

**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. 2014-34422 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 ██████████ Appellant's son and authorized hearings representative appeared and testified on the Appellant's behalf. Appellant was also present for the hearing but did not testify.

██████████, R.N., Quality and Training Manager, appeared and testified on behalf of the Department of Community Health's (Department) Waiver Agency, ██████████ ██████████ LLBSW, Social Work Supports Coordinator and ██████████, R.N., Pacer Project Manager for MPRO also testified on behalf of the Department's Waiver Agency.

**ISSUE**

Did the Department's Waiver Agency properly terminate 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 an ██████-year-old, (DOB: ██████████) who was enrolled in the MI Choice Waiver Program. (Exhibit A, p. 14 and testimony).
2. The Department contracts with the Waiver Agency to provide MI Choice Waiver services to eligible beneficiaries. (Testimony).

3. On ██████████, LLBSW, Social Work Supports Coordinator met with Appellant in her home for a reassessment to determine Appellant's continued eligibility for the MI Choice Waiver Program. ██████████ was unable to complete a Michigan Medicaid Nursing Facility Level of Care Determination (LOCD) on that date so she returned for another visit on ██████████. At the second visit an LOCD was completed and it was determined that the Appellant was no longer eligible for the MI Choice Waiver Program based on the LOCD. (Exhibit A, pp. 2-10, 14-32 and testimony).
4. On ██████████, Appellant was given an Advance Action notice advising her that based on the LOCD she did not qualify for the MI Choice Waiver program and her MI Choice Waiver Services would be terminated █ days from the date of the notice. Appellant was advised of her rights to a Medicaid Fair Hearing. (Exhibit A, p. 1).
5. Appellant requested an immediate review from ██████████ of the LOCD completed on ██████████ and on ██████████ sent the Appellant a letter upholding the LOCD and advising her that she no longer qualified for nursing facility level services and that her MI Choice Waiver services would be terminated within █ days from the date of ██████████ notice. ██████████ letter advised Appellant of her Fair Hearing Rights. (Exhibit A, pp. 11 and Exhibit B).
6. 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*, April 1, 2014, 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 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 reliable evidence that on ██████████, LLBSW, Social Work Supports Coordinator met with Appellant in her home for a ██████-day reassessment to determine Appellant's continued eligibility for the MI Choice Waiver Program. ██████████ stated based upon the information provided she was concerned that the Appellant did not pass the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD) so she returned for another visit on ██████████ when the Appellant's son would be present and completed another LOCD. ██████████ stated the Appellant and her son together provided the information needed to complete the LOCD on that date. ██████████ stated it was determined that the Appellant did not pass the LOCD and was no longer eligible for the MI Choice Waiver Program based on the LOCD. ██████████ handed the Appellant and her son an Advance Action notice on ██████████ indicating that her MI Choice Waiver Services would be terminated ██████ days from the date of the notice. (See Exhibit A, pp. 2-10 & 14-32).

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The documents submitted by the Waiver Agency support the testimony of ██████████ that the Appellant no longer met the qualifications for MI Choice Waiver Services based on the LOCD completed on ██████████. (See Exhibit A). The hearing summary prepared by ██████████ and the Assessment Report that are contained in Exhibit A demonstrate that ██████████ essentially did ██████ assessments, the ██████ one was completed to insure that the Appellant's son would be present to give input for the assessment. It was determined, while difficult, that the Appellant had been independent in bed mobility. She was mostly independent in transfers, but her son provides some supervision for transfers. Appellant reported she was independent with toileting in the past year. Appellant is able to feed herself and is only assisted with meal preparation. Accordingly, ██████████ determined the Appellant did not pass through Door 1.

For Door 2, ██████████ found that generally Appellant's memory was good, there was some forgetfulness reported by her son, but that did not affect her ability to perform her daily care needs. Appellant was found to be modified independent for cognitive skills, because it was reported she has some difficulty and needs reassurance with new situations. Finally, it was determined that the Appellant had no trouble making herself understood and expressing ideas clearly and without difficulty. Accordingly, ██████████ determined the Appellant did not pass through Door 2.

██████████ found the Appellant did not pass through Door 3, as there were no physician visits or physician order changes within the last ██████ days from the date of the assessment. Likewise, it was determined that the Appellant did not pass through door 4 as she did not have any of the treatments or conditions listed on the LOCD within the last ██████ days. Appellant also did not pass through Door 5 because she did not have any skilled rehabilitation therapies administered or scheduled within the last ██████ days from the date of the assessment. Appellant did not pass through Door 6, as there were no reports that the Appellant had been wandering, verbally abusive, physically abusive, she did not engage in any socially inappropriate or disruptive behaviors, and there were no reports that she was resisting care at least ██████ out of the last ██████ days from the date of the assessment. It was reported that she was not satisfied with her current pain control, but refused any assistance with it, and is limited in the type of medications she can take due to interaction with her Coumadin. ██████████ also found that the Appellant was not experiencing any delusions or hallucinations within the last ██████ days. (See Exhibit A, pp. 1, 17-32). Finally, as for Door 7, ██████████ reported that the Appellant was not a program participant for ██████ year as of the date of the assessment.

**Exception Process**

██████████, R.N., PACER Project Manager with ██████████ testified and provided documentation that ██████████ received the NF Exception Review request from the Appellant's son on April 4, 2014. (Exhibit B and testimony).

The Michigan Department of Community Health policy related to LOC exception eligibility for nursing facility services is found in its Medicaid Provider Manual:

### 5.1.D.2 Nursing Facility Level of Care Exception Process

The Nursing Facility Level of Care (LOC) Exception Review is available for Medicaid financially pending or Medicaid financially eligible beneficiaries who do not meet medical/functional eligibility based on the web-based Michigan Medicaid Nursing Facility LOC Determination criteria, but demonstrate a significant level of long term care need. The Nursing Facility LOC Exception Review process is not available to private pay individuals. The Nursing Facility LOC Exception Review is initiated only when the provider telephones the MDCH designee on the date the online Michigan Medicaid Nursing Facility LOC Determination was conducted and requests the Nursing Facility LOC Exception Review on behalf of a medically/functionally ineligible beneficiary. The Nursing Facility LOC Exception Criteria is available on the MDCH website. A beneficiary needs to trigger only one of the LOC Exception criteria to be considered as eligible under the Exception Review. [*Medicaid Provider Manual, Nursing Facility Coverages, April 1, 2014, p. 12*].

The exception process considers frailty, behaviors and treatments. ██████████, R.N., PACER Project Manager with ██████████ testified she received a call from the Appellant's son requesting an ██████████ Immediate review on ██████████. ██████████ stated they obtained the Appellant's records from ██████████ to do the review. ██████████ went through each of the exception criteria and found that the Appellant did not meet any of the exception criteria based on the information submitted by the Waiver Agency. (Exhibit B and testimony).

For the frailty categories, 1001, for toilet use, transfers, and bed mobility ██████████ noted Appellant was independent. The review found the Appellant ambulates independently, that she uses a quad cane outside and a rolling walker. ██████████ stated there was no indication that the Appellant took an unreasonable amount of time to perform any of her ADLs. For 1002, there was no documented evidence that she was totally incapacitated due to shortness of breath, pain or debilitating weakness. ██████████ noted there was some shortness of breath with normal day-to-day activities. Appellant had some diminished energy, but could complete her daily activities. The Appellant had right knee pain and wears a brace, her pain control was not adequate, and it was reported that the Appellant refuses assistance with pain management. ██████████ stated there was no indication of recovery time for her pain or shortness of breath so Appellant could not be approved under these criteria. For 1003 ██████████ stated there were no falls documented within the past month so Appellant could not be approved under these criteria.

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For 1004, ██████ stated Appellant's son handles the Appellant's medications, so there was no indication of a difficulty with managing the Appellant's medications. For 1005, ██████ stated the Appellant had no documented weight change. For 1006, ██████ stated there were no physician visits, no ER visits, and no order changes documented within the past █ days.

For the Behavior categories, 2001-2004, ██████ stated there was no wandering, no verbal or physical abuse, and no socially inappropriate behaviors mentioned in the Appellant's records. For 3000, ██████ stated the Appellant's records did not show that she was receiving any complex treatments or nursing care. ██████ stated since the Appellant did not meet the criteria for an exception ██████ upheld the denial decision and a letter was sent to the Appellant to advise her that the Agency's decision was upheld. (Exhibit B).

Appellant's son testified at the hearing that his mother had been a participant for █ year, but could only state that she first became a participant during the █ week in ██████. When questioned about it, Appellant's son acknowledged that she had been a participant for just less than a year when the ██████ assessment was done. He indicated his mother had █ doctor's appointments in ██████, but he did not provide the dates of the doctor visits. Appellant's son said his mother thought the assessment on ██████ was only an informal review. He urged that the Appellant should meet the frailty criteria as she has COPD, congestive heart, and atrial fibrillation. Appellant's son indicated the Appellant needs assistance with her medications and her inhaler. Appellant's son said ██████ had already completed the assessment before he was present and would not reopen it so some of the doors could be opened. He said ██████ has the Appellant rated basically as totally independent, which he said is not accurate. Appellant's son said his mother has resisted care, and does exhibit verbal abuse. He said she takes Advair and uses her inhaler daily. Appellant's son said the Appellant needs supervision while bathing, she needs assistance walking, since she uses a walker and a cane, and she needs someone around her whenever she moves about.

In response, ██████ stated Door 3 requires either one doctor's visit and █ order changes within the past █ days, or █ doctor's visits and █ order changes within the past █ days. She pointed out that the son's assertions that the mother had █ doctor's visits in ██████ did not meet the requirements of Door 3. ██████ also pointed out that the assessments did not document that the Appellant was exhibiting any of the behaviors listed to qualify under Door 6. ██████ stated that ██████ covered all of the doors when she returned on ██████ to complete the second assessment when the Appellant's son could be present for the assessment.

The Appellant bears the burden of proving, by a preponderance of evidence, that the Waiver Agency did not properly terminate her enrollment in the MI Choice Waiver program based upon the results of the reassessment completed on ██████. A preponderance of the material and credible evidence in this case establishes that the

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MI Choice Waiver Agency acted in accordance with the policy contained in the Medicaid Provider Manual, and its actions were proper when it terminated the Appellant's enrollment in the MI Choice program.

The policy in the Medicaid Provider Manual makes it clear that an individual cannot be enrolled in the MI Choice Waiver Program unless the individual meets the functional eligibility requirements through the online version of the Michigan Medicaid Nursing Facility Level of Care Determination. The preponderance of the evidence demonstrates that the Appellant did not meet the functional eligibility based on the information the Waiver Agent's received at the time of their reassessment completed on ██████████. The Waiver Agency's determination was also upheld by the immediate review completed by ██████████ on ██████████. The Appellant has failed to prove the Waiver Agency's actions were not proper when it terminated her enrollment in the MI Choice program.

Based on the information obtained during the reassessment performed by the Waiver Agent the Appellant was not eligible for MI Choice program at the time they terminated her enrollment in the program, because she no longer met the functional eligibility requirements for the program.

It is also noted that the Appellant's representative attempted to expand the record by submitting an ex parte Fax to the undersigned after the hearing had concluded. It is inappropriate for a party to submit materials ex parte following the conclusion of a hearing, and therefore, such documents were not considered in rendering this decision.

**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 properly terminated Appellant's enrollment in the MI Choice Waiver program.

**IT IS THEREFORE ORDERED** that:

The Department's decision is **AFFIRMED**.

*William D Bond*

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

Date Signed: ██████████

Date Mailed: ██████████

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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.