

**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. 2010-41195 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 ██████████. ██████████ ██████████ ██████████, represented the Appellant.

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

ISSUE

Did the ██████████ provide timely, proper notice to the Appellant that it could not assess him for the MI Choice Waiver program and had placed him 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 ██████████ to provide MI Choice Waiver services to eligible beneficiaries.
2. The ██████████ 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 an ██████████ man seeking MI Choice Waiver services.

4. The ██████████ was contacted on the Appellant's behalf and a telephone screening was completed on ██████████.
5. On ██████████, the ██████████ notified the Appellant in writing that the MI Choice Waiver program was at program capacity. The ██████████ notice failed to inform Appellant that he had been placed on the Waiver Enrollment Waiting List.
6. On ██████████, the Department received a request for hearing from the Appellant.

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, in this case an ██████████, 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 ██████████ 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's request for hearing evidences multiple medical issues affecting his ability to provide for himself, including but not limited to age, frailty, life long hearing impairment, heart condition and history of stroke. The Appellant's son is his only care giver and he is employed full time in addition to providing care for his father.

The ██████████ representative stated it used *Policy Bulletin 09-47* when making its determination, including priority. While based on the evidence presented it appears the Appellant may meet the nursing home level of care, a review of *Policy Bulletin 09-47* as applied to the facts in Appellant's case, establishes that the ██████████ properly determined the Appellant did not meet any exception from the chronological waiting list; therefore the ██████████ placement of Appellant on the chronological waiting list was proper.

The ██████████ failure to send Appellant notice of waiting list placement 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 when the ██████████ sent an adequate action notice, the notice failed to inform the Appellant that he was placed on a waiting list. Policy Bulletin

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MSA 05-21, effective May 2005, was issued in response to a settlement agreement that pertains to the administration of the MI Choice Waiver programs. 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 state the action taken. *42 CFR 431.210*. The ██████████ failure to inform the Appellant he was placed on a waiting list 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 ██████████ 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 ██████████ failed to send notice of waiting list placement and protocol, and provide information about alternative options. It is not in accord with 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 properly place the Appellant on the waiting list for MI Choice Services, however, failed to properly notify the Appellant of his placement on the waiting list in the Notice it sent him.

IT IS THEREFORE ORDERED that:

1. The ██████████ decision to place Appellant on its waiting list is **AFFIRMED**.
2. The ██████████ must timely issue a written proper notice to the Appellant, and the notice must inform him that he was placed on a MI Choice Waiver program waiting list.

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3. The [REDACTED] must inform the Appellant at what place he is currently listed on its MI Choice Waiver program waiting list.

Jennifer Isiogu
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

Date Mailed: 9/14/2010

cc:

[REDACTED]

***** 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.