

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER

Service Agency

OAH No. 2019050644

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on August 22, 2019, in San Bernardino, California.

Stephanie Zermeño, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant's mother and stepfather appeared on behalf of claimant, who was not present.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on August 22, 2019.

ISSUES

- 1) Is claimant entitled to receive "credit" for specialized individual training (SIT) hours not used between September 21, 2018, and present?
- 2) Is claimant entitled to require an IRC vendor to provide a supervisor or person with a graduate degree to administer SIT to claimant?

FACTUAL FINDINGS

1. Claimant is a 12-year-old girl who qualifies for regional center services based on a diagnosis of Autism Spectrum Disorder.
2. According to claimant's most recent Individualized Program Plan (IPP) completed on February 26, 2019, Claimant is very active and requires constant redirection to complete daily tasks. Claimant has many disruptive behaviors and has trouble regulating her emotions. Claimant does not like being told she cannot do something and often expresses maladaptive behaviors as a response. Claimant's behavior interferes with her social skills. Claimant often throws temper tantrums and engages in arguments with others. Claimant is impatient and easily frustrated. When in the community, she sometimes will run away. Claimant has engaged in aggressive behavior towards her family, including, kicking, hitting, punching, slapping, and throwing objects. Claimant does not have any safety awareness and requires constant supervision.
3. Claimant receives 24 hours per month of In-Home Supportive Services (IHSS). Claimant's mother is the provider. Claimant applied for but was denied protective supervision through IHSS. To date, it is unknown if that denial was

appealed. Claimant receives 88 hours per month of preferred provider respite. Claimant is authorized to receive 80 hours per month of SIT. However, SIT has not been provided since claimant's parents refused to allow the SIT provider, California PsychCare (CPC), to provide services after September 21, 2018.

4. According to a complaint filed with IRC on November 29, 2018, claimant's mother stated that a CPC staff member did not properly care for claimant on September 21, 2018.¹ Specifically, claimant's mother alleged that, on that date, a CPC staff member was not able to deal with claimant's behavior appropriately and chased claimant around the house. Claimant locked herself in the bathroom. The CPC worker forced the door open. Claimant ran to her room. The CPC worker chased claimant to her room and sat on claimant. IRC determined that claimant's rights had not been violated, but that the CPC worker acted improperly.

IRC recited the CPC Program Design Plan, and noted that the minimum qualifications for a CPC worker were a high school diploma, 20 hours of didactic training that includes basic teaching strategies to support consumers, Nonviolent Crisis Prevention Intervention, and other training. SIT vendors do not employ independent contractors to provide direct services. IRC concluded that it would review the CPC Program Design Plan and conduct an audit of the records to develop a plan of correction based on the incident.

¹ There were also complaints about how California Respite Care had interacted with claimant, and allegations of abuse. However, respite services are not at issue in this matter, so those aspects of the complaint were not considered.

5. Claimant's mother filed an appeal with the Department of Developmental Services (DDS), which DDS received on January 16, 2019. The complaint was against IRC, CPC, and claimant's respite provider. With respect to the CPC worker, DDS determined claimant's rights had been violated, but that IRC properly addressed the concern.

6. At claimant's February 26, 2019 IPP meeting, claimant's parents requested SIT services to be provided by a supervisor or someone who had a master of arts/science degree. Claimant's parents also requested that IRC provide "make up hours" to be provided to claimant for the SIT she had not been receiving since September 2018.² At the IPP meeting, IRC approved claimant to receive SIT through NC Behavioral Services. Nachole Caldwell³ is the Clinical Director of NC Behavioral Services, and she met with claimant's parents on April 9, 2019. Ms. Caldwell explained to claimant's parents that the only requirements for SIT staff are that they have a high school diploma, and be a registered behavioral technician if the consumer is aggressive, but that no staff who provide services have, or are required to have, a master of arts/science degree.

² In the request, claimant's parents referred to them as "compensatory" hours, however, compensatory implies that the request had to do with monetary compensation, which is not what was actually requested. Thus, the term was changed for purposes of this decision to "make up" hours.

³ Ms. Caldwell also testified at the hearing regarding her meeting with claimant's parents.

7. On April 16, 2019, IRC served claimant's mother with a Notice of Proposed Action denying the requests for "make up" SIT hours retroactive to September 20, 2019, and for SIT services to be provided by a vendor supervisor or staff with a master of arts/science degree.

8. On May 8, 2019, claimant's mother filed a fair hearing request contesting IRC's decision.

9. At hearing, Carmelita Florentino-Rodriguez, a Program Manager at IRC, Tina Gonzalez, claimant's IRC Consumer Services Coordinator, and Pamela Hutt, an IRC Behavioral Specialist, testified. The following is a summary of their testimony and documents provided at hearing.

SIT is a service intended to be used in conjunction with an Applied Behavior Analysis (ABA). It is a scientific evidence-based structured treatment modality that addresses socially significant behaviors for an individual and improves behaviors and skill sets of the individual. SIT is a specialized service that is a step at a higher level than a respite service; individuals who are a part of an SIT team are trained by highly qualified individuals who have strong behavioral backgrounds. ABA services are important to have in conjunction with SIT because when the SIT staff are in the home they strive to provide structure and model routines and strategies that are provided by the ABA program. Direct SIT providers are not supervisors or persons with graduate degrees; they are typically high school or undergraduates. Persons who have the type of training and education claimant's parents seek are typically those in the office or those who might provide services on a temporary basis, such as when a worker is unavailable until another regular SIT worker can be found.

Nobody disputes that claimant would benefit from the 80 hours per month of SIT services. However, vendors simply do not have supervisors provide direct services nor are they required to have staff who have master of arts/science degrees. The fact that a person may have an advanced degree also is not always indicative of the quality of services they provide.

10. Claimant's mother testified at the hearing. Her testimony is summarized as follows. As a mother, it was hard to see that her child was traumatized after the incident with the CPC worker. Claimant has not had SIT services since that incident. Taking care of claimant is exhausting and as parents, they need help. Because claimant's behaviors are so severe, and following the incident with the CPC worker, claimant's mother is afraid to leave claimant with anyone who is not properly trained. Claimant's family funds a private board-certified behavioral analyst (BCBA) who has a master's degree to provide care for claimant and it is working out well. Claimant's parents are also self-funding college level individuals to provide ABA services because the ABA provider that had been providing services dropped claimant because of claimant's behaviors. Claimant's grandmother watches claimant on occasion, but claimant is only with her grandmother after claimant's mother makes sure that claimant is in a good mood and will not act out. Based on the improvement in claimant's behaviors and well-being since receiving private services from a BCBA and college level ABA providers, claimant is doing well. Thus, claimant's mother concluded that only graduate-educated or supervisory staff should be permitted to provide SIT services to claimant.

11. Claimant's father testified at the hearing. Claimant's father stated that in order to maintain claimant in the home, they need good quality care that is

appropriate for claimant's needs. Without appropriate care, claimant will not be able to enjoy life in the manner of what would be expected for her age.

12. Claimant's parents provided several documents authored by Pegeen Cronin, Ph.D., and a functional behavioral assessment completed by Tanya Tompkins, M.Ed., BCAT. The reports collectively show that claimant has extremely challenging and defiant behaviors, aggressive at times, and can be very difficult to handle. Dr. Cronin concluded that services for claimant thus far have been reactive to claimant's bad behavior and therefore have reinforced her bad behavior. Thus, the services thus far have not served claimant's needs. Dr. Cronin concluded that there is a vast difference between the typical staff worker who may provide respite or behavioral services and a BCBA-qualified supervisor who would have the "extensive experience" needed to implement "client specific behavior strategies."

LEGAL CONCLUSIONS

Burden and Standard 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 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 IPP and provision of services and supports be centered on the individual and take into account the needs and preferences of the individual and family. Further, the provision of services must be effective in meeting the IPP goals, reflect the preferences and choices of the consumer, *and be a cost-effective use of public resources.* [Emphasis added].

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*. [Emphasis added].

8. In implementing IPPs, 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 IPP. (Welf. & Inst. Code, § 4648, subd. (a)(3) [emphasis added].)

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.)

Evaluation

11. Claimant had the burden of proving that she is 1) entitled to receive "credit" for SIT hours not used between September 21, 2018, and present, and 2)

require an IRC vendor to provide a supervisor or person with a graduate degree to administer SIT services. Claimant did not meet her burden.

With respect to issue number one, there is no provision in the Lanterman Act for "compensatory" or "make-up" hours – for any reason. The fair hearing process is a process by which eligibility is determined or the need for services is determined. It is not a civil proceeding where something akin to damages can be awarded, in any form. Claimant was entitled to 80 hours per month of SIT services prior to September 21, 2018. Claimant is still entitled to 80 hours per month of SIT services. Thus, claimant's position has not changed. IRC is prohibited by law from "banking" the 80 hours per month claimant has not used since September 21, 2018, and making a lump-sum award of hours for claimant to use in the future.

With respect to issue number two, IRC did not dispute that claimant has challenging behaviors. IRC did not dispute that the CPC worker involved in the September 21, 2018 incident handled the situation inappropriately. IRC did not dispute that claimant is entitled to 80 hours per month of SIT services. However, IRC has been diligent, given claimant's parents' desire not to use CPC for the SIT services (which was understandable under the circumstances), to seek out other SIT providers. IRC found NC Behavioral Services and Ms. Caldwell met with claimant's parents. However, claimant's parents do not want anyone other than a supervisor or graduate-degreed person to provide the services. The evidence established that it is highly unlikely, if not impossible, that any vendor will have a "staff" person to provide SIT services who is a supervisor or who has a graduate degree. It is neither required by law nor standard practice to have someone with that type of training and education provide routine SIT.

Furthermore, the fact that someone is a supervisor or has a graduate degree does not necessarily mean that they are better trained or more competent at

providing SIT services. Indeed, a person with a high school diploma who has been providing SIT services for years may be better qualified and more competent than a person who has a graduate degree but who has never provided SIT services. IRC has many vendors, and each vendor has its own requirements for the provision of services. IRC cannot compel a vendor to provide services at a specific level, such as a supervisor or a person with a graduate degree; they can only seek out vendors who provide the SIT service and connect that vendor with a consumer.

Claimants' parents' concerns are understandable, especially given the bad experience claimant had with CPC. Claimant's parents also cannot be faulted for wanting the best level of care they can obtain for their daughter. However, in providing services, IRC must not only use the vendors who are authorized to provide the service, it must also be fiscally responsible and make an effective use of public resources. It was not established that there is a vendored SIT provider with the special qualifications claimant's parents seek. The vendors IRC has to provide SIT services are qualified under applicable law to provide SIT services. To the extent claimant's parents' request could be construed as a request for a specially trained individual to provide SIT services, it was also not established that it would be appropriate, or an effective use of public resources under applicable law, for IRC to do so.

Accordingly, claimant's appeal must be denied.

ORDER

Claimant's appeal from IRC's determination that 1) it is not required to provide "credit" for SIT hours not used between September 21, 2018, and 2), it is not required

provide a supervisor or person with a graduate degree to administer SIT services to claimant (through a vendor or otherwise) is denied.

DATE: August 27, 2019

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 90 days.