



RICK SNYDER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
Christopher Seppanen  
Executive Director

MIKE ZIMMER  
DIRECTOR

[REDACTED]

Date Mailed: [REDACTED]  
MAHS Docket No.: 16-001922  
Agency No.: [REDACTED]  
Petitioner: [REDACTED]

**ADMINISTRATIVE LAW JUDGE: Robert J. Meade**

**DECISION AND ORDER**

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

After due notice, a hearing was held on [REDACTED]. Petitioner appeared on her own behalf. [REDACTED], Petitioner's sons, appeared as witnesses.

[REDACTED], Hearings Coordinator, represented the Department's Waiver Agency, the [REDACTED]. (Waiver [REDACTED])

**ISSUE**

Did the Waiver Agency properly determine that Petitioner's chosen self-determination caregiver was ineligible to serve because he had two prior felony convictions?

**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 Department contracts with [REDACTED] to provide MI Choice Waiver services to eligible beneficiaries.
2. [REDACTED] must implement the MI Choice Waiver program in accordance with Michigan's waiver agreement, Department policy and its contract with the Department.

3. Petitioner is a [REDACTED] year-old Medicaid beneficiary, born [REDACTED], who has been receiving MI Choice Waiver services through [REDACTED] since [REDACTED]. (Exhibit 1, Exhibit A, p 2; Testimony)
4. Under the MI Choice Waiver, Petitioner elected self-determination (SD) which allows an individual to select their own care provider, with some restrictions as to relationship to the participant and the individual passing a criminal background screen. (Exhibit A, pp 2, 9-10; Testimony)
5. Use of the criminal history screen, as part of the hiring process, was established for the protection of the elderly and disabled, and is based on Michigan Department of Health and Human guidelines and [REDACTED] own SD Employee Criminal Background Check Guidelines. Those guidelines state that a person with two or more felony convictions is not eligible to be a SD worker. (Exhibit A, pp 2, 9-10; Testimony)
6. Petitioner's chosen self-determination worker, her son [REDACTED], has two prior felony convictions per an ICHAT criminal history: Attempt-Felony Breaking and Entering a Building with Intent (MCL 750.110) on [REDACTED] and Attempt-Felony Uttering and Publishing (MCL 750.249) on [REDACTED]. [REDACTED] also has pending drug charges from an arrest in [REDACTED] and that case was bound over to Circuit Court in [REDACTED]. (Exhibit A, pp 2, 5-8; Testimony)
7. On [REDACTED] [REDACTED] sent Petitioner an Adequate Action Notice informing her that her son [REDACTED] was ineligible to be her caregiver through the MI Choice Waiver because of his prior felony convictions. (Exhibit A, p 11; Testimony)
8. On [REDACTED], Petitioner's request for hearing was received by the Michigan Administrative Hearing System. (Exhibit 1; 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 receiving 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)*

Medicaid policy in Michigan is contained in the Medicaid Provider Manual, which states, in pertinent part:

## **SECTION 9 – PROVIDERS**

Authorization for provision of services is the responsibility of the waiver agencies. They determine the status of the qualifications and certifications (if applicable) for all direct service providers, negotiate and enter into contracts with the providers, and reimburse providers.

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### **9.4 CRIMINAL HISTORY REVIEWS**

Each waiver agency and direct provider of home-based services must conduct a criminal history 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 criminal history 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 MDHHS conduct administrative monitoring reviews of providers annually to verify that mandatory criminal history checks have been conducted in compliance with operating standards. Waiver agencies must comply with additional criminal history reviews mandated by the State for home and community-based services providers.

*Medicaid Provider Manual  
MI Choice Waiver Chapter  
January 1, 2016, pp 34-35*

The Contract between the Waiver Agency and the Michigan Department of Health and Human Services provides:

### CRIMINAL HISTORY SCREENING POLICY

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Length of Time Barred from Working	Types of Convictions
Lifetime Ban	<ul style="list-style-type: none"> <li>- Felonies related to manufacture, distribution, prescription or dispensing of a controlled substance</li> <li>- Felony health care fraud</li> <li>- <u>More than one felony conviction</u></li> <li>- Felony for abuse neglect, assault, battery, criminal sexual conduct (1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> degree), fraud or theft against a minor or vulnerable adult</li> <li>- Felony or misdemeanor patient abuse</li> <li>- Felony involving cruelty or torture</li> </ul>

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*(Exhibit A, p 9)*

*Attachment N*

*Addendum 2*

*Last Revised August 26, 2015*

The Region 9 AAA Criminal Background Check Guidelines provide, in pertinent part:

Length of Time Barred from Working	Types of Convictions
Lifetime Ban Person is not eligible for employment	<ul style="list-style-type: none"> <li>• Felony for abuse, neglect, battery, criminal sexual conduct (1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> degree), fraud or theft against an adult or minor child.</li> <li>• Felony involving intent to cause death or serious bodily impairment.</li> <li>• Felonies related to</li> </ul>

	<p>manufacture, distribution, prescription or dispensing of a controlled substance.</p> <ul style="list-style-type: none"><li>• Felony involving cruelty or torture to adult or animal.</li><li>• Felony involving health care fraud.</li><li>• <u>More than one felony conviction.</u></li></ul>
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(Exhibit A, p 9)

The Waiver Agency witness testified that Petitioner was notified that her son [REDACTED] could not be her self-determination worker due to the above-referenced policies regarding felony convictions. The Waiver Agency witness indicated that a criminal background check showed that Petitioner's son [REDACTED] had two prior felony convictions and another felony case pending.

Petitioner testified that her son [REDACTED] has been caring for her since [REDACTED] and that she is aware of his prior convictions. Petitioner indicated that her medical condition is terminal and she chose to receive hospice at home so that she can stay close to her family. Petitioner testified that it is an issue of dignity and she would not want a stranger helping her with her personal care and hygiene.

Petitioner's son [REDACTED] testified his brother [REDACTED] is the only one in the family currently with the time and availability to care for Petitioner. Petitioner's son [REDACTED] indicated that he has his own family and a full-time job so he is unable to assist much with his mother's care. Petitioner's son [REDACTED] testified that Petitioner needs care 24/7 and is unable to do anything on her own. Petitioner's son [REDACTED] testified that Petitioner does not want a stranger involved in caring for her. Petitioner's son [REDACTED] also testified that caring for Petitioner has given his brother [REDACTED] some purpose in life and a chance to overcome his past mistakes and step-up and help the family.

Petitioner's son [REDACTED] testified that the policy is there to protect the elderly from predatory caregivers and he is no danger to his mother. Petitioner's son [REDACTED] indicated that it should be his mother's choice who cares for her at this time. Petitioner's son [REDACTED] indicated that he is already there doing the job anyway and that neither his mother nor the family would want anyone else to do it. Petitioner's son [REDACTED] pointed out that his brother [REDACTED] takes care of all his mother's finances, so he poses no risk to her in that area either.

The Waiver Agency and this Administrative Law Judge are bound by the MI Choice Program policy. In addition, this Administrative Law Judge possesses no equitable jurisdiction to grant exceptions to Medicaid, Department and MI Choice Program policy. The Waiver Agency provided sufficient evidence that it implemented the criminal background procedure in accordance with Department policy; therefore, its actions were proper. While the undersigned can sympathize with Petitioner's request, there is simply no exception available to the above policies.

### **DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Waiver Agency properly determined that Petitioner's chosen self-determination caregiver was ineligible to serve because he had two prior felony convictions.

**IT IS THEREFORE ORDERED** that:

The Department's decision is AFFIRMED.



RM/cg

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**Robert J. Meade**  
Administrative Law Judge  
for Nick Lyon, 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 Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Order if the request is received by MAHS 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. MAHS will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088; Attention: MAHS Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings  
Reconsideration/Rehearing Request  
P.O. Box 30763  
Lansing, Michigan 48909-8139

**DHHS -Dept Contact**

[REDACTED]

**DHHS -Dept Contact**

[REDACTED]

**Petitioner**

[REDACTED]

**Community Health Rep**

[REDACTED]