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. 2011-7999 EDW

[redacted]

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 [redacted]. [redacted] appeared on her own behalf. [redacted], appeared as a witness for the Appellant.

[redacted], 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 [redacted] and is seeking MI Choice Waiver services.
2. On [redacted], the Appellant contacted the waiver agency via telephone to request MI Choice Waiver services. (Exhibit 1, page 3)
3. The waiver agency determined that the Appellant passed the Telephone Intake Guidelines screening and is probably eligible for waiver services. (Exhibit 1, pages 3-8)
4. On [redacted], the Appellant was notified that the MI Choice Waiver program was at capacity, therefore, she would be placed on the waiting list. (Exhibit 1, page 9)

5. On [redacted], the Appellant reported that she was not looking to go into a nursing facility. (Intake Specialist Testimony)

6. 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.

7. Following notification that she had been placed on a waiting list for the MI Choice program, a formal, administrative hearing was requested on [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, in this case [redacted], 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 Intake Specialist provided evidence that the Appellant was placed on the waiting list at the time the initial telephone call was made on [redacted]. (Exhibit 1, pages 3-9) The Intake Specialist testified that the Appellant was contacted again on [redacted], to consider whether she was at risk for nursing facility admission. The Intake Specialist explained that no Imminent Risk Assessment was completed as the Appellant reported she was not looking to go into a nursing facility at the time. The Intake Specialist stated that the Appellant was placed on the waiting list in the order in which her call was received because she did not meet the criteria for prioritization.

The Appellant did not challenge the legal basis for her placement on the waiting list. The Appellant's [redacted] questioned why the Appellant can not be determined to be at imminent risk if she was found eligible for a nursing facility by an OBRA screening. The Appellant's [redacted] explained that the Appellant has stage 3 kidney cancer and needs assistance, including a home visit doctor, because she can not get to a doctor for medical care. The Appellant's [redacted] requested that an Imminent Risk Assessment be completed.

The waiver agency has established a waiting list due to the limited resources it has to provide services. The waiver agency did not complete an Imminent Risk Assessment prior to the [redacted], hearing based on the Appellant's report that she was not looking to go into a nursing facility. The Appellant did not meet the criteria for any of the wait list priority categories based on the information she reported by to the waiver agency. While this ALJ sympathizes with the Appellant's circumstances, the MI Choice Waiver agency 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; therefore, its actions were proper. Additionally, the Intake Specialist has agreed to re-send the Appellant a list of home care physicians and to complete an Imminent Risk Assessment as requested by the Appellant's [redacted].

DECISION AND ORDER

Based on the above findings of fact and conclusions of law, I find the MI Choice Waiver agency 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 AFFIRMED.

Colleen Lack
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 2/10/2011

***** 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.