

# 2020

## Office of the Medicaid Inspector General

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**KANSAS  
ATTORNEY GENERAL**

**DEREK SCHMIDT**



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# Letter from the Inspector General

June 5, 2020

TO: Attorney General Derek Schmidt

Secretary of the Kansas Department of Health and Environment, Dr. Lee Norman

Secretary of the Kansas Department for Aging and Disability Services, Laura Howard

Members of the Robert G. (Bob) Bethell Joint Committee on Home and Community Based Services and KanCare Oversight:

Representative Brenda Landwehr, Chair  
Senator Ed Berger  
Senator Barbara Bollier  
Senator Bud Estes  
Senator Richard Hilderbrand

Senator Gene Suellentrop, Vice-Chair  
Representative Barbara Ballard  
Representative John Barker  
Representative Will Carpenter  
Representative Susan Concannon  
Representative Monica Murnan

This report contains our findings from a review of the United States Department of Health and Human Services Office of Inspector General's List of Excluded Individuals/Entities (LEIE). We compared the LEIE to the list of personal care attendants classified as "active" in the state's billing system for personal care services. This review was completed in accordance with the Association of Inspectors General *Principles and Standards for Offices of Inspector General: Quality Standards for Inspections, Evaluations, and Reviews*, May 2014 Revision.

We welcome any comments or questions you may have regarding this report or our operations.

Respectfully submitted,

Sarah Fertig  
Medicaid Inspector General

# Introduction

Personal care services (PCS) are an important component of the Kansas Medicaid system because they provide needed supports in order to help Medicaid beneficiaries live in their homes instead of an institutional setting. PCS includes assistance with activities of daily living (ADLs) and instrumental activities of daily living (IADLs). ADLs include essential personal care activities such as toileting, dressing, bathing, and transferring.<sup>1</sup> IADLs are activities related to independent living and include shopping for groceries, meal preparation, using the telephone, and housework.<sup>2</sup> For some Medicaid waivers, PCS also includes additional supports such as supervision to provide for the health, safety, and welfare of the beneficiary, and assistance and accompaniment for exercise, socialization, and recreation activities.<sup>3</sup> The types of PCS provided may vary on a case-by-case basis depending on the beneficiary's individual needs. PCS is capped at 12 hours per 24-hour period unless a special accommodation is authorized by the beneficiary's managed care organization (MCO).<sup>4</sup>

The United States Department of Health and Human Services Office of Inspector General (HHS OIG) has identified PCS as a high-risk area for fraud, waste, abuse, and illegal acts involving the Medicaid program. This is because the services are often provided in a person's home without direct supervision; there are no uniform standards for personal care attendant (PCA) qualifications; and the Centers for Medicare and Medicaid Services (CMS) does not require states to enroll PCAs as providers.<sup>5</sup>

Kansas does not require PCAs to hold a professional credential or enroll as Medicaid provider. This means that the state lacks administrative options to remove unscrupulous PCAs from participation in Medicaid, such as revoking professional credentials or disenrolling the PCA as a provider based on regulatory criteria.<sup>6</sup>

The HHS OIG is authorized to exclude an individual or entity from participation in federal health care programs, such as Medicaid, as a service provider. We decided to conduct this review to determine whether it is possible for an HHS OIG-excluded individual to provide PCS to a Kansas Medicaid beneficiary despite the policies and procedures in place to prevent such an occurrence.

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<sup>1</sup> K.A.R. 30-5-300(a)(2).

<sup>2</sup> K.A.R. 30-5-300(a)(20).

<sup>3</sup> *See, e.g.*, Approved Application for 1915(c) Waiver: KS.0224.R06.00, July 1, 2019, Appendix C.

<sup>4</sup> KDADS Policy No. E2016-006, Effective February 1, 2016, Section II.a. This cap has been temporarily suspended during the COVID-19 emergency period. *See* KDADS COVID-19 Guidance - All HCBS Waiver Programs, available at: <https://www.kdads.ks.gov/covid-19>.

<sup>5</sup> HHS OIG, Investigative Advisory on Medicaid Fraud and Patient Harm Involving Personal Care Services, October 3, 2016, available at: <https://oig.hhs.gov/reports-and-publications/portfolio/ia-mpcs2016.pdf>.

<sup>6</sup> *See* K.A.R. 30-5-60. These criteria include non-compliance with state laws and demonstrating a pattern of submitting inaccurate billings.

# Personal Care Services

This section summarizes the state and federal laws and policies that govern PCS for Kansas Medicaid beneficiaries.<sup>7</sup>

## **Kansas' Medicaid State Plan**

Medicaid operates as a partnership between the state and the federal government. In exchange for federal matching funds, the state agrees to administer its Medicaid program in accordance with federal law and its CMS-approved state plan. PCS is available to Kansas Medicaid beneficiaries through its home and community-based services (HCBS) waivers. These waivers provide additional services to Medicaid beneficiaries who qualify for an institutional level of care to help the individual to remain at home.<sup>8</sup>

## **State Laws and Policies**

Kansas law protects the right of HCBS waiver participants to take an active role in selecting and training their PCAs. K.S.A. 2019 Supp. 39-7,100(b)(2) states that HCBS waiver participants “shall have the right to choose the option to make decisions about, direct the provisions of and control the attendant care services received by such individuals including, but not limited to, selecting, training, managing, paying and dismissing of an attendant.” This option is referred to as *self-directed PCS*. Under the self-direction model, a Medicaid beneficiary may select and train his or her own PCA, subject to some restrictions.<sup>9</sup> If a beneficiary chooses to self-direct his or her care, a financial management service (FMS) provider must serve as the beneficiary’s payroll agent. Self-directed PCS is available for the following HCBS waivers: Frail Elderly; Intellectual/Developmental Disability; Physical Disability; Brain Injury; and Technology Assisted.

HCBS waiver participants also have the option to arrange for PCS through a home health agency. This option is referred to as *agency-directed PCS*.

Kansas law does not prescribe any certification, licensure, or registration requirements for PCAs, and Kansas’ CMS-approved HCBS waivers do not require PCAs to be enrolled as Medicaid

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<sup>7</sup> This section does not include a discussion of the rule suspensions or alterations that are in effect only for the COVID-19 emergency period. Those documents can be found at: <https://www.kdads.ks.gov/covid-19>.

<sup>8</sup> See 42 U.S.C. 1396n(c).

<sup>9</sup> For instance, the PCA cannot be the parent of a minor child waiver participant unless conflict of interest has been mitigated. See KDADS Policy No. E2016-006, effective February 1, 2016, Section II.H.

providers.<sup>10</sup> KDADS Policy No. E2016-006 outlines the following requirements that must be met to qualify to work as a PCA:

- a. With the exception of the IDD waiver, PCS workers shall be 18 years of age or older, or have a high school diploma or equivalent, and meet the provider qualifications for providing PCS as defined in the HCBS Program waiver.
- b. For the IDD waiver, PCS workers shall be 16 years of age or older and meet the provider qualifications for providing PCS as defined in the HCBS IDD Program waiver.
- c. All PCS workers shall have all background checks with no prohibited offenses prior to providing support services in accordance with the respective HCBS waiver requirements.<sup>11</sup>

### Background Checks

KDADS has adopted a background check policy that requires all HCBS providers to complete a background check prior to providing HCBS services to a waiver participant.<sup>12</sup> The background check includes the following steps:

- A criminal record check, which is processed through KDADS;
- A Kansas Nurse Aid Registry check;
- A Kansas Motor Vehicle Registry check;
- An Adult Abuse, Neglect, and Exploitation Central Registry check;
- A Child Abuse and Neglect Central Registry check;
- If applicable, a license, certification, or registration check from the appropriate credentialing entity; and,
- A check of the HHS OIG exclusions list.<sup>13</sup>

The background check process must be completed every two years after the commencement of employment.<sup>14</sup> A person may be hired on a provisional basis pending the outcome of the above checks. However, if the background check reveals a prohibited offense or other adverse finding, the provision employee must be terminated immediately.<sup>15</sup>

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<sup>10</sup> See, e.g., Approved Application for 1915(c) HCBS Waiver: KS.0304.R04.02, September 1, 2019, Appendix C, available at: <https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/81736>.

<sup>11</sup> KDADS Policy No. E2016-006, effective February 1, 2016, Section I.N.1.

<sup>12</sup> KDADS Policy No. E2019-010, effective January 14, 2019, Section II.A.9.

<sup>13</sup> *Id.* at Section II.A.2-II.A.8.

<sup>14</sup> *Id.* at Section II.A.1.

<sup>15</sup> *Id.* at Section II.B.3.

For PCAs employed by a home health agency, the agency is responsible for performing the background check. Licensed home health agencies are required to conduct background checks on applicants for employment. Employment of any person who has been convicted of certain crimes, or whose name appears on a state or federal registry, is grounds for revocation of a home health agency's license.<sup>16</sup>

For self-directing beneficiaries, background checks for PCAs are performed by the beneficiary's FMS provider. FMS providers are required to maintain an employment file for each direct support worker, which must contain background check documentation, including documentation of the HHS OIG exclusions list check.<sup>17</sup>

### **Federal Law**

The HHS OIG is authorized to exclude an individual or entity from participation in federal health care programs.<sup>18</sup> The HHS OIG summarizes the effect of an exclusion as follows:

The effect of an OIG exclusion is that no Federal health care program payment may be made for any items or services furnished (1) by an excluded person or (2) at the medical direction or on the prescription of an excluded person. The exclusion and the payment prohibition continue to apply to an individual even if he or she changes from one health care profession to another while excluded. This payment prohibition applies to all methods of Federal health care program payment, whether from itemized claims, cost reports, fee schedules, capitated payments, a prospective payment system or other bundled payment, or other payment system and applies even if the payment is made to a State agency or a person that is not excluded. For example, no payment may be made to a hospital for the items or services furnished by an excluded nurse to Federal health care program beneficiaries, even if the nurse's services are not separately billed and are paid for as part of a Medicare diagnosis-related group payment received by the hospital. Also, the excluded nurse would be in violation of her exclusion for causing a claim to be submitted by the hospital for items or services the nurse furnished while excluded.<sup>19</sup>

Put simply, this means that no Medicaid monies may be used, directly or indirectly, to pay for services provided by an individual or entity who has been excluded by the HHS OIG.

There are two categories of exclusions: mandatory and permissive. Mandatory exclusions are blanket bans that occur when a person has been convicted of certain crimes, such as Medicaid-related crimes, patient abuse, and health care fraud.<sup>20</sup> Permissive exclusions occur when the HHS

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<sup>16</sup> K.S.A. 65-5108 and 65-5117.

<sup>17</sup> KDADS Financial Management Services Manual, effective April 10, 2015, Section D.4.d.2.b.

<sup>18</sup> 42 U.S.C. §§ 1320a-7 and 1320c-5.

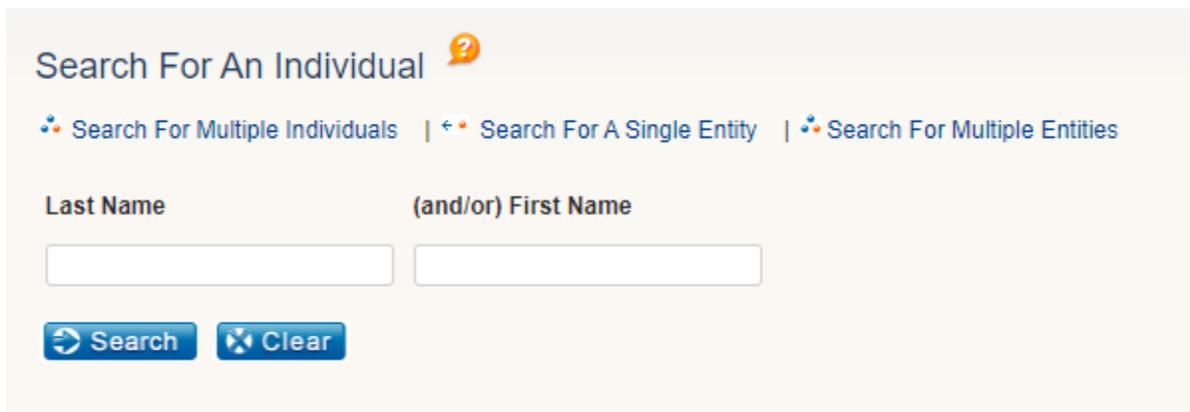
<sup>19</sup> HHS OIG, Updated Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs, May 8, 2019, p. 6 (internal citations omitted).

<sup>20</sup> 42 U.S.C. 1320a-7(a).

Secretary exercises his or her authority to exclude a person based upon other statutory factors, such as the revocation of a professional license to provide health care.<sup>21</sup>

An HHS OIG exclusion is effective for a minimum period of time in accordance with federal law.<sup>22</sup> After the conclusion of the minimum exclusion period, an excluded individual or entity can apply to have that exclusion lifted.<sup>23</sup>

The HHS OIG maintains a list of excluded individuals/entities (LEIE) on its website which is available for public use.<sup>24</sup> The LEIE allows any person to search for an excluded individual or entity, or multiple individuals or entities. A screenshot of the search options available is shown below:



The screenshot shows a search interface titled "Search For An Individual" with a help icon. Below the title are three search options: "Search For Multiple Individuals", "Search For A Single Entity" (which is selected), and "Search For Multiple Entities". There are two input fields: "Last Name" and "(and/or) First Name". Below the input fields are two buttons: "Search" and "Clear".

As of the date of this report, 581 Kansas individuals and business entities were on the HHS OIG exclusions list.

To enforce the exclusions program, the HHS Secretary may impose a civil monetary penalty on any person who submits a claim for payment from federal health care funds while that person is excluded from participation in Federal health care programs.<sup>25</sup> Civil monetary penalties are also available for any person or entity who “arranges or contracts (by employment or otherwise) with an individual or entity that the person knows or should know is excluded from participation in a Federal health care program . . . for the provision of items or services for which payment may be made under such a program.”<sup>26</sup>

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<sup>21</sup> 42 U.S.C. 1320a-7(b).

<sup>22</sup> 42 U.S.C. 1320a-7(c).

<sup>23</sup> 42 U.S.C. 1320a-7(g).

<sup>24</sup> This list is available at: [https://oig.hhs.gov/exclusions/exclusions\\_list.asp](https://oig.hhs.gov/exclusions/exclusions_list.asp).

<sup>25</sup> 42 U.S.C. 1320a-7a(a)(1)(D) and (c).

<sup>26</sup> 42 U.S.C. 1320a-7a(a)(6).

## **State Oversight**

Effective March 2, 2020, KDADS is required to conduct a review of each MCO's policies, systems, and processes that monitor HCBS provider qualifications at least once every 365 days.<sup>27</sup> The MCOs, in turn, are required to have "an internal system, process and/or policy in place to monitor and verify that all providers for each waiver are in compliance with the provider qualifications listed in the current and approved HCBS waiver at the time of the review period."<sup>28</sup>

The three MCOs have contracted with a company, Averifi, to complete the HCBS provider qualifications audits required by KDADS policy.<sup>29</sup> For FMS providers, Averifi will request a list of current employees hired by Medicaid beneficiaries and determine a random sample of direct case workers, such as PCAs, whose employee files will be subject to audit.

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<sup>27</sup> KDADS Policy No. M2017-171, effective March 2, 2020.

<sup>28</sup> *Id.* at Section I.A.

<sup>29</sup> KMAP Bulletin 20004, February 2020.

# Scope, Objective, and Methodology

## Scope

The State of Kansas uses AuthentiCare, an electronic visit verification system, to monitor, verify, and submit billing information for certain services provided to HCBS waiver participants, such as PCS. The scope of this review included all PCAs whose status shows as “active” in AuthentiCare. We excluded those PCAs whose status is “inactive” or “suspended.” The purpose of narrowing the scope of our review was to focus our analysis on those workers who may be actively providing services to Medicaid beneficiaries.

## Objective

The objective of this review was to obtain sufficient, appropriate evidence to answer the following questions:

- 1) Are there any HHS OIG-excluded individuals who are currently providing PCS to Kansas Medicaid beneficiaries?
- 2) Were payments for PCS made to any excluded individuals?

## Methodology

We used AuthentiCare to obtain a list of PCAs whose status is “active.” We then compared the list of active workers to the LEIE to identify name-based matches. We narrowed the field of name-based matches by identifying those whose LEIE exclusion date occurred before the date on which the worker became active in AuthentiCare. We categorized these workers as potential LEIE matches and isolated their records for further testing.

For each potential LEIE match, we compared the date of birth shown in the LEIE to the date of birth shown in AuthentiCare to determine whether there was an actual match. For each actual match, we pulled claims data from AuthentiCare and MMIS to determine whether any payments were made for PCS provided by excluded individuals. We also obtained employee records for each actual match to verify whether the employing home health agency, or the FMS provider assisting the Medicaid beneficiary in screening candidates for employment, conducted required LEIE checks prior to hiring the PCA.

To verify the HHS OIG exclusion, we conducted name-based searches of the LEIE and confirmed potential matches using the individual’s Social Security number. For each confirmed match, we requested documentation of the exclusion from the HHS OIG Sanctions Division. We were unable to obtain exclusion documentation for two of the confirmed matches. The HHS OIG Sanctions staff advised us that those documents were likely in hard copy format at the HHS OIG offices, but staff were unable to return to their offices due to the pandemic state of emergency.

## Review Findings

We identified four (4) PCAs who are classified as “Active” in AuthentiCare and are currently HHS OIG-excluded from participation in Medicaid. Of those four PCAs, two (2) do not have any recent claims activity. Specific findings for those PCAs are as follows:

- **PCA No. 1:** This individual was placed on the LEIE on August 20, 2012, and as of the date of this report has not been reinstated. We identified a total of **\$551.28** in payments made for PCS and enhanced care services provided by this individual during nine days in February 2019. We obtained and reviewed the employment file from this individual’s employing home health agency and determined that this PCA was hired on a provisional basis pending the outcome of background checks. The agency ran the HHS OIG exclusions check on February 12, 2019, roughly one week after the PCA began working, and received a match. This violated the KDADS HCBS Background Check Policy in effect at the time, which required the HHS OIG exclusions check to be completed prior to the start of provisional employment.<sup>30</sup>
- **PCA No. 2:** This individual was placed on the LEIE on October 20, 2014, and as of the date of this report has not been reinstated. She was entered into AuthentiCare as a PCA on April 6, 2016, but no claims were submitted for her services. The home health agency that employed this individual was unable to provide the employee file for this PCA and we were thus unable to determine whether the agency ran the required HHS OIG check. The agency stated that the PCA worked a total of four hours for Medicaid beneficiaries, but was paid with other funding sources. We found no evidence that Medicaid funds were used to pay for this PCA’s services.

We also identified two (2) PCAs who appeared to be actively providing PCS to Kansas Medicaid beneficiaries at the time of this review:

- **PCA No. 3:** This individual was placed on the LEIE on May 20, 2009, and as of the date of this report has not been reinstated. In October 2019 she was hired by a self-directed beneficiary to provide PCA services, but the FMS provider assisting the beneficiary did not run the required HHS OIG exclusion check. The FMS provider stated that they only run the background checks required by the state, which suggests that the FMS provider was unaware that they are required to run an HHS OIG exclusions check.

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<sup>30</sup> KDADS Policy No. E2019-010, effective January 14, 2019, Section II.B.1.f.

We identified a total of **\$5,329.80** in Medicaid payments made for PCS and enhanced care services provided by this individual between October 24, 2019, and February 12, 2020. No claims for this individual were submitted for dates of service after February 12, 2020.

- **PCA No. 4:** This individual was placed on the LEIE on January 20, 2013, and as of the date of this report has not been reinstated. This PCA was hired effective March 1, 2020, to provide services to a beneficiary who self-directs their care. The FMS provider that assisted the beneficiary with the employment process ran required background checks, including LEIE database searches. However, the FMS provider searched for the PCA’s name under the “Entity Search” option rather than the “Individual Search” option and therefore did not get a match.

The FMS provider also conducted the required Kansas Nurse Registry check on February 23, 2020, which returned a result stating that this individual has a prohibiting offense that would bar employment as a PCA. Our investigation revealed that this PCA was convicted of conspiracy to commit mistreatment of a dependent adult, a severity level 8, person felony, in October 2009. The PCA was placed on the LEIE following this conviction. It is unclear why this PCA was allowed to be hired notwithstanding the Kansas Nurse Registry check results.

We identified a total of \$381.84 in claims for PCS provided by this individual, of which **\$163.04** was paid. No PCS claims for this individual were submitted for dates of service after April 29, 2020.

Upon discovering that PCA No. 4 was currently providing services to a Medicaid beneficiary, we notified KDHE and KDADS Program Integrity staff, the FMS provider, and the beneficiary’s MCO. The FMS provider informed us that they canceled all pending billings from that PCA, notified the beneficiary that the PCA was no longer able to provide services, and terminated the PCA.

The table below contains a summary of our findings:

	Date of HHS OIG Exclusion	Dates of Service to Medicaid beneficiaries	Total Payments While Excluded
PCA #1	8/20/2012	2/3/2019 – 2/11/2019	\$551.28
PCA #2	10/20/2014	N/A	\$0
PCA #3	5/20/2009	10/24/2019 – 2/12/2020	\$5,329.80
PCA #4	1/20/2013	3/1/2020 – 4/29/2020	\$163.04

## **Referrals**

We intend to refer PCA #1, PCA #3, and PCA #4 to the Medicaid Fraud and Abuse division of the Attorney General's Office for possible prosecution upon receipt of exclusion documentation from the HHS OIG. The HHS OIG informs us that they expect to return to their offices around August 2020, at which time they will be able to access hard copy records of these exclusions.

# Recommendations

This review identified gaps in controls that permitted HHS OIG-excluded individuals to provide services to Kansas Medicaid beneficiaries. To help close those gaps, we make the following recommendations:

1. KDADS should revise Policy Number E2019-010, HCBS Background Check Policy, as follows:
  - a. Clarify that the policy requires FMS providers to conduct background checks on all PCA applicants for hire by self-directed Medicaid beneficiaries;
  - b. Clarify that the “Search For An Individual” option should be used when conducting HHS OIG exclusions checks on individuals; and
  - c. Clarify that an HHS OIG exclusions search must be conducted for the individual’s current name, *and* for any prior names the individual may have used previously.
2. KDADS should communicate the above revisions to all HCBS providers.
3. As part of the annual review process per KDADS Policy No. M2017-171, each MCO should ensure that Averifi samples a sufficient number of PCA worker files to provide reasonable assurance that the contracted home healthy agency or FMS provider is conducting a complete background check for all PCAs.

## Conclusion

Despite policies in place to prevent HHS OIG-excluded individuals from participating in Kansas' Medicaid program, we identified four excluded individuals who were hired to provide PCS to Medicaid beneficiaries. In one case, the PCA worked for Medicaid beneficiaries but was paid with non-Medicaid funds. In the other three cases, we determined that failure to comply with existing HCBS provider background check policies resulted in Medicaid monies being used to pay for services provided by an HHS OIG-excluded individual. Specifically, we made the following findings:

- One PCA was hired on a provisional basis prior to the HHS OIG exclusions check being completed, in violation of KDADS policy. The PCA was permitted to work for nine (9) days before the HHS OIG check was finally conducted.
- One PCA provided services to a Medicaid beneficiary between October 2019 and February 2020, and was never screened for HHS OIG exclusion. In this case, it appears that the FMS provider was unaware that KDADS policy requires an HHS OIG exclusions check to be conducted for all PCAs.
- One PCA was allowed to provide PCS to a Medicaid beneficiary notwithstanding a Kansas Nurse Registry check showing that the PCA had a prohibiting offense. In addition, the HHS OIG exclusions check was not performed correctly for this PCA, which led to a false negative result.

In total, we identified **\$6,044.12** in payments for personal care services provided by HHS OIG-excluded individuals.

Because Kansas does not require PCAs to hold a professional credential or enroll as a Medicaid provider, state-level administrative options for suspending or terminating a PCA from the Kansas Medicaid program are unavailable. This means that the state relies on home health agencies and FMS providers to follow background check requirements and prevent excluded individuals from serving as PCAs.

We recommend that home health agencies and FMS providers be reminded of state background check requirements, and that the MCOs require their contracted HCBS provider qualifications auditor to thoroughly review PCA employee files to ensure that complete and timely background checks are being completed.