

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF HEALTH AND HUMAN SERVICES**

P.O. Box 30763, Lansing, MI 48909
(517) 335-2484; Fax: (517) 373-4147

IN THE MATTER OF:

Docket No. 15-002397 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 Appellant's request for a hearing.

After due notice, a telephone hearing was held on ██████████ ██████████. Appellant appeared and testified on her own behalf. ██████████, Appellant's daughter, also testified as a witness for Appellant. ██████████, Hearings Coordinator, appeared and testified on behalf of the Michigan Department of Health and Human Services' Waiver Agency, ██████████ ██████████ ██████████ ██████████ ("Waiver Agency" or ██████████). ██████████, Appellant's Case Manager at ██████████, a registered nurse; and ██████████ the Associate Director at the ██████████ also testified as witnesses for Respondent.

ISSUE

Did the Waiver Agency properly deny Appellant's request to employ her daughter as her self-determination worker?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material and substantial evidence on the whole record, finds as material fact:

1. ██████████ 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. Appellant applied for waiver services through ██████████ and, on ██████████ ██████████ an initial assessment was performed. (Exhibit A, pages 19-21).
3. During that assessment, the Waiver Agency determined that Appellant was eligible for MI Choice waiver services and the parties discussed Appellant receiving services through the program's self-determination option, with her daughter as her self-determination worker. (Exhibit A, pages 19-21).

4. Subsequently, Appellant's daughter submitted an application to be a worker and the information required for a background check. (Exhibit A, page 18).
5. After receiving that application and information, the Waiver Agency conducted a criminal history screening and found that, on ██████████, ██████████, Appellant's daughter was found guilty of a misdemeanor violation of MCL 750.167(1)(l), Disorderly Person - Jostling. (Exhibit A, pages 3-9).
6. The Waiver Agency then advised Appellant and her daughter that Appellant's daughter had not passed the criminal background check and could not be Appellant's self-determination worker. (Exhibit A, page 17).
7. The Waiver Agency also sent Appellant written notice of its decision and Appellant's right to appeal that decision. (Exhibit A, page 17).
8. On ██████████, the Michigan Administrative Hearing System (MAHS) received the Request for Hearing filed in this matter regarding that denial. (Exhibit 1, page 1).

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.

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 Services to the Michigan Department of Health and Human Services. Regional agencies, in this case NEMCSA, 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.

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), and is reimbursable under the State Plan. 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 specific provision of services through the MI Choice program are governed by the Medicaid Provider Manual (MPM) and, in addition to the MPM itself, the Department also issues periodic Medical Services Administration (MSA) bulletins as updates of policy:

SECTION 1 – INTRODUCTION

The following documents comprise the Michigan Medicaid Provider Manual, and address all health insurance programs administered by the Michigan Department of Community Health (MDCH). MDCH also issues periodic bulletins as changes are implemented to the policies and/or processes described in the manual. An inventory of these bulletins is maintained in the Supplemental Bulletin List located on the

MDCH website. Bulletins are incorporated into the online version of the manual on a quarterly basis. (Refer to the Directory Appendix for website information.)

*MPM, January 1, 2015 version
Medical Provider Manual Overview, page 1*

Moreover, the MPM also refers to Minimum Operating Standards that define general and specific operating criteria for the MI Choice program:

4.5 OPERATING STANDARDS

MDCH maintains and publishes the "Minimum Operating Standards for MI Choice Waiver Program Services" (known as the Minimum Operating Standards) document. This document defines both general and specific operating criteria for the program. All waiver agencies and service providers are subject to the standards, definitions, limits, and procedures described therein.

For each service offered in MI Choice, the Minimum Operating Standards are used to set the minimum qualifications for all direct service providers, including required certifications, training, experience, supervision, and applicable service requirements. Billing codes and units are also defined in the document.

*MPM, January 1, 2015 version
MI Choice Waiver Chapter, page 25*

In this case, Appellant is appealing the Waiver Agency's decision to deny her request to employ her daughter as her self-determination worker. In doing so, Appellant bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred.

With respect to services providers through the self-determination option of the MI Choice program, the applicable section of the Minimum Operating Standards provide in part:

C. Self-Determined Service Providers

Participants choosing the self-determination option may directly manage service providers for the following home and community-based MI Choice waiver services; chore, community living supports, environmental accessibility adaptations, fiscal intermediary, goods and services, non-medical transportation, private duty nursing, respite services

provided inside the participant's home, and respite services provided in the home of another.

1. Supervision of Direct-Care Workers

The MI Choice participant, or designated representative, acts as the employer and provides direct supervision of the chosen home and community-based services direct care workers for designated self-determined services in the participant's plan of service. The participant, or designated representative, directly recruits, hires, and manages employees.

2. Use of a Fiscal Intermediary

MI Choice participants choosing the self-determination option must use an approved fiscal intermediary agency. The fiscal intermediary agency will help the individual manage and distribute funds contained in the participant's budget. The participant uses the funds in the budget to purchase waiver goods, supports, and services authorized in the participant's plan of services. Refer to the Fiscal Intermediary service standard for more information about this MI Choice service.

3. Reference and Criminal History Screening Checks

Each MI Choice participant, or fiscal intermediary chosen by the participant, must conduct reference checks and a criminal history screening 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 criminal history screening before authorizing the employee to furnish services in the participant's home.

*Minimum Operating Standards for
MI Choice Waiver Program Services
Attachment H, FY 2015
Page 9*

However, while the Minimum Operating Standards refer to a criminal history screening, they do not address what constitutes failing that screening and the Waiver Agency did not rely on that general policy. Instead, in determining that Appellant's daughter failed the criminal history screening and could not be a self-determination worker, the Waiver

Agency relies solely on the Medical Services Administration Bulletin (MSA) 14-31. Specifically, that bulletin states:

Bulletin Number: MSA 14-40

Distribution: Home Help Provider Agencies, MI Choice Waiver Agencies, Program of All-Inclusive Care for the Elderly (PACE) Programs, Prepaid Inpatient Health Plans (PIHPs), Integrated Care Organizations

Issued: September 2, 2014

Subject: Excludable Convictions for Medicaid Home Help Program Personal Care Service Providers

Effective: October 2, 2014

Programs Affected: Home Help

The Michigan Department of Community Health (MDCH) intends to utilize the authority extended to the state through 42 USC 1396t(k)(4) to meet the requirements under 42 CFR 441.570 to assure that "[n]ecessary safeguards have been taken to protect the health and welfare of enrollees." This bulletin extends the Medicaid provider criminal history screening and enrollment requirements to individuals who offer personal care services through the Medicaid Home Help program. Additionally, it augments the list of excludable convictions as outlined in Bulletin MSA 14-31 to include permissive exclusions as defined below. The screening requirements described in this bulletin are to apply to all providers of Medicaid Home Help personal care services. The requirements apply to both individual providers and to those providing services as an employee of a provider agency.

As used in this bulletin, "personal care services" include services provided to a Medicaid beneficiary to assist the beneficiary with completing their Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs)

while the beneficiary is in a home or community-based setting. ADLs include eating, bathing, dressing, toileting, transferring, mobility, walking, and personal hygiene. IADLs include financial management, shopping, telephone use, transportation, housekeeping, meal preparation, and managing medications.

Compliance Timeline: Beginning October 2, 2014, all new provider applicants must fully meet the provisions of this bulletin before being enrolled to provide services. Providers must be properly enrolled prior to being authorized, approved, or reimbursed to provide personal care services through the Medicaid Home Help program.

All currently enrolled providers must be fully compliant with the provisions of this policy by March 31, 2015. Screenings, updates, enrollments, and notifications to currently enrolled providers will be done on a timeline to be established by MDCH, but will be completed no later than the March 31, 2015 deadline.

Excludable Convictions: Excludable convictions fall into two general categories. Mandatory exclusions, as discussed in Bulletin MSA 14-31, are those set forth in the Social Security Act (42 USC 1320a-7[a]) and shown in the first bullet below. Permissive exclusions are allowed under part (b) of that section. The Act (42 USC 1396t[f][1][A]) states that "[n]othing in the Act shall be construed as preventing States from imposing requirements that are more stringent than the requirements published or developed by the Secretary." Finally, 42 CFR 441.570 requires the State to assure that "[n]ecessary safeguards have been taken to protect the health and welfare of enrollees." Permissive exclusions within the context of this policy are reflected in the second bullet and sub-bullets below. Based on these guidelines and subject to the Personal Choice and Acknowledgement of Provider provision, the Medicaid Home Help program shall not employ, independently contract with, or otherwise authorize or reimburse for services any individual who has direct access to or provides direct services to program participants if the individual has received a criminal history screening from MDCH that indicates one or more of the following:

* * *

Provider Application or Agreement: Any individual wishing to provide personal care services through the Medicaid Home Help program, including those providing such services as an employee of a provider agency, must submit a properly formatted and approved application or service agreement form to MDCH that:

- Provides notification that a criminal history screening will be performed on the applicant or provider;
- Identifies the general categories of convictions that will be screened;
- Provides adequate information as determined by MDCH to conduct such a screening;
- Notifies the applicant or provider that the results of the screening will be shared with the applicant, pertinent program participants, and pertinent program staff; and
- Is signed by the applicant or provider.

Providers are reminded that they must notify MDCH within 10 days of any change to their enrollment information. Failure to do so will result in termination of provider enrollment.

Notifications: MDCH will notify applicants or providers within 10 business days of an ineligible criminal history screening. The department will concurrently notify all affected program participants and Department of Human Services (DHS) staff of all criminal history information discovered through the screening process. The notice shall include a statement that the applicant or provider has a right to appeal the information relied upon by MDCH in making its decision regarding his or her employment eligibility based on the criminal history screening. The notice shall also include information describing the appellate procedures.

Placement in Provider Referral System: Names and contact information for all individuals successfully passing a criminal history screening will be placed in a provider referral system database administered and operated by MDCH. Individuals identified with an excludable conviction through the screening process CANNOT be placed in the provider referral database. Any individual in the provider referral database will have the option to:

- Update their personal and contact information;
- Indicate their work preferences or otherwise restrict their availability; and
- Indicate that they are not available for referrals to provide services to additional participants.

The database will be used to make referrals to Home Help program participants who are in need of personal care services. Providers are not required to accept service referrals made through the referral system. Similarly, program participants are not required to accept services from providers listed in any given referral. Providers serving through a personal choice selection as described below may not be placed in the provider referral database and cannot be given any additional participant referrals through that process.

Personal Choice and Acknowledgement of Provider

Selection: A participant receiving personal care services through the Medicaid Home Help program may select any family member or other individual to provide such services subject to the following restrictions:

- The provider does not have a disqualifying conviction that is one of the four Mandatory Exclusions under 42 USC 1320a-7.
- The provider is not legally responsible for the participant.
- The provider is capable of providing the required services and is otherwise qualified to do so.
- The provider has successfully undergone a criminal history screening conducted by MDCH and has received notification of a successful determination.

A participant may request to select a provider who has been determined ineligible as a result of a Permissive Exclusion identified through the criminal history screening process. The request must be submitted on a form specified by MDCH. The participant must provide a signed acknowledgement that indicates receipt of notification of the criminal offense(s) which prompted the exclusion and must indicate their selection of that provider to deliver services. The selection shall not be considered effective until the signed acknowledgement has been received, processed, and recorded by MDCH and communicated to DHS.

A personal choice selection may not be applied to the federally mandated exclusions that are described under 42 USC 1320a-7. A personal choice selection may be applied to permissive exclusions for the limited purpose of providing Home Help services to the specific individual identified in the request.

A personal choice selection through this section shall not be construed as approval, authorization or permission to provide services to other participants or through other programs. Providers selected through the personal choice provisions of this section will be registered in the Community Health Automated Medicaid Processing System (CHAMPS) and other systems for the purposes of monitoring, contacting, and generating payments, however, such individuals shall be prohibited from either being placed in the provider referral database or receiving referrals for additional clients through that process.

Reviews and Appeals: Individuals may request an administrative redetermination of the criminal history screening, but such a review is limited solely to the accuracy of the information used for the screening. Negative actions based on accurate criminal history are not subject to appeal, except as provided below. A review will not be granted to contest the merits of the court findings.

Providers who are authorized to furnish services for a program participant prior to the effective date of this policy may appeal a decision to terminate or deny their provider enrollment. Denial of provider enrollment due to a temporary enrollment moratorium is appealable, but the scope of review is limited to whether the temporary moratorium applies to the provider appealing the denial. The basis for imposing a temporary moratorium is not subject to review. After termination from the Medicaid program, the provider must contact MDCH to request re-enrollment as a Medicaid provider and reinstatement of billing privileges. Providers whose enrollment has been denied are not prohibited from submitting a request for subsequent re-enrollment.

However, given its clear language, while MSA 14-40 was to be distributed to MI Choice Waiver Agencies, it does not apply to service providers through the waiver program. For example, only “Home Help” is identified as a program affected by the bulletin. Similarly, the bulleting goes on to state that:

The screening requirements described in this bulletin are to apply to all providers of Medicaid Home Help personal care services.

* * *

Beginning October 2, 2014, all new provider applicants must fully meet the provisions of this bulletin before being enrolled to provide services. Providers must be properly enrolled prior to being authorized, approved, or reimbursed to provide personal care services through the Medicaid Home Help program.

* * *

Based on these guidelines and subject to the Personal Choice and Acknowledgement of Provider provision, the Medicaid Home Help program shall not employ, independently contract with, or otherwise authorize or reimburse for services any individual who has direct access to or provides direct services to program participants if the individual has received a criminal history screening from MDCH that indicates one or more of the following

Moreover, while a different bulleting addressing criminal screenings, MSA Bulletin 14-31, does apply to all personal care providers in Medicaid or Healthy Michigan programs, including the MI Choice Waiver Program, that bulleting only sets forth the mandatory exclusions found in the Social Security Act, 42 USC 1320a-7[a], and none of those exclusions apply in this case. There are four mandatory exclusion categories identified in MSA 14-31:

1. Any criminal convictions related to the delivery of an item or service under Medicare (Title XVIII), Medicaid (Title XIX) or other state health care programs (e.g., Children’s Special Health Care Services, Healthy Kids), (Title V, Title XX, and Title XXI)
2. Any criminal convictions under federal or state law, relating to neglect or abuse of patients in connection with the delivery of a health care item or service
3. Felony convictions **occurring after August 21, 1996**, relating to an offense, under federal or state law, in

connection with the delivery of health care items or services or with respect to any act or omission in a health care program (other than those included in number 1 above) operated by or financed in whole or in part by any federal, state, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct

4. Felony convictions **occurring after August 21, 1996**, under federal or state law, related to unlawful manufacture, distribution, prescription, or dispensing of a controlled substance

MSA 14-31, page 1

Here, Appellant's daughter was found guilty of a misdemeanor conviction of MCL 750.167(1)(l) and that statute states: "(1) A person is a disorderly person if the person is any of the following . . . (l) A person who is found jostling or roughly crowding people unnecessarily in a public place." Accordingly, Appellant's daughter's conviction does not fall within any mandatory exclusion category.

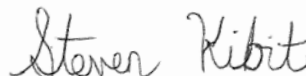
Given that the Waiver Agency improperly applied MSA 14-40 to this case and that MSA 14-40 was the sole basis for its decision, the undersigned Administrative Law Judge finds that the Waiver Agency has erred and that its decision must be reversed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency improperly denied Appellant's request to employ her daughter as her self-determination worker.

IT IS THEREFORE ORDERED that:

The Waiver Agency's decision is **REVERSED** and it must initiate enrollment of Appellant's daughter as her self-determination worker.



Steven J. Kibit
Administrative Law Judge
for Nick Lyon, Director

Michigan Department of Health and Human Services

Date Signed: ██████████
Date Mailed: ██████████

[REDACTED]
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SK/db

cc:

[REDACTED]

***** 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.