

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

P.O. Box 30763, Lansing, MI 48909
(877) 833-0870; Fax: (517) 334-9505

IN THE MATTER OF:

Docket No. 2012-43106 EDW

██████████
Appellant
_____ /

DECISION AND ORDER

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

After due notice, a hearing was held on ██████████. ██████████ Appellant's mother, appeared and testified on Appellant's behalf. Appellant and John Cowles, Appellant's father, also testified as witnesses. ██████████ Hearings Coordinator, represented the Northeast Michigan Community Service Agency - ██████████ on Aging ("Waiver Agency" or "AAA"). ██████████, Director of Business and Financial Services, also appeared as a witness for the Waiver Agency.

ISSUE

Did the Waiver Agency properly deny Appellant's request to employ Pam Page through the Self Determination 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. Appellant is a ██████ year-old woman who has been diagnosed with Multiple Sclerosis. Appellant is also bound to a wheelchair and has had incontinence in the past. (Exhibit 1, page 4).
2. AAA is a contract agent of the Michigan Department of Community Health (MDCH) and is responsible for waiver eligibility determinations and the provision of MI Choice waiver services.
3. On ██████████, Appellant was assessed and approved for entry into the MI Choice waiver program. (Exhibit 1, pages 3-6).
4. Appellant intended to employ Pam Page through the self determination option in the waiver program. (██████████)

Appellant).

5. As part of the employment application process, Page agreed to a criminal record check. (Exhibit 1, pages 29-30).
6. The background check revealed that Page had two felony convictions for the delivery/manufacture of controlled substances in ██████████ (Exhibit 1, page 31).
7. On ██████████ AAA sent Appellant a notice stating that it was denying her request to employ Page through the self determination program. (Exhibit 1, page 22).
8. On ██████████, the Michigan Administrative Hearings System (MAHS) received a Request for Hearing from Appellant with respect to the denial. In that request, Appellant asserted that she had employed Page in the past through DHS without incident and had been pleased with her work. Appellant also noted that Page's convictions occurred seventeen (17) years ago. (Exhibit 1, page 23).

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.

Appellant is claiming 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 Michigan Department of Community Health (Department). Regional agencies, in this case AAA, 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))

With respect to the employment of care providers, the Medicaid Provider Manual (MPM) states:

9.4 BACKGROUND CHECKS

Each waiver agency and direct provider of home-based services must conduct a criminal background review through the Michigan State Police for each paid staff or volunteer who will be entering a participant's residence. The waiver agency and direct provider shall have completed reference and background checks before authorizing an employee or volunteer to furnish services in a participant's residence. The scope of the investigation is statewide.

Both waiver agencies and MDCH conduct administrative monitoring reviews of providers annually to verify that mandatory criminal background checks have been conducted in compliance with operating standards.

(MPM, MI Choice Waiver Section
January 1, 2012, page 30)

The operating standards referenced in the MPM similarly provides, with respect to self determined service providers:

3. Reference and Background Checks

Each MI Choice participant, or fiscal intermediary chosen by the participant, must conduct a criminal background review through the Michigan State Police for each paid staff person who will be entering the participant's home. The MI Choice participant or fiscal intermediary shall conduct the background checks before authorizing the employee to furnish services in the participant's home.

(MDCH, Minimum Operating Standards for MI Choice Waiver Program Services,
Attachment H, October 1, 2011, page 9)

Additionally, the operating standards relating to self determination in particular also provide that, while a participant may choose any support worker who meets the provider requirements, the Waiver Agency can set policies for the types of criminal backgrounds that would preclude employment and the types that would not. (MDCH, Minimum Operating Standards for MI Choice Waiver Program Services, Attachment N, October 1, 2011, pages 6-7). Moreover, if "the waiver agent has specific policies regarding criminal

background, this can be part of the contract negotiating process.” (MDCH, Minimum Operating Standards for MI Choice Waiver Program Services, Attachment N, October 1, 2011, page 6).

The exhibits provided by AAA demonstrate that, pursuant to its contract with the Department, felonies related to the manufacture, distribution, prescription or dispensing of a controlled substance lead to a lifetime ban from working in the program. (Exhibit 1, pages 33-34). The Waiver Agency could have altered that policy, but it chose not to in the contract. (Exhibit 1, pages 33-34).

Here, it is undisputed that Page has two felony convictions for the delivery/manufacture of controlled substances. (Exhibit 1, page 31). There are no exceptions to the lifetime ban from working due to those convictions in the relevant policies and AAA chose not to make one as part of its contract, which was its right. Accordingly, the Waiver Agency properly denied Appellant’s request to employ Page.

Appellant argues that the convictions occurred long ago and that Page has previously provided her with services through DHS without incident. However, while this Administrative Law Judge appreciates Appellant’s argument, this ALJ does not have equitable jurisdiction and cannot overturn clear policy on the basis of purported fairness. Page is clearly banned from employment with the self determination program and the Waiver Agency’s decision must be sustained.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly denied Appellant’s request to employ Pam Page.

IT IS THEREFORE ORDERED that:

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

Steven J. Kibit
Administrative Law Judge
for Olga Dazzo, Director
Michigan Department of Community Health

**Docket No. 2012-43106 EDW
Decision and Order**

cc:



Date Mailed: 6-5-12

***** NOTICE *****

The Michigan Administrative Hearing System may order a rehearing on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. The Michigan Administrative Hearing System will not order a rehearing on the Department's motion where the final decision or rehearing cannot be implemented within 90 days of the filing of the original request. The Appellant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt of the rehearing decision.