STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF HEALTH AND HUMAN SERVICES
P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 373-4147

IN THE MATTER OF:

[redacted],

Docket No. 15-004364 EDW
Case No. [redacted]

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 [redacted]. Appellant appeared and testified. Neil Warren represented Appellant. Tina Cleaves appeared as a witness.

[redacted], Supports Coordinator, RN, appeared on behalf of the Department's Waiver Agent, Macomb Oakland County Regional Center on Aging. (MORC/Waiver Agency/Agency/or Department).

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 a[redacted]-year-old, who was enrolled in the MI Choice Waiver Program. (Exhibit A).

2. The Department contracts with the Waiver Agency to provide MI Choice Waiver services to eligible beneficiaries.

3. On [redacted], MORC met with Appellant in her home for a reassessment to determine Appellant's continued eligibility for the MI Choice Waiver Program. The Supports Coordinators completed a Michigan Medicaid Nursing Facility Level of Care Determination (LOCD) and it was

[redacted]

determined that the Appellant was no longer eligible for the MI Choice Waiver Program based on the LOCD. Appellant's diagnosis includes "cerebral, seizure disorder, transeschemic attack." (MORC Testimony).

4. MORC testified that Appellant had originally qualified for the Waiver program under Door 7 of the LOCD. MORC's documentary evidence is contrary to the Agency's testimony-evidence indicates that Appellant qualified under Door 2 pursuant to Exhibits A.7; A.17; A.20; and A.24.

5. On [redacted], 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 his MI Choice Waiver Services would be terminated 12 days from the date of the notice (on [redacted]). Appellant was advised of her rights to a Medicaid Fair Hearing. (Exhibit D.1).

6. No evidence was presented that an MPRO was completed.

7. On 3/30/15, MAHS received the Appellant's request for an Administrative Hearing.

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, 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) and section 1915(b) of the Social Security Act. MDCH carries out its waiver obligations through a network of enrolled providers that operate as Prepaid Ambulatory Health Plans (PAHPs). **(revised per bulletin MSA 14-26)** 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 [CHANGE MADE 10/1/14]

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 requires at least two waiver services, one of which must be Supports Coordination, **(revised per bulletin MSA 14-26)** 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.2, emphasis added).

* * *

2.2.A. MICHIGAN MEDICAID NURSING FACILITY LEVEL OF CARE DETERMINATION [CHANGES MADE 10/1/14]

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 person completing the LOCD must either be waiver agency staff or in the waiver agency's provider network. **(text added 10/1/14)**

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. (p. 2).

* * *

2.3.B. REASSESSMENT OF PARTICIPANTS [CHANGES MADE 10/1/14]

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.

The supports coordinator documents that the participant continues to meet the nursing facility level of care within the case record, specifying the appropriate "door" through which the participant meets level of care criteria. Reassessments are conducted in person 90 days after the initial assessment, with a reassessment every subsequent 180 days, or sooner upon a significant change in the participant's condition. Supports coordinators track reassessment dates within the waiver agency's information systems. If a supports coordinator determines the participant no longer meets the nursing facility level of care, the supports coordinator initiates program discharge procedures and provides the participant with advance notice and information on appeal rights. **(revised per bulletin MSA 14-26)** A refusal which prevents a redetermination within the 180-day window is cause for termination from the program. **(revised per bulletin MSA 14-27)** (p. 4).

Here, the Waiver Agency's evidentiary packet was thorough, and consistent. However, MORC's witness did not appear to be familiar with Appellant's case, and, incorrectly testified as to the contents of the packet, including date the Appellant was notified, and

which door Appellant was previously approved on.

Appellant argues that she needs assistance with many IADLs (laundry, cooking, housework). Appellant further argues that she incorrectly represented at the assessment that she was able to take care of some of her ADLs including "bathing, dressing, and cooking." Appellant's [redacted] Hearing Request. Appellant further argues that cleaning the tub, toilet and floors is too heavy for her.

Despite the Waiver Agency's witness's confusing testimony, the documentary evidence presented by the Waiver Agency (except for the Hearing Summary) was thorough, consistent and supported the action taken here. Appellant however, did not present clear and credible evidence of meeting the NFLOC eligibility criteria; Appellant represented at the assessment, and again in her hearing request, that her needs were not the type anticipated or that would fall under the NFLOC

The purview of an administrative law judge (ALJ) is to review the Department's action and to make a determination if those actions are in compliance with Department policy, and not contrary to law. The ALJ must base the hearing decision on the preponderance of the evidence offered at the hearing or otherwise included in the record. The ALJ at an administrative hearing must base a decision upon the evidence of record focusing at the time of the assessment. Regrets as to statements subsequent to the negative action cannot be given substantial evidentiary weight.

After a careful review of the credible and substantial evidence on the whole records, this ALJ finds that the Department's actions were in compliance with its policy, and supported by the documentary and testimonial evidence taken as a whole. The Supports Coordinator completed a Michigan Medicaid Nursing Facility Level of Care Determination (LOCD) and it was determined that the Appellant was no longer eligible for the MI Choice Waiver Program based on the LOCD. Despite the MORC's witness's testimony, Appellant had originally qualified for the Waiver program under Door 2. Memory issues are a logical result of Appellant's diagnoses. However, such memory problems can often improve with time. In fact, the progress notes contain an entry from the redetermination completed [redacted] that states in part: …participant does not meet criteria to be eligible for the MI choice waiver program…she stated that she knew she was starting to get better and that previous SC was trying to keep her on any way she could…" (Exhibit A.3).

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 at the March, 2015 assessment. A preponderance of the material and credible evidence in this case establishes that the 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 based upon the information they received at the [redacted] reassessment.

Based on the information obtained during the reassessment performed by the Waiver Agents 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.

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 acted properly when it terminated the Appellant's enrollment in the MI Choice Waiver program.

IT IS THEREFORE ORDERED that:

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

Spodarek

Janice Spodarek
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Health and Human Services

Date Signed: [redacted]

Date Mailed: [redacted]

JS/[redacted]

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.