

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. 2014-32509 CMH

██████████
Appellant
_____ /

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and upon a request for a hearing filed on behalf of the minor Appellant.

After due notice, a hearing was held on ██████████. Attorneys ██████████ and ██████████ represented Appellant. ██████████, Fair Hearings Officer, appeared and testified on behalf of Respondent ██████████, Appellant's father; ██████████ from ABA ██████████, Appellant's case manager at Community Support and Treatment Services (CSTS); and ██████████, a customer service representative at ██████████ and CSTS; were also present during the hearing.

Following the completion of the hearing, the record was left open until ██████████ at the request of Appellant's representatives so that the parties could have the opportunity to submit post-hearing briefs.

ISSUE

Did ██████████ properly decide to terminate Appellant's Applied Behavior Analysis (ABA) services?

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 Medicaid beneficiary, born ██████████ who has been diagnosed with Autism. (Respondent's Exhibit C, pages 1-2).
2. Appellant has been receiving services through ██████████ and ██████████ contracted service providers, including ██████████ hours per week of ABA services. (Respondent's Exhibit B, page 2).

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3. Following the most recent Individual Plan of Service (IPOS) meeting, on [REDACTED] Appellant again approved for [REDACTED] hours per week of ABA for the time period of [REDACTED] to [REDACTED]. (Respondent's Exhibit B, pages 1-2).
4. However, during that meeting, Appellant and his father were informed that Appellant's ABA services would not approved and could not be approved past [REDACTED], when Appellant turned [REDACTED] years-old. (Respondent's Exhibit C, page 2).
5. Appellant's family also indicated that they would appeal that determination. (Respondent's Exhibit C, page 2).
6. On [REDACTED], the Michigan Administrative Hearing System (MAHS) received the request for hearing filed on behalf of the minor Appellant in this case.
7. In that request for hearing Appellant's father appeals the decision to terminate Appellant's ABA services when Appellant turns [REDACTED] years-old.
8. On [REDACTED] also sent Appellant written notice that his ABA services would be terminated on [REDACTED]. (Respondent's Exhibit A, pages 1-2).
9. Regarding the reason for the termination, the notice stated:

The Medicaid Autism Benefit which provides children ages [REDACTED] months through [REDACTED] years old who have a diagnosis of Autism Spectrum Disorder with Applied Behavior Analysis (ABA) Services concludes on [REDACTED] as [REDACTED] [REDACTED] turns [REDACTED] years of age on [REDACTED]

Respondent's Exhibit A, page 1

10. On [REDACTED], MAHS issued a Notice of Hearing with respect to a telephone hearing scheduled for [REDACTED]
11. On [REDACTED] Appellant's father, who was his representative at the time, requested that the telephone hearing be changed into an in person hearing.
12. On [REDACTED], MAHS issued a Notice of Rescheduled In Person Hearing with respect to an in person hearing scheduled for [REDACTED].

13. As noted in the IPOS, Appellant's ABA services were still approved through the date of the in person hearing and he continued to utilize such services.
14. During the administrative hearing held on ██████████ the undersigned Administrative Law Judge also ruled that, given the timing of the request for hearing, Appellant services must remain in place until a decision and order is issued in this case.

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 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.

██████████ contracts with the Michigan Department of Community Health to provide services under the waiver pursuant to its contract obligations with the Department. Moreover, ██████████ must also follow the provisions of the Michigan Medicaid Provider Manual (MPM), which addresses all health insurance programs administered by the Michigan Department of Community Health.

With respect to the ABA services at issue in this case, the chapter of the MPM addressing mental health services through Prepaid Inpatient Health Plans (PIHPs), such as ██████████, states:

SECTION 3 – COVERED SERVICES

The Mental Health Specialty Services and Supports program is limited to the state plan services listed in this section, the services described in the Habilitation Supports Waiver for Persons with Developmental Disabilities Section of this chapter, and the additional/B3 services described in the Additional Mental Health Services (B3s) section of this chapter. The PIHP is not responsible for providing state plan covered services that MDCH has designated another agency to provide (refer to other chapters in this manual for additional information, including the Chapters on Medicaid Health Plans, Home Health, Hospice, Pharmacy and Ambulance), nor is the PIHP responsible for providing the Children's Waiver Services described in this chapter. However, it is expected that the PIHP will assist beneficiaries in accessing these other Medicaid services. (Refer to the Substance Abuse Section of this chapter for the specific program requirements for substance abuse services.) It is

expected that PIHPs will offer evidence based and promising practices as part of the Medicaid covered specialty services where applicable. PIHPs shall assure that these practices are provided by staff who have been appropriately trained in the model(s) and are provided to the population for which the model was intended.

3.1 APPLIED BEHAVIOR ANALYSIS

Refer to the Applied Behavior Analysis Section of this chapter for specific program requirements.

* * *

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

Accurate and early diagnosis of ASD is critical in ensuring appropriate intervention and positive outcomes. The

following is the process for determining eligibility for ABA for a child referred to the PIHP with a suspected diagnosis of autism or one of the related ASDs, including Autistic Disorder, Asperger's Disorder, and PDD-NOS. The MDCH Behavioral Health and Developmental Disabilities Administration (BHDDA) will make the final eligibility determination for ABA services.

Determination of diagnosis of ASD shall be performed by a child mental health professional (CMHP), which includes physicians, fully licensed psychologists, limited licensed psychologists, licensed or limited licensed master's social workers, licensed or limited licensed professional counselors, and registered nurses with a minimum education of a master's degree in a mental health-related field from an accredited school. The CMHP, as defined above, must have at least one year of experience in the examination and treatment of children with ASD, and is able to diagnose within their scope of practice and professional license. The determination of diagnosis will be performed using the Autism Diagnostic Observation Schedule-Second Edition (ADOS-2). A developmental family history interview, such as the Autism Diagnostic Interview-Revised (ADI-R), shall be administered with validation of diagnosis by a physician (preferably a child psychiatrist) and/or a fully licensed psychologist unless the diagnosis is made by either of those professionals.

The CMHP, as defined above, will use the appropriate ADOS-2 module that includes the Toddler Module or Module 1, 2, or 3. The ADOS-2 modules are appropriate to use from 12 months of age through adulthood. The ADOS-2 is to be administered at intake and discharge.

An ASD developmental family history interview, such as the ADI-R, shall be administered by the clinicians who are required to obtain advance training in conducting the ADI-R. Interviews should thoroughly address all domains relevant to ASD (social affective/communication skills, restricted repertoire).

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.

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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.

*MPM, April 1, 2014 version
Mental Health/Substance Abuse Chapter
Pages 15, 139-140, 146
(Underline added by ALJ)*

Pursuant to the above policy, ██████████ decided to terminate Appellant's ABA services in this case. ██████████ representative testified that ABA services through ██████████ are only available for children ██████████ months through ██████████ years old and that Appellant will turn ██████████ on ██████████ witness also testified that when as child turns ██████████ years old, another assessment is completed and the child is transitioned to other services.

In response, Appellant first argues that the medically-necessary ABA services are mandated by federal law as, under the Medicaid Act, participating states must provide early and periodic screening, diagnostic, and treatment services ("EPSDT") for Medicaid-eligible minors under the age of 21, see 42 USC 1396a(a)(43), 42 USC 1396d(a)(4)(B), 42 USC 1396d(r); including "necessary health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan." 42 USC 1396d(r)(5). According to Appellant, because Appellant's condition was discovered during EPSDT screening, Michigan Medicaid must provide any treatment necessary to correct or ameliorate that condition, including ABA, whether or not the treatment is covered by the state's plan or Appellant has aged out of the target population specifically identified in the above policy.

Appellant also argues that, given the policy relied upon by WCHO, the state of Michigan's Medicaid Plan also violates the Code of Federal Regulations because it fails to provide services that are sufficient in amount, scope or duration to treat individuals with Autism or Autism Spectrum Disorder. While a state Medicaid agency "may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures", 42 CFR 440.230(d), the Medicaid agency may not

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arbitrarily deny or reduce the amount, duration, or scope of a required service solely because of “the diagnosis, type of illness, or condition”, 42 CFR 440.230(c), and in this case it is undisputed that the termination of services was based solely on Appellant’s age and an age-restriction found in policy, not medical necessity.

Appellant further notes that, while the state of Michigan has made great strides regarding coverage for children with autism in recent years, including the enactment of Michigan’s Autism Insurance Reform legislation, much of that legislation excludes Medicaid beneficiaries and Appellant’s family, like many others, are unfairly and unlawfully being denied medically necessary services.

However, the undersigned Administrative Law Judge is bound by the applicable policy in this case and, as described above, that policy clearly provides that ABA services through a PIHPs such as ██████████ are only available to persons on the autism spectrum, with Medicaid financing, between ████████ months through ██████ years of age.

Here, Appellant will turn ██████ on ██████████ and, even if ABA services would clearly continue to benefit him and the termination was not based on a lack of medical necessity, ██████████ therefore provided sufficient evidence that it adhered to state policy when terminating Appellant’s ABA services.

Appellant and his representatives bear the burden of proving by a preponderance of evidence that ABA should be covered for Appellant through ██████████ after he turns ██████ years-old under the applicable policy, but they did meet that burden for the reasons discussed above. As such, the evidence in this case supports the conclusions ██████████ reached with regard to ABA services and its decision must be affirmed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that ██████████ properly decided to terminate Appellant’s ABA services.

IT IS THEREFORE ORDERED that:

██████████ decision is **AFFIRMED**.

Steven Kibit

Steven Kibit
Administrative Law Judge
for James K. Haveman, Director
Michigan Department of Community Health

Date Signed: ██████████

Date Mailed: ██████████

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SK/db

cc:

[REDACTED]

***** 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.