

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ANDREW D.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2012030294

DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 16, 2012, in Culver City.

Marianne Bowers, parent advocate, represented Claimant. Claimant's father was present at the hearing.

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (Service Agency or WRC).

The documentary and testimonial evidence described below was received, and argument was heard. The record was closed and the matter was submitted for decision on May 16, 2012.

ISSUE

Whether the Service Agency should be required to increase Claimant's behavior intervention services from 22 hours to 35 hours per month.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-11; Claimant's exhibits A-R.

Testimonial: Robin L. Morris, Psy.D., LMFT; Soryl Markowitz, LCSW, WRC Autism and Behavior Specialist; Doreece Taylor, MA, BCBA, Case Supervisor, California Unified Service Providers, LLC; and Claimant's father.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a three-year-old boy who is a consumer of the Service Agency on the basis of autism. He lives with his parents and eight-year-old brother who is also a regional center client.

2. This hearing arises from a fair hearing request filed by Claimant's father to appeal the Service Agency's decision to terminate funding for physical therapy, occupational therapy, and speech therapy effective March 31, 2012. A hearing on the appeal was originally set for April 2, 2012, but was continued, upon father's request, to May 16, 2012. On May 8, 2012, a meeting was held with Claimant's father, parent advocate Marianne Bowers, and Lisa Basiri (Basiri), during which the parties resolved the issues regarding physical therapy, occupational therapy, and speech therapy.

3. At the May 8, 2012, meeting, Claimant's father requested that the Service Agency increase Claimant's behavior intervention services from 22 hours to 35 hours per week. According to Basiri, this was the first time Claimant's father made this request to the Service Agency. The parties agreed that the issue of increasing Claimant's behavior intervention services from 22 hours to 35 hours per week could go forward at the hearing set for May 16, 2012.

CURRENT BEHAVIOR INTERVENTION SERVICES

4. Claimant currently receives behavior intervention services from California Unified Service Providers, LLC (CUSP), 22 hours per week, funded by the Service Agency. In September 2011, the Service Agency had referred Claimant to CUSP for a functional behavior assessment in response to Father's request for behavior intervention services. CUSP conducted a functional behavior assessment of Claimant in October 2011 and prepared a written report dated November 7, 2011. The Service Agency received CUSP's written report on or about December 5, 2011, and subsequently authorized Claimant to receive 22 hours per week of behavior intervention services from CUSP effective December 1, 2011.

5. Pursuant to Claimant's individual program plan (IPP) dated February 14, 2012, the Service Agency agreed to "fund behavior intervention services as a support to [Claimant] in accord with policy and standards," to assist Claimant in meeting his IPP goal that he will "engage in age level social activities." The IPP states, in part:

[Claimant] is noted to have varying moods. He can be compliant or cooperative at times, but is regularly resistive and stubborn about getting his way. He has regular tantrums and tries to manipulate situations by crying or by avoiding compliance with instructions. If upset or frustrated, he is noted to cry, spit, or throw items. Family was requested and approved for in home behavior intervention services to address inappropriate behavior concerns as arranged with [CUSP]. Parents requested behavior intervention

services for [Claimant] which are being provided through [CUSP].

6. In his current 22 hour per week program, CUSP works with Claimant on 23 goals that were developed in the functional behavior assessment completed in October 2011. The 23 goals address the following areas:

- (1) Object/Action Mands Towards Adults
- (2) Object/Action Mands Towards Peers/Sibling
- (3) Echoing Single-Syllables
- (4) Echoing 2-syllable combinations
- (5) Tacting Objects/Pictures
- (6) Responding to Social Identification Questions
- (7) Response to Name
- (8) Following Single-step Instructions
- (9) Selecting Objects
- (10) Matching
- (11) Sorting
- (12) Section by Feature/Function
- (13) Appropriate Toy Play
- (14) Imitating Single Step Actions
- (15) Oral Motor Imitation
- (16) Mimetic Toy Play
- (17) Toileting
- (18) Toileting Skills
- (19) Dressing/Undressing
- (20) Hand washing
- (21) Decreasing ALRs [anti-learning behaviors]

(22) Decreasing Automatically-maintained ALRs

(23) Decreasing Rate of Non-compliance

7. Each of the 23 goals developed by CUSP for Claimant's behavior intervention program has two intermediate "benchmarks" to measure his progress by April 2012 and August 2012, respectively. According to a Progress Report dated May 4, 2012, Claimant met the April 2012 benchmarks for all but three of his 23 goals. He did not meet the April 2012 benchmark for goal 4 (echoing 2-syllable combinations), goal 11 (sorting), and goal 17 (toileting).

CLAIMANT'S SCHOOL PROGRAM

8. Claimant turned three years old on January 22, 2012. He is currently attending a private preschool funded by his parents.

9. Claimant's initial individualized education program (IEP) meeting with Culver City Unified School District (school district) occurred on February 14, 2012. The IEP team recommended Claimant's placement in a special education preschool classroom with special education services and supports. Father disagrees with the school district's placement offer. He believes Claimant should be placed in a general education preschool classroom with a one-to-one behavioral aide. Father has retained an attorney to assist with an appeal of the school district's recommendation.

10. Father has not provided written notice to the school district of his disagreement with the school district's offer of placement in a special education preschool. Father disagrees with the placement offered by the school district because Claimant would be with other disabled children, some of whom do not talk. Father believes Claimant would be motivated if he is around typical peers. Father has observed Claimant in his current private preschool with typical peers. He saw Claimant attempt to imitate the other children's actions and

communicate with the other children. Although Claimant keeps to himself, Father believes his son wants to communicate. Father contends that if Claimant's CUSP technician accompanies Claimant to his private preschool, it would help Claimant to communicate with the other children. For example, the technician could create scenarios for Claimant to interact with the other children. In addition, the technician could use strategies from Claimant's home program and implement them in his preschool setting, allowing Claimant to generalize skills across different settings.

REQUEST FOR ADDITIONAL BEHAVIOR SERVICES

11. Father feels that Claimant is making limited progress in his current 22 hour per week program with CUSP. He believes that Claimant needs 35 hours per week of applied behavior intervention services. Claimant's brother went through the same CUSP program and Father believes that it was the intensity of services that allowed Claimant's brother to make significant progress. Father feels Claimant can achieve similar progress if his behavior services are increased to 35 hours per week.

12. Clinical psychologist Robin L. Morris diagnosed Claimant with Autistic Disorder on September 8, 2011. Dr. Morris recommended that Claimant receive, among other things, behavior intervention services of 10-15 hours per week at preschool and another 20 hours per week in the home. Dr. Morris' report states, in pertinent part:

The results of this evaluation should be shared with the [school district] and [Claimant's] current treatment team. It is recommended [Claimant] attend a preschool with typically developing peers,

accompanied by his behavior technician from his home program for **10 hours per week**. These hours should be increased in a 2 month period to **15 hours per week** after [Claimant] has become familiar with his program and built rapport with his interventionists. [Claimant's] behavior technician will frontload concepts, facilitate play interaction with and will offer individual assistance and more intensive strategies to address social, attention, play skills, communication and maladaptive behaviors. It is thought [Claimant] will benefit from ongoing 1:1 ABA therapy conducted in the home. [Claimant] displays significant levels of deficits in several areas of development. It is recommended [Claimant] continue to participate in a home program to address adaptive living skills, maladaptive behaviors, play skills and communication skills. A **20-hour a week 1:1 behavior program** is highly recommended to derive educational benefit and to improve [Claimant's] functioning across domains. (Bold in original.)

13. Similarly, CUSP recommended, among other things, "35 hours per week of 1:1/community-based behavior analytic intervention." The CUSP functional behavior assessment report states, in part: "Currently, we recommend 20 hours per week of 1:1 home based therapy and 15 hours per week of 1:1 therapy in a social setting of typically developing peers. An individual familiar with [Claimant's] home behavioral analytic program should accompany him in

this social setting, as to target areas of deficit that are targeted in the home setting."

14. Doreece Taylor (Taylor) is a case supervisor with CUSP. Taylor performed the functional behavior assessment of Claimant in October 2011. She has, at times, provided therapy to Claimant. She also provides two hours per week of supervision, during which she updates records and consults with other therapists.

15. All of CUSP's services are provided to Claimant in his home or backyard. The behavior technician works with Claimant on his skills only in the home setting. According to Taylor, in order to say that Claimant has "truly mastered" a skill, the skill needs to be demonstrated by Claimant outside of the home setting and with individuals other than the behavior technician. Taylor believes that Claimant should be provided services across different environments. She testified there is currently no opportunity to provide services to Claimant in the community "due to a lack of funding." On cross-examination, Taylor testified there are no restrictions that she is aware of that prevents her or other behavior technicians from providing therapy to Claimant in the community, accompanied by his parent.

16. CUSP recommended Claimant should receive "community-based behavior analytic intervention." According to Taylor, the term "community-based" means a structured social setting with typically developing peers; it is not just an outing to the grocery store or a park. Taylor testified that a structured social setting for Claimant would be, for example, a day camp program or his current preschool program, although she admitted that she has not observed the preschool program and is not aware of the contents of the program. Regarding the additional behavior intervention hours requested by Claimant's father, Taylor

testified the additional hours would be provided to Claimant in a social setting while accompanied by his CUSP behavior technician. According to Taylor, CUSP provides behavior intervention services to children in school settings.

LEGAL CONCLUSIONS

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

2. A regional center is required to secure the services and supports that meet the needs of the consumer, as determined in the consumer's IPP. (§§ 4646, subd. (a); 4648, subd. (a)(1).) A regional center must secure services that are effective in meeting the consumer's IPP goals and are cost-effective, and to the extent possible, reflect the preferences of the consumer and his or her family. (§§ 4512, subd. (b); 4646.)

3. 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." Under section 4646.4, subdivision (a)(2), a regional center, when purchasing services and supports, shall ensure "[u]tilization of generic services and supports when appropriate."

4. 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

¹ All further statutory references are to the Welfare and Institutions Code.

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

5. 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" Based on provisions such as these, and others, it is said that the regional center is the "payer of last resort."

6. Section 4686.2 became effective on July 1, 2009, and provides, in part, that regional centers are prohibited from purchasing "either ABA or intensive behavioral intervention services for purposes of providing respite, day care, or school services." (§ 4686.2, subd. (b)(3).)

DISCUSSION

7. The Service Agency has determined, through the IPP process, that Claimant needs behavior intervention services, and is currently funding such services through CUSP at the rate of 22 hours per week. This amount of service is effective in meeting Claimant's IPP goal to "engage in age level social activities." He met all but three of his 23 benchmark goals in his program with CUSP. The 22 hours per week of behavior services currently funded by the Service Agency exceeds the recommendation of Claimant's psychologist, Dr. Morris, and CUSP, both of whom recommended a home program of 20 hours per week.

8. Father has requested that the Service Agency increase Claimant's behavior intervention services by 13 hours per week, so that the CUSP behavior technician can also provide services to Claimant in his preschool classroom. The additional hours of services are for the purpose of facilitating Claimant's interaction and communication with the other children in his preschool classroom. The services requested by Father are not authorized under the Lanterman Act. First, the Service Agency's funding of behavior intervention services in Claimant's preschool classroom would constitute regional center funds being used to supplant the budget of the school district, which has the legal responsibility and receives public funds to provide such services. (§ 4648, subd. (a)(8).) Second, the Service Agency is obligated to utilize generic resources when appropriate (§ 4646.4, subd. (a)(2)), and to identify and pursue all possible sources of funding for consumers receiving regional center services, including school districts. (§ 4659, subd. (a).) Third, the Service Agency is prohibited from purchasing "either ABA or intensive behavioral intervention services for purposes of providing . . . school services." (§ 4686.2, subd. (b)(3).)

9. Claimant's contention that the Service Agency is required to provide the 13 additional hours of requested services because section 4512, subdivision (b), lists "education" as a service that may be included in a consumer's IPP. Section 4512, subdivision (b), by itself, does not authorize the services requested by Father. "A statute must be construed in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts [Citations]." (*People v. Hull, supra*, 1 Cal.4th at p. 272.) As discussed in Legal Conclusion 8, above, the requested services are not authorized under other, more pertinent provisions of the Lanterman Act.

10. Although the Service Agency is considered the payor of last resort, it was not established that the school district has failed or refused to provide a service that is needed by Claimant. The issue of the appropriateness of the placement and services offered by the school district is yet to be resolved; Father has indicated his intention to pursue a due process appeal against the school district and has retained an attorney to assist with the same. The Service Agency is not required to provide additional services pending the resolution of Father's appeal with the school district. The preponderance of the evidence established that Claimant's current program of 22 hours per week of behavior intervention services is necessary and effective to address his needs in areas that are within the responsibility of the Service Agency under the Lanterman Act. (Factual Findings 1-16.) Claimant's appeal shall be denied.

ORDER

Claimant's appeal is denied.

DATED: June __, 2012

ERLINDA G. SHRENGER

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.