November 17, 2017

Margo Sharp
Bureau of Medicaid Policy and Health System Innovation
Medical Services Administration
P.O. Box 30479
Lansing, MI 48909-7979

RE: Provider Enrollment Fitness Criteria (Policy Number: 1635-PE)

Dear Ms. Sharp:

I am the Policy Director at the Citizens Alliance on Prisons and Public Spending (CAPPS), a criminal justice research and advocacy organization based in Lansing. I am writing because the proposed provider enrollment fitness criteria (Policy Number: 1635-PE) is inconsistent with Federal law, is an arbitrary exercise of administrative authority, and is likely to have significant negative impacts on both public health and public safety in Michigan.

1. Not a Reasonable Standard Relating to Provider Qualifications. 42 C.F.R. 431.51(a)-(b) affords Medicaid recipients "Free choice of providers," subject to a state's right to impose "reasonable standards relating to the qualifications of providers." 42 C.F.R. 431.51(c)(2). The proposed provider enrollment fitness criteria does not comply with this regulation, as the standards it imposes are neither reasonably related to provider qualifications, nor a reasonable response to the perceived risk posed by providers (or agents thereof) with criminal histories. *First*, the proposed standards, which disqualify any provider or agent thereof from participation in Medicaid within 10 years of conviction of many state felonies and misdemeanors, are not reasonably related to provider qualifications. The proposed fitness criteria make no effort to demonstrate that providers with a criminal history are not qualified to provide medical services to Medicaid recipients, and in fact, many providers that could be impacted by this policy have been independently licensed to do so by the State of Michigan. Further, many of the best providers of critical health care services—such as substance abuse counselors and peer coaches—are qualified to do so *because of* their experience with substance abuse, and many of these individuals have criminal histories related to that experience. Amidst an opioid crisis of unprecedented proportions—the State's response to which gives an important role to peer coaches—it is counterproductive, and frankly, baffling, that DHHS is actively seeking to exclude such providers from the workforce. *Second*, this policy appears to be directed at a perceived risk posed by providers (or agents thereof) with criminal histories. However, neither the policy nor any information I am aware of in the administrative record justifies the nature or scope of the exclusion proposed. The proposed policy goes far beyond Federal law on mandatory and permissive exclusions, and both denies providers the ability to hire qualified individuals with criminal histories, and denies qualified individuals access to employment in health care—one of Michigan's largest industries. Further, this exclusion appears particularly unreasonable in light of the fact that health care providers already screen applicants for criminal histories, and that many providers are separately licensed by the State of Michigan. Absent evidence in the administrative record to justify the broad and lengthy exclusions contemplated by

the proposed policy, it is not a reasonable standard related to provider qualifications and is contrary to Federal law.

2. Title VII of the Civil Rights Act. People of color are disproportionately impacted by criminal records when seeking employment[1]; because of this, the proposed policy will have a disparate impact upon racial minorities that are protected by Title VII of the Civil Rights Act. When a policy has a disparate impact, Title VII requires employers to show that an exclusion based on criminal conduct is job related and consistent with business necessity. To make this showing, an employer must demonstrate that the exclusion is reasonable based on (1) the nature and gravity of the offense, (2) the time elapsed since the offense, and (3) the nature of the job held or sought.[2] The policy makes no effort to make this sort of individualized assessment, and excludes individuals from all provider roles for a broad range of crimes, including misdemeanors such as larceny and prostitution. It also imposes an across-the-board 10-year ban when evidence suggests that many individuals with criminal histories are no more likely to be arrested than members of the general public.[3] Accordingly, the policy appears to violate Title VII, and could subject providers that apply it to liability under Title VII.

3. Arbitrary Exercise of Administrative Authority. If the policy were interested in addressing a particular public safety concern, I would expect the administrative record to contain (1) evidence that the concern is factually-based, (2) evidence that DHHS considered a variety of options to address the concern at issue, and (3) evidence that DHHS narrowly tailored the proposed provider criteria to address that concern without unnecessary impacts to providers that do not demonstrably pose such a risk. However, I am aware of no evidence that DHHS considered any of these issues, and the fact that the provider criteria applies to all providers, and all people convicted of a broad range of crimes within a 10-year period suggests that DHHS failed to undertake this analysis and lacks a factual basis to exclude providers in the manner it proposes. If so, the proposed policy is an arbitrary exercise of administrative authority that is unlawful. *See Dykstra v. Department of Natural Resources*, 198 Mich. App. 482, 491 (1993) ("A rule is arbitrary if it was fixed or arrived at through an exercise of will or by caprice, *without consideration or adjustment with reference to principles, circumstances, or significance*.") (emphasis added).

4. Public Health Impacts. As noted above, many of the best providers of critical health care services—such as substance abuse counseling and peer coaching—are qualified to do so *because of* their experience with substance abuse, and many have criminal records arising from that experience. Consistent with this, Michigan's

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[1] *See* Kimberly Buddin-Crawford, *Supporting Black Labor: Ending Criminal Record Exclusions in the Workforce* (Jan. 19, 2017), available at http://www.aclumich.org/article/supporting-black-labor-ending-criminal-record-exclusions-workforce.

[2] *See Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.*, No. 915.002 (April 25, 2012), *citing Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975), available at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

[3] Alfred Blumstein and Kimonori Nakamura, *Redemption in an Era of Widespread Criminal Background Checks*, NIJ Journal (No. 263) at 13.

response to the opioid epidemic has recognized the value of peer coaches and has given them an important role in our state's medical response to the crisis. In light of this, it is counterproductive to arbitrarily exclude such providers from the workforce, and doing so is likely to have negative public health effects in our state—both by limiting the number of providers available to provide treatment and by taking some of the most qualified providers out of the field.

5. Public Safety Impacts. Finally, the across-the-board 10-year ban proposed by this policy is likely to have negative public safety impacts apart from blunting our response to the opioid crisis. While the desire to protect vulnerable populations from harm (which appears to be the intent of this policy) is laudable, policy changes that are not implemented in a targeted way can have significant unintended consequences, and I believe this policy will. It is well-established that stable employment is a key factor in post-conviction success for those with criminal-justice involvement,[4] and this policy would not only cut off access to potentially life-changing jobs in health care, it would take those jobs away from the many people that already have such jobs and who are models of successful reentry into society—including current substance abuse counselors and peer coaches. Not only is this a needless, and cruel, change to Medicaid policy, it is likely to negatively impact public safety by limiting access to employment for people with criminal records, and by taking away the livelihoods of numerous current providers (and their agents).

   For all of these reasons, please rescind this policy immediately.

Sincerely yours,

/s/
John S. Cooper, J.D., M.A.

[4] *See, e.g.,* Berg, M. T., & Huebner, B. M. (2011). Reentry and the ties that bind: An examination of social ties, employment, and recidivism. *Justice Quarterly*, 28(1), at 398 (finding unemployed offenders are 18% more likely to be rearrested than employed offenders within 600 days of release).