STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH
P.O. Box 30763, Lansing, MI 48909
(517) 335-2484; Fax: (517) 373-4147

IN THE MATTER OF:

Docket No. 2012-61540 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.* and upon Appellant's request for a hearing.

After due notice, a hearing was held on [redacted] Attorney [redacted] appeared on Appellant's behalf. [redacted] Appellant's daughter, also testified on Appellant's behalf. [redacted] Office Manager, represented the Department of Community Health's Waiver Agency, the Macomb-Oakland Regional Center, Inc. ("Waiver Agency" or "MORC").

ISSUE

Did the Department's MI Choice Waiver Agency properly deny Appellant's request for services through the MI Choice 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 Department contracts with MORC to provide MI Choice waiver services to eligible beneficiaries.

2. MORC must implement the MI Choice Waiver program in accordance to Michigan's waiver agreement, Department policy, and its contract with the Department.

3. On [redacted] Appellant's daughter applied for waiver services on Appellant's behalf and a telephone intake was completed. Appellant was placed on a waiting list in chronological order due to a lack of available slots in the program. (Testimony of [redacted]).

4. On [redacted] MORC notified Appellant in writing that she had been placed on the waiting list in chronological order. (Exhibit 1, page 1).

5. Appellant came to the top of the waiting list in [redacted] However, she did not qualify for Medicaid at that time due to her financial assets. (Testimony of [redacted] .

6. On [redacted] MORC sent Appellant a written notice stating that her application for services through the waiver program was denied "due to the fact that you do not qualify for Medicaid." (Exhibit 2, page 1).

7. On [redacted] the Michigan Administrative Hearing System (MAHS) received a Request for Hearing filed on Appellant's behalf. In that request, Appellant's attorney asserts that Appellant should have been given an opportunity to spend down her assets within a reasonable time. (Exhibit 3, pages 1-2).

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. 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.

Appellant is seeking services through the Department's Home and Community Based Services for Elderly and Disabled. 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 MORC, 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 MI Choice representative testified that, at the time Appellant first applied for the waiver program, the MI Choice Waiver program was at capacity for MI Choice Waiver enrollees. She also explained that it maintains a waiting list and contacts individuals on the list on a priority and first come, first served, basis when sufficient resources become available to serve additional individuals. Appellant was placed on the waiting list.

As described by the applicable version of the Medicaid Provider Manual (MPM), the

placement of Appellant on the waiting list was pursuant to policy:

> **3.2 TELEPHONE INTAKE GUIDELINES**
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> The Telephone Intake Guidelines (TIG) is a list of questions designed to screen applicants for eligibility and further assessment. Additional probative questions are permissible when needed to clarify eligibility. The TIG does not, in itself, establish program eligibility. Use of the TIG is mandatory for MI Choice waiver agencies prior to placing applicants on a MI Choice waiting list when the agency is operating at its capacity. The date of the TIG contact establishes the chronological placement of the applicant on the waiting list. The TIG may be found on the MDCH website. (Refer to the Directory Appendix for website information.)
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> Applicants who request services in MI Choice must be screened by telephone using the TIG at the time of their request. If the caller is seeking services for another individual, the waiver agency shall either contact the applicant for whom services are being requested or complete the TIG to the extent possible using information known to the caller. For applicants who are deaf, hearing impaired, or otherwise unable to participate in a telephone interview, it is acceptable to use an interpreter, a third-party in the interview, or assistive technology to facilitate the exchange of information.
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> As a rule, nursing facility residents who are seeking to transition into MI Choice are not contacted by telephone but rather are interviewed in the nursing facility. For the purposes of establishing a point of reference for the waiting list, the date of the initial nursing facility visit shall be considered the same as conducting a TIG, so long as the functional and financial objectives of a TIG are met. (Refer to the Waiting Lists subsection for additional information.) Specifically, the interview must establish a reasonable expectation that the applicant will meet the functional and financial eligibility requirements of the MI Choice program within the next 60 days.
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> Applicants who are expected to be ineligible based on TIG information may request a face-to-face evaluation using the Michigan Medicaid Nursing Facility Level of Care Determination and financial eligibility criteria. Such evaluations should be conducted as soon as possible, but

must be done within 10 business days of the date the TIG was administered. MI Choice waiver agencies must issue an adverse action notice advising applicants of any and all appeal rights when the applicant appears ineligible either through the TIG or a face-to-face evaluation.

When an applicant appears to be functionally eligible based on the TIG, but is not expected to meet the financial eligibility requirements, the MI Choice waiver agency must place the applicant on the agency's waiting list if it is anticipated that the applicant will become financially eligible within 60 days. Individuals may be placed on the waiting lists of multiple waiver agencies.

The TIG is the only recognized tool accepted for telephonic screening of MI Choice applicants.

3.3 ENROLLMENT CAPACITY

MI Choice capacity is limited to the number of participants who can be adequately served under the annual legislative appropriation for the program. Enrollment capacity for each individual waiver agency is at the agency's discretion based on available funding and the expected costs of maintaining services to enrolled participants.

Capacity is not determined by an allocated number of program slots. While numbers of slots must be monitored for federal reporting purposes, waiver agencies are expected to enroll any applicant for whom they have resources to serve.

3.4 WAITING LISTS

Whenever the number of participants receiving services through MI Choice exceeds the existing program capacity, any screened applicant must be placed on the waiver agency's waiting list. Waiting lists must be actively maintained and managed by each MI Choice waiver agency. The enrollment process for the MI Choice program is not ever actually or constructively closed. The applicant's place on the waiting list is determined by priority category in the order described below. Within each category, an applicant is placed on the list in chronological order based on the date of their request for services. This is the only approved method of accessing waiver services when the waiver program is at

capacity. [MPM, MI Choice Waiver Chapter, January 1, 2012, pages 5-6.]

Subsequently, Appellant reached the top of the waiting list and was evaluated for services. However, she was not financially eligible for Medicaid at that time and her application was denied. Regarding eligibility for the MI Choice program, the MPM states:

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 their 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.

2.1 FINANCIAL ELIGIBILITY

Medicaid reimbursement for MI Choice services requires a determination of Medicaid financial eligibility for the applicant by the Michigan Department of Human Services (MDHS). As a provision of the waiver, MI Choice applicants benefit from an enhanced financial eligibility standard compared to basic Medicaid eligibility. Specifically, MI Choice is furnished to participants in the special home and community-based group under 42 CFR §435.217 with a special income level equal to 300% of the SSI Federal Benefit Rate. Medicaid eligibility rules stipulate that participants are not allowed to spend down to achieve an enhanced financial eligibility standard.

[MPM, MI Choice Waiver Chapter, April 1, 2012, page 1.]

Given the clear policy that an applicant must establish their financial eligibility for Medicaid services at the time of the evaluation and continue to meet all eligibility requirements on an ongoing basis to remain in the program, the Waiver Agency was clearly correct in denying Appellant's application.

Appellant asserts that it is only fair that a Waiver Agency grant an applicant a reasonable time to spend down assets, but this Administrative Law Judge does not possess equitable jurisdiction and cannot decided things as a matter of fairness. Like the Waiver Agency, this Administrative Law Judge is bound by policy and that policy clearly states that an applicant must be met all financial eligibility requirements before services are required.

Appellant also points to Bridges Eligibility Manual 400 (4-1-2012) (hereinafter "BEM 400") in support of the assertion that the Waiver Agency had to wait before determining financial eligibility. BEM 400 provides, in part:

> **FIP, RAPC SDA AND FAP ASSET ELIGIBILITY**
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> **FIP, RAPC, SDA and FAP**
>
> **Policy Overview**
>
> Determine asset eligibility prospectively using the asset group's assets from the benefit month. Asset eligibility exists when the group's countable assets are less than, or equal to, the applicable asset limit at least one day during the month being tested. [BEM 400, page 3 of 52.]

However, by its own terms, that portion of BEM 400 only applies to the Family Independence Program (FIP), Refugee Assistance Program Cash (RAPC), State Disability Assistance (SDA), and Food Assistance Program (FAP). Moreover, it is worth noting that MORC does not even make MA decisions and it only checks to see if an applicant is financially eligible as determined by DHS. Accordingly, Appellant's BEM 400 citation does not support going against the clear policy of the MPM.

Appellant bears the burden of providing by a preponderance of the evidence that the Waiver Agency erred in denying her application. Given the clear policy in this case and the undisputed fact that Appellant was not financially eligible at the time her evaluation was reviewed, the Waiver Agency's decision must be affirmed.[1]

[1] The question did arise as to where Appellant would be placed on the waiting list if she did become financially eligible in the future. However, whatever Appellant's daughter was told in the past, it appears that this issue is not disputed and that the Waiver Agency is willing to put Appellant back at the top of the waiting list if she becomes financially eligible at some point.

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 denied Appellant's application for services through the MI Choice program.

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.

Steven Kibit

Steven J. Kibit
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

cc: [redacted]

Date Mailed: 9/27/2012

***** 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.