

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

REGIONAL CENTER OF ORANGE
COUNTY,

Service Agency.

OAH No. 2018110112

DECISION

Administrative Law Judge Cindy F. Forman of the Office of Administrative Hearings heard this matter on December 3, 2018, in Santa Ana, California.

Claimant was represented by his mother and his brother. Claimant was not present at the hearing.¹

Paula Noden, Manager, Fair Hearings & Mediations, represented Regional Center of Orange County (RCOC or Service Agency).

Oral and documentary evidence was received, and the matter was submitted for decision at the conclusion of the hearing.

¹ Claimant, his mother, and his brother are identified by their descriptors to protect their privacy.

ISSUE

Whether Service Agency is required to fund applied behavior analysis (ABA) therapy² for claimant in addition to the ABA therapy currently funded by Medi-Cal/Optima (CalOptima)?

FACTUAL FINDINGS

FACTUAL BACKGROUND

1. Claimant is a 17-year-old client of Service Agency who resides with his mother and two brothers in Garden Grove, California. Claimant has not been in contact with his father for two years.

2. Claimant has been diagnosed with mild intellectual disability, autism spectrum disorder, bipolar disorder, and oppositional defiant disorder. He is approximately five feet, six inches tall, weighs 165 pounds, and is in general good health. Claimant needs assistance with his daily living and self-care tasks, including taking his prescription medications, personal care, and dressing. Although he is able to express his needs and wants verbally, claimant is a selective speaker and often needs to be prompted to speak. He requires supervision in all settings to prevent injury or harm to himself and others.

3. Claimant currently attends La Quinta High School, where he is in a special day class for children with mild to moderate disabilities. In the spring of 2018, claimant

² ABA therapy has been defined by statute as “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.” (Wel. & Inst. Code § 4686.2, subd. (d)(1).)

had a 1:1 aide at school; the record does not disclose if claimant has had a 1:1 aide during the current 2018-2019 school year.

4. Claimant displays disruptive and aggressive social behavior, elopement, and emotional outburst. He is physically aggressive with his mother, his brothers, behavioral interventionists, his teachers, and any other person who interferes when he is having an escalation. Because of his size and weight, claimant is able to cause significant injury. He has had intense episodes of aggression resulting in serious caretaker and staff injury, including concussions, multiple lacerations to the head, neck, and face, and broken noses. Claimant recently punched a teacher six times in the nose.

5. Claimant currently receives six hours of psychiatric consultation each month from Gail E. Fernandez, M.D., and 36 hours of personal assistance care per week from No Ordinary Moments, Inc. (NOM), each funded by RCOC. RCOC has also authorized 288 hours of behavioral respite services per year (24 hours per month) from an outside provider. However, the family has requested that claimant's older brother provide the behavioral respite services instead, and RCOC has agreed. The personal assistance services and behavioral respite services are to be used outside of the six hours claimant attends school and are intended to address claimant's disruptive and aggressive social behavior and his emotional outbursts as well as to keep family members and other individuals assisting claimant safe from his physical aggression.

6. Claimant also receives services from generic sources. He receives 222 hours of In Home Support Services each month. Of that amount, 195 hours is authorized for protective supervision. Claimant also receives speech therapy and ABA therapy from CalOptima.

CLAIMANT'S ABA THERAPY

7. RCOC originally provided 1:1 (one paraprofessional working with claimant) ABA therapy to claimant starting in the early 2000's when claimant was part of the Early

Start program. RCOC continued to fund ABA therapy to claimant on a 1:1 basis until 2016, with some breaks in service at the request of client's mother. In 2016, pursuant to a change in the law, RCOC stopped providing ABA therapy to its clients if the clients were covered by private health insurance or by Medi-Cal. Consequently, CalOptima took over funding ABA services for claimant. On June 15, 2017, Center for Autism and Related Disorders, Inc. (CARD) began to provide ABA services to claimant and continues to provide these services until this day. The ABA therapy is provided by a paraprofessional who is supervised by a professional. CalOptima is responsible for approving and funding CARD's services.

8. CalOptima initially authorized CARD to provide 1:1 ABA therapy to claimant for ten hours a week. A progress report prepared by CARD based on a clinical evaluation dated April 28, 2018, and submitted to CalOptima (exhibit 7), indicates that CARD began providing 2:1 ABA therapy, involving two paraprofessionals, to claimant sometime in December 2017, staff permitting; it was not made clear at the hearing whether CalOptima funded the second paraprofessional for these sessions. The addition of a second ABA paraprofessional coincided with claimant's incidents of intense aggression and concerns over safety of the ABA paraprofessional.

9. On June 21, 2018, based on CARD's recommendation, claimant sought formal authorization from CalOptima to increase claimant's ABA therapy from 10 hours of 1:1 therapy each week to 40 hours of 1:1 therapy per week, or 20 hours per week for two staff members (2:1 therapy sessions). The CalOptima Progress Report stated the basis for its request for increased ABA sessions as follows:

The request for 40 hours of 1:1 therapy per week (20 hours per week for 2 staff members/ 2:1 therapy sessions) is based on the intensity at which aggression occurs. The hours will be utilized to establish further skills in the area of flexibility. . . .

As additional flexibility scenarios are presented and parent involvement is increased, extinction burst[s] are expected to occur. The presence of trained, 2:1 therapy staff will help to ensure the safety of the family, staff, and Derek.”

(Exhibit 7, p. 37.) In another part of the Progress Report, CARD explains how the requested 2:1 therapy would work:

One therapist will place demands while the other therapist will provide behavioral support should an episode of aggression occur. Both therapists should not place a demand at the same time. Therapist will alternate roles between each activity.”

(*Id.*, at p. 14.) Claimant also requested approval for CARD to provide ten hours of supervision of the paraprofessionals providing the ABA therapy and two hours of parent consultation per month.

10. On June 27, 2018, CalOptima denied claimant’s request. (Exhibit 6.) Instead, CalOptima authorized CARD to provide ten hours per week of 1:1 ABA therapy to claimant, eight hours of supervision per month, and two hours of parent consultation per month. CalOptima also indicated that more parent consultation would be approved if requested. As a result of CalOptima’s denial, CARD resumed providing 1:1 ABA therapy sessions to claimant in August 2018.

11. On August 8, 2018, claimant appealed CalOptima’s decision denying claimant’s request for 2:1 ABA therapy. On September 6, 2018, CalOptima upheld its June 27, 2018 decision on the ground that claimant had demonstrated steady progress with the existing ABA therapy hours. CalOptima found that the information provided by CARD did not support the need for additional hours of ABA therapy for claimant. (Ex. 5.)

12. A. After receiving CalOptima's denial, claimant's mother requested RCOC to fund the ABA hours that CalOptima had declined to fund. RCOC held a Planning Team Meeting with claimant's mother on October 12, 2018, to discuss her request. At the meeting, it was determined that CARD was providing only six hours of 1:1 ABA therapy each week because the agency lacked available staff to fulfill the approved ten hours a week of 1:1 services. RCOC advised claimant's mother to seek a Fair Hearing of CalOptima's denial and provide additional evidence of the need for a second ABA paraprofessional. In addition, RCOC advised CARD to modify its Progress Report to describe more fully the nature and scope of claimant's physical aggression to support CARD's request for a 2:1 staff ratio. RCOCO also advised CARD to change the billing codes for the requested services to allow CalOptima to pay the second staff member.

B. At the meeting, RCOC acknowledged that claimant's current needs and behaviors required the presence of an additional person in the home during his ABA sessions for safety reasons. RCOC believed that the second person was not required to work for CARD and that NOM could provide that additional person, particularly in light of NOM personnel's training in crisis management. RCOC therefore increased NOM's hours to 36 hours per week so that a second person could be present during claimant's ABA therapy. RCOC declined to fund the additional ABA hours requested by claimant's mother because it believed that there was no indication that claimant's needs could not be met by the existing 1:1 staff ratio authorized by CalOptima. In addition, RCOC asserted that it was precluded by statute and regulation from funding the ABA therapy until claimant exhausted all avenues of appeal and CalOptima's decision to decline funding was final.

C. A letter dated October 16, 2018, memorialized the discussion at the meeting and RCOC's offer of increasing NOM's hours from 32 to 36 per week to provide

the additional second person in claimant's ABA sessions. RCOC also wrote that if CalOptima approved claimant's request for 2:1 funding, the Service Agency would reduce NOM's hours to 32 hours per week but would allow NOM to continue to overlap 30 minutes with CARD staff at the end of the ABA therapy to support a safe transition.

D. In a Notice of Proposed Action (NOPA), dated October 16, 2018, RCOC denied claimant's request to supplement 30 hours of 1:1 ABA direct services. The NOPA stated that claimant "is currently being served by a generic resource and RCOC cannot supplant the budget of another agency, citing Welfare and Institutions Code³ sections 4648, subdivision (a)(8), 4646.4, subdivision (a), and 4659, subdivision (a)(1), as well as Government Code section 95021, subdivision (b)(3).

13. Claimant filed a Fair Hearing Request with RCOC appealing RCOC's decision, which was received by RCOC on November 1, 2018. The Fair Hearing Request sought an approval of 30 hours of 1:1 ABA direct services as supplementary services. According to the Fair Hearing Request, "RCOC is failing to secure needed services and supports to meet [claimant's] needs. In order to create positive social behaviors and reduce maladaptive behaviors, [claimant's] ABA services require 2:1 ratio. The request is for RCOC to supplement current generic services." (Exhibit 1.)

14. This hearing ensued.

OTHER EVIDENCE

15. Christina A. Genter, a Board Certified Behavior Analyst for over 15 years and the Behavior Services Specialist of RCOC, testified at the hearing. Ms. Genter has never observed claimant. Based on the CARD Progress Report, she agreed that Claimant needed 2:1 staffing during his ABA sessions in order for others to remain safe in the

³ All statutory references are to the Welfare and Institutions Code unless otherwise stated.

home. However, Ms. Genter believed that claimant did not need a second ABA paraprofessional to ensure everyone's safety. Ms. Genter testified that an ABA paraprofessional could be a high school graduate and was considered an entry position. She therefore believed that NOM, whose personnel were trained in crisis intervention, would be more effective in making sure the family and the ABA provider were safe. Ms. Genter also believed claimant's rate of progress had been steady and CARD had not established that his needs could not be met with the existing level of service authorized by CalOptima.

16. Claimant's brother testified at the hearing. He confirmed claimant's history of violent behaviors and pointed out that claimant's aggression is getting worse. Claimant's brother believes that a second person needs to be present at the ABA therapy sessions but that the second person should be an ABA-trained therapist. Claimant's brother asserted that the presence of a second ABA paraprofessional would avoid the need for NOM to be present during the therapy.

17. Claimant's mother testified of her fear that CARD would not provide any ABA therapy at all to claimant if two therapists could not be present. She believed that NOM could not provide ABA therapy and that claimant had excelled with two therapists present. She urged RCOC to focus on claimant's individual needs, and asserted that his progress as a result of ABA therapy was due to the presence of two individual therapists.

18. Claimant's mother and brother submitted a prescription from claimant's psychiatrist to support their request for an increase in ABA therapy hours. The prescription notes: "Due to [claimant's] severe aggression and combination of autism and schizoaffective [disorder], he requires significant behavioral support [with a] 2:1 ratio for 40 hours weekly." (Exhibit A.) Claimant did not provide any psychiatric evaluation or report to support the prescription.

19. After the October 16, 2018 Planning Committee Meeting, claimant's mother filed a Fair Hearing Request with CalOptima to appeal the September 6, 2018 denial. The CalOptima Fair Hearing is scheduled to take place on December 13, 2018. As part of the Fair Hearing Request, claimant submitted a Treatment Plan Update/Progress Report dated October 27, 2018 (Treatment Plan Update), from CARD that provided additional information in support of additional staffing. (Exhibit F.) According to the Treatment Plan Update, CARD is seeking authorization for 20 hours of 2:1 therapy per week and nine hours of program supervision and two hours of individual parent training per month. The Treatment Plan Update indicated that CARD was recommending 2:1 services because of claimant's history of intensive aggressive behavior. The Treatment Plan Update also noted that the existing 1:1 ABA sessions did not provide staff sufficient opportunity to address flexibility deficits that typically lead to instances of aggression in the home. (Ex. F, p. 3.) It was not known when a decision would be made after the December 13, 2018 hearing.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code⁴ § 4500 et seq.)

2. The standard of proof in this matter is a preponderance of the evidence, because no other law or statute, including the Lanterman Act, requires otherwise. (Evid. Code, § 115.) A preponderance of the evidence requires the trier of fact to determine that the existence of a fact is more probable than its nonexistence. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.) Because claimant is the party seeking services,

⁴ All statutory references are to the Welfare and Institutions Code unless otherwise noted.

i.e., that Service Agency fund additional ABA therapy hours, claimant has the burden of proof in this case. (See Evid. Code, §§ 115 and 500.) Claimant has not met his burden.

3. Regional centers are charged with the responsibility of carrying out the state's responsibilities to the developmentally disabled under the Lanterman Act. (§ 4620, subd. (a).) Under the terms of the Lanterman Act, the regional center is responsible for assisting persons with developmental disabilities and their families in securing those services and supports which "maximize opportunities and choices for living, working, learning, and recreating in the community." (§ 4640.7, subd. (a).) When deciding what services to provide a consumer, a regional center has a duty to provide services that meet the consumer's needs and preferences and that are also a cost-effective use of public resources. (§§ 4640.7, subd. (b), 4646, subd. (a).)

4. The Lanterman Act specifically contemplates the funding of ABA services. For example, section 4512, subdivision (b), specifically defines "services and supports for persons with developmental disabilities" to include, in part, "behavior training and behavior modification training," and section 4685, subdivision (c)(1), requires service agencies to give high priority to services intended to allow a child consumer to remain at home, such as "behavior modification programs."

5. Pursuant to section 4659, regional centers are required to "identify and pursue all possible sources of funding for consumers receiving services." Subdivision (a)(1) of section 4659 identifies such sources to include "[g]overnmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the states supplementary program."

6. Furthermore, section 4648, subdivision (a)(8), provides that "Regional Center funds shall not be used to supplant the budget of any agency which has a legal

responsibility to serve all members of the general public and is receiving public funds for providing those services.”

7. However, when a generic agency fails or refuses to provide services and supports that a consumer needs to maximize his or her potential for a normal life, the Lanterman Act requires the service agency to make up the service shortfall. For example, section 4501 states that “[t]he complexities of providing services and supports . . . requires the coordination of services of many state departments and community agencies to ensure that no gaps occur in communication or provision of services and supports.” Similarly, section 4647, subdivision (a), directs regional centers to secure services “through purchasing or by obtaining from generic agencies or other resources, service and supports specified in the person’s individual program plan . . .” The regional center therefore is the payor of last resort for a service where all other public sources for payment have been identified but decline funding. (See § 4659.10; Cal. Code Regs., tit. 17, § 52109, subd. (b).)

8. As set forth in Factual Finding 19, claimant’s appeal of CalOptima’s most recent denial remains pending. Consequently, it is too soon to determine that CalOptima has failed or refused to provides services claimant contends he needs to maximize his potential for a normal life. (Legal Conclusions 4 through 7.) Before RCOC can consider funding the additional ABA services demanded by claimant, claimant must exhaust the generic resources available to meet those needs. (Legal Conclusions 5 through 7.) In the interim, RCOC has provided additional services to ensure the safety of the family and the ABA therapist so that the CalOptima-authorized therapy may continue.

9. There is insufficient evidence to determine at this time whether claimant requires additional ABA therapy other than that currently authorized. Claimant has not been personally observed by RCOC’s behavior services specialist (Factual Finding 15),

and no psychological evaluation or report was supplied to support the psychiatric prescription for additional ABA services (Factual Finding 18). The record does not show that any behavioral assessment has been conducted. Consequently, nothing in this decision precludes claimant from seeking funding of additional ABA therapy hours from RCOC, as the payer of last resort, if claimant's appeal is denied in the CalOptima Fair Hearing Process. If claimant still desires the additional ABA therapy hours, RCOC shall convene another planning meeting to discuss the basis of claimant's request as well as the necessity of a behavioral assessment pursuant to section 4686.2 or any other assessment to determine the appropriate staff ratio and number of ABA therapy hours required to meet claimant's needs.

ORDER

Claimant's appeal is denied.

Dated:

CINDY F. FORMAN

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 90 days.