



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: February 15, 2017  
MAHS Docket No.: 16-018367  
Agency No.: [REDACTED]  
Petitioner: [REDACTED]

**ADMINISTRATIVE LAW JUDGE: Janice Spodarek**

**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 February 9, 2017. Petitioner appeared on her own behalf and testified.

[REDACTED] RN Special Projects Manager represented and testified on behalf of the State of Michigan Department of Health and Human Services subcontractor Region II Area Agency on Aging, (Waiver Agency or Respondent). Witnesses included [REDACTED] RN Supports Coordinator, and [REDACTED] SW Supports Coordinator.

**ISSUE**

Did the Waiver Agency properly determine that Petitioner was no longer eligible for the MI Choice Waiver Program?

**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 is a [REDACTED] year old female Medicaid beneficiary, born [REDACTED] [REDACTED] who has been receiving services through the MI Choice Waiver Program. (Exhibit A; Testimony).
2. Petitioner is [REDACTED] feet tall, weighs [REDACTED] pounds, and testified that she quit smoking in November, 2016, "just before my lung surgery." Petitioner has COPD, pulmonary hypertension, diabetes, and lupus. (Exhibit I.2; Testimony).

3. The Waiver Agency is a contract agent of the Michigan Department of Health and Human Services (MDHHS) and is responsible for waiver eligibility determinations and the provision of MI Choice Waiver Services.
4. On December 5, 2016, a Level of Care Determination (LOCD) of Petitioner was done by the Waiver Agency to determine continued eligibility for the MI Choice Waiver Program. Based on the results of the LOCD, the Waiver Agency determined that Petitioner was no longer eligible for the MI Choice Waiver Program because she did not pass through any of the seven doors of the LOCD. Petitioner was verbally informed following the reassessment that she was no longer eligible for the program and was given a Request for Hearing Form. (Exhibit A.1-10; Testimony).
5. On December 6, 2016 the Waiver Agency sent Petitioner an Adequate Action Notice informing Petitioner that it determined she was no longer eligible for the MI Choice Waiver Program and advised her that services would be terminated effective December 5, 2016. (Exhibit A, p 15; Testimony).
6. Despite the failure of the Respondent to issue an Advance Negative Action Notice with an 11 day pended date, the Respondent did not close Petitioner's case, indicating at hearing that the action was reinstated pending the outcome of the hearing. (Testimony).
7. On December 16, 2016, the Michigan Administrative Hearing System received Petitioner'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 Petitioner is claiming 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 (formerly HCFA) to the Michigan Department of Health and Human Services (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)*

A waiver under section 1915(c) of the [Social Security] Act allows a State to include as “medical assistance” under its plan, home and community based services furnished to recipients who would otherwise need inpatient care that is furnished in a hospital, SNF [Skilled Nursing Facility], ICF [Intermediate Care Facility], or ICF/MR [Intermediate Care Facility/Mentally Retarded], and is reimbursable under the State Plan. *42 CFR 430.25(c)(2)*

The policy regarding enrollment in the MI Choice Waiver program is contained in the *Medicaid Provider Manual, MI Choice Waiver*, April 1, 2016, 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).

In order to be found eligible for MI Choice Waiver services, Petitioner must meet the requirements of at least one Door. The Waiver Agency presented testimony and documentary evidence that Petitioner did not meet any of the criteria for Doors 1 through 7.

### **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

Petitioner was found to meet the NFLOC previously based on Door 1 for Transferring. However, at the reassessment at issue here, Petitioner was found to be independent

with bed mobility, transfers, toilet use and eating. As such, Petitioner did not qualify under Door 1.

### **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."

Petitioner's short-term memory was determined to be okay, she was found to be independent with cognitive skills for daily decision-making, and she was able to make herself understood. As such, Petitioner did not qualify under Door 2.

### **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.

Petitioner reported 5 physician visits and 0 physician change orders within the 14-day period leading up to the LOCD. As such, Petitioner did not qualify under Door 3.

### **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

Petitioner reported daily oxygen therapy but did not have a ‘continuing need’ associated with Door 4. Accordingly, Petitioner did qualify under Door 4.

### **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.

Petitioner was not currently receiving any skilled rehabilitation therapies at the time of the LOCD. Accordingly, Petitioner did not 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.

Petitioner did not have any delusions or hallucinations within seven days of the LOCD. Petitioner did not exhibit any of the challenging behaviors associated with Door 6 within the seven days of the LOCD. Accordingly, Petitioner did not qualify under Door 6.

### **Door 7** **Service Dependency**

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

The LOC Determination provides that Petitioner did not qualify under Door 7 as she did not meet criteria 1-3 in Field 93.

Petitioner argued that her doctor and PA feel that she needs the extra help at home. Petitioner attached a December 9, 2016 letter from her PA stating that “we would like her to continue her services with Region 2 Assistance.” Petitioner also argued that she gets out of bed when her caregivers come but goes back to bed and requires their help.

Based on the information at the time of the LOCD, Petitioner did not meet the Medicaid nursing facility level of care criteria. The LOCD is designed by the Michigan Department of Health and Human Services and must be applied in all cases regardless of what the applicant’s diagnosis is. This does not imply that Petitioner does not need any assistance, or that she does not have any medical problems, only that she was not eligible to receive ongoing services through the MI Choice Waiver Program at the time of the assessment. Accordingly, the Waiver Agency properly determined that Petitioner was not eligible for continued MI Choice Waiver services. If Petitioner’s condition has worsened since the December 5, 2016 reassessment, she can seek to be reevaluated for services if she wishes to do so.

Petitioner did not prove by a preponderance of evidence that the Waiver Agency erred in finding that she was no longer eligible for the MI Choice Waiver Program. Petitioner offered no evidence or arguments that address the NFLOC criteria-the evidence reviewed herein. Therefore, Petitioner is not eligible for the MI Choice Waiver Program.


### **DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly determined that Petitioner was no longer eligible for the MI Choice Waiver Program.

**IT IS THEREFORE ORDERED** that:

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

JS/cg



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**Janice Spodarek**

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]

**Community Health Rep**

[REDACTED]

**DHHS -Dept Contact**

[REDACTED]

**Petitioner**

[REDACTED]