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3. Following the most recent assessment of Appellant's status in the program, the CMH determined that Appellant would age out of the autism ABA benefit but would be eligible for ongoing DD services. Testimony at the administrative hearing was that Appellant declined the DD services.
4. On ██████████ the CMH issued a Notice informing Appellant that "all services" will be terminated effective ██████████. The authority for the action being taken is given as "42 CFR 440.230(d)." No narrative reason is given on the notice. The notice is identified as giving Appellant a right to a "Medicaid Fair hearing." (Respondent's Exhibit A).
5. On 1 ██████████ the Michigan Administrative Hearing System (MAHS) received the request for hearing filed on behalf of the minor Appellant in this case. (Respondent's Exhibit B). Appellant filed a timely hearing request within the █ day pended period. The CMH failed to reinstate the action pending the outcome of the administrative hearing. (Testimony).
6. In the request for hearing, Appellant's mother appeals the decision to terminate Appellant's ABA services when Appellant turns █ years-old stating that the autism benefit will be expanded to individuals over █ beginning ██████████, that ██████████ and ██████████ ██████████ have received grants making it possible for children who should have aged out to remain in their programs, that her daughter will be negatively impacted, and that ██████████ ██████████ will require Appellant to go back on a █ month wait list. (Respondent Exhibit B).
7. During the administrative hearing held on ██████████, the undersigned Administrative Law Judge 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,

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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.

WCHO contracts with the Michigan Department of Community Health to provide services under the waiver pursuant to its contract obligations with the Department. Moreover, WCHO 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 WCHO, 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.

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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, October 1, 2015 version  
Mental Health/Substance Abuse Chapter  
Pages 15, 139-140, 146  
(Underline added by ALJ)*

The first issue here is whether the Respondent was required to reinstate Appellant's action due to a timely hearing request, pending the outcome of the administrative hearing. As noted in the Findings of Fact, Respondent's notice was dated ██████████. Appellant's hearing request was filed ██████████. Appellant filed her hearing request within

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the █ day period that would give her a right to have the action stopped pending the outcome of the hearing under federal and state requirements.

Respondent argued that it was not required to reinstate the action here pending the outcome of the hearing despite Appellant's filing of the hearing request within the 10 day period on the grounds that the action here is not one of federal Medicaid law. However, Respondent offered no authority to support its contention that the action here is not covered by federal regulations. Part of the eligibility requirements for obtaining the autism benefit is that the recipient be a beneficiary of Medicaid. The notice of the program ending here issued by the CMH itself cites the federal Medicaid regulation as authority for the action here-42 CFR 440.230(d). Moreover, state policy and procedure Advance Negative Action Notices to be reinstated pending the outcome of an administrative hearing. Respondent offered no authority or evidence that would show that the facts here follow under any exception(s) to the legal requirement that the action be reinstated. Failure to reinstate the action here is a violation of 42 CFR 431.211 absent evidence showing that an exception is carved out. Respondent submitted no such evidence. Thus, the Respondent is required to reinstate the action and issue benefits to Appellant that she is entitled to receive under federal and/or state law pending the out of the administrative hearing as required by law.

Regarding Appellant ageing out, pursuant to the above policy, CMH decided to terminate Appellant's ABA services in this case. The CMH's representative testified that ABA services through the DMH are only available for children █ months through █ years old. Appellant turned █ on ██████████. The CMH's witness also testified that at █ years old, another assessment determined that Appellant is eligible for ongoing DD services; Respondent's Pre-Hearing Summary states that Appellant is currently authorized for supports coordination and respite. Appellant declined the DD services.

In response, Appellant argues that her daughter will be substantially harmed due to the interruption of services, and, she will be required to be placed back on a wait list in ██████████ which is █ months. Appellant also argue that ██████████ and ██████████ offer continuation of ABA services for children 'ageing out' as the benefits will be extended to individuals up to █ years of age beginning ██████████.

The applicable Medicaid Provider Manual policy in effect at the time Appellant turned █ indicates that the ABA benefit to children with autism is a benefit from █ month through █ years of age. 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 PIHP such as the CMH are only available to persons on the autism spectrum, with Medicaid financing, between █ months through █ years of age at the time Appellant turned █.

Here, Appellant turned █ on ██████████. Under the applicable policy, Appellant was no longer eligible for ABA services. Thus, this ALJ must the proposed closure decision on the basis that Appellant turned █.

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However, Appellant was and is entitled to have the ABA benefits continue under federal and state law and policy, due to having filed a timely hearing request. Thus, if not already done, the CMH is required to continue the benefits until the disposition of the decision and order.

It is noted that the Respondent may choose to continue services on the grounds that the date of this D & O will be after the date of the new law allowing for individuals to receive ABA services until █████ (which goes into effect █████)

It is also noted that the Respondent may have an internal exception policy that would allow continue of benefits due to the unusual circumstances and timing of the facts in this case. However, any such exception is not review herein.

**DECISION AND ORDER**

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that Respondent failed to reinstate the action here due to a timely hearing request, and thus, the failure to do so is REVERSED. The CMH is ordered to reinstate the action and issue supplemental benefits to Appellant during the time period from the date of closure until the receipt of this Decision and Order.

It is further ordered that the ██████████ proposed decision to terminate Appellant's ABA services due to Appellant turning █ was correct, and thus, is AFFIRMED.



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Janice S. Spodarek  
Administrative Law Judge  
for Nick Lyon, Director  
Michigan Department of Health  
and Human Services

Date Signed: ██████████  
Date Mailed: ██████████

JS/cg

cc: ██████████  
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**\*\*\* 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.