Michigan Behavior Analysis Providers (MiBAP) Association
1100 S Rose St
Kalamazoo MI 49001

August 30, 2019

To: Michigan Department of Health & Human Services (MDHHS)
        Michigan Prepaid Inpatient Health Plans (PIHPs)
Attn: *Dr. George Mellos, Deputy Director, Behavioral Health and Developmental Disabilities*
        Lisa Grost, Autism and Intellectual Developmental Disabilities State Administrator

Re: Criminal Background Checks for Staff Categorized as Behavioral Technicians

To Whom It May Concern:

The Michigan Behavior Analysis Provider (MiBAP) Association would like to formally request that the State of Michigan and all Prepaid Inpatient Health Plans (PIHPs) delay implementation and clarify policy as it relates to the implementation of criminal background checks for staff categorized as Behavioral Technicians ("BTs"). Specifically, we are concerned that language to preclude BTs with "…*any* criminal history record information" will have significant, unintended consequences to include:

- Reduced access to care for Michigan families, and longer waiting lists for ABA services;
- Inconsistent implementation across the provider community, without proper implementation guidance and access to data currently unavailable to private business (e.g., expunged records);
- Increased risk to the provider community and the State of costly legal action, to include lawsuits, as a result of unfair employment practices and policies that violate federal equal employment opportunity law.

In reference to the Criminal History Screening Policy (the "Screening Policy") of Southwest Michigan Behavioral Health (SWMBH), we are in receipt of Revision 01 to the Screening Policy, dated June 27, 2019 (the "Amendment"). The Amendment attempts to interpret the Michigan Public Health Code, specifically MCL 333.18263, which put restrictions on who can act as a BT. Notably, MCL 333.18263(1)(a) states that in individual cannot work as a BT unless the BT's "criminal history check does not contain any criminal history record information for that individual." To our knowledge, Michigan has not issued any regulations further defining "criminal history record information." Although BTs are not required to have a license, the Amendment seeks to interpret MCL 333.18263(1)(a) by broadly defining the type of excludable criminal history record information as <u>any</u> misdemeanor or felony conviction, with no distinction for factors such as date of conviction or nature of charge(s). The Amendment's strict interpretation of MCL 333.18263(1)(a) is against the policy of the United States Equal Employment Opportunity Commission ("EEOC") as it would create a blanket policy to exclude individuals with any conviction from working as a BT, without any recourse by the BT. This Amendment is against EEOC policy, as a blanket policy can be discriminatory when it has a disparate impact on minorities. Companies would therefore be at risk of an EEOC finding that they are discriminating against protected

classes of individuals if adopting the Amendment's policy of excluding anyone with any criminal conviction, regardless of the circumstances. This blanket policy is beyond what is required for other health professionals, including those other professionals listed in the Screening Policy. Further, the application of the Amendment would put stricter requirements on BTs than are placed on higher level licensed positions, with no opportunity for a hearing to challenge the result.

In 2012, EEOC issued Enforcement Guidance 915.005 on "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (the "Enforcement Guidance"). The purpose of the Enforcement Guidance was to "consolidate and update the U.S. Equal Employment Opportunity Commission's guidance documents regarding the use of arrest or conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq." The Enforcement Guidance remains in effect to this day. In the Enforcement Guidance, the EEOC states that "An employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended." The EEOC therefore recommended a policy favoring an individualized assessment that considers "a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)). The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity." The EEOC also states that "a policy or practice requiring an <u>automatic, across-the-board exclusion</u> from all employment opportunities because of <u>any criminal conduct is inconsistent with the *Green* factors because it does not focus on the dangers of particular crimes and the risks in particular positions</u>." As the court recognized in Green, "[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed."

Michigan Department of Civil Rights has issued a Pre-Employment Inquiry Guide to help employers navigate the hiring process. The guide itself adopts the EEOC stance when it says that "it is a violation of Title VII of the US Civil Rights Act for employers to have a blanket policy of not hiring or accepting applications from anyone with a criminal conviction."

Despite the clear guidance for the EEOC that an Employer must use an individualized assessment, the Amendment appears to take the position that <u>any</u> and <u>all</u> misdemeanor or felony convictions would disqualify an employee from working as a BT, without regard to any analysis of the nature and gravity of the offense or conduct or the time that has passed since the offense or conduct and/or completion of the sentence, nor the nature of the job held or sought. Effectively, the Amendment appears to institute a blanket policy of not allowing anyone with any criminal conviction to work as a BT, against the guidance form the EEOC and the Michigan Department of Civil Rights. This could create a clearly inequitable situation where an employee could be barred from working as a BT because, as a minor thirty years prior, they pled *nolo contendere* to a shoplifting charge or traffic offense.

In other contexts, Michigan legislators have considered all of these *Green* factors, as is apparent in the other unchanged sections of the Screening Policy. Notably, as related to three other public health positions, the Screening Policy sets a detailed list of disqualifying convictions, which are dependent on the nature of the offense and the time since completing the terms and conditions of sentencing, parole and probation. This exhaustive list was created with the positions applied for in mind; for example, a conviction for neglect or abuse of patients in connection with the delivery of health care is automatically disqualifying from participating in Medicare and state health care programs. We feel strongly that precluding "any criminal history record information" in hiring BTs will leave providers exposed to costly legal action, in the form of lawsuits claiming discrimination under Title VII of the US Civil Rights Act.

In addition to these risks, we are also concerned about the practical realities of implementation, to include the requirement to search expunged records and other types of criminal history that private companies have no ability to access.

Accordingly, we believe that the Amendment's interpretation of MCL 333.18263(1)(a) "criminal history record information" is flawed. PIHPs should not interpret that statute to ban a BT with any conviction, but should instead apply the *Green* factors (a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job) when considering convictions. We would welcome the opportunity to work with the State and/or appropriate legislators in delaying or changing this policy until an effective solution can be found.

Respectfully,

Michael F. Dow
President, Michigan Behavior Analysis Providers (MiBAP) Association
(231) 668–4909 x8103