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:

[redacted]

Docket No. [redacted]
Case No. [redacted]

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 [redacted]. Attorney [redacted] appeared on Appellant's behalf. [redacted] Appellant's father; [redacted] owner of [redacted] and [redacted], Analyst and Program Supervisor at [redacted]; testified as witnesses for Appellant. [redacted] Fair Hearings Officer, appeared and testified on behalf of Respondent [redacted] Community Health Organization ([redacted], Appellant's case manager at [redacted]), and [redacted] Health Services Supervisor at [redacted], also testified as witnesses for Respondent.

ISSUE

Did [redacted] properly deny Appellant's request for [redacted] hours per week of Applied Behavior Analysis [redacted] 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 [redacted] year-old Medicaid beneficiary who has been diagnosed with Autism and who receives services through [redacted] and [redacted] (Petitioner's Exhibit 3, page 1).

2. Prior to his sixth birthday, Appellant received [redacted] hours per week of [redacted] services and [redacted] hours per week of family training through [redacted]. (Testimony of [redacted]; Testimony of [redacted].

3. However, in [redacted], Appellant's family was notified that his [redacted] services would end on Appellant's [redacted] birthday. (Respondent's Exhibit A, page 7).

4. Appellant appealed that termination of services. (Respondent's Exhibit A, page 7).

5. Appellant's [redacted] services continued while his appeal was pending. (Petitioner's Exhibit 1, pages 1-3; Testimony of [redacted]).

6. On [redacted], an administrative hearing was held before the undersigned Administrative Law Judge. (Respondent's Exhibit A, page 7).

7. On [redacted] the undersigned Administrative Law Judge issued a Decision and Order affirming [redacted] decision to terminate Appellant's [redacted] services. (Respondent's Exhibit A, pages 7-16).

8. Appellant's [redacted] services subsequently continued until [redacted] at which point his new Individual Plan of Service (IPOS) took effect. (Testimony of [redacted]; Testimony of [redacted].

9. Appellant's family continued to request that [redacted] services be part of the new IPOS. (Testimony of [redacted]; Testimony of [redacted].

10. In the new IPOS, [redacted] authorized targeted case management; respite care services; [redacted] hours a week of skill building assistance; and [redacted] hours per week of family training. (Respondent's Exhibit A, pages 4-6).

11. The skill building assistance and family training were to be provided by [redacted] and all parties understood that, while labelled as skill building assistance, [redacted] would actually continue to provide the same [redacted] services as before, just in a lesser amount. (Respondent's Exhibit A, page 4; Testimony of [redacted]; Testimony of [redacted]; Testimony of [redacted]; Testimony of [redacted]; Testimony of [redacted]).

12. [redacted] sent Appellant written notice of the new IPOS. (Respondent's Exhibit A, pages 2-3).

13. On [redacted] the Michigan Administrative Hearing System (MAHS) received the request for hearing filed on behalf of the minor Appellant.

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.
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> *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, the Michigan Department of Community Health (MDCH) operates a section 1915(b) and 1915(c) Medicaid Managed Specialty Services and Support program waiver.

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

With respect to the [redacted] services at issue in this case, the chapter of the MPM addressing mental health and substance abuse services 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.
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> **3.1 APPLIED BEHAVIOR ANALYSIS**
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> Refer to the Applied Behavior Analysis Section of this chapter for specific program requirements.
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> * * *
>
> **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.
>
> 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, [redacted] decided to deny Appellant's request for [redacted] services in this case. As testified to by [redacted] witnesses, [redacted] services through [redacted] are only available for children [redacted] months through [redacted] years-old and Appellant is [redacted] years-old.

In response, Appellant argues that the requested [redacted] services are medically necessary and therefore mandated by federal law in this case. Under Medicaid law, participating states must provide early and periodic screening, diagnostic, and treatment ("EPSDT") services for Medicaid-eligible minors under the age of [redacted], 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). Appellant's autism was discovered during an EPSDT screening and Appellant argues, pursuant to the above statutes, that Michigan Medicaid must provide any treatment necessary to correct or ameliorate that condition, including [redacted] services, through age [redacted] whether or not the treatment is covered by the state's plan or Appellant has aged out of the target population specifically identified for [redacted] services in the MPM. Appellant also notes that such arguments have been accepted in other jurisdictions[1] and in a recent bulletin put forth by the Center for Medicaid and CHIP[2] Services (CMCS) on [redacted].

Similarly, Appellant also argues that, to the extent the state of Michigan's Medicaid Plan fails to provide the medically necessary [redacted] services, it violates the Code of Federal Regulations by failing to provide services that are sufficient in amount, scope or duration to treat individuals with autism. 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 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).

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 due to the fact they do not have private insurance.

However, any equitable arguments regarding a disparity between benefits provided under private insurance and those provided under Medicaid are immaterial to this administrative hearing. Moreover, while Appellant makes general arguments based on federal statutes and regulations, it is the specific policies found in the MPM that implement those more general provisions and that apply in this case. Here, the clear and specific policy of the MPM expressly provides that [redacted] services are only available to persons on the autism spectrum, with Medicaid financing, between [redacted] months through [redacted] years of age. Appellant was [redacted] years-old at the time of the denial in this case and, consequently, [redacted] services are not covered under the MPM and [redacted] properly denied the request for such services.

[1] *See*, *e.g.*, *Garrido v Dudek*, 731 F3d 1152 (CA 11, 2013); *Parents League for Effective Autism Services v Jones-Kelley*, 339 Fed Appx 542 (CA 6, 2009).
[2] Children's Health Insurance Program

Outside of the formal denial of [redacted] services, the actual authorization of services in this case is problematic as [redacted] appears to have approved the provision of [redacted] services under a different name, despite the fact that those services are not covered. Moreover, the amount of services authorized does not appear to be based on any medical necessity. [redacted] testified that she did not make any determination regarding medical necessity and was merely following the directions of [redacted] representative in only authorizing [redacted] hours per week of skill building assistance, while [redacted] representative denied playing any role in the decision. Similarly, while [redacted] testified that the change in the amount of hours was based on Appellant's improvement, she also expressly acknowledged that Appellant would have continued to receive [redacted] hours per week of [redacted] services if he had not aged out of those services and, instead of identifying any specific improvements that were relied upon, she only testified that Appellant services are generally expected to be reduced as he improves.

Nevertheless, any issues outside of the denial of [redacted] services are beyond the scope of this hearing as the sole issue raised by Appellant in this case is the denial of the request for [redacted] services.[3] For the reasons discussed above, the undersigned Administrative Law Judge finds that [redacted] services are not covered by Medicaid in this case and that the [redacted] denial of Appellant's request for such services must be affirmed.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the [redacted] properly denied Appellant's request for [redacted] hours per week of [redacted] services.

IT IS THEREFORE ORDERED that:

The [redacted] decision is **AFFIRMED**.

Steven Kibit

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

Date Signed: [redacted]

Date Mailed: [redacted]

[3] Appellant and his representatives did not request more skill building assistance, even if that assistance are [redacted] services in practice, because they are understandably dissatisfied with receiving [redacted] services under a different name, as such services could be switched to actual skill building assistance at any time and without any advance notice or right to an appeal.

[redacted]
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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.