



GRETCHEN WHITMER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS  
DIRECTOR

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Date Mailed: February 11, 2020  
MOAHR Docket No.: 19-012211  
Agency No.: ██████████  
Petitioner: ██████████

**ADMINISTRATIVE LAW JUDGE: Colleen Lack**

**DECISION AND ORDER**

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 *et seq*; 42 CFR 438.400 *et seq*; and Mich Admin Code, R 792.11002.

After due notice, a hearing was held on January 15, 2020. ██████████, sister and Authorized Hearing Representative (AHR), appeared on behalf of the Petitioner. Alex Faber, Intake and Wait List Management Supervisor, appeared on behalf of the Respondent, Area Agency on Aging 1-B ("Waiver Agency" or "AAA 1-B"). Peter Chona, Bromberg & Associates, LLC was present to provide interpretation services.

During the hearing proceedings, the Waiver Agency's Hearing Summary packet was admitted as Exhibit A, pp. 1-18.

**ISSUE**

Did the Respondent properly place Petitioner 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. Respondent is a contract agent of the Michigan Department of Health and Human Services and is responsible for waiver eligibility determinations and the provision of MI Choice waiver services in its service area.
2. On October 11, 2019, Respondent received a referral for Petitioner for the MI Choice Waiver Program and a telephone intake screening was completed. (Exhibit A, pp. 2 and 9-17; Intake and Wait List Management Supervisor Testimony)

3. During that screening, Petitioner scored as Level C and was found to be potentially eligible for the waiver program. (Exhibit A, p. 15)
4. There is currently a waiting list for the MI Choice Wavier program. (Exhibit A, p. 2; Intake and Wait List Management Supervisor Testimony)
5. Petitioner was placed on the waiting list in chronological order because he did not meet the criteria for any of the three priority categories. (Intake and Wait List Management Supervisor Testimony)
6. On October 11, 2019, the Waiver Agency sent Petitioner written notice that he had been placed on the waiting list in chronological order. (Exhibit A, p. 8)
7. On November 22, 2019, the Michigan Office of Administrative Hearings and Rules (MOAHR) received the Request for Hearing filed in this matter. (Exhibit A, p. 4)

### **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.

Petitioner 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 Department. Regional agencies, in this case Respondent, 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 Medicaid Provider Manual (MPM) outlines the approved evaluation policy and the MI Choice waiting list policy:

### **3.2 MI CHOICE INTAKE GUIDELINES**

The MI Choice Intake Guidelines 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 MI Choice Intake Guidelines does not, in itself, establish program eligibility. A properly completed MI Choice Intake Guidelines 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. Individuals who score as Level C, Level D, Level D1 or Level E are those applicants determined potentially eligible for program enrollment and will be placed on the MI Choice waiting list. The date of the MI Choice Intake Guidelines contact establishes the chronological placement of the applicant on the waiting list. The MI Choice Intake Guidelines may be found on the MDHHS website. (Refer to the Directory Appendix for website information.)

When the waiver agency is at capacity, applicants requesting enrollment in MI Choice must either be screened by telephone or in person using the MI Choice Intake Guidelines at the time of their request for proper placement on the waiting list. If a caller is seeking services for another individual, the waiver agency shall either contact the applicant for whom services are being requested or complete the MI Choice Intake Guidelines 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 (introductory interview) shall be considered the same as conducting a MI Choice Intake Guidelines, so long as the functional objectives of the MI Choice Intake Guidelines are met. (Refer to the Waiting Lists subsection for additional

information.) Specifically, the introductory meeting 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 MI Choice Intake Guidelines 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 MI Choice Intake Guidelines 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 MI Choice Intake Guidelines or a face-to-face evaluation.

When an applicant appears to be functionally eligible based on the MI Choice Intake Guidelines 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 MI Choice Intake Guidelines is the only recognized tool accepted for telephonic screening of MI Choice applicants and is only accessible to MI Choice waiver agencies. It is not intended to be used for any other purpose within the MI Choice program, nor any other Medicaid program. MI Choice waiver agencies must collect MI Choice Intake Guidelines data electronically using software through the MDHHS contracted vendor.

### **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.

Waiver agencies are allocated a specific number of slots each fiscal year based upon legislative appropriation and must manage enrollments within that allocation.

### **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, October 1, 2019, version  
MI Choice Waiver Chapter, pages 6-7  
(Underline added by ALJ)

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 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 MDHHS. 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 MDHHS. A final approval of a diversion request is made by MDHHS.

#### **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 MI Choice Intake Guidelines completion or initial nursing facility introductory meeting.

*MPM, October 1, 2019, version  
MI Choice Waiver Chapter, pages 8-9*

Here, the Intake and Wait List Management Supervisor indicated 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. Accordingly, when Petitioner was determined to be potentially eligible for the program from the telephone intake screening, based on his score as Level C, he was placed on the waiting list. Moreover, there is no evidence that Petitioner qualified for a higher priority level, given the information provided during the intake screening. (Exhibit A, pp. 2 and 9-17; Intake and Wait List Management Supervisor Testimony)

Petitioner's sister did not dispute the information recorded during the intake screening and relied upon by the Waiver Agency. Petitioner's sister indicated that Petitioner only has Medicare coverage and asked if Petitioner will qualify for Medicaid. (Sister Testimony)

The Intake and Wait List Management Supervisor explained that the Michigan Department of Health and Human Services (MDHHS) determines eligibility for Medicaid. (Intake and Wait List Management Supervisor Testimony) A Medicaid application can be filed for Petitioner with MDHHS at any time. As discussed, when Petitioner's place comes up on the waiting list for the MI Choice Waiver program, Petitioner will be further assessed for the MI Choice Waiver program. The Medicaid/financial eligibility aspect of that determination regarding the MI Choice Waiver program will be made by MDHHS.

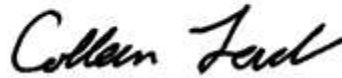
The evidence confirms that MI Choice Waiver services were not denied for Petitioner. Rather, Petitioner was determined to be potentially eligible for the program. Petitioner was placed on the waiting list because the program is at capacity. The evidence establishes that the Waiver Agency properly placed Petitioner on the waiting list pursuant to the Department's policy and the information provided at that time.

**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 Petitioner on its waiting list based on available information at that time.

**IT IS THEREFORE ORDERED** that

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



CL/dh

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**Colleen Lack**  
Administrative Law Judge  
for Robert Gordon, 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 Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR 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. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

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

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

**DHHS Department Rep.**

Heather Hill  
400 S. Pine 5th Floor  
Lansing, MI 48933

**DHHS -Dept Contact**

Brian Barrie  
CCC 7th Floor  
Lansing, MI 48919

**DHHS -Dept Contact**

Elizabeth Gallagher  
400 S. Pine 5th Floor  
Lansing, MI 48909

**Petitioner**

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**Authorized Hearing Rep.**

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**Community Health Rep**

Lori Smith  
Area Agency on Aging 1B  
29100 Northwestern Hwy Ste 400  
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