

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: April 12, 2021
MOAHR Docket No.: 21-000852
Agency No.: [REDACTED]
Petitioner: [REDACTED]

ADMINISTRATIVE LAW JUDGE: Steven Kibit

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.*, and upon Petitioner's request for a hearing.

After due notice, a telephone hearing was held on March 31, 2021. Petitioner appeared and testified on her own behalf. [REDACTED], registered nurse, and [REDACTED] [REDACTED], social worker, also testified as witnesses for Petitioner. Krystn Hartner, Intake and Waitlist Supervisor, appeared and testified on behalf of the Respondent Area Agency on Aging 1-B.

During the hearing, the following exhibits were entered into the record:

- Exhibit A: Request for Hearing
- Exhibit B: Adequate Notice of MI Choice Waitlist Removal
- Exhibit C: Compass Screening
- Exhibit D: Progress Notes

ISSUE

Did Respondent properly remove Petitioner from its waitlist?

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 MDHHS and is responsible for waiver eligibility determinations and the provision of MI Choice waiver services in its service area.

2. On May 13, 2020, Petitioner applied for waiver services through Respondent and a telephone intake was completed. (Exhibit C, pages 1-8).
3. During the intake assessment, Petitioner was determined to be potentially functionally eligible for the waiver program after being scored as a Level D. (Exhibit C, pages 1-8).
4. However, while found to be potentially functionally eligible, Petitioner was placed on a waiting list due to a lack of available slots in the program. (Testimony of Respondent's representative).
5. Petitioner also did not have active Medicaid at that time and Respondent was to work with Petitioner in applying for it so she would be eligible for the waiver program. (Testimony of Respondent's representative).
6. Respondent attempted to contact Petitioner via telephone at different times of the day on October 9, 2020, October 14, 2020, and October 15, 2020. (Exhibit D, page 1; Testimony of Respondent's representative).
7. However, Petitioner did not answer those telephone calls or subsequently return any messages left for her. (Exhibit D, page 1; Testimony of Respondent's representative).
8. On October 29, 2020, Respondent sent Petitioner a letter asking her to contact Respondent within twelve days and notifying her that, if she failed to do so, Respondent would remove her from the waitlist. (Exhibit D, page 1; Testimony of Respondent's representative).
9. Petitioner did not contact Respondent within twelve days of the letter. (Testimony of Respondent's representative).
10. On November 19, 2020, Respondent sent Petitioner an Adequate Notice of MI Choice Waitlist Removal. (Exhibit B, page 1).
11. In that notice, Respondent advised Petitioner that it was removing her from its waitlist because it has been unable to contact her. (Exhibit B, page 1).
12. On March 1, 2021, the Michigan Office of Administrative Hearings and Rules (MOAHR) received the request for hearing filed by Petitioner in this matter with respect to Respondent's decision. (Exhibit A, pages 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. 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 applied for 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 to the Michigan Department of Health and Human Services. 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)

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). See 42 CFR 430.25(c)(2).

Types of services that may be offered through the waiver program include:

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)

The Medicaid Provider Manual (MPM) outlines the governing policy for the MI Choice Waiver program and, with respect to waitlists, the applicable version of the MPM states in part:

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 MI Choice waiting list. The waiting list 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.

Each waiver agency must follow these waiting list removal guidelines when removing an applicant from the MI Choice waiting list. *A MI Choice waiver agency may remove an applicant from the MI Choice waiting list if the applicant:*

- Enrolled in MI Choice;
- Enrolled in another community-based service or program;
- Was admitted to a nursing facility and is no longer interested in MI Choice;
- Is deceased;
- Moved out of state;
- Is not eligible for MI Choice;
- Is no longer interested in or refuses MI Choice enrollment; or

- *Is unable to be contacted by the waiver agency using all of the following methods:*
 - *The waiver agency called at least three times with a varied day of week and time of day.*
 - *If the waiver agency was able to leave a message, and the applicant did not return the call within 10 business days.*
 - *The waiver agency sent a letter to the applicant with a deadline to contact the waiver agency within 12 business days, and the applicant either did not respond or mail was returned.*

An Adequate Action Notice must be sent to the applicant no later than the date of removal from the MI Choice waiting list. MI Choice waiver agencies can obtain a template for the Adequate Action Notice on the MDHHS website. (Refer to the Directory Appendix for website information.)

*MPM, October 1, 2020 version
MI Choice Waiver Chapter, page 7
(italics added for emphasis)*

Here, as discussed above, Respondent removed Petitioner from its waitlist pursuant to the above policies.

In appealing that decision, Petitioner bears the burden of proving by a preponderance of the evidence that Respondent erred in removing Petitioner from its waitlist. Moreover, the undersigned Administrative Law Judge is limited to reviewing Respondent's decision in light of the information that was available at the time the decision was made.

Given the available information and applicable policies in this case, Petitioner has failed to meet her burden of proof and Respondent's decision must therefore be affirmed.

As provided in the MPM above, Respondent could remove Petitioner from its waiting list if Petitioner was unable to be contacted by Respondent calling at least three times, with the calls at a varied day of the week and time of day; Respondent leaving messages if possible and Petitioner not returning any messages within ten days; and Respondent sending a letter to Petitioner with a deadline to contact Respondent within twelve business days and Petitioner not responding. It also is undisputed in this case that Respondent complied with the applicable policies by attempting to contact Petitioner through all the methods detailed in the MPM, and that Petitioner never responded to those attempts. Moreover, while Petitioner offers a credible explanation for why she

failed to respond to Respondent's attempt to contact her, *i.e.*, that she was in-and-out of the hospital during that time period, the above policy does not identify any exceptions and, based on the information it had, Respondent acted properly.

To the extent Petitioner is still interested in waiver services, she can always reapply for such services. With respect to the decision in this case however, Respondent acted properly and its decision to remove Petitioner from its waitlist must be affirmed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that Respondent properly removed Petitioner from its waitlist.

IT IS THEREFORE ORDERED that:

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

SK/sb


Steven Kibit
Administrative Law Judge
for Elizabeth Hertel, 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
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DHHS -Dept Contact

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Elizabeth Gallagher
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Community Health Rep

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Petitioner

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