

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

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IN THE MATTER OF:

Docket No. 2010-23496 EDW
2010-23499 EDW

██████████

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 ██████████ ██████████ appeared on her own behalf.

██████████, represented the Department's waiver agency, the ██████████, was present and provided testimony on behalf of the Department's waiver agency, the ██████████

██████████, represented the Department's waiver agency, ██████████.

ISSUE

Did the Department's MI Choice Waiver agent properly determine that it could not assess the Appellant for the MIChoice Waiver program, and instead place her on a waiting list?

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 ██████████ and ██████████ ██████████ to provide MI Choice Waiver services to eligible beneficiaries.
2. ██████████ 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]-year-old woman who is approved for Medicaid if she meets a monthly Medicaid spend-down of [REDACTED].
4. The Appellant made a request for MI Choice Waiver services on [REDACTED], [REDACTED], from the [REDACTED] conducted a telephone screen. (Exhibit B).
5. On [REDACTED], more than two (2) months after the telephone screen, [REDACTED] notified the Appellant in writing that the MI Choice Waiver program was at program capacity. (Exhibit A-[REDACTED]). The [REDACTED] notice failed to inform Appellant that she had been placed on the Waiver Enrollment Waiting List. (Exhibit B-SA).
6. On [REDACTED], more than two months after the Appellant's telephone screen, the [REDACTED] referred the request for services to [REDACTED]. (Exhibit A-[REDACTED]).
7. On [REDACTED] The [REDACTED] notified the Appellant in writing that the MI Choice Waiver program was at program capacity but did not clearly inform Appellant that she had been placed on the Waiver Enrollment Waiting List. (Exhibit A-[REDACTED]).
8. On [REDACTED] the State Office of Administrative Hearings and Rules received two requests for hearing from the Appellant, one for each waiver agencies' capacity notice. (Exhibits 1 for [REDACTED] and [REDACTED]).

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 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 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)*

Placement on Waiting List

The MI Choice representatives for the ██████████ testified that their waiver programs are at capacity for MI Choice Waiver enrollees. The MI Choice representative from The ██████████ explained 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,
November 2009, pages 1-2 of 3.*

The Appellant testified she has a lot of medical problems, including a possible cancer in her spine, and she was seeking MI Choice services to obtain help with the medical problems. The Appellant explained that [REDACTED] was helping her but would soon stop with the help. It is noted that the Appellant has been approved for Medicaid if she meets a monthly Medicaid spend-down of [REDACTED], but she has not met the [REDACTED] spend-down each month to have active Medicaid.

To the Appellant's questions about the waiting list the MI Choice representative from The ██████████ explained that it used *Policy Bulletin 09-47* when making its determination and explained the waiting list procedure, including priority. A review of *Policy Bulletin 09-47* and application to Appellant finds that both of the agencies properly determined the Appellant did not meet any exception from the chronological waiting list.

The ██████████ ██████████ failed to send Appellant a timely, contemporaneous notice of action.

The ██████████ and ██████████ notices failed to adequately inform Appellant she had been placed on MI Choice program waiting lists.

There is no dispute that the ██████████ waited more than two (2) months to send Appellant a capacity adequate action notice. The ██████████ representative stated that The ██████████ was taking measures to correct the delays in issuing capacity action notices.

A review of the ██████████ and ██████████ capacity adequate action notices demonstrate that neither notice informed the Appellant that she 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 ██████████ 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 explain the action taken. *42 CFR 431.210*. The above listed Department policy requires MI Choice Program agencies to send written notice explicitly using the terminology that the applicant was placed on a "waiting list." The ██████████ notice nowhere lists the phrase "have been placed on a waiting list." The ██████████ notice is titled "MI Choice Medicaid Waiver Wait List Letter" but nowhere lists the phrase "have been placed on a waiting list. To the vulnerable population the MI Choice Waiver is intended to serve, "Capacity Action Notice" or "MI Choice Medicaid Waiver Wait List Letter" without any explanation of waiting list placement may be confusing and counter to the waiver's purpose. In other

words, the notices failed to inform the Appellant she was placed on a waiting list, which offends the federal regulation mandate and is out of compliance with Department policy requirements.

Summary

The MI Choice agencies and this Administrative Law Judge are bound by the MI Choice program policy. In addition, this Administrative Law Judge possesses no equitable jurisdiction to grant exceptions to Medicaid, Department and MI Choice program policy.

The evidence of record demonstrated the MI Choice Waiver agencies placement of Appellant on the MI Choice waiting lists was proper.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the MI Choice Waiver agencies properly denied assessment of the Appellant and placed the Appellant on their waiting lists.

IT IS THEREFORE ORDERED that:

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

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

cc:

[REDACTED]

Date Mailed: 4/26/2010

***** 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.