

**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. 2010-32870 EDW

██████████,

Appellant

_____ /

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge (ALJ) pursuant to MCL 400.9 and 42 CFR 431.200 *et seq.*, following the Appellant's request for a hearing.

After due notice, a telephone hearing was held ██████████ ██████████, daughter, appeared on the Appellant's behalf. ██████████ appeared and testified. ██████████, physical therapist, appeared as a witness for the Appellant.

██████████, Intake Specialist, for the Senior Alliance, appeared on behalf of the Department-contracted MI Choice Waiver agency (hereafter, 'Department').

ISSUE

Did the Department properly place the Appellant on the waitlist for the MI Choice Waiver program?

FINDINGS OF FACT

Based upon the competent, material, and substantial evidence on the whole record, I find as material fact:

1. The Appellant is ██████ year old and is seeking MI Choice Waiver services. (Exhibit 1, pages 2-9)
2. The Appellant contacted the waiver agency via telephone on ██████████, to request MI Choice waiver services. (Exhibit 1, pages 2-8)
3. On ██████████, the Appellant was notified that the MI Choice Waiver program was at capacity, thus she would be placed on the waiting list. (Exhibit 1, page 9)
4. The Appellant's daughter has sent additional information to the waiver agency regarding her mother's condition and need for services. (Daughter Testimony)
5. The Department's waiver agency is currently at capacity and, due to lack of funds, is

unable to enroll Appellant in the MI Choice Waiver program at this time.

6. The Appellant requested a formal, administrative hearing on ██████████. (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 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 Area Agency on Aging (AAA), 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 U.S. Department of Health and Human Services, on page 5 of a letter to State Medical Directors labeled Olmstead Update Number 4 (SMDL #01-006), dated January 10, 2001, in reply to the following question responded, in part:

May a State use the program's funding appropriation to specify the total number of people eligible for an HCBS waiver?

CMS has allowed States to indicate that the total number of people to be served may be the lesser of either (a) a specific number pre-determined by the State and approved by CMS (the approved "factor C" value), or (b) a number derived from the amount of money the legislature has made available (together with corresponding Federal match). The current

HCBS waiver preprint contains both options....

The waiver agency has committed all the financial resources made available through the Department's appropriations and to ensure continued service to current waiver enrollees and is not assessing any additional individuals. It maintains a waiting list and contacts individuals on the list on a first come, first served basis when sufficient resources become available to serve additional individuals. It then determines how many individuals from the list it can assess and assesses a limited number of individuals from the list to determine if they may be eligible for enrollment in the MI Choice Waiver.

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

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 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 Appellant's daughter testified that she was told the wait list would only be for six months and wanted to know why her mother was still not receiving services. The Appellant, her daughter and the physical therapist discussed the activities the Appellant needs assistance with and her limitations.

The waiver agency witness stated the agency had to establish a waiting list due to the limited resources it has to provide services. She stated the Appellant was placed on the waiting list at the time the initial telephone call was made in [REDACTED]. The waiver agency witness testified that the Appellant did not qualify for one of the three priority categories for the waiting list.

However, the waiver agency witness misstated the policy regarding the priority criteria. The

witness stated that the Appellant would have to have gone into a nursing facility before she would meet the criteria for a priority category. This is not correct. The Appellant may qualify for priority status without being admitted to a nursing facility in the third category, Current Adult Protective Services clients and Diversion Applicants. As described in the above cited policy bulletin, an applicant may be eligible for diversion status if they are living in the community and are at imminent risk of nursing facility admission, as determined by use of the Imminent Risk Assessment. The waiver agency even submitted another policy bulletin, Medical Services Administration Policy Bulletin 09-56, which clarified the updates made to the waiting list priority categories, including Diversion Applicants. (Exhibit 1, pages 10-12)

The MI Choice Waiver agency has not provided sufficient evidence that it implemented the MI Choice waiting list procedure in the manner in which CMS has approved and in accordance to Department policy. The waiver agency failed to conduct an Imminent Risk Assessment to determine if the Appellant meets the priority criteria as a diversion applicant. Based upon the outcome of the screening, the Appellant's priority may be moved up on the waiting list.

DECISION AND ORDER

Based on the above findings of fact and conclusions of law, I find the MI Choice Waiver agency has not properly denied Appellant enrollment and placed her on the waiting list due to limited financial resources.

IT IS THEREFORE ORDERED that:

The Department's decision is **PARTIALLY REVERSED**. The Department must perform an Imminent Risk Assessment to determine whether or not the Appellant meets the criteria to be considered a Diversion Applicant.

Colleen Lack
Administrative Law Judge
for Janet Olszewski, Director
Michigan Department of Community Health

cc:

[REDACTED]

Date Mailed: 7/20/2010

[REDACTED]
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***** 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.