STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
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. 2011-50094 EDW
Case No. 77956479

,

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 . Testimony was taken from the Waiver Agent's witness , but the matter had to be continued when it was determined that the Appellant's representative did not have the Waiver Agent's exhibits and was not at the Appellant's residence where the exhibits had been mailed, and further that other exhibits the parties wished to admit had not been served on all the parties.

The matter was continued to , but was again adjourned at the request of the Appellant's representative so he could attend a conference out east.

The matter was concluded on Tuesday, . A request for a further continuance submitted by the Appellant's representative at the end of the day on Monday, was denied as being untimely and without good cause.

Attorney appeared and represented the Appellant. , Appellant's son, appeared and testified on behalf of the Appellant.

Attorney , the 's legal counsel represented the Department's Waiver Agency. , former Quality and Training Support Coordinator, for the (MI Choice waiver program); , Community Care Department Project Manager for the ; and, , a Supports Coordinator, with the , appeared as witnesses for the Waiver Agency.

ISSUE

Did the Waiver Agency properly determine the Appellant was not eligible for the MI Choice Waiver Program?

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 Appellant was enrolled in the MI Choice Waiver Program. He was receiving services through the Waiver Self Determination Program. Appellant's son [redacted] was employed as his worker. (Exhibit 1 and Testimony).

2. The Waiver Agency is a contract agent of the Michigan Department of Community Health (MDCH) and is responsible for waiver eligibility determinations and the provision of MI Choice Waiver Services.

3. The Appellant is a [redacted] year-old man ([redacted]) diagnosed with trans cereb ischemia, NOS; chr ischemia hrt dis, NOS; hypertension, NOS; muscle weakness-general; depressive disorder nec; and, pure hypercholesterolem. (Exhibit 5).

4. The Appellant is currently residing in an apartment with his son [redacted] who was his Self Determination worker. (Exhibit 5 and Testimony).

5. On [redacted], a reassessment of the Appellant was done by the Waiver Agency to determine continued eligibility for the MI Choice Waiver Program. (Exhibits 5 and Testimony).

6. On [redacted], the Waiver Agency sent Appellant an Advance Action Notice that it determined he was no longer eligible for the MI Choice Waiver Program and advised him that services would be terminated effective [redacted]. (Exhibit 1 and Testimony).

7. On [redacted], MAHS received the Appellant's request for an administrative hearing. (Exhibit 6).

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 The ( ), 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)*

A waiver under section 1915(c) of the [Social Security] Act allows a State to include as "medical assistance" under its plan, home and community based services furnished to recipients who would otherwise need inpatient care that is furnished in a hospital, SNF [Skilled Nursing Facility], ICF [Intermediate Care Facility], or ICF/MR [Intermediate Care Facility/Mentally Retarded], and is reimbursable under the State Plan. *42 CFR 430.25(c)(2)*

> 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).
>
> Home or community-based services may include the following services, as they are defined by the agency and approved by CMS:
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> - Case management services.
> - Homemaker services.
> - Home health aide services.
> - Personal care services.
> - Adult day health services
> - Habilitation services.
> - Respite care services.
> - Day treatment or other partial hospitalization services, psychosocial rehabilitation services and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness, subject to the conditions specified in paragraph (d) of this section.
>
> Other services requested by the agency and approved by CMS as cost effective and necessary to avoid institutionalization. 42 CFR 440.180(b).

On , the Department issued MI Choice Operations Advisory Letter #26. The letter states in part:

MI CHOICE CONTRACT REQUIREMENTS

The MI Choice contract requires waiver agents to seek all other forms of payment before authorizing MI Choice services (Attachment K, pp. 43-44). The HHS program is another form of payment for home and community based services, and therefore the participant and supports coordinators must fully consider this option **before** MI choice enrollment. MI Choice participants cannot receive services from both the HHS program and MI Choice, as this is a duplication of Medicaid services. (Attachment K, pp. 25-26). (Exhibit 2).

The Michigan Department of Community Health, Medical Services Administration issued bulletin number MSA 11-27 on July 1, 2011, effective August 1, 2011, for the purpose of adding a MI Choice Policy Chapter to the Medicaid Provider Manual. This new policy chapter provides in part:

SECTION 1 – GENERAL INFORMATION

MI Choice is a waiver program operated by the Michigan Department of Community Health (MDCH) to deliver home and community-based services to elderly persons and persons with physical disabilities who meet the Michigan nursing facility level of care criteria that supports required long-term care (as opposed to rehabilitative or limited term stay) provided in a nursing facility. The waiver is approved by the Centers for Medicare and Medicaid Service (CMS) under section 1915(c) of the Social Security Act. MDCH carries out its waiver obligations through a network of enrolled providers that operate as organized health care delivery systems (OHCDS). These entities are commonly referred to as waiver agencies. MDCH and its waiver agencies must abide by the terms and conditions set forth in the waiver.

MI Choice services are available to qualified participants throughout the state and all provisions of the program are available to each qualified participant unless otherwise noted in this policy and approved by CMS. (p. 1).

* * *

SECTION 2 - ELIGIBILITY

The MI Choice program is available to persons 18 years of age or older who meet each of three eligibility criteria:

- An applicant must establish his/her financial eligibility for Medicaid services as described in the Financial Eligibility subsection of this chapter.

- The applicant must meet functional eligibility requirements through the online version of the Michigan Medicaid Nursing Facility Level of Care Determination (LOCD).

- It must be established that the applicant needs at least one waiver service and that the service needs of the applicant cannot be fully met by existing State Plan or other services.

All criteria must be met in order to establish eligibility for the MI Choice program. MI Choice participants must continue to meet these eligibility requirements on an ongoing basis to remain enrolled in the program.

* * *

2.2.B. FREEDOM OF CHOICE

Applicants or their legal representatives must be given information regarding all long-term care service options for which they qualify through the NF LOCD, including MI Choice, Nursing Facility and the Program of All-Inclusive Care for the Elderly (PACE). That a participant might qualify for multiple programs does not mean they can be served by all or a combination thereof for which they qualify. Nursing facility, PACE, MI Choice, and Adult Home Help services may not be chosen in combination with each other. Applicants must indicate their choice, subject to the provisions of the Need for MI Choice Services subsection of this chapter, and document via their signature and date that they have been informed of their options via the Freedom of Choice (FOC) form that is provided to an applicant at the conclusion of any LOCD process. Applicants must also be informed of other service options that do not require Nursing Facility Level of Care, including Home Health and Home Help State Plan services, as well as other local public and private service entities. The FOC form must be signed and dated by the individual (or his/her legal representative) seeking services and is to be maintained in the participant case record.

* * *

2.3. NEED FOR MI CHOICE SERVICES

In addition to meeting financial and functional eligibility requirements and to be enrolled in the program, MI Choice applicants must demonstrate the need for a minimum of one covered service as determined through an in-person assessment and the person-centered planning process.

> **Note:** Supports coordination is considered an administrative activity in MI Choice and does not constitute a qualifying requisite service. Similarly, informal support services do not fulfill the requirement for service need.
>
> An applicant cannot be enrolled in MI Choice if his/her service and support needs can be fully met through the intervention of State Plan or other available services. State Plan and MI Choice services are not interchangeable. MI Choice services differ in nature and scope from similar State Plan services and often have more stringent provider qualifications.
>
> * * *
>
> **2.3.B. REASSESSMENT OF PARTICIPANTS**
>
> Reassessments are conducted by either a properly licensed registered nurse or a social worker, whichever is most appropriate to address the circumstances of the participant. A team approach that includes both disciplines is encouraged whenever feasible or necessary. Reassessments are done in person with the participant at the participant's home.

testified the Appellant was an active Waiver participant with the . However, based on the assessment the supports coordinator determined he had very strong informal supports and that his needs could be met through the Adult Home Help Program through DHS Medicaid. stated the Department had instructed them if a person's needs can be met through Adult Home Help that is the program they need to use. The supports coordinator assisted Appellant in applying for the Adult Home Help with DHS. About six weeks later advance notice was sent to Appellant and then they closed the case.

testified the received an Advisory Letter from the Department on , stating that anyone whose service needs can be met through the Home Help Service Program should be enrolled in that program instead of the MI Choice Waiver Program. (Exhibit 2). stated on a reassessment was done of the Appellant and it appeared the Appellant could have all of his needs met through the DHS Home Help program and by the informal supports he had in place including his son who was living with him and his ex-wife who was coming over to prepare meals and prove some other assistance. The did a referral to DHS on for the Home Help Program.

stated they kept the Appellant on the MI Choice Waiver Program until , because of the length of time it takes to complete the DHS Home Help application process. DHS did a Home Help Assessment on . Thereafter, the did another reassessment on and it was determined that the Appellant's needs could be met through the Home Help Program.

stated since Appellant's enrollment was progressing for the Home Help Program, and because people can't be enrolled in both programs, the sent advance notice to Appellant on indicating Appellant's MI Choice case would be closed within 12 days if no appeal was filed within that period of time. Appellant's case was then closed on .

, Appellant's Case Manager, testified she had received Appellant's case as a transfer about a year before his case was closed. He was on the MI Choice Program at that time and was receiving 40 hours per week of Self Determination Services. stated Appellant's son was his worker.

stated she completed a reassessment of the Appellant to determine continued eligibility for the MI Choice Waiver program on . stated the Appellant met the financial and medical eligibility requirements for the MI Choice Waiver, but not the need requirements for the Waiver Program. stated the Appellant's needs could be met through the DHS Home Help program and through informal supports being provided by the Appellant's family, who were preparing his meals, managing his medications, and managing his finances.

stated she assisted Appellant's son with the completion of the DHS Home Help application and she submitted it for him on . Thereafter, on she sent the Advanced Action Notice to Appellant's home indicating an appeal needed to be filed within 12 days or his case would be closed. stated that the Appellant's case was then closed on . She further stated the Appellant's case was reviewed because of the advisory letter received from the Department.

During her testimony, was confronted with a recorded phone call between her and . The call was recorded sometime after the continuance, but without ' permission. The content of the phone call did not discredit the witness' testimony.

The Appellant's son testified they have applied for other programs since the Appellant was terminated from the MI Choice Waiver Program. admitted the Appellant was receiving Adult Home Help through the DHS. However, the benefit is only per month whereas the through the MI Choice Waiver program provided $ per month on the Self Determination Program.

indicated that a nursing home would cost $ per month and other programs were not able to service the Appellant in the religious manner he needs with the halal food requirements and so forth. did not think there was any discrimination involved the closing of his father's case. He did think, however, that the decision had to do with money. The Appellant's representative argued it would have been cheaper if Appellant were kept on the MI Choice Waiver Program through the , than it will be if they have to put the Appellant in a nursing home.

Weighing the evidence in this case the Waiver Agency provided a preponderance of evidence to show that the Appellant was no longer eligible for the MI Choice Program. When the Waiver Agent completed the reassessment in [redacted], it was determined by the Waiver Agent that the Appellant's needs could be met through the Home Help Program along with the informal supports being provided by the family and the Appellant's ex-wife. Appellant's witness has acknowledged that the Appellant is now receiving services through the home help program. The Appellant's main complaint seems to be that the amount of money through the Home Help Program is much less than they were receiving under the MI Choice Waiver Program.

The Appellant did not prove by a preponderance of evidence that the Waiver Agent erred in finding that he was no longer eligible for the MI Choice Program. The Appellant did not provide any sworn testimony or evidence to show that the Appellant's needs were not being met through informal supports and the Home Help Program now or at the time he was terminated from the program. Therefore, the Appellant is not eligible for the MI Choice Waiver Program.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly determined the Appellant was not eligible for the MI Choice Waiver Program.

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.

William D. Bond
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 12/14/2012

***** NOTICE *****

The Michigan Administrative Hearing System 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 Michigan Administrative Hearing System 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.