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. 2010-7406 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 commenced on [redacted], and continued and completed on [redacted]

[redacted], Appellant's son, represented the Appellant. Appellant and her MI Choice Waiver chore provider, [redacted], were present and gave testimony.

[redacted], Waiver Eligibility Specialist and Hearings Coordinator, represented the Department's MI Choice waiver agency, [redacted] waiver agency or AAA). and [redacted] re management; appeared as witnesses on behalf of [redacted].

ISSUE

Did the Department's Waiver Agency properly terminate Appellant from the MI Choice Waiver program in [redacted]

Did the Department properly determine that it could not assess the Appellant for the MI Choice Waiver program and place her on a waiting list in [redacted]

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 the waiver agency to provide MI Choice waiver services to eligible beneficiaries.

2. The Appellant is a [redacted]-year-old woman. The Appellant's diagnosis is unclear and unsubstantiated. (Exhibit 5, p 8).

3. On [redacted] the waiver agency conducted a three-month reassessment of Appellant's MI Choice waiver services. (Exhibit 5, page 4). During the reassessment the waiver agency care management team observed the Appellant on her hands and knees cleaning a mess her cat had made. The waiver agency care management team also observed the Appellant carry a chair across the room for them to use. The waiver agency care management team was told by the Appellant that she can drive herself and that she drives to and stays at the home of her boyfriend. (Exhibit 5, page 4).

4. During the [redacted] reassessment the waiver agency care management team asked Appellant questions related to the nursing home seven door, level of care determination tool. The Appellant answered the questions competently and indicated she can perform all of her personal care, manages her finances and can drive. (Exhibit 5, page 5).

5. Based on their observations and on the information told by the Appellant, the waiver agency care management team determined the Appellant did not meet any of the seven door tool criteria and therefore did not meet the level of nursing home skilled care. (Exhibit 1, page 3).

6. On [redacted] the waiver agency sent an Advance Action Notice to the Appellant notifying her of a termination of MI Choice waiver services because she was "not medically eligible for the waiver program." (Exhibit 5, page 19). The notice indicated the waiver agency would refer Appellant to the Department of Human Services Home Help program.

7. On [redacted] the waiver agency notified the Appellant's Oscoda County Department of Human Services Home Help Program worker, [redacted] that the Appellant was not medically eligible for the MI Choice waiver program. (Exhibit 5, page 17).

8. On [redacted] the waiver agency received a referral back to the MI Choice program from [redacted] Home Help Program worker [redacted] for the Appellant. (Exhibit 1). [redacted] referred her back to the MI Choice program even though she had been notified the Appellant had been terminated only weeks before for not being medically eligible. The DHS indicated the Appellant's income was too high to make her eligible for DHS Home Help Services. (Exhibits 1, 2 and 5).

9. On [redacted], the waiver agency performed a telephone screen and placed the Appellant on the MI Choice waiting list. (Exhibit 1).

10. On [redacted], the State Office of Administrative Hearings and Rules received a request for hearing from the Appellant. (Exhibit 4). The Appellant's request was not clear whether she was contesting one or both of the waiver agency actions.

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 was receiving 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 (CMS, 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).*

During the hearing the MI Choice waiver agency witnesses testified that at the [redacted] reassessment they observed the Appellant on her hands and knees cleaning a mess her ill cat had made on the floor. The waiver agency care management team also observed the Appellant carry a chair across the room for them to use. The waiver agency care management team was told by the Appellant that she can drive herself and that she drives to and stays at the home of her significant other. (Exhibit 5, page 4).

During the [redacted] reassessment the waiver agency care management witnesses asked Appellant questions related to the nursing home seven door level of care determination tool. The waiver agency care management witnesses explained that

Appellant answered the questions competently and the only issue reported about mental health status was sometimes forgetting to take her medication; therefore the Appellant was not eligible for the waiver through door two.

The waiver agency care management witnesses stated the Appellant said she can perform all of her personal care, manage her finances and can drive and therefore did not pass through doors 1, and 4-6. (Exhibit 5, page 5). The waiver agency care management witnesses explained that because the Appellant had not been on the waiver for a year and she was independent, she was not eligible through door 7.

Based on their observations and on the information told by the Appellant, the waiver agency care management team determined the Appellant did not meet any the seven-door level of care determination tool criteria, she did not meet a nursing home level of care, and therefore the Appellant's MI Choice waiver services were terminated. (Exhibit 5, page 3).

The Appellant's son testified at the hearing that although the Appellant may have some good days, she has bad days during which she needs help. The assistance described as needed is not the array of skilled nursing services anticipated as the intent of the MI Choice waiver, rather the services included in the DHS Home Help Program. The Appellant's income recently increased and she is not longer financially eligible for DHS Home Help services. Her financial ineligibility for DHS HHS does not make her eligible for the MI Choice waiver; to the contrary the MI Choice waiver has a higher level of medical need to eligible.

In Appellant's case, the waiver agency indicated her diagnosis was neurofibromatosis but there was no independent medical documentation, such as a doctor report or clinical diagnostic test results to certify she has neurofibromatosis. The Appellant's son stated that Appellant's diagnosis was fibromyalgia, but there was no independent medical documentation. Fibromyalgia and neurofibromatosis are two distinct and non-related diagnoses and the evidence demonstrates an error occurred on the part of the agency or Appellant with regard to actual diagnosis; in any event, neither party submitted physician certification for either diagnosis.

The waiver agency's was proper to terminate Appellant from the MI Choice waiver.

1915 (c) (42 USC 1396n (c) allows home and community based services to be classified as "medical assistance" under the State Plan <u>when furnished to recipients who would otherwise need inpatient care that is furnished in a hospital SNF, ICF or ICF/MR</u> and is reimbursable under the State Plan. (42 CFR 430.25(b)).

Home and community based services means services not otherwise furnished under the State's Medicaid plan, that are furnished under a waiver granted under the provisions of part 441, subpart G of this subchapter. (42 CFR 440.180(a)).

The state of Michigan utilizes the seven door tool to assess whether an individual needs a nursing home level of care. The evidence in this case unequivocally demonstrates that the Appellant does not need a nursing home level of care.

With regard to Appellant being placed on the MI Choice waiting list pursuant to a telephone screen, the *Medical Services Administration Policy Bulletin 05-21, April 2005, pages 1-2 of 5,* outlines the approved evaluation policy and priority categories of the MI Choice waiting list policy:

> **Any person who expresses interest in the MI Choice Program must be evaluated by telephone using the Telephone Intake Guidelines (TIG) at the time of her or her request.** If the person is seeking services for another, the MI Choice Program agent shall either:
>
> - Contact the person for whom services are being requested, or
> - Complete the TIG to the extent possible using information known to the caller.
>
> **Applicants to the program who are determined presumptively eligible based on financial criteria and the TIG must be offered a face-to-face evaluation within seven days if the MI Choice Program is accepting new participants.** Applicants who are determined presumptively eligible when new participants are not being accepted must immediately be placed on the MI Choice Program Waiting List. If an applicant who is determined presumptively eligible through the TIG screening process does not receive a face-to-face evaluation within seven days, the person shall be placed on the Waiting List based on the priority category, chronologically by date of the original request for services. Contact logs will no longer be used. (Bold emphasis added).

Based on the MI Choice Program policy above, the waiver agency was proper to place the Appellant on a waiting list and to issue a notice informing her of such.

The Appellant is currently on the MI Choice waiver waiting list. If Appellant is assessed pursuant to the waiting list it is recommended that the waiver agency seek documentation directly from Appellant's physician as to the correct diagnosis and certification as to why the diagnosis prohibits the Appellant from performing her own personal care and chores and how the diagnoses meet any of the seven door criteria. It is unknown whether the waiver agency will seek to recoup MI Choice waiver program payments made to Appellant's or her chore provider for the periods of time for which she drove and could perform her self-care.

The Appellant bears the burden of proving, by a preponderance of evidence, that the waiver agency did not properly terminate her MI Choice waiver services or place her on a waiting list. A preponderance of the material and credible evidence established that the MI Choice waiver agency acted in accordance to the law and the Department policy, and its actions were proper when it terminated the Appellant's MI Choice program and subsequently placed her on a waiting list. Therefore, the Appellant failed to prove that the waiver agency's actions were not proper when it terminated the Appellant's MI Choice program services.

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 properly terminated Appellant's MI Choice waiver services.

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: 2/22/2010

***** 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.