STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 334-9505

IN THE MATTER OF:

Docket No. 2010-16801 EDW

[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]. [redacted] appeared on his own behalf. [redacted], Appellant's parents were present and provided testimony on behalf of Appellant.

[redacted], Intake Specialist, represented the Department's waiver agency, the [redacted]

ISSUE

Did the [redacted] provide timely, proper notice to the Appellant that it could not assess him for the MI Choice Waiver program and needed to place him on a waiting list?

Did the [redacted] properly provide Appellant MI Choice Waiver program alternative options?

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 Department contracts with [redacted] to provide MI Choice Waiver services to eligible beneficiaries.

2. The [redacted] must implement the MI Choice Waiver program in accordance to Michigan's waiver agreement, Department policy and its contract with the Department.

3. The Appellant is a [redacted] with muscular dystrophy. Appellant's

muscular dystrophy has advanced to the degree that he is paralyzed from the neck down. The Appellant is totally dependent on others to provide his care and transportation. (Exhibit 2).

4. The Appellant made a request for MI Choice Waiver services on [redacted] The Senior Alliance conducted a telephone screen with the Appellant regarding the request. (Exhibit 1, pp. 3-8).

5. On [redacted], more than four months after the screen, [redacted] notified the Appellant in writing that the [redacted] program was at program capacity. The [redacted] notice failed to inform Appellant that he would be placed on the Waiver Enrollment Waiting List. (Exhibit 1, p 8).

6. On [redacted], the Department received a request for hearing from the Appellant. (Exhibit 2).

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 is claiming services through the [redacted]. 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 Community Health (Department). Regional agencies, in this case an [redacted] ([redacted]), 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)*

MI Choice Waiver waiting list procedure and priority categories

The MI Choice representative testified that the Senior Alliance waiver program is at capacity for MI Choice Waiver enrollees. The MI Choice representative said that from the telephone intake it appeared the Appellant did not meet any exception from the chronological waiting list and therefore was placed on the waiting list.

The pertinent section of *Policy Bulletin 09-47:*

> The following delineates the current waiting list priority categories and their associated definitions. They are listed in descending order of priority.
>
> **Persons No Longer Eligible for Children's Special Health Care Services (CSHCS) Because of Age** This category includes only persons who continue to need Private Duty Nursing care at the time coverage ended under CSHCS.
>
> **Nursing Facility Transition Participants** A given number of program slots will be targeted by MDCH each year to accommodate nursing facility transfers. Nursing facility residents are a priority only until the enrollment target established by MDCH has been reached.
>
> **Current Adult Protective Services (APS) Clients** When an applicant who has an active APS case requests services, priority should be given when critical needs can be addressed by MI Choice Program services. It is not expected that MI Choice Program agents seek out and elicit APS cases, but make them a priority when appropriate.
>
> **Chronological Order By Date Services Were Requested** This category includes potential participants who do not meet any of the above priority categories and those for whom prioritizing information is not known.
>
> **Updates**
>
> Below are the two waiting list priority categories that have been updated. The updated categories will also be available on the MDCH website at www.michigan.gov/medicaidproviders >> Prior Authorization >> The Medicaid Nursing Facility Level of Care

> Determination >> MI Choice Eligibility and Admission Process.
>
> **Nursing Facility Transition Participants**
> Nursing facility residents who face barriers that exceed the capacity of the nursing facility routine discharge planning process qualify for this priority status. Qualified persons who desire to transition to the community are eligible to receive assistance with supports coordination, transition activities, and transition costs.
>
> **Current Adult Protective Services (APS) Clients and Diversion Applicants**
> When an applicant who has an active APS case requests services, priority is given when critical needs can be addressed by MI Choice Waiver services. It is not expected that MI Choice Waiver agents solicit APS cases, but priority should be given when appropriate.
>
> An applicant is eligible for diversion status if they are living in the community or are being released from an acute care setting and are found to be at imminent risk of nursing facility admission. Imminent risk of placement in a nursing facility is determined using the Imminent Risk Assessment, an evaluation approved by MDCH. Supports coordinators administer the evaluation in person, and final approval of a diversion request is made by MDCH.
>
> *Medical Services Administration Policy Bulletin 09-47, October 2009, pages 1-2 of 3.*

The Appellant and his parents questioned why the Appellant was not considered a priority for enrollment in the MI Choice waiver program. The [redacted] representative stated it used *Policy Bulletin 09-47* when making its determination, including priority. While based on the evidence presented it appears the Appellant would meet the nursing home level of care, a review of *Policy Bulletin 09-47* and application to Appellant finds that the [redacted] properly determined the Appellant did not meet any exception from the chronological waiting list.

The [redacted] closure of the MI Choice program is not in compliance with Department policy and the *Eager* legal settlement agreement

The Appellant and his parents testified that at the time [redacted] performed a telephone screen in [redacted], they were not provided a written notice of what action

would be taken with his request, they were not provided information about any other assistance programs available in the community, they were not given an explanation of what a waiting list was or how long a waiting list was, and they were not provided explanation of why his dire health situation would not be considered a priority.

The MI Choice representative testified that the [redacted] "closed" the MI Choice Program to new applicants. When the [redacted] representative was questioned about what exactly she meant by "closed the MI Choice Program to new applicants" she clarified that [redacted] was at capacity so it closed the program. The [redacted] representative further explained that while it might add names of applicants to a waiting list, the [redacted] was not updating the list.

When the [redacted] representative was asked whether it regularly updated its waiting list after current participants died or to check if list participants were no longer interested, the [redacted] representative testified "no" because it had closed the program and would not review any names on the list or add an applicant if a participant dropped out until it opened the MI Choice program; maybe in one year. When the Appellant asked how long it would be until he reached the top of the chronological list the [redacted] representative stated the wait was expected to be one to two years.

In *Eager v. Granholm (Engler)*, a federal lawsuit was filed to challenge the closure of the MI Choice program to applicants by Department waiver agents. *Case No. 5:02-CV-44*. In February 2004, a settlement agreement was reached in which the Department agreed to develop waiting list protocol that, in part, ensured MI Choice waiver programs that were at capacity would regularly update waiting lists so that the waiver program would not be actually or constructively closed.

Upon execution of the *Eager* settlement agreement the Department immediately sent written notification to all its waiver agents instructing them about the prohibition against closing the program and protocol for regularly maintaining waiting lists. *Reinhart February 2004 letter.* Subsequently the Department developed policy and issued MSA Bulletins embodying its MI Choice Waiver waiting list protocol policy.

Department policy requires that its agent, here Senior Alliance, ***maintain*** a waiting list and contact waiting list individuals on a priority and first come, first served basis when sufficient resources become available to serve additional individuals. (MSA Bulletin 05-21, p 2). According to its representative, [redacted] does not "maintain" a waiting list. The [redacted] representative was asked several questions about its waiting list procedure and her answers consistently confirmed that the [redacted] closed the waiver program and until it decided to open the waiver again would not review its waiting list for the number of enrollees that may have dropped out, or to determine whether the number of dropped enrollees resulted in capacity resources to allow in a new waiver enrollee.

The [redacted] admitted closure of the MI Choice Waiver Program is in direct violation of Department policy and the *Eager* settlement agreement. The [redacted]

[redacted] admitted refusal to regularly review its enrollment and move applicants up on the waiting list as current enrollees drop out of the MI Choice Waiver Program is in direct violation of Department policy and the *Eager* settlement agreement. The purpose of the Department's waiting list policy is for MI Choice waiver agents to regularly update and report on waiting lists and therefore avoid "static" lists which constructively "close" the program.

> **The [redacted] failure to send Appellant notice of waiting list placement and failure to send notice contemporaneous with the telephone intake demonstrates non-compliance with federal regulation, the MI Choice program waiver, its contract with the Department, legal settlement agreement and Department policy.**

There is no dispute that the [redacted] waited more than four months to send Appellant a capacity adequate action notice and that when it did send a notice, the notice failed to inform the Appellant that he was placed on a waiting list.

Policy Bulletin MSA 05-21, effective May 2005, was issued in response to the settlement agreement. Each of the MI Choice Waiver Agents the Department contracts with is paid for implementing the program and is responsible for being aware of and complying with program updates. As part of its contract the [redacted] must comply with Department policy, which as articulated beginning in 2005 requires:

> An adverse action notice **must be provided** to any applicant **at the time they have been placed on the Waiting List**. Required language for these notices is on the MDCH website at www.michigan.gov/mdch, select "Providers," select "Information for Medicaid Providers," select "Michigan Medicaid Nursing Facility Level of Care Determination."
> (Bold emphasis added).

Federal regulation requires notices of action to state the action taken. *42 CFR 431.210.* The [redacted] failure to inform the Appellant offends the mandates of the federal regulation and is out of compliance with Department policy requirements, which generously includes in its policy example waiting list notices for use by the waiver agent.

> **The [redacted] failure to advise Appellant of all alternative options for assistance demonstrates non-compliance with the MI Choice program waiver, its contract with the Department, legal settlement agreement and Department policy.**

It is undisputed that the [redacted] failed to advise Appellant of all alternative options for assistance. It is undisputed that several months after the telephone intake and upon Appellant's request for information about alternative options for personal care assistance programs, the [redacted] sent to Appellant a list…but it was merely a list of medical equipment suppliers, not the alternative waiver-type services programs the Appellant and his parents were seeking. Based on statements at hearing from the

[redacted] representative, she did not have knowledge or understanding of the Department of Human Services Home Help Program, Community Mental Health or alternative options for assistance.

The *Eager* settlement specified that MI Choice waiver agents, by 2005, would be trained on, and in turn would provide to applicants, alternative assistance options.

Policy Bulletin MSA 05-21, effective May 2005, the terms of which [redacted] must comply, include:

> MI Choice Program agents will advise applicants on Waiting Lists of all alternative options for assistance, such as other MI Choice Program openings in a given area, Home Help service options, or paying privately for care until a MI Choice Program slot becomes available.

The [redacted] failure to advise Appellant of all alternative options for assistance demonstrates non-compliance with the MI Choice program waiver, its contract with the Department, *Eager* legal settlement agreement and Department policy.

The [redacted] is bound by the MI Choice program waiver, its contract with the Department MI Choice program policy, to implement the waiver according to those laws and policies.

The Appellant provided a preponderance of evidence that [redacted] failure to send timely notice, send notice of waiting list placement and protocol, and provide information about alternative options, was not proper or in accordance to law or Department policy.

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 did not provide timely proper notice to the Appellant that it could not assess him for the MI Choice Waiver program and needed to place him on a waiting list; and did not properly provide Appellant MI Choice Waiver program alternative options.

IT IS THEREFORE ORDERED that:

1. The [redacted] decision to place Appellant on its waiting list is AFFIRMED.

2. The [redacted] must timely issue a written proper notice to the Appellant that it placed him on its MI Choice Waiver program waiting list.

3. The [redacted] must update its waiting list to reflect enrollees who have dropped out of the program or off the list since the time [redacted] "closed" the waiver and inform the Appellant at what place he is currently listed on its MI Choice Waiver program waiting list.

4. The [redacted] must timely provide Appellant MI Choice Waiver program alternative options including his county Home Help service options and his county community mental health options.

Lisa K. Gigliotti
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: _____

***** NOTICE *****

The State Office of Administrative Hearings and Rules 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 State Office of Administrative Hearings and Rules 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.