Appellant was unable to get out of bed by herself, she couldn't bathe herself, and has to have someone help her with all of her personal care needs. The granddaughter stated she did not understand how the nurse could do the assessment properly without a translator.

Nurse ██████ responded to the granddaughter's testimony indicating that she explained things during the reassessment in terms that she believed the Appellant's daughter-in-law seemed to understand. Nurse ██████ stated that she would definitely take a translator out with her in the future. She reiterated that it was the first time she had met the Appellant and it seemed like the daughter-in-law understood her just fine on the telephone and again at the assessment.

The Appellant bears the burden of proving, by a preponderance of evidence, that the Waiver Agency did not properly reduce her MI Choice Waiver services. A preponderance of the material and credible evidence in this case establishes that the MI Choice Waiver Agency failed to utilize a translator when it conducted the reassessment in this case thereby failing to insure that it had received accurate information concerning the Appellant's current needs for services. Accordingly, the Waiver Agency did not act properly when it reduced the Appellant's MI Choice Waiver services.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the MI Choice Waiver Agency did not properly reduce the Appellant's MI Choice Waiver services.

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IT IS THEREFORE ORDERED that:

- The Department's decision is **REVERSED**.
- The Waiver Agency shall conduct a new reassessment with a translator to obtain accurate information to assess the Appellant's current needs for services under the MI Choice Waiver Program.

William D Bond

William D. Bond
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

Date Signed: [REDACTED]

Date Mailed: [REDACTED]

WDB/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.