

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

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IN THE MATTER OF:

██████████,

Appellant.

_____ /

Docket No. 2012-3014 EDW
Case No.

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge (ALJ), pursuant to M.C.L. § 400.9 and 42 C.F.R. § 431.200 et seq. upon the Appellant's request for a hearing.

After due notice, a hearing was held on ██████████. Appellant appeared and testified on her own behalf. ██████████, Waiver Services Director, represented the Department of Community Health's Waiver Agency, the ██████████ Area Agency on Aging ("Waiver Agency" or "AAA").

ISSUE

Did the Department's MI Choice Waiver Agency properly determine that it could not immediately assess Appellant for the MI Choice Waiver Program and place her on a waiting list?

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 AAA to provide MI Choice Waiver services to eligible beneficiaries.
2. AAA must implement the MI Choice Waiver program in accordance to Michigan's waiver agreement, Department policy, and its contract with the Department.
3. Appellant is a ██████ year-old woman who has been diagnosed with kidney failure. (Exhibit 1, page 8).
4. On ██████████, Appellant requested MI Choice Waiver services. (Exhibit 1, page 8).

5. AAA staff conducted a telephone screen with Appellant and determined that, while Appellant appears eligible for the program, the program is at capacity and Appellant must be placed on the waiting list. (Exhibit 1, pages 8-10).
6. On ██████████, AAA notified Appellant in writing that the MI Choice Waiver Program was at program capacity and she could not be evaluated for enrollment at that time. (Exhibit 1, page 10). Appellant was also placed on the Waiver Enrollment Waiting List. (Exhibit 1, page 10).
7. On ██████████, the Department received a Request for Hearing from the Appellant. (Exhibit 1, page 3).

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 claiming 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 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 C.F.R. § 430.25(b))

The MI Choice representative testified that the MI Choice Waiver program is at capacity for MI Choice Waiver enrollees. The MI Choice representative 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.

The attachment to Medical Services Administration Policy Bulletin 11-27 (June 28, 2011) (hereinafter "MSA 11-27") outlines the approved evaluation policy and the MI Choice waiting list policy:

3.2 TELEPHONE INTAKE GUIDELINES

The Telephone Intake Guidelines (TIG) are a list of questions designed to screen potential MI Choice program participants for potential eligibility and further assessment. Additional probative questions are permissible when needed to clarify potential 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.

Persons who request services in MI Choice must be screened by telephone using the TIG at the time of his/her request. If the caller is seeking services for another individual, the waiver agency shall either contact the person 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 participant in the interview, or assistive technology to facilitate the exchange of information.

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. 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.

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 their waiting list if it is anticipated that they might 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 individuals 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 participant for whom they have resources to serve.

3.4 WAITING LISTS

Whenever the number of persons receiving and applying for services through MI Choice exceeds the existing program capacity, any 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 his/her request for services. This is the only approved method of accessing waiver services when the waiver program is at capacity.

(Attachment to MSA 11-27, pages 6-7)

Moreover, with regard to priority categories, the pertinent section of the attachment to MSA 11-27 states:

3.4.A. PRIORITY CATEGORIES

Applicants will be placed on a waiting list by priority category and then chronologically by date of request of services. Enrollment in MI Choice is assigned on a first come/first served basis using the following categories, listed in order of priority given:

3.4.A.1. CHILDREN'S SPECIAL HEALTH CARE SERVICES (CSHCS) AGE EXPIRATIONS

This category includes only those persons who continue to require Private Duty Nursing services at the time such coverage ends due to age restrictions under CSHCS.

3.4.A.2. NURSING FACILITY TRANSITION PARTICIPANTS

Nursing facility residents who desire to transition to the community and will otherwise meet enrollment requirements for MI Choice qualify for this priority status and are eligible to receive assistance with supports coordination, transition activities, and transition costs. Priority status is not given to applicants whose service and support needs can be fully met by existing State Plan services.

3.4.A.3. CURRENT ADULT PROTECTIVE SERVICES (APS) AND DIVERSION APPLICANTS

An applicant with an active Adult Protective Services (APS) case is given priority when critical needs can be addressed by MI Choice services. It is not expected that MI Choice waiver agencies solicit APS cases, but priority is given when necessary.

An applicant is eligible for diversion priority 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 (IRA), an evaluation developed by MDCH. Use of the IRA is essential in providing an objective differentiation between those applicants at risk of a nursing facility placement and those at imminent risk of such a placement. Only applicants found to meet the standard of imminent risk are given priority status on the waiting list. Applicants may request that a subsequent IRA be performed upon a change of condition or circumstance.

Supports coordinators must administer the IRA in person. The design of the tool makes telephone contact insufficient to make a valid determination. Waiver agencies must submit a request for diversion status for an applicant to MDCH. A final approval of a diversion request is made by MDCH.

3.4.A.4. CHRONOLOGICAL ORDER BY SERVICE REQUEST DATE

This category includes applicants who do not meet any of the above priority categories or for whom prioritizing information is not known. As stated, participants will be placed on the waiting list in the chronological order that they requested services as documented by the date of TIG completion or initial nursing facility interview.

(Attachment to MSA 11-27, page 8)

Appellant testified that she has end-stage renal disease and is trying to get a kidney transplant. However, no one disputes her medical issues and she was actually given a position on the waiting list because of her needs. Nevertheless, the MI Choice representative testified that the waiver agency is at capacity for MI Choice Waiver enrollees. 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.

While no imminent risk assessment was performed, Appellant clearly does not qualify for that higher priority level given her express testimony that she is not on dialysis and not in any danger of going into a nursing home. As noted by the Waiver Agency's representative, if Appellant's condition worsens, she can always reapply to the program and she might be placed on a priority level on the waiting list.

The Waiver Agency and this Administrative Law Judge are bound by the MI Choice program policy and cannot order enrollment into a program that has no available slots. In addition, this Administrative Law Judge possesses no equitable jurisdiction to grant exceptions to Medicaid, Department and MI Choice program policy.

The MI Choice Waiver Agency provided sufficient evidence that it implemented the MI Choice waiting list procedure in the approved manner and in accordance to Department policy. Therefore, its actions were proper.

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 placed Appellant on the waiting list.

IT IS THEREFORE ORDERED that:

The Department's decision is **AFFIRMED**.

Steven J. Kibit
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

cc:



Date Mailed: 12/6/2011

***** 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.