



STATE OF MICHIGAN

GRETCHEN WHITMER  
GOVERNOR

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

MARLON BROWN  
DIRECTOR

Date Mailed: November 1, 2024  
MOAHR Docket No.: 24-010619  
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, 42 CFR 431.200 *et seq.* and 42 CFR 438.400 *et seq.* upon Petitioner's request for a hearing.

After due notice, a telephone hearing was held on October 30, 2024. [REDACTED] Authorized Hearing Representative (AHR) appeared and testified on Petitioner's behalf.

Sarah Smeltzer, RN, appeared and testified on behalf of the Department's Waiver Agency, Region 3B Area Agency on Aging. (Waiver Agency).

**ISSUE**

Did the Waiver Agency properly terminate Petitioner's services because Petitioner's provider failed a criminal background check?

**FINDINGS OF FACT**

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

1. Petitioner is a Medicaid beneficiary who has been receiving services through the Waiver Agency for a number of years. (Exhibit 1; Testimony).
2. On September 13, 2024, the Waiver Agency received notice from Petitioner's fiscal intermediary that Petitioner's daughter and provider, [REDACTED] was no longer eligible to be a provider due to a criminal background check. (Exhibit A, p 6; Testimony).
3. A criminal background check run on Petitioner's daughter and provider; [REDACTED] on September 1, 2024, shows a conviction for Retail Fraud – Third Degree on September 15, 2023. (Exhibit A, pp 7-12; Testimony).

4. On September 13, 2024, the Waiver Agency called Petitioner to let her know that her daughter could no longer be her paid caregiver through the self-determination program due to a criminal background check completed by that agency. (Exhibit A, p 6; Testimony). The Waiver Agency informed Petitioner that she could hire another self-determination provider or hire an agency caregiver to provide care, but Petitioner declined at that time. (*Id.*)
5. On September 13, 2024, the Waiver Agency sent Petitioner a Notice of Adverse Benefit Determination informing her that her services would be terminated due to the criminal background check on Petitioner's daughter and provider. (Exhibit A, pp 1-4; Testimony).
6. On September 26, 2024, the Michigan Office of Administrative Hearings and Rules (MOAHR) received Petitioner's Request for Hearing. (Exhibit 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. 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 is seeking 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 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)*

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

## 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.

Waiver agencies must also check the MDHHS Sanctioned Providers List and must not contract with any providers on this list for the duration of the sanction period until approved by MDHHS to resume providing services. The MDHHS Sanctioned Provider List is located on the MDHHS website. (Refer to the Directory Appendix for website information.)

*Medicaid Provider Manual  
MI Choice Waiver Chapter  
July 1, 2024, pp 72-73*

Waiver Agency policy also provides:

### **Criminal Background Checking**

All providers must conduct, or cause to be conducted, a criminal background check that reveals information similar or substantially similar to information found on an Internet Criminal History Access Tool (ICHAT) check and a national and state sex offender registry check for each new employee, employee, subcontractor, subcontractor employee, and volunteer who has in-person client contact, in-home client contact, access to a client's personal property, or access to confidential client information:

I-CHAT: <http://apps.michigan.gov/ichat>

Michigan Public Sex Offender Registry: <http://www.mipsor.state.mi.us/>

National Sex Offender Registry: <http://www.nsopw.gov/>

Criminal background checks for new hires must be completed before the individual works directly with clients or has access to a client's personal property or confidential client information.

Each provider is required to update criminal background checks for all employees and volunteers every three years to identify convictions in the event they occur while an individual is employed or providing volunteer service:

- All employees and volunteers hired before the effective date of this policy must be rescreened within ninety (90) days from the effective date of this policy. After that, criminal background checks for these employees and volunteers must be completed no later than thirty (30) days after every third anniversary from the date of the last background check.
- Updated criminal background checks for employees and volunteers hired after the effective date of this policy must be completed no later than thirty (30) days after every third anniversary of the hire date.

All AAAs are required to maintain a copy of the results of each criminal background check for paid and volunteer staff in a confidential and controlled access file.

**Exclusions:** No employee or volunteer shall be permitted to work directly with clients or have access to a client's personal property or confidential client information if:

**Mandatory Exclusions:** The results of the criminal background check show that the person has a federal or state felony conviction related to one or more of the following crimes:

1. Crimes against a "vulnerable adult" as outlined in MCL 750.145n et seq.
2. Violent crimes including, but not limited to, murder, manslaughter, kidnapping, arson, assault, battery, and domestic violence.
3. Financial crimes include but are not limited to fraud, forgery, counterfeiting, embezzlement, and tax evasion.
4. Sex crimes include, but are not limited to, rape, sexual abuse, criminal sexual conduct, and prostitution.
5. Cruelty or torture.
6. Abuse or neglect; or
7. Felony involving the use of a firearm or dangerous weapon.

**Felony convictions:** The results of the criminal background check show that the person has a federal or state felony conviction within the preceding ten (10) years from the date of the background check, including but not limited to:

1. Crimes involving state, federal, or local government assistance programs.
2. Theft crimes including, but not limited to, larceny, burglary, robbery, extortion, false pretenses, false representation, and conversion; or
3. Drug crimes include, but are not limited to, possession, delivery, and manufacturing.

**Misdemeanor Convictions:** The results of the criminal background check show that the person has a federal or state misdemeanor conviction within the preceding five (5) years from the date of the background check, including but not limited to:

1. Crimes involving state, federal, or local government assistance programs.
2. Crimes against a "vulnerable adult" as outlined in MCL 750.145n et seq.
3. Financial crimes include but are not limited to fraud, forgery, counterfeiting, embezzlement, and tax evasion.
4. Theft crimes include but are not limited to larceny, burglary, robbery, extortion, false pretenses, false representation, and conversion.
5. Sex crimes include, but are not limited to, rape, sexual abuse, criminal sexual conduct, and prostitution.
6. Drug crimes include, but are not limited to, possession, delivery, and manufacturing.
7. Cruelty or torture.
8. Abuse or neglect.
9. Home invasion.
10. Assault or battery; or

11. Misdemeanor involving the use of a firearm or dangerous weapon with the intent to injure, the use of a firearm or dangerous weapon that results in a personal injury, or a misdemeanor involving the use of force or violence or the threat of the use of force or violence.

For purposes of the excluded offenses identified above, an individual is considered to have been convicted of a criminal crime when:

1. A judgment of conviction has been entered against the individual or entity by a federal, state, tribal, or local court, regardless of whether an appeal is pending.
2. There has been a finding of guilt against the individual by a federal, state, tribal, or local court; or
3. A plea of guilty or nolo contendere by the individual has been accepted by a federal, state, tribal, or local court.

Arrest records, by themselves, do not disqualify an individual.

Providers must maintain documentation of all criminal background checks, including a list of all paid and volunteer staff subject to this policy, the date of the most recently completed criminal background check, and the source of the background check. Employees hired before the effective date of this policy are not exempt from this requirement.

**\*NOTE:** Contact CWS Contracts Department with any questions regarding CBC results and for assistance understanding these eligibility determinations/guidelines before allowing employees to provide services to participants.

*Exhibit A, pp 14-16*

Petitioner bears the burden of proving by a preponderance of the evidence that the Waiver Agency erred in terminating her services. Moreover, this Administrative Law Judge is limited to reviewing the Waiver Agency's decision in light of the information it had at the time it made that decision.

The Waiver Agency's RN testified that on September 13, 2024, she received notice from Petitioner's fiscal intermediary that Petitioner's daughter and provider, [REDACTED] was no longer eligible to be a provider due to a criminal background check. The Waiver Agency's RN indicated that a criminal background check run on Petitioner's daughter and provider; [REDACTED] on September 1, 2024, showed a conviction for Retail Fraud – Third Degree on September 15, 2023. The Waiver Agency's RN testified that on September 13, 2024, she called Petitioner to let her know that her daughter could no longer be her paid caregiver through the self-determination program due to a criminal background check completed by that agency. The Waiver Agency's RN indicated that she informed Petitioner that she could hire another self-determination provider or hire an agency caregiver to provide care, but Petitioner declined at that time.

The Waiver Agency's RN testified that based on the above, on September 13, 2024, she sent Petitioner a Notice of Adverse Benefit Determination informing her that her services would be terminated due to the criminal background check on Petitioner's daughter and provider. Petitioner's daughter testified that the incident giving rise to the conviction happened about a year ago while she was at [REDACTED]. Petitioner's daughter indicated that she was confronted by an angry employee at [REDACTED] and accused of stealing, so she just left.

Petitioner's daughter testified that the police later came to her home and issued her a summons. Petitioner's daughter indicated that when she went to court the judge said she could just plead "mute" and pay a \$300 fine. Petitioner's daughter testified that she agreed to do so but did not realize it would result in a criminal conviction. Petitioner's daughter indicated that she needs the job of Petitioner's caregiver and she will have to find another job if she can't do this. Petitioner's daughter testified that Petitioner needs a lot of care and there is no one else in the family who can take care of her. Petitioner's daughter indicated that without her assistance, Petitioner will likely end up in a nursing home.

Given the above evidence, Petitioner has failed to prove, by a preponderance of the evidence, that the Waiver Agency erred in terminating her services due to the criminal history screening conducted on her daughter and provider. As indicated above, policy indicates that providers may not have a misdemeanor conviction within the past five years for "Theft crimes [which] include but are not limited to larceny, burglary, robbery, extortion, false pretenses, false representation, and conversion." Here, Petitioner's daughter and provider was convicted of Retail Fraud – 3<sup>rd</sup> Degree in September 2023, which is within the last five years. Further, Retail Fraud – 3<sup>rd</sup> Degree would fit into the category of "theft crimes" as defined above. While the undersigned can sympathize with Petitioner and her provider, this tribunal has no equitable power and no authority to ignore clear policy. Therefore, based on the available information, the Waiver Agency's decision must be affirmed.

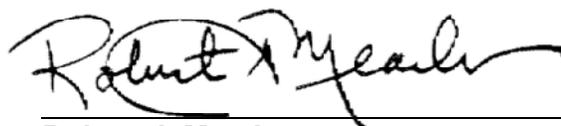
Petitioner is free to choose another provider through self-determination or hire an agency provider to meet her needs.

### **DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the MI Choice Waiver Agency properly terminated Petitioner's services because Petitioner's provider failed a criminal background check.

**IT IS THEREFORE ORDERED** that:

The Waiver Agency's decision is **AFFIRMED**.



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**Robert J. Meade**  
Administrative Law Judge

RM/sj

**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

**PROOF OF SERVICE**

I certify that I served a copy of the foregoing document upon all parties, to their last known addresses in the manner specified below, this 1st day of November 2024.

*S. James*

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S. James  
**Michigan Office of Administrative  
Hearings and Rules**

**Via Electronic Mail:**

**Community Health Representative**  
Region 3b Area Agency On Aging  
c/o Jodi De Jonge- Waiver Director  
CareWell Services Southwest  
200 W. Michigan Ave, Suite 102  
Battle Creek, MI 49017  
**Jdejonge@carewellservices.org**

**DHHS Department Representative**  
Heather Hill  
MDHHS  
400 S. Pine, 5th Floor  
Lansing, MI 48933  
**HillH3@michigan.gov**

**Via First Class Mail:**

**Petitioner**

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██████████ MI ██████████

**Authorized Hearing Representative**

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██████████ MI ██████████