



RICK SNYDER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
Christopher Seppanen  
Executive Director

SHELLY EDGERTON  
DIRECTOR

[REDACTED]

Date Mailed: December 14, 2016  
MAHS Docket No.: 16-013833  
Agency No.: [REDACTED]  
Petitioner: [REDACTED]

**ADMINISTRATIVE LAW JUDGE: Colleen Lack**

**DECISION AND ORDER**

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and upon the Petitioner's request for a hearing.

After due notice, a hearing was held on November 16, 2016. [REDACTED], the Petitioner, appeared on her own behalf. [REDACTED], Hearing Coordinator, represented the Department of Health and Human Services' Waiver Agency, [REDACTED] [REDACTED] " or "Waiver Agency"). [REDACTED], Registered Nurse (RN) Care Manager, and [REDACTED], Social Worker, appeared as witnesses for the Waiver Agency.

During the hearing proceedings, the Waiver Agency's Hearing Summary packet was admitted as Exhibit A, pp. 1-63, and a copy of the [REDACTED], termination notice was admitted as Exhibit B, pp. 1-2.

**ISSUE**

Did the Waiver Agency properly terminate Petitioner's MI Choice Waiver services case due to a retrospective review determination that Petitioner did not meet the Nursing Facility Level of Care Determination (LOCD) criteria?

**FINDINGS OF FACT**

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

1. Petitioner has been receiving services through the MI Choice Waiver program since September of 2013. (Exhibit A, p. 2)

2. For the enrollment determination, it was found that Petitioner met the LOCD criteria on [REDACTED] via Door 4 based on intravenous (IV) medications. (Exhibit A, pp. 2 and 30-38)
3. Petitioner continued to meet the Door 4 criteria based on IV medications on subsequent LOCDs completed on [REDACTED], and [REDACTED] (Exhibit A, pp. 2 and 14-29)
4. On [REDACTED] another LOCD was completed. The Waiver Agency determined that Petitioner meet the criteria for Door 7 Service Dependency. (Exhibit A, pp. 2 and 6-12)
5. Between [REDACTED] and [REDACTED] the Michigan Peer Review Organization (MPRO) requested records for a retrospective review of Petitioner's case for the time period of [REDACTED] through [REDACTED]. [REDACTED] determined that Petitioner did not meet the LOCD criteria from [REDACTED] on (in continuation); and that [REDACTED] determination was subsequently reversed. (Exhibit A, pp. 2, 43-56; Testimony of Hearing Coordinator)
6. On [REDACTED] requested records for a retrospective review of Petitioner's case for the time period of [REDACTED] through May 25, 2016. (Exhibit A, pp. 57-58)
7. On [REDACTED], the Waiver Agency provided documentation to MPRO. (Exhibit A, pp. 59-61)
8. On [REDACTED] requested records for a retrospective review of Petitioner's case for the time period of [REDACTED] through [REDACTED] (Exhibit A, p. 62)
9. On [REDACTED] the Waiver Agency provided documentation to [REDACTED]. (Exhibit A, p. 62)
10. On [REDACTED] determined that Petitioner did not meet the LOCD criteria from [REDACTED], on (in continuation). (Exhibit A, p. 63)
11. On [REDACTED], an Advance Action Notice was issued to Petitioner stating her eligibility for the MI Choice Program would be terminated effective [REDACTED], because [REDACTED] determined she did not meet the level of care medically for the waiver program. Therefore, Petitioner would be disenrolled from the waiver program on [REDACTED], and her services would be stopped. (Exhibit B, pp. 1-2)
12. On [REDACTED], Petitioner filed a Request for Hearing contesting the Waiver Agency's action. (Exhibit A, pp. 3-5)

## **CONCLUSIONS OF LAW**

The Medical Assistance Program (MA) 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.

Petitioner is seeking 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 to the Michigan Department of Health and Human Services. Regional agencies, in this case NEMSCA, 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))

Federal regulations require that Medicaid pay for services only for those beneficiaries who meet specified level of care criteria. In accordance with the federal regulations the Michigan Department of Health and Human Services implemented functional/medical eligibility criteria for Medicaid nursing facility, MI Choice, and PACE services.

MI Choice applicants are evaluated for functional eligibility via the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD). The LOCD consists of seven screening Doors. The doors are: Door 1- Activities of Daily Living; Door 2-Cognitive Performance; Door 3- Physician Involvement; Door 4- Treatments and Conditions; Door 5- Skilled Rehabilitative Therapies; Door 6- Behavioral Challenges; and Door 7- Service Dependency. 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. *Medicaid Provider Manual, MI Choice Waiver Chapter, July 1, 2016, pp. 1-2.*

In order to be found eligible for MI Choice Waiver services, the Petitioner must meet the requirements of at least one Door. For the enrollment determination, it was found that Petitioner met the LOCD criteria on [REDACTED], via Door 4 based on IV medications. (Exhibit A, pp. 2 and 30-38) Petitioner continued to meet the Door 4 criteria based on intravenous medications on subsequent LOCDs completed on [REDACTED], and [REDACTED]. (Exhibit A, pp. 2 and 14-29) On [REDACTED] another LOCD was completed. The Waiver Agency determined that Petitioner meet the criteria for Door 7 Service Dependency. (Exhibit A, pp. 2 and 6-12)

### Door 1

#### Activities of Daily Living (ADLs)

The LOCD, pages 1-3 of 9, provides that the Petitioner must:

**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

The LOCD, pages 3-4 of 9, provides that to qualify under Door 2 Petitioner must:

**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**

The LOCD, pages 4-5 of 9, provides that to qualify under Door 3 Petitioner must:

**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 Physician Order changes in the last 14 days, OR
2. At least two Physician Visit exams AND at least two Physician Order changes in the last 14 days.

### **Door 4** **Treatments and Conditions**

The LOCD, page 5 of 9, indicates that in order to qualify under Door 4, the Petitioner 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

**Scoring Door 4:** The applicant must meet score "yes" in at least one of the nine categories and have a continuing needs to qualify under Door 4.

### **Door 5** **Skilled Rehabilitation Therapies**

The LOCD, pages 5-6 of 9, provides that the Petitioner must:

**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**

The LOCD, pages 6-7 of 9, provides a listing of behaviors (Wandering, Verbally Abusive, Physically Abusive, Socially Inappropriate/Disruptive, and Resists Care) and problem conditions (Delusions, and Hallucinations) recognized under Door 6.

**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**

The LOCD, page 7 of 9, provides that Petitioner could qualify under Door 7 if there was evidence that he: is currently being served by either the MI Choice Program, PACE program, or Medicaid reimbursed nursing facility; for at least one year; requires ongoing services to maintain current functional status; and no other community, residential or informal services are available to meet the Petitioner’s needs.

In this case, the Waiver Agency believes that Petitioner does meet the LOCD criteria. Rather, the termination of her enrollment in the MI Choice Waiver program was based on the retrospective review determination from MPRO. The Waiver Agency feels that Petitioner is still in need of the waiver services, would greatly benefit from them, and has seen her decline since the services were eliminated. The Waiver Agency believes that Petitioner more than qualifies under Door 7, service dependency. (Exhibit A, pp. 6-63, Testimony of Hearing Coordinator and RN Case Manager)

Regarding Door 7, Petitioner had been a waiver participant since [REDACTED], therefore she was being served by the MI Choice Waiver program for more than one year. The services Petitioner was receiving, and was dependent upon, included Community Living Supports (CLS) 3 hours per week. The CLS services involved an aide in the home doing heavier cleaning, changing bed linens, vacuuming, scrubbing the floor, running errands, shopping, help lifting bags, etc. It was noted that Petitioner rarely drives due to arthritis and pain in her arms, wrists, and hands. Additionally, the MI Choice Waiver program provided assistance with lawn mowing and snow removal as needed, which would be difficult for Petitioner to do physically or to have done for her financially. It was noted that Petitioner is not eligible for other programs, such as the Care Management program due to her age; or the Adult Home Help Services program

because she does not require assistance with personal care. There were no other community service programs that could supply the services Petitioner is dependent upon to remain safely in her home. (Exhibit A, pp. 59-60, Testimony of RN Care Manager)

It was also explained that the reason there was no current IV medication use at the time of the last LOCD, [REDACTED], was because Petitioner's prior doctor left the practice in [REDACTED]. Petitioner then struggled to find a new rheumatologist. Petitioner began seeing a new doctor in [REDACTED], Michigan. Petitioner has had to start over with the new doctor. For example, there were problems with trying to get Petitioner's records from the prior doctor and Petitioner had an allergic reaction to a new medication this doctor prescribed. Petitioner was bedridden from the end of September and to the end of [REDACTED]. The plan is for Petitioner to get her medical records up to code, such as getting vaccinations, before she can start on an IV medication, Remicade. (Testimony of RN Care Manager and Petitioner)

Overall, the evidence does not support the [REDACTED] Advance Action Notice terminating Petitioner's MI Choice Waiver program case effective [REDACTED]. (Exhibit B, pp. 1-2) It is noted that there was no current LOCD completed at the time of the [REDACTED], determination to terminate Petitioner's waiver enrollment and services. Rather, this termination was in response to an MPRO retrospective review determination. Based on the documentation and credible testimony of the Waiver Agency, the first [REDACTED] retrospective review period was [REDACTED], through [REDACTED]. The initial [REDACTED], [REDACTED] determination that Petitioner did not meet the LOCD criteria from [REDACTED], on (in continuation), was reversed on [REDACTED]. Accordingly, during a portion of that period that Petitioner was again found eligible for the MI Choice Waiver program, Petitioner met the criteria through Door 7 on the [REDACTED] LOCD. (Exhibit A, pp. 2, 6-13, 43-56, and 59-60; Testimony of Hearing Coordinator). It is unclear why Petitioner's case then went through a second retrospective review with [REDACTED] not even a month later and for a portion of the same time period. On [REDACTED] requested records for a retrospective review of Petitioner's case for the time period of [REDACTED], through [REDACTED] (Exhibit A, pp. 57-58) On [REDACTED], [REDACTED] again determined that Petitioner did not meet the LOCD criteria, this time from [REDACTED], on (in continuation). (Exhibit A, p. 63) This is inconsistent with the [REDACTED], reversal of the initial determination for the first retrospective review, which would have been based on much of the same documentation due to the overlapping time periods. Further, the Waiver Agency has provided sufficient evidence that Petitioner would have continued to meet the Door 7 criteria for service dependency at the time of the [REDACTED], termination action because she had been a program participant for more than one year, was dependent on the services she was receiving to maintain her functional status; and no other community, residential or informal services were available to meet Petitioner's needs.

**DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency improperly terminated Petitioner's MI Choice Waiver services case due to a retrospective review determination that Petitioner did not meet the Nursing Facility Level of Care Determination (LOCD) criteria.

**IT IS THEREFORE ORDERED** that

The Waiver Agency's decision is REVERSED. The Waiver Agency shall initiate re-assessing Petitioner for eligibility for the MI Choice Waive program, to include completing a new LOCD.

CL/cg



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**Colleen Lack**

Administrative Law Judge

for Nick Lyon, Director

Department of Health and Human Services



**NOTICE OF APPEAL:** A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; Attention: MAHS Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings  
Reconsideration/Rehearing Request  
P.O. Box 30763  
Lansing, Michigan 48909-8139

**DHHS -Dept Contact**

[REDACTED]

**DHHS -Dept Contact**

[REDACTED]

**Petitioner**

[REDACTED]

**Community Health Rep**

[REDACTED]