

**STATE OF MICHIGAN  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM  
FOR THE DEPARTMENT OF COMMUNITY HEALTH**  
P. O. Box 30763, Lansing, MI 48909  
(877) 833-0870; Fax (517) 373-4147

IN THE MATTER OF:

████████████████████

Docket No. 2014-31015 CMH  
Case No. ██████████

Appellant

\_\_\_\_\_ /

**DECISION AND ORDER**

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 upon Appellant's request for a hearing.

After due notice, a hearing was held on ██████████. ██████████, Appellant's mother, appeared and testified on Appellant's behalf. ██████████, Children's Autism Behavioral Trainee, appeared as a witness for Appellant.

██████████, Manager Customer Services, Due Process Hearings Coordinator, appeared on behalf of ██████████ (CMH, GHS or Department). ██████████, Supervisor Quality Management and Interim Supervisor, ██████████, appeared as a witness for the Department.

**ISSUE**

Did the CMH properly terminate Appellant's Applied Behavior Analysis (ABA)?

**FINDINGS OF FACT**

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

1. Appellant is a █ year old Medicaid beneficiary, born ██████████, who has been receiving services through ██████████ (CMH). (Exhibit A, p 15; Testimony)
2. CMH is under contract with the Department of Community Health (MDCH) to provide Medicaid covered services to people who reside in the CMH service area. (Testimony)
3. Appellant is diagnosed with Autism. (Exhibit A, p 23; Testimony)

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4. Appellant lives with his parents in a single family home. (Exhibit A, pp 35-38, 18; Testimony)
5. Appellant's family has few informal supports and none are adequate to care for Appellant's needs. (Exhibit A, p 38; Testimony)
6. Appellant attends school five days per week for ½ day at [REDACTED]. Appellant also receives speech and occupational therapy at [REDACTED]. (Exhibit A, p 17; Testimony)
7. Appellant and his family currently receive the Medicaid Covered Specialty Mental Health Services and Supports of Respite, Supports Coordination, Family Training and Applied Behavior Analysis (ABA). (Exhibit A, pp 42-42; Testimony)
8. Appellant was enrolled in ABA in [REDACTED] and has made tremendous progress since attending the program at the [REDACTED]. (Exhibits B, 2; Testimony)
9. On [REDACTED], CMH sent an Advance Action Notice to Appellant's parents which indicated that Applied Behavior Analysis would be terminated effective [REDACTED] because the benefit is only allowed up to age [REDACTED] and Appellant will turn [REDACTED] years old on [REDACTED]. [REDACTED] is a Friday and the [REDACTED] is not open on the weekends). The notice included rights to a Medicaid fair hearing. (Exhibit A, pp 1-3)
10. The Michigan Administrative Hearing System received Appellant's request for hearing on [REDACTED]. (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 (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.

Title XIX of the Social Security Act, enacted in 1965, authorizes Federal grants to States for medical assistance to low-income persons who are age 65 or over, blind, disabled, or members of families with dependent children or qualified pregnant women or children. The program is jointly financed by the Federal and State governments and administered by States. Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures. Payments for services are made

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directly by the State to the individuals or entities that furnish the services.

*42 CFR 430.0*

The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with the specific requirements of title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department. The State plan contains all information necessary for CMS to determine whether the plan can be approved to serve as a basis for Federal financial participation (FFP) in the State program.

*42 CFR 430.10*

Section 1915(b) of the Social Security Act provides:

The Secretary, to the extent he finds it to be cost-effective and efficient and not inconsistent with the purposes of this subchapter, may waive such requirements of section 1396a of this title (other than subsection(s) of this section) (other than sections 1396a(a)(15), 1396a(bb), and 1396a(a)(10)(A) of this title insofar as it requires provision of the care and services described in section 1396d(a)(2)(C) of this title) as may be necessary for a State...

The State of Michigan has opted to simultaneously utilize the authorities of the 1915(b) and 1915(c) programs to provide a continuum of services to disabled and/or elderly populations. Under approval from the Centers for Medicare and Medicaid Services (CMS) the Department of Community Health (MDCH) operates a section 1915(b) and 1915(c) Medicaid Managed Specialty Services and Support program waiver. CMH contracts with the Michigan Department of Community Health to provide services under the waiver pursuant to its contract obligations with the Department.

Medicaid beneficiaries are only entitled to medically necessary Medicaid covered services for which they are eligible. Services must be provided in the appropriate scope, duration, and intensity to reasonably achieve the purpose of the covered service. See *42 CFR 440.230*.

The *Medicaid Provider Manual, Mental Health/Substance Abuse*, section articulates Medicaid policy for Michigan. It states with regard to Applied Behavior Analysis (ABA):

## **SECTION 19 - APPLIED BEHAVIOR ANALYSIS**

The purpose of this policy is to clarify developmental screening policy for children who may be affected by Autism Spectrum Disorder (ASD), and to describe coverage and processes for the treatment of ASD for beneficiaries 18 months through 5 years of age.

According to the U.S. Department of Health & Human Services, autism is characterized by impaired social interactions, problems with verbal and nonverbal communication, repetitive behaviors, and/or severely limited activities and interests. Early detection and treatment can have a significant impact on the child's development. Autism can be viewed as a continuum or spectrum, known as Autism Spectrum Disorder (ASD), and includes Autistic Disorder, Asperger's Disorder, and Pervasive Developmental Disorder-Not Otherwise Specified (PDD-NOS). The disorders on the spectrum vary in severity and presentation, but have certain common core symptoms. The goals of treatment for ASD focus on improving core deficits in communication, social interactions, and restricted behaviors. Changing these fundamental deficits may benefit children by developing greater functional skills and independence.

\* \* \* \*

### **19.3 DIAGNOSIS/DETERMINATION OF ELIGIBILITY FOR TARGET GROUP**

The target group for the ABA benefit includes children 18 months through 5 years of age with a diagnosis of ASD based upon a medical diagnosis in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) of ASD and who have the developmental capacity to clinically participate in the available interventions covered by the benefit. A well-established DSM-IV diagnosis of Autistic Disorder, Asperger's Disorder or PDD-NOS should be given the diagnosis of ASD.

\* \* \* \*

### **19.6 ABA INTERVENTION**

ABA services are available for Medicaid beneficiaries diagnosed with ASD and are provided for all levels of severity of ASD. The behavioral intervention should be provided at an appropriate level of intensity in an appropriate setting(s) for an appropriate period of time, depending on the needs of the child and their family within their community. Clinical determinations of service intensity, setting(s), and duration are designed to facilitate the child's goal attainment. These supports may serve to reinforce skills or lessons taught in school, therapy or other settings, but are not intended to supplant services provided in school or other settings

or to be provided when the child would typically be in school but for the parent's choice to home-school the child. Each child's IPOS must document that these services do not include special education and related services defined in the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) that are available to the individual beneficiary through a local education agency. The recommended service intensity, setting(s), and duration will be included in the child's IPOS, with the planning team and the family reviewing the IPOS at regular intervals (minimally every three months) and, if indicated, adjusting service intensity and setting(s) to meet the child's changing needs. Intensity includes the number of hours of intervention provided to the child. Service intensity determination will be based on research-based interventions integrated into an IPOS with input from the planning team.

Treatment methodology will use an ethical, positive approach to any serious behaviors (e.g., self-injury, aggression) based on a comprehensive bio-psychosocial assessment including, but not limited to, functional analysis/assessment performed by a BCBA. The use of punitive, restrictive, or intrusive interventions is prohibited during ABA. The use of restraints, seclusion, and aversive techniques are prohibited by the Michigan Department of Community Health (MDCH) in all community settings.

There are two levels of intensity within ABA Services: Early Intensive Behavioral Intervention (EIBI) and Applied Behavioral Intervention (ABI). The PIHP's Utilization Management will authorize the intensity of services prior to delivery of services. EIBI is available to any eligible child who has an ADOS-2 score that falls within the Autism range and is provided an average of 10-20 hours a week (actual hours as determined by an ABA plan and interventions required). EIBI is available for children 18 months through 5 years of age as defined by the child's ability to actively engage in the therapeutic treatment process. ABI is a level of intervention available for children 18 months through 5 years of age who have an ADOS-2 score that falls within the Autism or ASD range who are not receiving EIBI and is provided an average of 5-15 hours a week.

*Medicaid Provider Manual,  
Mental Health and Substance Abuse Chapter,  
October 1, 2013, pp 139-149*

The CMH is mandated by federal regulation to perform an assessment for the Appellant to determine what Medicaid services are medically necessary and determine the amount or level of the Medicaid medically necessary services that are needed to reasonably achieve her goals.

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CMH's Interim Supervisor, [REDACTED], testified that ABA services are only available for children [REDACTED] through [REDACTED] old and that Appellant will turn [REDACTED] on [REDACTED], [REDACTED]. CMH's Interim Supervisor, [REDACTED] indicated that ABA consists of intensive, direct, one on one services in a structured environment that lead to skill development and learning opportunities for persons on the Autism Spectrum Disorder. CMH's Interim Supervisor, [REDACTED] testified that the [REDACTED] has individual treatment rooms, larger spaces for group activities, as well as play areas used for rewards. CMH's Interim Supervisor, [REDACTED] indicated that individuals receiving treatment at the [REDACTED] receive services 5 days per week, for 3 hours each session, for a total of 15 hours of ABA services each week. CMH's Interim Supervisor, [REDACTED] testified that workers at the [REDACTED] are specially trained and are taking classes to become certified to work with persons with Autism. CMH's Interim Supervisor, [REDACTED] indicated that persons accepted into the program go through a screening, followed by a three step assessment process before being accepted into the program. CMH's Interim Supervisor, [REDACTED] testified that when a child turns 6 years old, another assessment is completed and the child is transitioned to school services as well as other Medicaid benefits available through GHS.

Appellant's mother requested that the services be extended for another 8 months because Appellant did not start to receive ABA services until [REDACTED]. Appellant's mother indicated that funding for autism services in Michigan was set to begin [REDACTED], so Appellant missed 8 months of services that he would have been entitled to. Appellant's mother testified that to receive the same services privately would be cost-prohibitive. Appellant's mother indicated that early intervention is extremely important for persons with autism and leads to much better results later in life. Appellant's mother testified that Appellant was diagnosed with autism at age [REDACTED] and has been receiving services through the school district beginning at age [REDACTED] but never made anywhere near the kind of progress he has made in the past several months in the [REDACTED]. Appellant's mother testified that if Appellant were allowed to continue at the [REDACTED], it is possible that he would soon be speaking in complete sentences and might have the opportunity to be a fully functioning adult one day. Appellant's mother testified that the services offered at the school cannot match what is offered at the [REDACTED].

Appellant's mother testified that Appellant now uses "I want" sentences to request food; something that he was unable to do at all before attending the Clinic. Appellant's mother indicated that Appellant can now take his clothes on and off with little assistance, hangs his coat up when entering a room, puts his shoes on the shoe rack, throws trash away, makes good eye contact, and bites his fingers much less than before attending the Clinic. Appellant's mother indicated that Appellant interacts more during play time, has fewer tantrums because he is less frustrated, and does not walk in a repeating fashion any longer. Appellant's mother testified that she is sure Appellant would continue to improve if he were allowed to continue in the [REDACTED] and she does not want him to go backwards if he stops attending the Clinic. (Exhibit 2 also demonstrates the progress Appellant has made).

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Appellant's Children's Autism Behavioral Trainee testified that Appellant's progress in the Clinic has been very good and that he has mastered 76 distinct tasks since beginning at the Clinic. Appellant's Children's Autism Behavioral Trainee indicated that Appellant did not really speak when he began at the clinic and he now makes spontaneous requests up to 150 times per day and has learned over 190 words. Appellant's Children's Autism Behavioral Trainee indicated that Appellant's finger biting is way down since he began attending the Clinic. Appellant's Children's Autism Behavioral Trainee testified that Appellant's attendance at the clinic is at 93% and would be even higher if he had not missed a week during the winter due to illness. Appellant's Children's Autism Behavioral Trainee indicated that Appellant's mother's attendance at the Clinic is 100%. Appellant's Children's Autism Behavioral Trainee testified that in her professional opinion, Appellant would continue to improve if he were allowed to continue at the ██████████.

This administrative law judge must follow the Code of Federal Regulations (CFR) and the state Medicaid policy, and is without authority to grant services not in accordance with the CFR and state policy, even if those services would clearly benefit a consumer, as is certainly the case here. The CMH provided sufficient evidence that it adhered to the CFR and state policy when terminating Appellant's ABA services. As indicated above, ABA services are only available to persons on the autism spectrum, with Medicaid financing, between █████ months through █████ years of age, and Appellant will turn █████ on █████. While it is unfortunate that Appellant did not begin to receive autism services in █████ when they first became available, there is simply no provision in the Medicaid Provider Manual or the CFR's to extend ABA services, paid for by Medicaid, beyond a person's █████ birthday. While there was some testimony regarding the reasons why Appellant began receiving ABA services when he did, ultimately this evidence is irrelevant because, regardless of the reason Appellant began ABA services later, he still cannot continue those services, with Medicaid financing, past his █████ birthday. Appellant, who bears the burden of proving by a preponderance of evidence that ABA should be covered past █████ years of age, did not meet that burden.

As such, the evidence presented by the Department supports the conclusions it reached with regard to ABA services.

[REDACTED]  
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**DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that CMH properly terminated Appellant's ABA services.

**IT IS THEREFORE ORDERED** that:

The CMH decision is **AFFIRMED**.



Robert J. Meade  
Administrative Law Judge  
for James K. Haveman, Director  
Michigan Department of Community Health

cc:

[REDACTED]

[REDACTED]  
Date Signed: April 16, 2014

Date Mailed: April 16, 2014

**\*\*\* NOTICE \*\*\***

The Michigan Administrative Hearing System may order a rehearing on either its own motion or at the request of a party within 30 days of the mailing date of this Decision and Order. The Michigan Administrative Hearing System will not order a rehearing on the Department's motion where the final decision or rehearing cannot be implemented within 90 days of the filing of the original request. The Appellant may appeal the Decision and Order to Circuit Court within 30 days of the receipt of the Decision and Order or, if a timely request for rehearing was made, within 30 days of the receipt of the rehearing decision.