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[redacted] **MI** [redacted]

Date Mailed: December 18, 2020
MOAHR Docket No.: 20-006905
Agency No.: [redacted]
Petitioner: [redacted]

ADMINISTRATIVE LAW JUDGE: Corey Arendt

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 December 16, 2020. [redacted], Petitioner's Authorized Hearing Representative, appeared and testified on Petitioner's behalf.

Jessica Rottmann, Intake and Waitlist Supervisor appeared and testified on behalf of the Respondent, Area Agency on Aging 1-B (Department).

ISSUE

Did the Waiver Agency 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. The Michigan Department of Health and Human Services (DHHS) contracts with Waiver Agencies to provide MI Choice Waiver services to eligible beneficiaries. The Department is one of those Waiver Agencies. (Exhibit A; Testimony.)

2. Waiver Agencies must implement the MI Choice Waiver program in accordance with Michigan's waiver agreement, MDHHS policy, and its contract with the MDHHS. (Exhibit A; Testimony.)

3. On October 27, 2020, Petitioner' AHR contacted the Department and requested Wavier Services. (Exhibit A; Testimony.)

4. On October 27, 2020, an Intake Specialist from the Department conducted a telephone screen with Petitioner's AHR, which showed that Petitioner was eligible for assessment for the MI Choice Waiver Program at a Level C. However, because the Program was at capacity, Petitioner was not assessed and was placed on the waiting list. (Exhibit A; Testimony.)

5. On October 27, 2020, the Department notified Petitioner both verbally and via an Adequate Action Notice that the MI Choice Waiver Program was at program capacity, but that Petitioner had been placed on the Waiver Enrollment Waiting List. (Exhibit A; Testimony.)

6. On November 13, 2020, Petitioner's request for hearing was received by the Michigan Office of Administrative Hearings and Rules. (Exhibit A; Testimony.)

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 is claiming 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)*.

A Telephone Intake Guidelines screening for the MI Choice Waiver program was completed by the Department's Intake Specialist and it was determined that Petitioner passed the Telephone Intake Guidelines screening, so Petitioner was then placed on the MI Choice Waiver wait list and Petitioner was sent an adequate action notice, i.e., a capacity notice, informing the Petitioner that she was placed on the wait list.

The Medicaid Provider Manual, MI Choice Waiver Chapter 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.

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 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.[1]

The Department witness testified that the MI Choice Waiver Program is at capacity for MI Choice Waiver enrollees. The Waiver Agency witness said that from the telephone intake it appeared that Petitioner was eligible for assessment for the MI Choice Waiver Program, but that Petitioner was placed on the waiting list because the Program was at capacity. The Waiver Agency witness indicated that the Waiver Agency maintains a waiting list and contacts individuals on the list on a priority and first come, first serve basis when sufficient resources become available to serve additional individuals. The witness went on to indicate that at the time of the intake screening, Petitioner did not score as an imminent risk and that at no point in time was an imminent risk assessment requested.

Petitioner's AHR argued the Petitioner was an imminent risk and has been ever since he relocated from Florida. However, the AHR did not specifically identify questions in the intake assessment that they disagreed with or were felt were incorrect. The AHR also did not indicate they had requested an imminent risk assessment.

The Department and this Administrative Law Judge are bound by the MI Choice Program policy. In addition, this Administrative Law Judge possesses no equitable

[1] Medicaid Provider Manual, MI Choice Waiver Chapter, July 1, 2020, pp 5-8.

jurisdiction to grant exceptions to Medicaid, Department, and MI Choice Program policy. The Department provided sufficient evidence that it implemented the MI Choice waiting list procedure in accordance with MDHHS policy; therefore, its actions were proper.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Department properly denied assessment of Petitioner and placed Petitioner on the waiting list.

IT IS THEREFORE ORDERED that:

The Department's decision is AFFIRMED.

CA/dh

Corey Arendt
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
Petitioner	[redacted] [redacted] [redacted] MI [redacted]
DHHS -Dept Contact	Elizabeth Gallagher 400 S. Pine 5th Floor Lansing, MI 48909
Community Health Rep	Lori Smith Area Agency on Aging 1B 29100 Northwestern Hwy Ste 400 Southfield, MI 48034
Authorized Hearing Rep.	[redacted] [redacted] [redacted] MI [redacted]