

**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. 14-008387 EDW

██████████

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.*, and upon the Appellant's request for a hearing.

After due notice, an in-person hearing was held on ██████████ Appellant's daughter and designated power of attorney, appeared and testified on Appellant's behalf. ██████████ represented the Department of Community Health's Waiver Agency, the ██████████ ("Waiver Agency" or "██████").

ISSUE

Did the Department's MI Choice Waiver Agency properly place Appellant on a waiting list 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. ████████ is a contract agent of the Michigan Department of Community Health and is responsible for waiver eligibility determinations and the provision of MI Choice waiver services in its service area.
2. On ██████████, Appellant's representative applied for waiver services on Appellant's behalf and a telephone intake was completed. (Respondent's Exhibit B, pages 1-4).
3. Appellant was subsequently found to be probably eligible for the program, but was placed on a waiting list in chronological order due to a lack of available slots in the program. (Testimony of ████████).
4. That same day, the Waiver Agency sent Appellant written notice that she had been placed on the waiting list in chronological order. (Respondent's Exhibit A, page 1).

5. Specifically, that notice stated:

Although you requested an evaluation under the Michigan Medicaid Nursing Facility Level of Care Determination for MI Choice program services, the MI Choice Program is currently at program capacity and we are unable to evaluate you for enrollment at this time. The legal basis for this decision is 42 CFR 440.23 (d).

Be assured, your information will be maintained, chronologically, on a waiting list for potential future enrollment. Our agency will be contacting you or your representative every █████ days to review and maintain your placement on the wait list.

Respondent's Exhibit A, page 1

6. The reference to "42 CFR 440.23 (d)" in the notice was an error as no such regulation exists. The notice should have referred to 42 CFR 440.230(d). (Testimony of █████).
7. Given that error, as well as the language stating that the Waiver Agency was unable to evaluate Appellant at this time, Appellant's representative was unsure if Appellant was actually placed on the waitlist and she decided to appeal. (Testimony of Appellant's representative).
8. On █████, the Michigan Administrative Hearing System (MAHS) received the Request for Hearing filed by Appellant and her representative in this matter. (Petitioner's Exhibit 1, pages 1-9).
9. After the assessment and while the appeal was pending, Appellant was moved into a nursing care facility. (Testimony of Appellant's representative).

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 ██████████, 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 the MI Choice Waiver program was at capacity for enrollees at the time of the notice in this case and 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 Medicaid Provider Manual (MPM) outlines the approved evaluation policy and the MI Choice waiting list policy:

3.2 TELEPHONE INTAKE GUIDELINES

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).

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.

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.

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, July 1, 2014 version
MI Choice Waiver Chapter, pages 5-6

Moreover, with regard to priority categories, the pertinent section of the MPM 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.

Waiver agencies are required to conduct follow-up phone calls to all applicants on their waiting list. The calls are to determine the applicant's status, offer assistance in accessing alternative services, identify applicants who should be removed from the list, and identify applicants who might be in crisis or at imminent risk of admission to a nursing facility. Each applicant on the waiting list is to be contacted at least once every 90 days. Applicants in crisis or at risk require more frequent contacts. Each waiver agency is required to maintain a record of these follow-up contacts.

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

This category includes only those applicants 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 TRANSITIONS

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. ADULT PROTECTIVE SERVICES (APS) AND DIVERSIONS

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 an 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, applicants 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.

MPM, July 1, 2014 version
MI Choice Waiver Chapter, pages 7-8

Here, the MI Choice representative testified that the Waiver Agency was at capacity for MI Choice Waiver enrollees at all times relevant to this case. Pursuant to the above policy, it therefore 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 in this case. Moreover, while no imminent risk assessment was performed, it appeared that one was not necessary and that Appellant did not qualify for that higher priority level, or any other priority level, given the information provided during the intake and hearing. Accordingly, the Waiver Agency properly placed Appellant on the waiting list pursuant to the Department's policy.

After the assessment and while the appeal was pending, Appellant was moved into a nursing care facility. Given that move and the policy that "Nursing Facility Transitions" is a priority category on the waitlist, Appellant may need to be moved up the waitlist and the Waiver Agency's representative indicated that she would telephone Appellant's representative after the hearing to discuss that issue.

However, regardless of any future developments, this Administrative Law Judge is limited to reviewing the Waiver Agency's decision in light of the information it had at the time it made that decision and, given the available information in this case, the Waiver Agency's actions must be affirmed.

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 Waiver Agency's decision is **AFFIRMED**.

Steven Kibit

Steven J. Kibit
Administrative Law Judge
for Nick Lyon, Director
Michigan Department of Community Health

Date Signed: [REDACTED]

Date Mailed: [REDACTED]

SK/db

cc: [REDACTED]

***** 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.