



GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

[REDACTED]
MI [REDACTED]

Date Mailed: June 9, 2020
MOAHR Docket No.: 20-001978
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Robert J. Meade

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9, 42 CFR 431.200 *et seq.* and 42 CFR 438.400 *et seq.* upon Petitioner's request for a hearing.

After due notice, a hearing was held on May 27, 2020. Petitioner appeared and testified on his own behalf. [REDACTED] Petitioner's father, appeared as a witness for Petitioner.

Gail Wejrowski, RN, Clinical Director, appeared and testified on behalf of the Department's waiver agency, The Senior Alliance. (Waiver Agency or Senior Alliance). Kelly Faber, Chief Clinical Officer and Patricia Burns, Supports Coordinator appeared as witnesses for the Waiver Agency.

ISSUE

Did the Waiver Agency properly deny Petitioner's application for services due to a violation of MI Choice Participant Responsibilities?

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 Michigan Department of Health and Human Services (MDHHS or Department) contracts with the Waiver Agency to provide MI Choice Waiver services to eligible beneficiaries. (Exhibit A; Testimony)
2. The Waiver Agency must implement the MI Choice Waiver program in accordance with Michigan's waiver agreement, Department policy and its contract with the Department. (Exhibit A; Testimony)
3. Petitioner is a Medicaid beneficiary who previously received services through the Waiver Agency. (Exhibit A, p 1; Testimony)

4. Petitioner's case was closed on January 17, 2017 due to Petitioner and his father violating Waiver Agency policies regarding behavior towards staff. (Exhibit A, pp 10-11; Testimony)
5. Petitioner appealed the 2017 case closure, but the closure was upheld following an administrative hearing. (Exhibit A, pp 1-9; Testimony)
6. Petitioner then requested a rehearing or reconsideration, which was denied on February 23, 2017. (Exhibit A, pp 12-13)
7. The Waiver Agency provides to all participants in the program a copy of the MI Choice Waiver Participant Handbook, which outlines the participant's responsibilities within the Waiver Agency. (Exhibit A, pp 16-34; Testimony)
8. On January 17, 2020, Petitioner's father contacted the Waiver Agency seeking to re-enroll Petitioner in the program. During the screening process, Petitioner's father became short tempered and raised his voice, which made the screener uncomfortable. After this incident and considering Petitioner's previous case closure for failure to follow policies found in the Participant Handbook, the Waiver Agency informed Petitioner's father that Petitioner would not be re-enrolled in the program. (Exhibit A, p 15; Testimony)
9. On January 17, 2020, the Waiver Agency sent Petitioner an Adequate Action Notice indicating that Petitioner would not be enrolled in the program due to Petitioner's father's behavior during the screening call and past failures of both Petitioner and his father to comply with the provisions of the MI Choice Patient Responsibilities handbook. (Exhibit A, p 15; Testimony)
10. On March 17, 2020, the Michigan Office of Administrative Hearings and Rules received Petitioner's request for hearing. (Exhibits 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 (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.

This Petitioner has been receiving 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 Health and Human

Services (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)*

Medicaid policy in Michigan is contained in the Medicaid Provider Manual (MPM). With regard to the MI Choice Waiver program, the MPM provides, in part:

SECTION 1 - GENERAL INFORMATION

MI Choice is a waiver program operated by the Michigan Department of Health and Human Services (MDHHS) to deliver home and community-based services to elderly persons and persons with physical disabilities who meet the Michigan nursing facility level of care criteria that supports required long-term care (as opposed to rehabilitative or limited term stay) provided in a nursing facility. The waiver is approved by the Centers for Medicare & Medicaid Services (CMS) under section 1915(c) and section 1915(b) of the Social Security Act. MDHHS carries out its waiver obligations through a network of enrolled providers that operate as Prepaid Ambulatory Health Plans (PAHPs). These entities are commonly referred to as waiver agencies. MDHHS and its waiver agencies must abide by the terms and conditions set forth in the waiver.

MI Choice services are available to qualified participants throughout the state, and all provisions of the program are available to each qualified participant unless otherwise noted in this policy and approved by CMS. MDHHS will not enact any provision to the MI Choice program that prohibits or inhibits a participant's access to a person-centered plan of service, discourages participant direction of services, interferes with a participant's right to have grievances and complaints heard, or endangers the health and welfare of a participant. The program must monitor and actively seek to improve the quality of services delivered to participants.

Safeguards are utilized to ensure the integrity of payments for waiver services and the adequacy of systems to maintain compliance with federal requirements.

Waiver agencies are required to provide oral and written assistance to all Limited English Proficient applicants and participants. Agencies must arrange for translated materials to be accessible or make such information available orally through bi-lingual staff or through the use of interpreters.

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 requires at least two waiver services, one of which must be Supports Coordination, 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.

*Medicaid Provider Manual
MI Choice Waiver Chapter
January 1, 2020, pp 1-2*

The Waiver Agency provides to all participants in the program a copy of the MI Choice Waiver Participant Handbook. Page 8 of the handbook is titled, “Your Responsibilities” and indicates, among other things that participants are required to:

- Choose the services and supports included in your plan, help develop that plan, and know and follow what is in that plan.
- Tell your supports coordinator about changes in what you need.

- Tell your supports coordinator about other services and supports you may have.
- Tell your supports coordinator about any other insurance you have.
- Know the information in this handbook.
- Ask questions or let us know when you do not understand something.
- Be available so that you can receive your services.
- Let us know as soon as possible when you will not be available to receive a service.
- Keep valuable things such as keepsakes, money, credit cards, jewelry, and guns or other weapons in a safe place.
- Tell your supports coordinator when you are concerned about your workers.
- Make sure your home is safe and non-threatening for people who are helping you. This includes:
 - Being respectful to workers who come into your home.
 - Not verbally or physically abusing the people trying to help you.
 - Not using profane or offensive language toward the people who are trying to help you.
 - Keeping pets outside or otherwise secure so that your worker can give you the services and supports you need.
 - Being a responsible gun or weapon owner. This means that all weapons will not pose a threat, intended or unintended, real or implied, to the people helping you.
 - Making sure there are no illegal or illicit activities happening in your home. Some of the people who come to your home will have to report these things to Adult Protective Services.

(Exhibit A, p 24)

The Waiver Agency's witnesses testified that it was decided that Petitioner would not be enrolled in the program based on the past incidents that led to Petitioner's termination

from the program in 2017 as well as the behavior of Petitioner's father during the screening call in January 2020.

Petitioner testified that he is a quadriplegic and spends all day in bed. Petitioner took issue with the complaints from 2017 and indicated that he never threatened anyone and certainly never threatened to shoot anyone. Petitioner questioned how he could even carry out such a threat given that he has no use of his arms or legs. Petitioner then reviewed each of the incidents he had with each staff member back in 2017. Petitioner testified that the first worker was let go because she was not hygienic. Another worker was let go because while he generously allowed the worker to go pick up her daughter during her work hours, the worker started to take advantage of the situation by returning later and later. Petitioner indicated that another worker was let go because she appeared to be a meth addict; she was shaking so much. Petitioner testified that another worker was let go because she had a medical condition that caused her to sweat profusely and she would always have to leave the home to get fresh air right in the middle of providing care to him. Petitioner testified that the last worker they let go was about [REDACTED] years old and left one day while cleaning Petitioner after a bowel movement and never came back. Petitioner did admit that he referred to some of the workers as "African mother-f***ers" and he indicated that he hoped the Waiver Agency would accept his apology.

Petitioner's father testified that when he and his son had issues with caregivers, he thought that it was best to report the issues to the staffing company as opposed to the Waiver Agency so that the company could fix the issues. Petitioner's father indicated that the company was owned by an African couple and the couple appealed to the fact that Petitioner and his father are African-American in order to prevent them from contacting the Waiver Agency. Petitioner's father testified that they have learned their lesson and that if there are issues with caregivers in the future, they will report those issues directly to the Waiver Agency. Petitioner's father testified that when they finally told the company they were going to report the issues to the Waiver Agency, the company called the Waiver Agency first and made up all of these complaints about them.

Petitioner's father testified that Petitioner has now gone without care for over three years because of this incident and he needs the help. Petitioner's father indicated that it's wrong that Petitioner has had to suffer for three years for something he did not do. Petitioner's father testified that no one has been hurt in this situation besides Petitioner. Petitioner's father also mentioned the one caregiver they let leave each day to pick up her daughter even though she was supposed to be caring for Petitioner. Petitioner's father testified that they were nice to this caregiver and then she turned around and made false accusations against them.

Regarding the call to the Waiver Agency in January 2020 to re-enroll Petitioner, Petitioner's father indicated that he was in the hospital with Petitioner at the time, it was noisy, and his phone did not have the best connection. Petitioner's father testified that all he did was ask the Waiver Agency worker to repeat herself because he was having difficulty hearing her. Petitioner's father indicated that maybe it is something with his

voice, but he was not being mean, and he said nothing offensive during the call. Petitioner's father testified that he did not use foul language and the worker judged him by his voice, which was unfair.

Petitioner bears the burden of proving, by a preponderance of the evidence that the Waiver Agency erred in denying his services. Based on the evidence presented, Petitioner has failed to meet that burden. Here, the incidents that led to Petitioner's termination from the Waiver Agency in 2017 are not really at issue. Petitioner appealed that denial back in 2017 and the administrative law judge found that the complaints against Petitioner and his father were credible. The administrative law judge's decision was also upheld by a supervising administrative law judge following Petitioner's request for a rehearing or reconsideration. The undersigned administrative law judge cannot disturb that ruling some three years later based solely on the testimony of Petitioner and his father. Therefore, if the undersigned accepts as true the incidents that led to Petitioner's termination from the program in 2017, the Waiver Agency's actions in 2020 are reasonable. It was reasonable for the Waiver Agency representative to be guarded when speaking to Petitioner's father in January 2020 and it was reasonable for the representative to feel threatened and offended by Petitioner's father tone and demeanor on the phone. The Waiver Agency representative also reasonably reported the incident to her manager, who reviewed the entire history of Petitioner's case and reasonably decided to deny Petitioner's enrollment in the program. Based on the evidence in this record, the denial of Petitioner's services was proper.

While Petitioner may not be able to enroll for services through the Waiver Agency at this time, there are other services available to meet Petitioner's needs, such as services through the MDHHS Adult Home Help program and possibly Community Living Supports through Petitioner's local Community Mental Health Authority. During the instant hearing, Petitioner and his father seemed apologetic, reasonably calm and understanding of what led to the initial termination of Waiver services. Hopefully, the parties will someday be able to reconcile, and Petitioner will be able to receive services through the Waiver Agency at some point in the future.

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 Petitioner's services due to violations of MI Choice Participant Responsibilities.

IT IS THEREFORE ORDERED that:

The Waiver Agency's decision is AFFIRMED.



RM/sb

Robert J. Meade
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
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DHHS -Dept Contact

Brian Barrie
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DHHS -Dept Contact

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Community Health Rep

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Petitioner

[REDACTED]
MI