ISSUE

Is the Department entitled to Summary Disposition following the issuance of a January 13, 2020, Order of Summary Suspension.

FINDINGS OF FACT

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

1. REDACTED and REDACTED were enrolled providers in the Michigan Medicaid program and agreed to the enrollment conditions found within the Medical Assistance Provider Enrollment & Trading Partner Agreements. (Exhibits E and F)

2. On November 19, 2019, REDACTED reported that he had a 75% ownership interest in REDACTED. (Exhibit C)

3. On or about May 2, 2019, a felony warrant was issued against REDACTED. The felony warrant charged REDACTED with Criminal Sexual Conduct — Fourth Degree (Force or Coercion):

> COUNT 1: CRIMINAL SEXUAL CONDUCT — FOURTH DEGREE (FORCE OR COERCION)
>
> did engage in sexual contact with another person, to-wit: [redacted] using force or coercion to accomplish the sexual contact; contrary to MCL 750.520e(1)(b). [750.520 E 1A]

(Exhibit A)

4. On January 21, 2020, the REDACTED Judicial District Court held a preliminary examination where they found probable cause exists to believe both that the offense has been committed and that REDACTED committed the offense in question. REDACTED was bound over to Circuit Court on the charges. (Exhibit B)

5. On January 13, 2020, the Department issued an Order of Summary Suspension against both REDACTED and REDACTED, effective January 15, 2020. (Exhibit H)

6. On January 17, 2020, Petitioner's hearing request was received by MOAHR. (Hearing Request)

CONCLUSIONS OF LAW

The Administrative Procedures Act (APA) allows parties "an opportunity to present oral and written arguments on issues of law and policy[.]"[2] Pursuant to MCL 24.272(3), a party may pursue a motion for summary disposition to address questions of law that do not involve factual disputes.[3]

MCR 2.116(3) serves as a guide for summary disposition motions under MCL 24.272(3).[4] Pursuant to MCR 2.116(C)(10), summary disposition is appropriate when there is no genuine dispute of material fact among parties to an action and the moving party is entitled to judgment as a matter of law. A motion under MCR 2.116(C)(10) requires the ALJ to consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Rambin v Allstate Ins* **Co, 495 Mich 316, 325 (2014). If in doing this the ALJ concludes there is no genuine issue of material fact, then the tribunal should grant the Department judgment as a matter of law. MCR 2.116(C)(10).**

Furthermore, the Michigan Administrative Code allows for summary disposition under Rule 792.10129, which provides, in pertinent part:

> **(1) A party may make a motion for summary disposition of all or part of a proceeding. When an administrative law judge does not have final decision authority, he or she may issue a proposal for decision granting summary disposition on all or part of a proceeding if he or she determines that that any of the following exists:**
>
> **(a) There is no genuine issue of material fact.**
>
> **(b) There is a failure to state a claim for which relief may be granted.**
>
> **(c) There is a lack of jurisdiction or standing.**
>
> **(2) If the administrative law judge has final decision authority, he or she may determine the motion for summary decision without first issuing a proposal for decision.**
>
> **(3) If the motion for summary disposition is denied, or if the decision on the motion does not dispose of the entire action, then the action shall proceed to hearing.**
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[2] MCL 24.272(3).
[3] *Smith v Lansing Sch Dist,* 428 Mich 248, 256-257; 406 NW2d 825 (1987).
[4] See *e.g. American Community Mutual Ins* Co *v Commr of Ins,* 195 Mich App 351, 361-363; 491 NW2d 597 (1992).

As such, this Administrative Law Judge has the authority to hear and decide preliminary dispositive motions and the authority to issue a decision for summary disposition.

The Social Welfare Act of 1939, 1939 PA 280, (Act) as amended, provides for the summary suspension of Medicaid providers.

MCL 400.111f provides, in pertinent part:

> (1) The director may issue an order incorporating a finding that emergency action is required to protect the state's interest, as the state's interest is described in this subsection by the statement of circumstances warranting emergency action, in any of the following: the public health, welfare, or safety; medically indigent individuals; or public funds of the program of medical assistance. Circumstances that warrant emergency action include, but are not limited to, any of the following:
>
> (a) A reasonable belief, determined in accordance with professionally accepted standards, that rendered services for which a provider has submitted claims were medically unnecessary, inappropriate, or of inferior quality, and therefore that the continued participation in the program by the provider or payments to the provider for services constitutes a threat to the public health, safety, or welfare or to the health, safety, or welfare of recipient medically indigent individuals.
> (b) A reasonable belief that the provider has violated the medicaid false claims act, Act No. 72 of the Public Acts of 1977, being sections 400.601 to 400.613 of the Michigan Compiled Laws, the health care false claims act, Act No. 323 of the Public Acts of 1984, being sections 752.1001 to 752.1011 of the Michigan Compiled Laws, or a substantially similar statute of another state or the federal government.
> (c) A reasonable belief that the overpayment sought to be recovered pursuant to this section, or pursuant to any other section of this act, is in jeopardy of not being recovered.
> (d) A reasonable belief that 10% or $10,000.00, whichever is less, for a noninstitutional provider, or 10% or $50,000.00, whichever is less, for an institutional provider, of the provider's total program dollar amount for claims submitted at any time during the most recent 12-month period was unsubstantiated or was for services that were noncovered.

(e) A reasonable belief that 10% or $10,000.00, whichever is less, for a noninstitutional provider, or 10% or $50,000.00, whichever is less, for an institutional provider, of the provider's total program dollar amount for claims submitted at any time during the most recent 12-month period were medically unnecessary, inappropriate, or of inferior quality.

(f) A reasonable belief that 15% or $15,000.00, whichever is less, for a noninstitutional provider, or 15% or $75,000.00, whichever is less, for an institutional provider, of the provider's total program dollar amount for claims submitted at any time during a consecutive 12-month period, and that 5% or $5,000.00, whichever is less, for a noninstitutional provider, or 5% or $25,000.00, whichever is less, for an institutional provider, of the provider's total program dollar amount for claims submitted during the most recent 12-month period, was for services that were noncovered.

(g) A reasonable belief that 15% or $15,000.00, whichever is less, for a noninstitutional provider, or 15% or $75,000.00, whichever is less, for an institutional provider, of the provider's claims submitted at any time during a consecutive 12-month period, and that 5% or $5,000.00, whichever is less, for a noninstitutional provider, or 5% or $25,000.00, whichever is less, for an institutional provider, of the provider's total program dollar amount for claims submitted during the most recent 12-month period, was for services that were medically unnecessary, inappropriate, or of inferior quality.

(h) A reasonable belief that the provider is refusing to comply with section 111b(7), (19), or (25).

(2) If the director finds that emergency action is required under subsection (1) in a clinic, corporation, partnership, or other entity with multiple providers or locations, the director may extend any emergency action to the entire legal entity and its providers.

* * * *

(5) Upon a determination that circumstances described in subsection (1) exist, the director may issue an order for the summary suspension of payments on pending or subsequent claims, in whole or in part, or for the

> summary suspension of a provider from participation in the program of medical assistance. The summary suspension shall be effective on the date specified in the order or on service of a certified copy of the order on the provider, whichever occurs later, and shall remain in effect during administrative or judicial proceedings on the suspension. Upon request of a provider, a contested case hearing pursuant to chapter 4 and chapter 6 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.271 to 24.287 and 24.301 to 24.306 of the Michigan Compiled Laws, shall be commenced not later than 15 days after the summary suspension. If a contested case hearing is requested by a provider relative to an emergency suspension under this section, a hearing shall be held to determine whether the emergency suspension is supported by competent, material, and substantial evidence on the whole record. Under appropriate circumstances, the state department may hold or institute a hearing under section 111c(1), or take an action under section 111d at the same time an action is taken under this section, while an action under this section is pending, or after a decision on an action is made. The presiding officer may consolidate the 2 hearings into a single proceeding in the interest of economy. However, the director shall not make a final decision in a contested case under section 111c(1) or 111d arising from or related to an emergency action or the circumstances upon which an emergency action was taken.

(Underline added by ALJ)

MCL 400.111d provides, in pertinent part:

> (1) Participation as a provider in the program is subject to denial, suspension, termination, or probation on the grounds specified by section 111e. The director may take 1 or more of the following actions:
>
> (a) Refuse to enroll an applicant.
> (b) Suspend a provider indefinitely or for a term certain.
> (c) Terminate the agreement with and the participation of a provider.
> (d) Place a provider on probation. At the director's discretion, the probation may have conditions reasonably related to the grounds for probation.

(e) Impose specific limits, conditions, or controls on a provider's provision of services to medically indigent individuals, including specific reviews, documentation, or prior approval of a treatment plan which shall be accomplished before the designated services are rendered.
(f) Selectively suspend a provider's participation at 1 or more practice locations where that provider has no direct, indirect, or close family ownership interest in the practice.

(2) Suspension or termination of a provider shall preclude that provider from submitting a claim, either personally or by a sole proprietorship, clinic, group, partnership, corporation, association, or other entity to the program for any services, supplies, or equipment provided under the program, except for services, supplies, or equipment actually provided and received by a medically indigent individual before the effective date of the suspension or termination.

MCL 400.111e provides, in pertinent part:

(5) In addition to or in place of the grounds specified in subsection (1), (2), or (3), the director may base an action provided for in section 111d(1)(a), (b), (c), (d), (e), or (f) on his or her judgment that the action is necessary to protect the health of medically indigent individuals, the welfare of the public, and the funds appropriated for the program.

42 CFR 1001.1001a provides:

§ 1001.1001 Exclusion of entities owned or controlled by a sanctioned person.

(a) *Circumstance for exclusion.* The OIG may exclude an entity:

(1) If a person with a relationship with such entity—

(i) Has been convicted of a criminal offense as described in sections 1128(a) and 1128(b)(1), (2), or (3) of the Act;
(ii) Has had civil money penalties or assessments imposed under section 1128A of the Act; or

(iii) Has been excluded from participation in Medicare or any State health care program, and

(2) Such a person has a direct or indirect ownership or control interest in the entity, or formerly held an ownership or control interest in the entity but no longer holds an ownership or control interest because of a transfer of the interest to an immediate family member or a member of the person's household in anticipation of or following a conviction, imposition of a civil money penalty or assessment under section 1128A of the Act, or imposition of an exclusion.

The *Michigan Medicaid Provider Manual* governs termination of Medicaid Providers enrollments, including summary suspensions. It states as follows:

SECTION 6 - DENIAL OF ENROLLMENT, TERMINATION AND SUSPENSION

6.1 TERMINATION OR DENIAL OF ENROLLMENT

MDHHS may terminate or deny enrollment in the Michigan Medicaid program. Termination of enrollment means a provider's billing privileges have been revoked and all appeal rights have been exhausted or the timeline for appeal has expired. Denial of enrollment means the provider's application will not be approved for participation in the Medicaid program.

MDHHS must terminate or deny a provider's enrollment in Michigan's Medicaid program for the following reasons:

* * * *

- The provider has a federal or state felony conviction within the preceding 10 years of their provider enrollment application, including but not limited to, any criminal offense related to:

  - murder, rape, abuse or neglect, assault, or other similar crimes against persons;
  - extortion, embezzlement, income tax evasion, insurance fraud, and other similar
  - financial crimes;
  - the use of firearms or dangerous weapons; or
  - any felony that placed the Medicaid program or its beneficiaries at immediate risk, such as a

malpractice suit that results in a conviction of criminal neglect or misconduct.

- The provider has a federal or state misdemeanor conviction within the preceding five years of their provider enrollment application, including but not limited to, any criminal offense related to:

  - any misdemeanor crime listed as a permissive exclusion in 42 USC 1320a-7(b);
  - rape, abuse or neglect, assault, or other similar crimes against persons;
  - extortion, embezzlement, income tax evasion, insurance fraud, or other similar financial crimes; or
  - any misdemeanor that placed the Medicaid program or its beneficiaries at immediate risk, such as a malpractice suit that results in a conviction of criminal neglect or misconduct.

* * * *

6.3 SUSPENSION

Summary suspension prevents further payment after a specified date, regardless of the date of service (DOS).

If an indication of fraud or Medicaid misuse/abuse is discovered during any of the following, MDHHS considers it as a basis for summary suspension:

- An evaluation of billing practices.
- The prior authorization (PA) process.
- An on-site review of financial and medical records and a written report of this review is filed.
- The construction of a profile to evaluate patterns of utilization of Medicaid beneficiaries served by
- the provider.
- A peer review of services or practices.
- A hearing or conference between MDHHS and the provider (and counsel, if so requested).

- Indictment or bindover on charges under the Medicaid or Health Care False Claims Act or similar state/federal statute.

Medicaid Provider Manual
General Information for Providers Chapter
January 15, 2020, pp 16-19

MCL 400.111d and MCL 400.111e provides the Director of the Department with the ability to suspend a provider indefinitely or for a term certain if he or she determines that the suspension is necessary to protect the health of medically indigent individuals, the welfare of the public, and the funds appropriated for the program. Pursuant to MCL 400.111f, the suspension may be pursued through an emergency action to protect the state's interest in the public health, welfare, or safety; medically indigent individuals; or public funds of the program of medical assistance.

As set forth in MCL 400.111f, the Legislature determined the Department must only meet a reasonable belief standard of proof when taking emergency action under the Social Welfare Act. The list of circumstances that warrants emergency action is non-exhaustive, but each listed circumstance begins with a "reasonable belief." The rational for this standard of proof is clear. A temporary suspension of Medicaid enrollment may be necessary to protect the public health, welfare, safety of the medically indigent individuals, or public funds of the program until definitive proceedings are held on the merits. (Respondent's Consolidated Motion and Brief for Summary Disposition, p. 5)

Under the above Medicaid Provider Manual policy, the list of circumstances under which the Department is to terminate or deny a provider's enrollment includes: when the provider has a federal or state felony conviction within 10 years for any criminal offense relating to murder, rape, abuse or neglect, assault, or other similar crimes against persons; or a federal or state misdemeanor conviction within 5 years for any criminal offense relating to murder, rape, abuse or neglect, assault, or other similar crimes against persons.

Accordingly, it would follow that a temporary suspension may be warranted to protect the public health, welfare, and safety of the medically indigent individuals if there is a reasonable belief that a provider committed such a criminal offense, while definitive proceedings are held on the merits. Respondent's argument that in the case of criminal proceedings it is not feasible for the Department to investigate and litigate the underlying grounds for an ongoing criminal prosecution is persuasive. (Respondent's Consolidated Motion and Brief for Summary Disposition, p. 5)

As noted by Respondent, *People v. Yost, 468 Mich 122, 125-126 (2003)* holds that a finding of probable cause "requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a *reasonable belief* of the accused's guilt." *Id.* (emphasis added) Accordingly, a bind over on a criminal charge would support a Director's determination that emergency action was needed to protect the state's interest in the public health, welfare, or safety; medically indigent individuals;

or public funds of the program of medical assistance based on a reasonable belief standard.

The Department argues that summary disposition is appropriate because there is no issue of material fact, and the Department is entitled to judgment as a matter of law. In support, the Department relies on *Iqbal Nasir, et al v Michigan Department of Health & Human Services,* **Case No 19-004341-AA. In that case, the court found that an order of summary suspension of an Appellant's Medicaid privileges was both warranted and a lawful exercise of the Department's authority based upon a district court's probable cause finding.** *Id. at 7.*

In this case, Respondent asserts that the felony warrant and CMPD Incident/Investigation Report provided the Director's designee grounds for the emergency suspension of REDACTED and REDACTED to protect the state's interest in ensuring that public health, welfare, or safety; and medically indigent patients are protected. The felony warrant charged REDACTED with Criminal Sexual Conduct — Fourth Degree (Force or Coercion). (Exhibit A) On January 21, 2020, the REDACTED Judicial District Court held a preliminary examination where they found probable cause exists to believe both that the offense has been committed and that REDACTED committed the offense in question. REDACTED was bound over to Circuit Court on the charges. (Exhibit B) As noted by Respondent, the sexual assault occurred by means of an OB/GYN, at the REDACTED office, and with a minor. Specifically, a high school student present for a job shadow. (Exhibit G; Respondent's Consolidated Motion and Brief for Summary Disposition, p. 7)

Petitioner argues the that Department has failed to establish how an unproven nine-year-old allegation of misconduct by REDACTED created emergency circumstances warranting immediate suspension of both REDACTED and REDACTED from participation in the Medicaid program. Petitioner notes that the basis for the summary suspension was REDACTED being charged based on a single incident allegedly occurring in 2011, which was reported to the police in REDACTED 2019. Petitioner also notes that REDACTED has never been accused of sexually assaulting a patient. (Petitioner's Response to Respondent's Consolidated Motion and Brief for Summary Disposition, pp. 1-7) However, the above cited Medicaid Provider Manual policy regarding denial or termination of enrollment due to convictions for criminal offenses relating to murder, rape, abuse or neglect, assault, or other similar crimes against persons does not indicate the criminal offense needed to involve a patient or Medicaid beneficiary. Further, the policy indicates that felony convictions that occurred up to ten years prior to the provider enrollment application are a basis for denial or termination of enrollment for these types of criminal offences.

Petitioner's arguments that the cases Respondent relies upon are factually distinguishable from the present case because the dates of the allegations in relation to the criminal charges and summary suspension were more recent or that Petitioner's would have to prove REDACTED's innocence to overcome the summary suspension of his participation status in the Medicaid program are similarly not persuasive. Again, the Department considers felony convictions for criminal offenses relating to murder, rape, abuse or neglect, assault, or other similar crimes against persons occurring up to ten years before the provider enrollment application as a basis for denial or termination of

enrollment. The bind over on the felony criminal sexual misconduct charge, as described in the felony warrant and CMPD Incident/Investigation Report, supports the Department's determination that emergency action was needed to protect the state's interest in the public health, welfare, or safety; and medically indigent individuals based on a reasonable belief standard.

Lastly, Petitioner argues that REDACTED's ownership status in REDACTED does not create emergency circumstances that require the summary suspension of REDACTED in the Medicaid program. (Petitioner's Response to Respondent's Consolidated Motion and Brief for Summary Disposition pp. 7-8) MCL 400.111f(2) permits the department to extend a summary suspension to the entire legal entity and its providers if the Director finds emergency action is required in a clinic, corporation, partnership, or other entity with multiple providers or locations. It is uncontested that REDACTED had a 75% ownership interest in REDACTED. Further, the alleged sexual assault occurred at the REDACTED office with a high school student present for a job shadow. Additionally, 42 CFR 1001.1001a allows for an exclusion of an entity when a person with a relationship with such entity has been excluded from participation in Medicare or any State health care program. Petitioner's distinction that was has been suspended, not excluded, is not persuasive. REDACTED is excluded from participating in the Medicaid program while he is suspended.

Based upon the filings received and the arguments presented, Respondent has shown there is no genuine issue of material fact. There has been a finding of probable cause, which supports a reasonable belief that REDACTED committed criminal sexual conduct-fourth degree requiring the summary suspension of REDACTED and REDACTED to protect the state's interest in the public health, welfare, or safety; and medically indigent individuals. As a result, Respondent's Motion for Summary Disposition should be granted and the summary suspension was proper.

IT IS THEREFORE ORDERED that:

- Respondent's Motion for Summary Disposition is **GRANTED.**
- The Order of Summary Suspension issued by the Department on January 13, 2020, effective January 15, 2020, is **UPHELD.**