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:

[redacted]

Appellant
_____/

Docket No. 2012-24968 EDW
Case No. [redacted]

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 on [redacted]. [redacted], Appellant's daughter, appeared and testified on behalf of the Appellant.

[redacted], Care Management Director, [redacted], represented the Department's Waiver Agency. (Waiver Agency or [redacted], Care Management Social Worker and [redacted], Care Management Supervisor of Operations, appeared as witnesses for the Waiver Agency.

[redacted], RN, Care Management Director, represented the [redacted]. [redacted], RN/Supports Coordinator; [redacted], LBSW, Supports Coordinator; and [redacted], RSW, Manager, Home & Community Based Services, appeared as witnesses for the [redacted]).

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 is enrolled in the MI Choice Waiver Program, receiving services through the Waiver Self Determination Program. Appellant's daughter [redacted] was employed as her worker/caregiver. (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. (Exhibit 1, pp 53-69).

3. The Appellant received MI Choice Waiver services from [redacted] through [redacted], when she chose to receive services through the Department of Human Services Adult Home Help program. (DHS-AHH). Appellant resumed receiving MI Choice Waiver services on [redacted] and has continued to receive said services through the present date. (Exhibit 1, pp 7-8).

4. The Appellant is a [redacted] year-old female, born [redacted], who is diagnosed with coronary heart disease and hypertension, with a history of stroke, hemiplegia, and depression. (Exhibit 1, pp 85-86). Appellant's doctor lists additional diagnosis of contracture of joint in shoulder region, arm, hand, hip, leg, and foot; residual spastic right hemiplegia with chronic right shoulder pain, probable neuropathic pain, mild CKD, aphasia, complex partial epilepsy, degenerative arthritis, post-stroke cognitive impairment, dysphagia, hyperlipidemia, neurogenic bladder, osteoporosis, insomnia, central post stroke pain, carotid stenting on the right side, diminished hearing, possible sleep apnea, not ambulating because of her spastic right hemiplegia, fall since [redacted]; gait and balance problems. (Exhibit 4)

5. The Appellant is currently residing in a single family home with her daughter [redacted] who is also her Self Determination worker. (Exhibit 1, pp 80-93 and Testimony).

6. On [redacted], a reassessment of the Appellant was done by the Waiver Agency to determine continued eligibility for the MI Choice Waiver Program. (Exhibits 1, pp 108-121 and Testimony).

7. On [redacted], the Waiver Agency sent Appellant an Advance Action Notice informing Appellant that it determined she was no longer eligible for the MI Choice Waiver Program and advised her that services would be terminated effective [redacted]. The reason given for the action was: "[redacted] needs can be met through the DHS Adult Home Help program." (Exhibit 1, pp 4-5 and Testimony).

8. On [redacted], the Michigan Administrative Hearing System received the Appellant's request for an administrative hearing. (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 the Region IV Area Agency on Aging, 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:
>
> - 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 October 18, 2010, 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 1, pp 9-12).

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. *Emphasis added*.

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. *Emphasis added*.

* * *

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.

Medicaid Provider Manual, MI Choice Waiver
June 28, 2011, pp 1-5

[redacted], Care Management Social Worker, [redacted], testified that she learned about the changes to the MI Choice Waiver program during a meeting. [redacted] testified that her next reassessment with Appellant following the changes was in [redacted] and, because she did not find any new MI Choice Waiver services needed by Appellant, she made the referral to Adult Home Help.

Appellant was also reassessed by [redacted], RN, BSN, on [redacted] and [redacted] also determined that all of Appellant's needs were being met through the hours of Community Living Supports provided through the MI Choice Waiver. [redacted] concluded that since Appellant did not need any services that were not available through DHS-AHH, that a referral of Appellant to DHS-AHH was proper.

[redacted], Appellant's daughter, testified that, in her opinion, Michigan's policy with regard to the MI Choice Waiver conflicts with federal law. [redacted] testified that she had been taking care of her mother for [redacted] years and has given up many

personal opportunities to do so. [redacted] indicated that if she did not take care of her mother, her mother would need to be in a nursing home, which would cost the State more money. [redacted] pointed out that the pay for services through DHS-AHH was considerably less than the pay for services through the MI Choice Waiver, which was unfair given that her mother's needs continue to increase, not decrease. When asked repeatedly what specific MI Choice Waiver service her mother needed that was not covered by DHS-AHH, [redacted] could not provide a specific answer, but instead answered "all of them".

Following the hearing, the record was left open so that the Appellant's daughter could submit her closing arguments in writing. On [redacted], the undersigned received a written closing argument from [redacted], in which she put forth several arguments as to why Appellant should remain in the MI Choice Waiver program. First, [redacted] argued that there has been no policy change or federally approved amendments to Medicaid that allow the Waiver Agency to move persons from the MI Choice Waiver program to DHS-AHH. However, the Department properly issued MI Choice Operations Advisory Letter #26 on [redacted], which makes clear that under the MI Choice contract, waiver agents must 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. In addition, these changes were incorporated into the Medicaid Provider Manual when the 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.

Second, [redacted] argued that the decision to move Appellant to DHS-AHH should be reversed because Appellant's medical and functional needs have not changed. However, this argument actually supports the waiver agent's decision in this matter, i.e. because Appellant's conditions have not changed, and because, for some time now, she has not needed a specific MI Choice Waiver program service, her needs can be met through DHS-AHH.

Third, [redacted] argued that Appellant's Plan of Care from [redacted] indicates that Appellant requires supervisory care and DHS-AHH does not offer supervisory care. However, "supervisory care" is also not a specific service provided under the MI Choice Waiver program. Appellant's "supervisory care" consists of Appellant's daughter and the workers who will come into her home through the DHS-AHH program.

Finally, [redacted] argued that based on letters submitted by Appellant's doctors Appellant needs 24 hour assistance and that the limited hours provided through DHS-AHH, as well as the lack of skilled assistants and supervisory care, will force Appellant into a nursing home. However, no-one is disputing that Appellant has significant health issues and may, at some point, need to go into a nursing home. All the waiver agency is

saying is that the same services that Appellant is receiving now through the MI Choice Waiver program are available through DHS-AHH.

As indicated clearly above, the waiver agency must administer the MI Choice Waiver program in accordance with policy found in the Medicaid Provider Manual (MPM). The MPM indicates, "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." Here, despite ample opportunity to do so, the Appellant has not been able to point to a specific MI Choice Waiver service that she needs. The MPM also provides, "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." Here, the evidence shows that Appellant's needs can be met through DHS-AHH. The evidence also shows that Appellant previously received services through DHS-AHH per her own choice, but only switched back to the MI Choice Waiver program when she realized that the pay for services was less through DHS-AHH.

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 Waiver Program. When the Waiver Agency completed reassessments in [redacted] and [redacted], it was determined by the Waiver Agency that the Appellant's needs could be met through the DHS-AHH Program along with the informal supports being provided by Appellant's daughter. The Appellant's main complaint seems to be that the amount of money through DHS-AHH is much less than she was receiving under the MI Choice Waiver Program, however, such a complaint is irrelevant to the determination of whether Appellant's needs can be met through DHS-AHH.

The Appellant did not prove by a preponderance of evidence that the Waiver Agent erred in finding that she was no longer eligible for the MI Choice Waiver Program. The Appellant did not provide any sworn testimony or evidence to show that the Appellant needed a specific service provided only through the MI Choice Waiver program or that her needs could not be met through DHS-AHH. 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.

Robert J. Meade
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 4/11/2012

***** 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.