

GRETCHEN WHITMER
GOVERNOR

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

ORLENE HAWKS
DIRECTOR

[REDACTED]
[REDACTED]
[REDACTED] MI [REDACTED]

Date Mailed: July 22, 2020
MOAHR Docket No.: 20-003792
Agency No.: [REDACTED]
Petitioner: [REDACTED]

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 July 15, 2020. [REDACTED], Daughter and Authorized Hearing Representative (AHR), represented the Petitioner. [REDACTED], the Petitioner, was present. Jessica Rottmann, Intake and Wait List Supervisor, appeared on behalf of the Respondent, Area Agency on Aging 1-B ("Waiver Agency" or "AAA 1-B").

During the hearing proceedings, the Waiver Agency's Hearing Summary packet was admitted as Exhibit A, pp. 1-22.

ISSUE

Did the Waiver Agency properly determine that Petitioner was not eligible for MI Choice Waiver services because the Petitioner did not meet the MI Choice Intake Guidelines (MIG) criteria?

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 April 24, 2020, Respondent received a referral for Petitioner for the MI Choice Waiver Program and the MIG, a telephone intake screening, was completed.

(Exhibit A, pp. 2 and 14-22; Intake and Wait List Supervisor Testimony)

3. During that screening, Petitioner scored as Level B and was not found to be potentially eligible for the waiver program. (Exhibit A, p. 20)
4. On April 24, 2020, an Adequate Action Notice was issued to Petitioner indicating she was not eligible for the MI Choice Waiver program based on the MIG. (Exhibit A, p. 13)
5. On June 16, 2020, the Michigan Office of Administrative Hearings and Rules (MOAHR) received the Request for Hearing filed in this matter. (Hearing Request with attachments)

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, April 1, 2020, 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, April 1, 2020, version
MI Choice Waiver Chapter, pages 8-9*

In this case, Petitioner's daughter provided the responses for the April 24, 2020, MIG. Petitioner was scored as Level B based on the recorded responses. Accordingly, the Waiver Agency determined that Petitioner did not meet the MIG criteria. (Exhibit A, pp. 14-22; Intake and Wait List Supervisor Testimony) Under the above cited MPM policy, individuals who score as Level C, Level D, Level D1 or Level E are those applicants determined potentially eligible for program enrollment. Therefore, on April 24, 2020, written notice was issued to Petitioner indicating she was not eligible for the MI Choice Waiver program based on the MIG. (Exhibit A, p. 13)

Petitioner's Daughter indicated some of the responses provided for the telephone screening were not recorded accurately. For example, regarding questions 3 and 5 more assistance was needed than just supervision. (Exhibit A, pp. 14-22; Daughter Testimony) The individual with the Waiver Agency that completed the April 24, 2020, MIG with Petitioner's daughter was not present during the hearing proceeding to address the accuracy of the recorded responses.

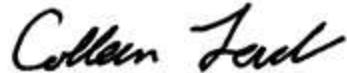
The evidence supports the Waiver Agency's determination that Petitioner was not potentially eligible for MI Choice Waiver services based on the recorded responses for the April 24, 2020, MIG. However, Petitioner's daughter testified that some of her responses for that screening were not recorded accurately. It is unknown whether changing the responses for the identified questions would have resulted in Petitioner receiving a different score on the MIG. Accordingly, the April 24, 2020, determination that Petitioner was not eligible for MI Choice Waiver services because the Petitioner did not meet the MIG criteria cannot be upheld based upon the available information. A new screening is needed to determine Petitioner's potential eligibility for the MI Choice Waiver program.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency did not properly determine Petitioner's potential eligibility for the MI Choice Waiver program utilizing MI Choice Intake Guidelines (MIG) criteria based on the available information.

IT IS THEREFORE ORDERED that:

The Waiver Agency's decision is **REVERSED**. If they have not already done so, the Waiver Agency shall initiate re-screening Petitioner utilizing the MIG.



Colleen Lack

Administrative Law Judge
for Robert Gordon, Director
Department of Health and Human Services

CL/dh

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
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Lansing, MI 48909

Authorized Hearing Rep.

[REDACTED]
[REDACTED]
[REDACTED] MI [REDACTED]

Petitioner

[REDACTED]
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Community Health Rep

Lori Smith
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