

GRETCHEN WHITMER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS  
DIRECTOR

[REDACTED]  
[REDACTED]  
[REDACTED], MI [REDACTED]

Date Mailed: April 27, 2021  
MOAHR Docket No.: 21-000492  
Agency No.: [REDACTED]  
Petitioner: [REDACTED]

**ADMINISTRATIVE LAW JUDGE: Steven Kibit**

**DECISION AND ORDER**

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

After due notice, a telephone hearing was begun on March 17, 2021. However, the hearing could not be completed during the allotted time and it was determined that it must be continued later. After due notice, the hearing was subsequently continued and completed on April 7, 2021.

[REDACTED], friend and caregiver to Petitioner, appeared and testified on Petitioner's behalf. [REDACTED], Petitioner's son, and [REDACTED], Petitioner's daughter, also testified as witnesses for Petitioner.

Ann Weir, Hearings Coordinator, appeared and testified on behalf of Respondent Region 9 Area Agency on Aging. Rebecca Tousigna, Community Based Care Supervisor, and Kathleen Miner, Social Worker/Supports Coordinator, also testified as witnesses for Respondent.

During the hearing, both parties submitted evidence packets that were admitted into the record, with Petitioner's packet entered as Exhibit #1, pages 1-87, and Respondent's packet entered as Exhibit A, pages 1-41.<sup>1</sup>

**ISSUE**

Did the Respondent properly deny Petitioner's request for services through the MI Choice Waiver program?

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<sup>1</sup> Petitioner's Exhibit was admitted over Respondent's objection.

## **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 an [REDACTED] (■) year-old woman who lives alone and does not have a legal guardian. (Exhibit A, page 10; Testimony of Petitioner's representative; Testimony of Petitioner's son).
2. She is enrolled in a Care Management Program through Respondent and is authorized to receive home delivered meals, homemaking services, and personal care services. (Exhibit A, page 40).
3. Respondent is also a contract agent of the Michigan Department of Health and Human Services (MDHHS) and responsible for eligibility determinations and the provision of waiver services in its service area through the MI Choice Waiver program.
4. On November 19, 2020, Petitioner's son requested via telephone that Petitioner be reassessed for the MI Choice Waiver Program. (Exhibit A, page 41).
5. In making that request, Petitioner's son indicated why he believed that Petitioner needed more care and why her current circumstances are unsafe. (Exhibit A, pages 40-41).
6. Respondent's Community Based Care Supervisor indicated that Respondent did not believe that Petitioner was either financially or functionally eligible for the waiver program, but that it would reassess Petitioner. (Exhibit A, pages 40-41).
7. She also indicated that Petitioner's son should also call Adult Protective Services if he believed Petitioner cannot make safe decisions. (Exhibit A, pages 40-41).
8. On November 20, 2020, staff from Respondent completed an assessment with Petitioner. (Exhibit A, pages 10-26, 39-40).
9. The assessment was completed with Petitioner via telephone due to COVID safety precautions. (Exhibit A, page 40).
10. On November 23, 2020, staff from Respondent also spoke with a representative from the provider of Petitioner's Case Management Program services, who indicated that, even though Petitioner would be unable to transfer out of a bathtub alone and has no shower head in the bathtub, Petitioner has always refused personal care services. (Exhibit A, page 39).

11. On November 24, 2020, Respondent entered a Nursing Facility Level of Care Determination (LOCD) with respect to Petitioner. (Exhibit A, pages 39).
12. In completing that LOCD, Respondent relied solely on what it was told by Petitioner herself. (Testimony of Social Worker/Supports Coordinator).
13. On November 24, 2020, Respondent sent Petitioner a written Adequate Action Notice stating that the request for waiver services was denied. (Exhibit A, page 4).
14. Specifically, the notice stated:

Following a review of your long-term care needs, it has been determined that you do not qualify for MI Choice Program services based on the *Michigan Medicaid Nursing Facility Level of Care Determination*. You did not qualify under any of the following eligibility categories: Activities of Daily Living, Cognition, Physician Involvement, Treatments and Conditions, Skilled Rehabilitation Therapies, Behavior, or Service Dependencies. The legal basis for this decision is 42 CFR 440.230 (d).

*Exhibit A, page 4*

15. On February 16, 2021, the Michigan Office of Administrative Hearings and Rules received the request for hearing filed in this matter with respect to that denial. (Exhibit A, pages 5-10).

## **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. 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 (formerly HCFA) to the Department. Regional agencies, in this case Respondent, 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 Medicaid Provider Manual (MPM) outlines the approved evaluation process for the waiver program and, in part, it states:

## **2.2 FUNCTIONAL ELIGIBILITY**

The MI Choice waiver agency must verify an applicant's functional eligibility for program enrollment using the [Michigan Medicaid Nursing Facility Level of Care Determination (LOCD)] application in CHAMPS. Waiver agencies must conduct an LOCD in person with an applicant and submit that information in the LOCD application in CHAMPS, or the agency may adopt the current existing LOCD conducted by another provider. The information submitted is put through an algorithm within the application to determine whether the applicant meets LOCD criteria. Only the LOCD application in CHAMPS can determine functional eligibility for the nursing facility level of care. Additional information can be found in the Nursing Facility Level of Care Determination Chapter and is applicable to MI Choice applicants and participants.

*MPM, October 1, 2020 version  
Mi Choice Waiver Chapter, page 2*

Moreover, regarding the LOCD referenced in the above policy, the MPM also provides:

### **SECTION 1 – GENERAL INFORMATION**

The Michigan Department of Health and Human Services (MDHHS) is required to assess all individuals seeking Medicaid-funded long-term services and supports (LTSS) that require level of care eligibility to determine their functional need for those services. The determination is an essential component of eligibility for services provided in

nursing facilities, the MI Choice Waiver Program, the Program of All- Inclusive Care for the Elderly (PACE), and the MI Health Link Home and Community Based Services (HCBS) Waiver Program. Policies contained herein apply equally and consistently to each of these programs except as noted.

MDHHS uses a standard assessment and process for all programs and services that require an individual meet the nursing facility level of care. Programs may not use any other assessment in place of the Level of Care Determination (LOCD) tool for this determination. The LOCD assures a consistent and reliable process for determining that individuals meet the functional eligibility requirements.

Providers may access the LOCD online in the Community Health Automated Medicaid Processing System (CHAMPS) through the MILogin application. (Refer to the Directory Appendix for website information.) LOCD assessment data is entered and processed in CHAMPS.

The LOCD is a “point in time” assessment; that is, it determines the individual’s functional eligibility at the time of the assessment. MDHHS assumes that beneficiaries will maintain functional eligibility until they are determined otherwise through a reassessment or the LOCD’s End Date. A face-to-face LOCD is an in-person meeting between the qualified and licensed health professional and the individual seeking functional eligibility.

## **SECTION 2 – ELIGIBILITY REQUIREMENTS**

Individuals seeking Medicaid-funded services from nursing facilities, MI Choice Waiver Program, PACE, or the MI Health Link HCBS Waiver Program must meet eligibility criteria. These criteria must be met before Medicaid payment is made for services rendered. Each beneficiary must be eligible for Medicaid services, demonstrate a need for nursing facility level of care, and meet all additional program-specific requirements. Medicaid reimbursement for covered services is only appropriate when both financial and functional eligibility have been established, and the individual meets other program-specific eligibility criteria.

## **2.1 BASIC MEDICAID ELIGIBILITY**

Eligibility for Medicaid is determined by a variety of factors including, but not limited to, financial rules, age, health status, state residency and citizenship status. Providers are instructed to refer individuals who are not yet Medicaid eligible to a local MDHHS office or the MDHHS website for assistance. (Refer to the Directory Appendix for website information.)

## **2.2 NEED FOR NURSING FACILITY LEVEL OF CARE**

An individual's need for nursing facility level of care is determined through the Nursing Facility Level of Care Determination (LOCD) assessment tool. The LOCD is a scientifically-validated and reliability-tested tool utilized during initial application and program eligibility redeterminations. This chapter describes the criteria and processes for administering the LOCD.

## **2.3 PROGRAM SPECIFIED ELIGIBILITY REQUIREMENTS**

In addition to meeting Medicaid financial and functional eligibility requirements, individuals must also meet all program specific requirements before they can be determined eligible for that program. (Refer to the Nursing Facility Coverages, the MI Choice Waiver, the Program of All-Inclusive Care for the Elderly, and the MI Health Link chapters or to provider contracts for specific program requirements.) This chapter applies only to the LOCD process and is not intended to replace program-specific requirements.

## **SECTION 3 – NURSING FACILITY LEVEL OF CARE DETERMINATION PROCESS**

### **3.1 LOCD ASSESSMENT REQUIREMENT FOR REIMBURSEMENT**

The LOCD must be conducted prior to or on the day of an individual's admission to a nursing facility or enrollment in MI Choice Waiver Program, PACE, or MI Health Link HCBS Waiver Program to ensure reimbursement for a Medicaid eligible beneficiary. The LOCD must be conducted face-to-face by a qualified and licensed health professional. The qualified and licensed health professional conducting the

LOCD or a designated employee of the organization must enter the assessment findings online in the CHAMPS system. Except where otherwise noted, only LOCDs entered in CHAMPS are considered valid for establishing functional eligibility.

The LOCD is considered payable when all the following conditions are met:

- the beneficiary meets LOCD criteria;
- the LOCD is entered online in CHAMPS;
- the LOCD is active on the date of service (meaning the date of service is on or after the LOCD Start Date and before the LOCD End Date); and
- the beneficiary is receiving LTSS and meets all program-specific eligibility criteria.

### **3.2 PERSONS AUTHORIZED TO CONDUCT THE LOCD**

A qualified and licensed health professional must be a physician, registered nurse, licensed practical nurse, licensed social worker (Limited License Bachelor of Social Work, Limited License Master Social Worker, Licensed Bachelor Social Worker, or Licensed Master Social Worker), physician's assistant, nurse practitioner, licensed psychologist, physical therapist, respiratory therapist, occupational therapist or speech therapist. Once the LOCD is completed by a qualified and licensed health professional, a clinical or non-clinical staff person may enter the LOCD information in CHAMPS. When the LOCD data are entered, CHAMPS applies the MDHHS algorithm to determine eligibility.

\* \* \*

### **SECTION 4 – NURSING FACILITY LEVEL OF CARE DETERMINATION CRITERIA**

The Michigan Nursing Facility Level of Care Determination criteria includes seven domains of need, called Doors. The Doors include: (1) Activities of Daily Living; (2) Cognitive Performance; (3) Physician Involvement; (4) Treatments and Conditions; (5) Skilled Rehabilitation Therapies; (6)

Behaviors; and (7) Service Dependency. The Doors and the assessment items are listed below. *Guidance on administering the LOCD, including definitions and methods, is provided in the Michigan Medicaid Nursing Facility Level of Care Determination Field Definition Guidelines.*

*The LOCD should be an accurate reflection of an individual's current functional status. This information is gathered in a face-to-face meeting by speaking to the individual and those who know the individual well, observing the individual's activities, and reviewing an individual's medical documentation.* Refer to the Michigan Medicaid Nursing Facility Level of Care Determination Field Definition Guidelines on the MDHHS website for more information. (Refer to the Directory Appendix for website information.)

#### **4.1 DOOR 1: ACTIVITIES OF DAILY LIVING**

Door 1 assesses four ADLs: (1) Bed Mobility; (2) Transfers; (3) Toilet Use; and (4) Eating.

#### **4.2 DOOR 2: COGNITIVE PERFORMANCE**

Door 2 assesses short-term memory, cognitive skills for daily decision-making and making self-understood.

#### **4.3 DOOR 3: PHYSICIAN INVOLVEMENT**

Door 3 assesses the frequency of physician visits and physician order changes.

#### **4.4 DOOR 4: TREATMENTS AND CONDITIONS**

Door 4 assesses a set of nine treatments and conditions that may be a predictor of potential frailty or increased health risk. The treatments and conditions include: Stage 3-4 Pressure Sores; Intravenous or Parenteral Feeding; Intravenous Medications; End-stage Care; Daily Tracheostomy Care, Daily Respiratory Care, Daily Suctioning; Pneumonia within the Last 14 Days; Daily Oxygen Therapy; Daily Insulin with Two Order Changes in the Last 14 Days; and Peritoneal or Hemodialysis.

#### **4.5 DOOR 5: SKILLED REHABILITATION THERAPIES**

Door 5 assesses the presence of rehabilitation interventions, including physical therapy, occupational therapy, and speech therapy.

#### **4.6 DOOR 6: BEHAVIOR**

Door 6 assesses behavioral challenges. It includes five behavioral symptoms: wandering, verbal abuse, physical abuse, socially inappropriate or disruptive behavior, and resistance to care. Door 6 also assesses for the presence of delusions and hallucinations.

#### **4.7 DOOR 7: SERVICE DEPENDENCY**

Door 7 applies to beneficiaries currently receiving other services and supports in nursing facilities, MI Choice, PACE, or the MI Health Link HCBS Waiver program. It assesses the beneficiary's dependence on services to maintain the current level of functioning and whether there are options for maintaining the level of functioning with services and supports available in the community.

#### **4.8 DOOR 8: FRAILTY**

MDHHS or its designee determined that the beneficiary is eligible for Medicaid LTSS services based upon the Frailty Criteria. Individuals who exhibit certain behaviors and treatment characteristics that indicate frailty may be admitted or enrolled to LTSS programs requiring an LOCD. The individual needs to trigger one element of this criteria to be considered for Frailty. Refer to the Michigan Medicaid Nursing Facility Level of Care Determination Exception Process on the MDHHS website for more information. (Refer to the Directory Appendix for website information.) For the MI Health Link program, the Frailty Criteria are applied by the Integrated Care Organization.

#### **4.9 DOOR 0: INELIGIBLE**

The LOCD was conducted and the beneficiary did not meet the criteria for any of the doors. The beneficiary is not eligible for Medicaid LTSS services at this time. (Refer to the Individual Does Not Meet LOCD Criteria, Action Notices, and Appeal Rights section for additional information.)

#### **4.10 DOOR 87: ELIGIBLE PENDING FACE-TO-FACE REASSESSMENT**

The passive redetermination process could not confirm eligibility. The provider has 45 days from the date of the passive redetermination or until the current End Date, whichever is earlier, to conduct a new face-to-face assessment.

*MPM, October 1, 2020*

*Nursing Facility Level of Care Determination Chapter, pages 1-3, 9-10*  
*(italics added for emphasis)*

As provided in the above policy, the Michigan Medicaid Nursing Facility Level of Care Determination Field Definition Guidelines provide guidance in administering the LOCD, including definitions and methods.

For example, with respect to Door 1, those guidelines state in part:

Most applicants who qualify for the Michigan Medicaid nursing facility level of care criteria will qualify under Activities of Daily Living (ADL). This set of criteria has been designed to identify those applicants with a significant loss of independent function.

An individual can vary in ADL performance from day to day. It is important to capture the total picture of ADL performance over a 7-day period. The 7-day period look-back is based on the date of eligibility determination. Information should be obtained from multiple sources when available. Since accurate coding is important for making eligibility decisions, be sure to consider each activity definition fully.

The wording used in each coding option reflects real life situations where slight variations are common. When variations occur, the coding ensures that the applicant is not assigned to an excessively independent or dependent category. Codes permit one or two exceptions for the provision of additional care before the applicant is categorized as more dependent.

*To evaluate the applicant's ADL performance, begin by observing physical tasks. Talk with the applicant to ascertain what he/she does for each ADL activity, as well as the type and level of assistance by others. Also, talk with family*

*members and others when possible and weigh all responses to determine a consistent picture of ADL performances.*

*Michigan Medicaid Nursing Facility Level of Care Determination, Field Definition Guidelines, page 2*  
*(italics added for emphasis)*

Similarly, with respect to Door 2, the Field Definition Guidelines state in part:

The Michigan nursing facility level of care definition is meant to include applicants who need assistance based on cognitive performance. Door 2 uses the Cognitive Performance Scale to identify applicants with cognitive difficulties, especially difficulties with short-term memory and daily decision-making, both essential skills for residing safely in the community.

The applicant's ability to remember, think coherently, and organize daily self-care activities is very important. The focus is on performance, including a demonstrated ability to remember recent events and perform key decision-making skills.

Questions about cognitive function and memory can be sensitive issues for some applicants who may become defensive, agitated, or very emotional. These are common reactions to performance anxiety and feelings of being exposed, embarrassed, or frustrated when the applicant knows he/she cannot answer the questions cogently.

*Be sure to interview the applicant in a private, quiet area without distraction (not in the presence of others, unless the applicant is too agitated to be left alone). Using a nonjudgmental approach to questioning will help create a needed sense of trust. Be cognizant of possible cultural differences that may affect your perception of the applicant's response. After eliciting the applicant's responses to questions, return to the family or specific caregivers as appropriate to clarify or validate information regarding cognitive function over the last 7 days. For applicants with limited communication skills or who are best understood by family or specific caregivers, you would need to carefully consider family insights in this area.*

*Michigan Medicaid Nursing Facility Level of Care Determination, Field Definition Guidelines, pages 6-7*

*(italics added for emphasis)*

Here, Respondent denied Petitioner's request for services pursuant to the above policies and on the basis that Petitioner failed to pass through any of the doors of the LOCD and is therefore ineligible for the waiver program.

In appealing that decision, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent erred. Moreover, the undersigned Administrative Law Judge is limited to reviewing Respondent's decision in light of the information that was available at the time the decision was made.

Given the available information and applicable policies in this case, Petitioner has met that burden of proof and Respondent's decision must be reversed.

The above policies, both in the MPM and in the Field Definition Guidelines, repeatedly indicate that the LOCD should be an accurate reflection of an individual's current functional status based on multiple sources of information, including the individual herself; family and caregivers for the individual; and medical documentation. However, in this case, it is undisputed that, despite indications from the Petitioner's son that Petitioner's own reports cannot be trusted and statements from a representative from the Care Management Program that Petitioner is refusing necessary personal care services, Respondent based the LOCD solely on what Petitioner reported and without reaching out for information from other sources. Petitioner may be, as stated by Respondent's witnesses, her own person and Respondent should never ignore her reports as requested by Petitioner's witnesses, but it is also not required to rely solely on what Petitioner reports, even if Petitioner appeared to understand all questions and be able to answer them accurately, especially when other sources of information, including specific care providers, were readily available.

The two parties in this matter paint very different pictures of Petitioner's abilities and needs, and it is not clear from the record if Petitioner passed through any of the doors of the LOCD. Nor is it clear if Petitioner is financially eligible for the program or if she would even accept waiver services if approved. However, the record does demonstrate that Respondent erred by relying solely on what Petitioner reported and, consequently, the undersigned Administrative Law Judge finds both that Respondent's decision must be reversed and that it must initiate a reassessment of Petitioner's request for waiver services.

## DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, finds that Respondent improperly denied Petitioner's request for services.

**IT IS THEREFORE ORDERED** that

The Respondent's decision is **REVERSED**, and it must initiate a reassessment of Petitioner's request for waiver services.

SK/sb

*Steven Kibit*  
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**Steven Kibit**  
Administrative Law Judge  
for Elizabeth Hertel, 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 Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR 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. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

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

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

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