

**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. 2014-32278 EDW
Case No. ██████████

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and MCL 400.37, following Appellant's request for hearing.

After due notice, a telephone hearing was held on ██████████. Appellant did not appear. Appellant was represented by ██████████.

██████████, RN, Clinical Manager appeared on behalf of ██████████, (Agency) subcontracting with the Michigan Department of Community Health's MI Choice Waiver program. Later in the hearing, ██████████, Special Projects Clinical Manager joined the hearing as a witness for the Agency.

ISSUE

Did the Waiver Agency present evidence that it properly determined that Appellant was no longer eligible for the MI Choice Waiver program?

FINDINGS OF FACT

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

1. Appellant is an ██████ year old female, who is a recipient of Medicaid.
2. No witnesses at the administrative hearing had personal knowledge of this case.
3. Prior to the negative action (case closure) herein, Appellant had an open MI Choice Waiver program. Appellant had eligibility under Door 1. Appellant resides in an assisted living facility.
4. The Agency witness testified that a social worker conducted a re-assessment

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on or about ██████████ and assessed Appellant under the Michigan Nursing Facility Level of Care (NFLOC) tool. (Testimony) The Agency presented no evidence of the NFLOC assessment.

5. On ██████████ the Agency erred in issuing an “Adequate” Action Notice of MI Choice Medicaid Waiver non-enrollment after assessment based on the NFLOC Determination. (Exhibit A.7) No evidence was presented of an Advance Negative Action Notice. (Exhibit A.7)
6. The Agency testified that it requested a “frailty exception” subsequently conducted MPRO. (Exhibit A.2)
7. On ██████████ MPRO issued a letter of denial for the MI Choice Waiver Program. The letter indicates that if Appellant disputes the action Appellant may request a hearing with Michigan Administrative Hearing System (MAHS). Exhibit A.2)
8. The Agency testified that despite the appeals rights to MAHS in the MPRO denial that Appellant has no right to a hearing with MAHS and that the Respondent is not required to bring MPRO witnesses to the administrative hearing. (Testimony)
9. On ██████████ Appellant's MI Choice Waiver case closed.
10. On ██████████ Appellant's representative filed a request for an administrative hearing with MAHS. The agency failed to send the evidentiary packet to Appellant's representative.
11. During the administrative hearing, the Agency witness appeared during a conference she was attending that day. The Agency's witness testified that she did not have privacy and had a speaker cell phone function on during the administrative hearing; individuals attending the conference could over hear the administrative hearing. When the Administrative Law Judge (ALJ) was informed of these facts, sometime into the administrative hearing, the hearing was stopped due to potential HIPPA violations. The Agency witness indicated that her supervisor was aware that she was assigned to hold an administrative hearing while attending a conference.

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.

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This Appellant is claiming eligibility for 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 Medicaid and Medicare Services to the Michigan Department of Community Health (Department). Regional agencies, in this case, A&D Home Health Care, Inc., 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)

1915(c) (42 USC 1396n (c) allows home and community based services to be classified as "medical assistance" under the State Plan when furnished to recipients who would otherwise need inpatient care that is furnished in a hospital SNF, ICF or ICF/MR and is reimbursable under the State Plan. (42 CFR 430.25(b))

Effective November 1, 2004, the Michigan Department of Community Health (MDCH) implemented revised functional/medical eligibility criteria for Medicaid nursing facility, MI Choice, and PACE services. Federal regulations require that Medicaid pay for services only for those beneficiaries who meet specified level of care criteria.

Section 5.1.D. of the Medicaid Provider Manual Nursing Facility Coverages references the use of an online Michigan Medicaid Nursing Facility Level of Care Determination tool (*Michigan Medicaid Nursing Facility Level of Care Determination, March 7, 2005*, or LOC or NFLOC). The LOC must be completed for all Medicaid-reimbursed admissions to nursing facilities or enrollments in MI Choice or PACE on and after November 1, 2004. The Medicaid Provider Manual on the MI Choice Waiver Chapter also discusses the Level of Care Determination (LOCD) in Section 2.2-Functional Eligibility.

The Level of Care Assessment Tool consists of seven-service entry Doors. The Doors are: Activities of Daily Living, Cognition, Physician Involvement, Treatments and Conditions, Skilled Rehabilitative Therapies, Behavior, or Service Dependency. In order to be found eligible for MI Choice Waiver services, the Appellant must meet the requirements of at least one Door. Medicaid Provider Manual, Michigan Department of Community Health, MI Choice Waiver Chapter, p 2; Version April 1, 2014.

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The Level of Care Assessment Tool consists of seven-service entry Doors. The Doors are: Activities of Daily Living, Cognition, Physician Involvement, Treatments and Conditions, Skilled Rehabilitative Therapies, Behavior, or Service Dependency. In order to be found eligible for MI Choice Waiver services, the Appellant must meet the requirements of at least one Door.

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

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."

Door 3
Physician Involvement

Scoring Door 3: The applicant must meet either of the following to qualify under Door 3

1. At least one Physician Visit exam AND at least four Physicians Order changes in the last 14 days, OR
2. At least two Physician Visit exams AND at least two Physicians Order changes in the last 14 days.

Door 4
Treatments and Conditions

Scoring Door 4: The applicant must score “yes” in at least one of the nine categories above and have a continuing need to qualify under Door 4.

In order to qualify under Door 4 the applicant must receive, within 14 days of the assessment date, any of the following health treatments or demonstrated any of the following health conditions:

- A. Stage 3-4 pressure sores
- B. Intravenous or parenteral feedings
- C. Intravenous medications
- D. End-stage care
- E. Daily tracheostomy care, daily respiratory care, daily suctioning
- F. Pneumonia within the last 14 days
- G. Daily oxygen therapy
- H. Daily insulin with two order changes in last 14 days
- I. Peritoneal or hemodialysis

Door 5
Skilled Rehabilitation Therapies

Scoring Door 5: The applicant must have required at least 45 minutes of active ST, OT or PT (scheduled or delivered) in the last 7 days and continues to require skilled rehabilitation therapies to qualify under Door 5.

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.

Door 7
Service Dependency

Scoring Door 7: The applicant must be a current participant and demonstrate service dependency under Door 7.

Under general evidentiary rules, the Respondent in MI Choice Waiver cases has the burden of going forward and to bring forth evidence of the action taken and, of the authority relied upon in taking the action. While administrative hearings generally apply relaxed rules of evidence, nevertheless, general guidelines found in the following authorities apply: general rules of evidence, civil procedure, DCH and MAHS administrative rules, the Michigan Administrative Procedures Act, and the DCH Administrative Hearing Pamphlet.

In this case, the Agency testified that it closed Appellant's MI Waiver case after assessing Appellant under the NFLOC tool as required by federal, state, and DCH law and procedures. However, the Agency failed to present the NFLOC assessment. Nor did the individual who testified at the administrative hearing have personal knowledge of this case.. Thus, that individual could not give direct, or be subject to cross-examination Nor did the Agency send a copy of the evidentiary packet to Appellant's representative. That representative could not examine or prepare in advance for the administrative hearing.

As noted, no NFLOC assessment was in the evidentiary packet. As to the evidence that was presented-Progress Notes-Appellant's representative sufficiently raised factual inconsistencies after given the chance to review

The purview of an Administrative Law Judge (ALJ) is to review the Agency's action at the time the action was taken, and to determine if that action was correct, consistent with the Medicaid Provider Plan, and not contrary to law. As the Agency failed to submit the NFLOC evidence, the Agency's closure must be reversed.

It is noted that the Agency also issued an Adequate Action Notice; the Agency should have issued an Advance Negative Action Notice. The Agency also failed to bring in a witness from MPRO, and even insisted that Appellant has no right to a review of the MPRO exception request with MAHS despite the MPRO denial clearly stating that Appellant has a right to an administrative hearing with MAHS. Nor did the Agency issue an evidentiary packet to Appellant's representative. Most disturbing however, was the Agency's appearance at the administrative hearing in a large room with a cell speaker phone function. It was at this point, when the ALJ was informed, that the evidentiary hearing was discontinued as Appellant's HIPPA rights were potentially compromised.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, finds that the Waiver Agency did not present evidence of having properly closed Appellant's MI Choice Waiver case.

IT IS THEREFORE ORDERED that:

The Department's closure is REVERSED.

The Department is ordered to immediately reinstate Appellant's MI Choice Waiver case back to the date of closure at the level of benefits for which Appellant was previously receiving, and, issue any supplemental benefits to Appellant to which she is entitled.

/s/ _____
Janice Spodarek
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health


cc:



Date Signed: 5/1/2014

Date Mailed: 5/8/2014

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***** NOTICE *****

The Michigan Administrative Hearing System for the Department of Community Health 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 for the Department of Community Health 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.