

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016060156

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on July 7, 2016.

Leigh-Ann Pierce, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant's father represented claimant, who was not present at the hearing.

The matter was submitted on July 7, 2016.

ISSUES

1. Should IRC fund claimant's request for Applied Behavioral Analysis<sup>1</sup> (ABA)

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<sup>1</sup> Applied Behavioral Analysis means the design, implementation, and evaluation of systematic instructional and environmental modifications to promote positive social behaviors and reduce or ameliorate behaviors which interfere with learning and social interaction." (Welf. & Inst. Code, § 4686.2, subd. (d)(1).)

wrap-around services to be provided by EMQ Families First (EMQ), a vendored agency?

2. Should IRC increase the hours claimant's family receives for respite?

## FACTUAL FINDINGS

### BACKGROUND

1. On May 18, 2016, IRC served claimant with a notice of proposed action denying claimant's request for ABA services to be provided by EMQ. EMQ is a crisis intervention team that provides what is referred to as "wrap around services," which uses ABA foundational principles to work closely with the individual and families of individuals who have autism in order to improve the overall living environment.

2. Claimant qualified for ABA services through his private insurance, and there are multiple in-network providers who will provide the service. EMQ is not one of them. Claimant's insurance has not denied ABA treatment. However, claimant's insurance requires him to use an in-network provider.

3. On May 24, 2016, claimant filed a request for a fair hearing objecting to IRC's decision not to fund ABA services through EMQ. Claimant also requested increased respite hours in the fair hearing request.

4. On June 10, 2016, representatives from IRC and claimant's parents participated in an informal meeting regarding the fair hearing request. Claimant's parents presented their concerns regarding why they believed IRC should fund EMQ services and additional respite hours. IRC explained that it is the payor of last resort, and claimant's parents must consider generic resources prior to IRC funding a service request. IRC noted that claimant's insurance did not deny ABA services and has many providers who provide ABA services. IRC further explained that if claimant's parents did not feel the ABA services provided were appropriate, they could file an appeal with their insurance company.

Regarding respite care, IRC advised that claimant already received 28 hours per

month of respite care and that he may request In Home Supportive Services (IHSS) to meet the family's additional respite needs.

5. Following the informal meeting, IRC adhered to its original determination not to fund EMQ services or provide increased respite hours because there are other generic resources available. Claimant appealed that determination, and this hearing ensued.

#### CLAIMANT'S BACKGROUND

6. Claimant is 11 years old. He resides with his mother and father and one older sister. He qualifies for regional center services based on a diagnosis of Autism Spectrum Disorder (autism). Claimant has been receiving regional center services since he was a toddler, when he entered the Early Start Program.

Claimant experiences severe behavioral difficulties. His parents do not believe he has demonstrated any progress in his overall growth, maturity, or behaviors, although IRC noted in his May 27, 2016, Individual Program Plan (IPP), that he has demonstrated improvement in areas of self-care, communication, and safety awareness. Claimant can feed himself but he requires assistance to prepare food. He must be monitored due to difficulty in controlling how many snacks he eats. Claimant is able to use the bathroom and clean himself independently but has several accidents per week while sleeping.

Claimant has a very limited attention span. He has emotional outbursts and tantrums when he is out in the community. Claimant is very sensitive to crowds and loud noises, and when confronted with either setting, his outbursts and tantrums get worse. Claimant does not initiate interaction with anyone. At home, claimant is an introvert and withdraws to his room where he sometimes takes his clothes off and plays with toys. When claimant is extremely upset, he will hit. If he becomes upset while in the car, he will kick the air vent. Claimant also runs or wanders away when overstimulated. Claimant has no sense of personal boundaries.

Claimant just completed fifth grade. Prior to the end of the school year, claimant was in a special mild to moderate handicapped day class where he received one-on-one ABA services. During the school year, claimant was in three different classrooms due to his behavioral problems. His last classroom was for mild to moderate autism. Towards the end of the school year, claimant's parents withdrew him from classes for four weeks because they disagreed with this placement. The school district has told claimant's parents that he needs to be transitioned into a moderate to severe autism class due to his behavioral problems.

Claimant currently receives 28 hours per month of respite care provided by Maulin Home Care Services. He does not receive IHSS or ABA. In the past, IRC has funded the following ABA programs: 75 hours per month of ABA through Lovaas from July 2009 to June 2010; 65 hours per month through the Center for Autism and Related Disorders (CARD) from August 2010 through June 2011; 65 hours per month through Coyne & Associates from August 2011 through May 2012; and 35 hours per month through Hope Counseling from September 2012 through July 2013. IRC stopped funding ABA in 2013 following a change in the law that required persons to seek ABA treatment through their private insurer. Claimant began receiving treatment from Autism Spectrum Therapies in August 2013 through his private insurer. He remained in the program until July 2014 when his parents terminated treatment due to their belief that the staff was poorly trained. They re-enrolled him in the same program from August to October 2015 but felt his behaviors worsened so they terminated the program. Claimant has not received any ABA treatment since that time.

#### EVIDENCE PRESENTED BY IRC

7. IRC Program Manager Millee Martin-Walton and Consumer Services Coordinator Daisy Ventura testified at the hearing. According to both witnesses, claimant is eligible for IHSS and has private insurance, thus, there are generic resources available to

meet claimant's needs. IHSS would provide personal care to claimant so that his parents may have a break, while his private insurance has a multitude of in-network ABA providers who could provide the service claimant needs.

8. Ms. Martin-Walton testified that for ABA to be successful, there has to be consistency in the program. She said that it usually takes three to four years to show significant progress. She further stated that in looking at claimant's history with specific ABA providers, he has not remained in the program for any length of time. She explained that withdrawing claimant from ABA programs disrupts the continuity in treatment that can lead to regression.

9. Both Ms. Ventura and Ms. Martin-Walton believe claimant needs to be in an ABA program due to his behavioral issues. They believe an ABA program would be sufficient. According to Ms. Martin-Walton, EMQ is a behavioral crisis team meant to stabilize an extreme situation, which does not exist in claimant's case. Extreme situations include unplanned psychiatric issues, suicidal ideations, injuring others and engaging in violence towards others – not simply hitting that is a result of the disability itself. Ms. Martin-Walton stated that after EMQ stabilizes the situation, they will transition a person to regular ABA treatment. Thus, it is not meant to be a long-term strategy. Given that claimant is already eligible for ABA services through his private insurance and does not fit the criteria for an extreme case, EMQ is not appropriate.

#### EVIDENCE PRESENTED ON BEHALF OF CLAIMANT

10. Claimant's father testified at the hearing and presented evidence on behalf of his son. Claimant's father was credible, articulate, and well-prepared. His love for his son was evident and he was sincere in his belief that more intense ABA services are needed in order to help his son with increasingly difficult behavioral problems.

11. With respect to increased respite hours, claimant's father stated that the family does not need increased respite. He stated he is more interested in addressing

claimant's behavioral problems than respite care. Claimant's father stated they need treatment options to address claimant's difficulties, not someone to babysit him. Claimant's father stated that they will consider IHSS as an option but do not currently have IHSS services.

12. Claimant's father understood that, as a generic resource, he must pursue an appeal with his private insurer regarding his request for EMQ. Claimant's father provided evidence in support of his attempts to go through proper channels with his private insurer in order to obtain approval for the services. He has experienced extreme frustration with his insurer because they have not given him a denial that he can appeal. Claimant's father requested ABA services through EMQ. His insurer sent him a letter stating that they were not denying ABA services but that since EMQ was not an in-network provider, he needed to pursue ABA treatment with another provider.

13. Claimant's father contacted the insurance company and requested that the insurer fund ABA services through EMQ via a single-payor agreement. According to claimant's father, his private insurer declined to do so. In other words, they are not interested in pursuing a single-payor agreement. Claimant's father was told that if a qualified professional recommends a referral for EMQ services, it was something that could be considered.

14. Claimant's father requested a referral to EMQ from his primary care provider. On June 28, 2016, his primary care provider sent him a letter stating that it was not their responsibility to authorize behavioral health treatment, and provided phone numbers for the Mental Health Service Administrator (MHSA) who is responsible for authorizing behavioral health treatment. To date, there has been no denial of services from the MHSA.

15. Claimant's parents have not appealed the denial of EMQ services through the private insurer's fair hearing process, nor have they filed a complaint with the California Department of Managed Health Care regarding their insurer's handling of their request for

ABA services through EMQ.

16. Claimant's father stated that the family is trying everything it possibly can in order to get claimant the treatment he needs. They had high hopes for EMQ services because that service spends time with, and works with, the family. Claimant's father is concerned that claimant is getting older and stronger. If claimant's behavioral needs are not addressed, they may have to place him in a residential care facility. Claimant's father explained that they want to exhaust every option because he is their son, and they want him to be able to live in their home.

17. Claimant's father provided a history of ABA providers who have serviced claimant and why the relationship was terminated. Claimant's father described claimant's most recent ABA provider, Autism Spectrum Therapies (AST), as mediocre. From August 2013 to July 2014, and then again from August to October 2015, claimant participated in the AST program. Claimant's parents cancelled AST because they felt claimant's behaviors worsened and the staff were poorly trained. Claimant's father noted also that there was a high turnover in the AST staff and they found AST, overall, to be unresponsive to claimant's needs.

Regarding claimant's treatment from Hope Counseling from September 2012 to July 2013, claimant's father noted that they could not address claimant's behavioral needs and claimant's violent outbursts led to Hope requiring the ABA treatment be done in their clinic. Claimant's parents objected to the clinical treatment and cancelled the program.

Regarding claimant's treatment from Coyne & Associates, claimant's parents felt Coyne & Associates was more interested in meeting their program goals rather than tailoring a program to claimant's needs. Claimant's parents felt the program director was arrogant towards them and the school district. Claimant's parents objected to the home-based therapy program because it was, in their opinion, not helping. Claimant's parents cancelled the services.

Regarding claimant's treatment from CARD from August 2010 through June 2011, claimant's father described this program as the worst of them all. He said the therapists were unqualified and there was a high turnover in staff. Claimant's family objected to the treatment and CARD cancelled the treatment.

Regarding claimant's treatment from Lovaas, which was funded by IRC from July 2009 to June 2010, claimant's father said they had poor program supervision and a high staff turnover staff. Claimant's father explained that they had previously used Lovaas in 2008 when they were private-pay clients, and it was a very strong program. However, when they could no longer afford it and it was funded by IRC, the program declined. Claimant's parents cancelled the program.

Claimant's father also noted they received ABA treatment from Applied Behavioral Consultants (ABC) from October to December 2008. Claimant's father said they had poorly trained and inexperienced staff. ABC insisted that sessions be completed in their clinic and not at home, for unknown reasons. Claimant's parents objected and cancelled the program.

18. Claimant's father testified that it is his belief that programs that have a high turnover in staff are ineffective. In his view, it shows that the program is not sending out staff that is capable in the first place. He explained that another problem with all ABA providers is that they try to prescribe the same treatments according to their own program; he feels it is a "cookie cutter" approach that his son hated. Claimant's father stated that the providers will keep doing the same drills over and over until claimant gets it 100 percent right and all that does is increase his son's frustration level without addressing his behaviors. Claimant's father said the ABA programs and drills have done nothing to help claimant learn life skills.

19. Claimant's father said that claimant is on the waiting list to be evaluated by



the Diagnostic Center<sup>2</sup> to see if they can do something to help his son. Claimant's father testified that it has been a hard journey and the family is desperate to get claimant the help he needs.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish by a preponderance of the evidence that IRC should fund the requested service. (Evid. Code, §§ 115, 500; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.)

### THE LANTERMAN ACT

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: To prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish

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<sup>2</sup> The Diagnostic Center is managed by the California Department of Education and provides assessment and educational planning services to assist local school districts in determining what assistance may be beneficial to special needs students.

services for those individuals.

3. Welfare and Institutions Code section 4512, subdivision (b) defines “services and supports” as:

[S]pecialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer’s family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option . . . Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.

4. The Department of Developmental Services (DDS) is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.) In order to comply with its statutory mandate, DDS contracts with private non-profit community agencies, known as “regional centers,” to provide the developmentally disabled with “access to the services and supports best suited to them throughout their lifetime.” (Welf. & Inst. Code, § 4620.)

5. A regional center’s responsibilities to its consumers are set forth in Welfare and Institutions Code sections 4640-4659.

6. Welfare and Institutions Code section 4646 requires that the Individual

Program Plan and the provision of the services and supports be centered on the individual with developmental disabilities and take into account the needs and preferences of the individual and the family. Further, the provisions of services must be effective in meeting the IPP goals, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

7. Welfare and Institutions Code section 4648 requires regional centers to ensure that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and to secure services and supports that meet the needs of the consumer, as determined by the IPP. This section also requires regional centers to be fiscally responsible.

8. In implementing Individual Program Plans, regional centers are required to first consider services and supports in natural community, home, work, and recreational settings. (Welf. & Inst. Code, § 4648, subd. (a)(2).) Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family. (*Ibid.*) A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer in order to best accomplish all or any part of the Individual Program Plan. (Welf. & Inst. Code, § 4648, subd. (a)(3).)

9. The regional center is required to consider all the following when selecting a provider of consumer services and supports: A provider's ability to deliver quality services or supports to accomplish all or part of the consumer's individual program plan; provider's success in achieving the objectives set forth in the individual program plan; the existence of licensing, accreditation, or professional certification; cost of providing services or supports of comparable quality by different providers; and the consumers, or, where appropriate, the parents, legal guardian, or conservative of a consumer's choice of providers. (Welf. & Inst. Code, § 4648, subd. (a)(6).)

10. The regional center is also required to consider generic resources and the

family's responsibility for providing services and supports when considering the purchase of regional center supports and services for its consumers. (Welf. & Inst. Code, § 4646.4.)

11. Welfare and Institutions Code section 4659, subdivision (c), prohibits IRC from purchasing services available from generic resources, including IHSS, "when a consumer or family meets the criteria of this coverage but chooses not to pursue this coverage. As the family is eligible for IHSS, but has not chosen to pursue it, IRC cannot fund the requested services.

#### CAUSE DOES NOT EXIST TO REQUIRE IRC TO FUND EMQ SERVICES OR PROVIDE ADDITIONAL RESPITE HOURS

12. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. Claimant had the burden of demonstrating the need for the requested service or support, funding for EMQ and respite. Claimant did not meet that burden.

Claimant's father testified credibly regarding the difficulties faced by his family due to claimant's behavioral problems. His testimony demonstrated that the family is doing everything it can to seek whatever services and supports might be available to help claimant better adapt to his surroundings. IRC did not dispute that claimant is in need of ABA services. However, both Ms. Martin-Walton and Ms. Ventura correctly pointed out that claimant's parents have not yet exhausted the generic resources available to meet those needs. In other words, if claimant's parents believe claimant is in need of ABA services from EMQ, claimant's parents need to go through their private insurance and complete their insurer's fair hearing procedure as well as complete the complaint process for the Department of Managed Health Care if necessary, prior to IRC being able to consider funding their request. Similarly, given that claimant does not have IHSS, claimant's family needs to apply for IHSS services, be denied, and appeal the denial before IRC can consider additional hours for respite.

Claimant's father's frustration with the insurance company is understandable. Claimant's parents are commended for the progress they have made in maneuvering through that process. However, at this time, it is premature for IRC to consider funding EMQ services or providing additional respite hours due to the Lanterman Act's requirements that the family must first pursue generic resources.

## ORDER

Claimant's appeal from Inland Regional Center's determination that it will not fund EMQ services or provide additional hours of respite care is denied.

DATED: July 19, 2016

\_\_\_\_\_/s/\_\_\_\_\_  
KIMBERLY J. BELVEDERE  
Administrative Law Judge  
Office of Administrative Hearings

## NOTICE

**This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.**