RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Christopher Seppanen
Executive Director

SHELLY EDGERTON
DIRECTOR

[redacted]

Date Mailed: March 17, 2017
MAHS Docket No.: 17-002137
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Janice Spodarek

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and upon the Petitioner's request for a hearing.

After due notice, a hearing was held on March 14, 2017. Petitioner was represented by her Guardian and Hearing Representative, [redacted] appeared as a witness.

[redacted] Resource Specialist, appeared on behalf of the Michigan Department's Health and Human Services subcontractor, [redacted], Michigan (Waiver Agency, AAA or Respondent).

ISSUE

Did the Waiver Agency properly remove Petitioner from the MI Choice Waiver waitlist on the grounds that Petitioner is enrolled in another community based service program--the Home Help Services (HHS) 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. Petitioner is a [redacted] year old female Medicaid and SSI beneficiary, born [redacted].

2. The Waiver Agency is a contract agent of the Michigan Department of Health and Human Services (MDHHS) and is responsible for waiver eligibility determinations and the provision of MI Choice Waiver Services.

3. On [redacted] Petitioner was placed on the wait list as she applied for and met the MI Choice Intake Guidelines. (Exhibit A).

4. At all relevant time, Petitioner has had a HHS grant at about 30 hours per week.

5. Respondent's hearing summary states that Petitioner was told verbally and by mail that Petitioner "cannot have both programs [HHS] at the same time" and that the Petitioner "was told verbally and by mail that an appeal of the HHG was necessary before applicant could be assessed for the MI Choice Program, as applicant cannot have both programs at the same time." (Exhibit A.5). The Respondent's witness testified that Petitioner can have both programs. [Testimony of [redacted]].

6. The Respondent failed to submit evidence of the written notification and testify as to what procedures the notice contained regarding the filing of "the appeal" and obtaining "the letter."

7. Following the CMH instructions, Petitioner's representative did request more hours from the HHS program and was subsequently involved in a conference meeting with Petitioner's worker and supervisor and informed that no more hours were available. (Testimony of Petitioner's Guardian).

8. The Respondent's witness testified at the administrative hearing that the conference meeting was not in compliance with the Respondent's instructions. (Testimony of [redacted]).

9. On [redacted] the Respondent issued an Adequate Action Notice of MI Choice Waitlist Removal informing Petitioner that she was being removed for "the following reason as specified in the MI Choice Policy Chapter of the MPM: applicant enrolled in another community based service program (DHHS Home Help Program)."

10. The Respondent did not include applicable policy from the Michigan Medicaid Provider Manual (MPM) because "no other judge has ever asked for it" but testimony was that it was somewhere in the MI Choice Policy Chapter. Respondent testified that this policy states that an individual cannot be enrolled in another community based program. Testimony by Respondent was that this procedure was laid out in a written notice but the Respondent did not have a copy of the written notice, nor was it included in the evidentiary packet. At the same time, Respondent's witness testified contrary that in fact, an individual can be enrolled in both programs. (Testimony of [redacted]).

CONCLUSIONS OF LAW

The Medical Assistance Program (MA) 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:

> Title XIX of the Social Security Act, enacted in 1965, authorizes Federal grants to States for medical assistance to low-income persons who are age 65 or over, blind, disabled, or members of families with dependent children or qualified pregnant women or children. The program is jointly financed by the Federal and State governments and administered by States. Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services.
>
> *42 CFR 430.0*

> The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department. The State plan contains all information necessary for CMS to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the State program.
>
> *42 CFR 430.10*

Section 1915(b) of the Social Security Act provides:

> The Secretary, to the extent he finds it to be cost-effective and efficient and not inconsistent with the purposes of this subchapter, may waive such requirements of section 1396a of this title (other than subsection (s) of this section) (other than sections 1396a(a)(15), 1396a(bb), and 1396a(a)(10)(A) of this title insofar as it requires provision of the care and services described in section 1396d(a)(2)(C) of this title) as may be necessary for a State…
>
> *42 USC 1396n(b)*

The State of Michigan has opted to simultaneously utilize the authorities of the 1915(b) and 1915 (c) programs to provide a continuum of services to disabled and/or elderly populations. Under approval from the Centers for Medicare and Medicaid Services (CMS) the Department of Health and Human Services (DHHS) operates a section 1915(b) Medicaid Managed Specialty Services and Support program waiver in conjunction with a section 1915(c).

This Petitioner is requesting 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 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).

With regard to Community Living Supports under the MI Choice Waiver Program, the Medicaid Provider Manual indicates:

4.1.H. COMMUNITY LIVING SUPPORTS

Community Living Supports (CLS) facilitate an individual's independence and promote participation in the community. CLS can be provided in the participant's residence or in community settings. CLS include assistance to enable participants to accomplish tasks that they would normally do for themselves if able. The services may be provided on an episodic or a continuing basis. The participant oversees and supervises individual providers on an ongoing basis when participating in self-determination options. Tasks related to ensuring safe access and egress to the residence are authorized only in cases when neither the participant nor anyone else in the household is capable of performing or financially paying for them, and where no other relative, caregiver, landlord, community/volunteer agency, or third party payer is capable of or responsible for their provision. When transportation incidental to the provision of CLS is included, it shall not also be authorized as a separate waiver service for the participant. Transportation to medical appointments is covered by Medicaid through DHS.

CLS includes:

- Assisting, reminding, cueing, observing, guiding and/or training in household activities, ADL, or routine household care and maintenance.

- Reminding, cueing, observing and/or monitoring of medication administration.

- Assistance, support and/or guidance with such activities as:

- Non-medical care (not requiring nurse or physician intervention) – assistance with eating, bathing, dressing, personal hygiene, and ADL;

- Meal preparation, but does not include the cost of the meals themselves;

- Money management;

- Shopping for food and other necessities of daily living;

- Social participation, relationship maintenance, and building community connections to reduce personal isolation;

- Training and/or assistance on activities that promote community participation such as using public transportation, using libraries, or volunteer work;

- Transportation (excluding to and from medical appointments) from the participant's residence to community activities, among community activities, and from the community activities back to the participant's residence; and

- Routine household cleaning and maintenance.

▪ Dementia care including, but not limited to, redirection, reminding, modeling, socialization activities, and activities that assist the participant as identified in the individual's person-centered plan.

▪ Staff assistance with preserving the health and safety of the individual in order that he/she may reside and be supported in the most integrated independent community setting.

▪ Observing and reporting any change in the participant's condition and the home environment to the supports coordinator.

> These service needs differ in scope, nature, supervision arrangements, or provider type (including provider training and qualifications) from services available in the State Plan. The differences between the waiver coverage and the State Plan are that the provider qualifications and training requirements are more stringent for CLS tasks as provided under the waiver than the requirements for these types of services under the State Plan.
>
> CLS services cannot be provided in circumstances where they would be a duplication of services available under the State Plan or elsewhere. The distinction must be apparent by unique hours and units in the approved service plan.
>
> *MPM, July 1, 2015 version*
> *MI Choice Waiver Chapter, pages 13-14*

Home Help Services (HHS) are provided to enable functionally limited individuals to live independently and receive care in the least restrictive, preferred settings. These activities must be certified by a physician and may be provided by individuals or by private or public agencies. Adult Services Manual 101 (12-1-2013) (hereinafter "ASM 101") addresses what services may be provided as HHS:

> Home help services are non-specialized personal care service activities provided under the independent living services program to persons who meet eligibility requirements.
>
> Home help services are provided to enable individuals with functional limitation(s), resulting from a medical or physical disability or cognitive impairment to live independently and receive care in the least restrictive, preferred settings.
>
> Home help services are defined as those tasks which the department is paying for through Title XIX (Medicaid) funds. These services are furnished to individuals who are **not** currently residing in a hospital, nursing facility, licensed foster care home/home for the aged, intermediate care facility (ICF) for persons with developmental disabilities or institution for mental illness.
>
> These activities **must** be certified by a Medicaid enrolled medical professional and may be provided by individuals or by private or public agencies. **The medical professional does not prescribe or authorize personal care services.**

Needed services are determined by the comprehensive assessment conducted by the adult services specialist.

Personal care services which are eligible for Title XIX funding are limited to:

Activities of Daily Living (ADL)

- Eating.
- Toileting.
- Bathing.
- Grooming.
- Dressing.
- Transferring.
- Mobility.

Instrumental Activities of Daily Living (IADL)

- Taking medication.
- Meal preparation/cleanup.
- Shopping for food and other necessities of daily living.
- Laundry.
- Housework.

An individual must be assessed with at least one activity of daily living (ADL) in order to be eligible to receive home help services.

Note: If the assessment determines a need for an ADL at a level 3 or greater but these services are not paid for by the department, the individual would be eligible to receive IADL services.

Example: Ms. Smith is assessed at a level 4 for bathing however she refuses to receive assistance. Ms. Smith would be eligible to receive assistance with IADL's if the assessment determines a need at a level 3 or greater.

Note: If an individual uses adaptive equipment to assist with an ADL, and without the use of this equipment the person would require hands-on care, the individual must be ranked a level 3 or greater on the functional assessment. This individual would be eligible to receive home help services.

> **Example:** Mr. Jones utilizes a transfer bench to get in and out of the bathtub which allows him to bathe himself without the hands-on assistance of another. The adult services specialist must rank Mr. Jones a 3 or greater under the functional assessment. Mr. Jones would be eligible to receive home help services.
>
> Assistive technology would include such items as walkers, wheelchairs, canes, reachers, lift chairs, bath benches, grab bars and handheld showers.

ASM 101, pages 1-3 of 5

The applicable policies of the MPM acknowledge that there may be overlap between waiver services and HHS, and that a beneficiary may qualify for both programs, in addition to any other programs the beneficiary may meet the criteria for. Moreover, in general, a beneficiary who qualifies for both programs has the freedom to choose between them:

> **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 nursing facility LOCD, including MI Choice, Nursing Facility and the Program of All-Inclusive Care for the Elderly (PACE). Qualified applicants may only enroll in one of these long-term care programs at any given time. Nursing facility, PACE, MI Choice, and Adult Home Help services cannot 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 supports coordinator and the applicant (or their legal representative) seeking services and is to be maintained in the applicant's case record.

However, the MPM also indicates that an applicant cannot be enrolled in MI Choice if his or her needs can be met through State Plan or other available services.

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.

* * *

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.

MPM, July 1, 2015 version
MI Choice Waiver Chapter, page 3

Furthermore, the MPM requires that Waiver Agencies comply with the Minimum Operating Standards for MI Choice Waiver Program Services published by the Department and Attachment K of those Operating Standards provides that persons who qualify for the Home Help program and for whom that program will fully meet their support needs do not qualify for the MI Choice program:

> **4.5 OPERATING STANDARDS**
> MDCH maintains and publishes the "Minimum Operating Standards for MI Choice Waiver Program Services" (known as the Minimum Operating Standards) document. This document defines both general and specific operating criteria for the program. All waiver agencies and service providers are subject to the standards, definitions, limits, and procedures described therein.
>
> For each service offered in MI Choice, the Minimum Operating Standards are used to set the minimum qualifications for all direct service providers, including required certifications, training, experience, supervision, and applicable service requirements. Billing codes and units are also defined in the document.
>
> *MPM, July 1, 2015 version*
> *MI Choice Waiver Chapter, page 24*

> **C. STANDARDS OF SUPPORTS COORDINATION**
>
> Waiver agencies provide SC activities consistent with the principles listed below:
>
> **1.** SCs follow the principles of PCP; including providing opportunities for participants to express goals, desires, and expectations and supporting the involvement of allies to participate in planning activities.
>
> **2.** Qualified SCs perform the initial MI Choice assessment function as a team. Qualified staff includes a Registered Nurse (RN) and a Social Worker (SW), both with valid Michigan licenses to practice their profession.
>
> **3.** SCs receive ongoing training and supervision, as appropriate.

4. SCs endeavor to identify and discuss all potential support and service options and emphasize participant choices and preferences.

5. The SC shall assure the participant's rights. This includes the right to participate actively in SC services including the development of the plan of service, the right to use a supports broker, the right to receive or refuse services, the right to choose providers, and the right to participate in a PCP process.

a) Every MI Choice participant signs a Freedom of Choice consent form to receive services from MI Choice. The single sign on system will generate this form for each participant once the waiver agency completes the participant's NFLOC Determination in the on-line system. Waiver agencies follow the requirements defined in the MI Choice chapter of the Medicaid Provider Manual available online at: http://www.mdch.state.mi.us/dchmedicaid/manuals/MedicaidProviderManual.pdf

b) Participants must be informed of the following:

(1) Services available in MI Choice, PACE, and nursing facilities. Participants or their legal representative must sign the freedom of choice form to indicate their preference for MI Choice. Waiver agencies maintain properly completed, signed, and dated forms in the participant's case record.

(2) The consent to receive MI Choice services remains in effect as long as the participant's case is open or until revoked by the participant or by a relative or other legally responsible adult only when the participant is determined legally incompetent or is physically unable.

(3) Services available through the Medicaid State Plan which may meet their needs. Examples include the Home Help

Services program available through the Department of Human Services (DHS). Persons who qualify for the Home Help program and for whom this program will fully meet their services and support needs do not qualify for the MI Choice program because they do not have the need for a waiver service.

MI Choice Program Operating Criteria, FY 2015
Attachment K, pages 16-17
(Emphasis added)

Requirements

* * *

6. Waiver agencies enroll applicants the waiver agency determines eligible for MI Choice services, who consent to participate in MI Choice, and for whom the other community-based services, such as the Home Help Services program will not fully meet the service and support needs of the applicant.

MI Choice Program Operating Criteria, FY 2015
Attachment K, pages 26-27
(Emphasis added)

E. USE OF OTHER PAID SERVICES

Before authorizing MI Choice services for a participant, the waiver agency must take full advantage of services and supports in the community that are available to the participant and paid for by other fund sources, including third party reimbursements and the Medicaid State Plan services. MI Choice funding is the payment source of last resort. Two exceptions are Physical Disability Services (PDS) funds and OSA in-home services funds. These are extremely limited fund sources and would be quickly exhausted if used for MI Choice participants. (Note: An executive order cut PDS funds from the FY 2010 budget. MDCH does not expect the Governor to reinstate these funds for FY 2014.)

MI Choice Program Operating Criteria, FY 2015
Attachment K, page 48
(Emphasis added)

Here, on [redacted], Petitioner was placed on the MI Choice wait list. Petitioner's Hearing Summary states that on [redacted] Petitioner was contacted to update information and was informed that Petitioner was on the HHG (HHS), and informed that an appeal of the HHG was necessary "as applicant cannot have both programs at the same time." Testimony from the Respondent was that Petitioner was told verbally and in writing what the process was to obtain the appeal to submit the Respondent as Petitioner could not have both MI Choice and HHS. At the same time, the Respondent's witness testified that Petitioner could have both programs. However, the Respondent did not submit as evidence the purported notice, nor could the Respondent cite the policy and procedure that lays out the appeal process which the Respondent alleges Petitioner failed to pursue trigger the negative action herein.

Petitioner's representative argues that he did what he was instructed to do, and, had a conference hearing with Petitioner's caseworker and supervisor, and was instructed that Petitioner could not receive any more hours for the HHS program. However, Petitioner subsequently received notice that she would be taken off the wait list for failing to pursue the appeal, and, that she can reapply. The current wait list is one year, which would make her wait from [redacted] to approximately [redacted]—over 2 years.

It appears from the MPM cited above that and individual might have both community based programs, but cannot have duplicate services. As such, the CMH should have assessed Petitioner for services as argued for by Petitioner, as Petitioner argues that the HHS grant does not provide enough and does not provide the same kinds of services that Petitioner is in need of that the MI Choice Waiver program can provide.

Here, the Respondent gave contradictory evidence with regard to the notice, the purported policy, and the testimony—on the one hand, the denial stated that Petitioner cannot have both programs; at hearing, Respondent's witness testified that Petitioner can have both programs. In addition, the Respondent indicated that it removed Petitioner from the wait list on the grounds that Petitioner failed to appeal. However the Respondent failed to submit the notice it claimed that was mailed to Petitioner giving Petitioner information as to the procedure to file an appeal. Petitioner's testimony regarding a conference meeting or hearing with the case worker and the caseworker's supervisor was credible. The Respondent could not rebut the presumption that Petitioner in fact followed Respondent's instructions as Respondent did not and could not procedure evidence of written notice giving instructions that were contrary to Petitioner actions.

Petitioner has met her burden of proof. The burden then shifts to Respondent to bring forth sufficient evidence to support its position that it acted correctly. Respondent failed to submit the applicable policy, and, gave contradictory testimony. Under these facts, the general rules of evidence require that the action here cannot be upheld as it is not supported by credible and substantial evidence.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency improperly removed Petitioner's name from MI Choice Waiver wait list.

IT IS THEREFORE ORDERED that:

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

Within 10 days of the issuance of this Decision and Order, the Waiver Agency must certify that it has placed Petitioner's name back on the MI Choice wait list with the initial date of [redacted].

JS/cg

Janice Spodarek
Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

NOTICE OF APPEAL: A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; Attention: MAHS Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30763
Lansing, Michigan 48909-8139

Petitioner [redacted]

DHHS -Dept Contact [redacted]

DHHS -Dept Contact [redacted]

Authorized Hearing Rep. [redacted]

Community Health Rep [redacted]