

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LUIS R.,

Claimant,

OAH No. 2012060529

and

KERN REGIONAL CENTER,

Service Agency.

DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Bakersfield, California on July 19, 2012. Joni F., claimant's parent, represented claimant.¹ Jeffrey F. Popkin, Associate Director, represented Kern Regional Center (KRC or service agency).

The matter submitted for decision on July 19, 2012. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions and Order.

ISSUE

Whether service agency should grant claimant's request for 65 hours per month of applied behavioral analysis (ABA) services.

¹ Initials are used to preserve confidentiality.

FACTUAL FINDINGS

1. Claimant is a 12-year old consumer of KRC based on his qualifying diagnosis of Pervasive Developmental Disorder NOS with substantial handicap in learning, self-direction, and social functioning. Claimant additionally has a diagnosis of Attention Deficit/Hyperactivity Disorder (ADHD). Claimant resides with his mother, who is his primary caretaker.

2. Claimant first exhibited cognitive delays at age three-years old. He qualifies for special education services based on a diagnosis of Intellectual Disability, which he receives from Greenfield Union Elementary School District. Claimant undisputedly has a history of maladaptive behaviors. At age five-years old, a July 29, 2005 Psychological Assessment to determine claimant's eligibility for supports and services under the Lanterman Developmental Disability Act (Lanterman Act)² enumerated his behavioral challenges as including difficulty interacting with others, delayed language, echolalia, encompassing preoccupations, stereotyped and repetitive behaviors, and difficulty with changes in routine behaviors. (Exhibit 8.)

3. At claimant's mother's request, on April 20, 2012, the Center for Autism and Related Disorders (CARD) conducted a functional behavior assessment of claimant and prepared a report and intervention plan indicating that claimant continues to present with behavioral difficulties. He is unable to develop appropriate peer relationships. He demonstrates deficits in the areas of play and communication. He is aggressive and non-compliant. He engages in self-manipulation. He perseverates. According to the CARD report, "His inappropriate behaviors are occurring at a rate that interferes or impedes his ability to acquire new skills." (Exhibit E.)

² Welf. & Inst. Code, § 5400 et seq.

4. The CARD report recommends that claimant “receive[s] 12 hours per week of direct 1:1 ABA services which are to be used to focus on and improve his adaptive living skills, reduce his maladaptive behaviors, and improve his functional communication, social and play skills. In addition, it is recommended that . . . [claimant] receive[s] 5 hours per month of supervision to supervise, consult, and address inappropriate behaviors and skill deficits related to home and general community settings. Also, 4 hours per month of direct parent training and consultation is recommended to assist his parents with consistent behavior management techniques. It is also recommended that . . . [claimant] receive[s] 4 hours per month of clinical attendance to address the generalization of skills and behavioral interventions with family and team members.” In total, CARD recommends 65 hours per month of ABA services for claimant, for which his mother has requested KRC-funding.

5. By letter dated May 3, 2012, KRC notified claimant’s mother of its denial of her request for KRC to fund 65 hours per month of ABA services for claimant. Alternatively, KRC approved funding for 24 hours per month of ABA services of claimant. KRC asserts that its internal guideline limits ABA services to 24 hours per month. Claimant’s mother made a timely Fair Hearing Request on claimant’s behalf. Thereafter, these proceedings ensued.

6. At the hearing, claimant’s mother credible testimony established the severity of claimant’s maladaptive behaviors. Claimant is completely dependent on his mother for his daily needs. He cannot prepare any of his meals. He requires constant redirection at meal times. He cannot regulate his bath water. He engages in repetitive behaviors such as flipping light switches on and off and manipulating his genitals. He does not understand personal space; he hugs and declares his affection for strangers. Claimant’s mother testified that when claimant was eight-years old he received ABA

services, but he did not profit from those services because he lacked understanding of the consequence and reward system utilized in the service. She believes that at 12-years old claimant has a better understanding of consequences and positive reinforcements, and he is therefore now able to benefit from ABA services.

7. Claimant's treating psychiatrist, Salvador del Rosario, M.D. testified telephonically at the hearing. Dr. del Rosario last examined claimant on July 13, 2012. He testified that claimant's current diagnoses include Schizoaffective Disorder, Autism, ADHD symptoms, and mild retardation. Claimant's regimen of psychotropic medications includes Risperdal for aggression and psychosis, Thorazine for aggression and psychosis, Trileptal for mood stabilization, Tenex for hyperactivity and impulsivity, and Lexapro for repetitive behaviors. Dr. del Rosario testified that claimant's co-occurring developmental and mental health diagnoses are all contributing to his behavioral deficits. Dr. del Rosario's treatment objective has been to stabilize claimant's aggression, impulsivity, and mood disorder. However, the multiple antipsychotics, mood stabilizers, stimulants, antidepressants, and benzodiazepines that claimant has been consuming have worsened his behavior and caused adverse effects. Dr. del Rosario testified that during claimant's last office visit, claimant required constant direction and re-direction. It was evident to Dr. del Rosario that claimant's medications were not working for him. In addition, because of the high dosages of his medications, claimant has experienced severe weight gain. Dr. del Rosario testified that claimant "is one of the kids I'm struggling with in our clinic." According to Dr. del Rosario, "Medication that usually helps [with maladaptive behaviors such as claimant's], hasn't work for [claimant]. [Claimant] is on so many meds at very high doses that we need to cut back. We now need to try external controls."

8. Claimant has established that the severity of his maladaptive behaviors is insufficiently addressed with 24 hours per month of ABA services.

LEGAL CONCLUSIONS

1. Claimant's appeal of KRC's denial of 65 hours of ABA services is granted. (Factual Findings 1 through 8, inclusive; Legal Conclusions 2 through 4, inclusive.)

2. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act, which mandates that an "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream of life in the community." (Welf. & Inst. Code § 4501.) Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code § 4620 et seq.) Regional centers are responsible for developing and implementing individual program plans (IPPs) for consumers, for taking into account individual consumer needs and preferences, and for ensuring service cost effectiveness. (Welf. & Inst. Code § § 4646, 4646.5, 4647, and 4648.)

2. The services and supports to be funded for a consumer is determined the IPP process, which involves collaboration with the consumer and service agency representatives. Services and supports for persons with developmental disabilities are defined as "specialized 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 rehabilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives." Services and supports can include those providing behavior training and behavior modification programs. (Welf. & Inst. Code § 4512, subd. (b).)

3. Welfare and Institutions Code section 4686.2, which regulates the provision of ABA services, states the following:

(a). Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, any vendor who provides applied behavioral analysis (ABA) services, or intensive behavioral intervention services or both, as defined in subdivision (d) shall:

1. Conduct a behavioral assessment of each consumer to whom the vendor provides these services.
2. Design an intervention plan that shall include the service type, number or hours and parent participation needed to achieve the consumer's goals and objectives, as set forth in the consumer's individual program plan (IPP) or individualized family service plan (IFSP). The intervention plan shall also set forth the frequency at which the consumer's progress shall be evaluated and reported.
3. Provide a copy of the intervention plan to the regional center for review and consideration by the planning team members.

(b). Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional centers shall:

- (1). Only purchase ABA or intensive behavioral intervention services that reflect evidence-based practices, promote positive social behaviors, and ameliorate behaviors that interfere with learning and social interactions.
- (2). Only purchase ABA or intensive behavioral intervention services when the parent or parents of minor consumers receiving services participate in the intervention plan for the consumers, given the critical nature of parent participation to the success of the intervention plan.

- (3). Not purchase either ABA or intensive behavioral intervention services for purposes of providing respite, day care, or school services.
- (4). Discontinue purchasing ABA or intensive behavioral intervention services for a consumer when the consumer's treatment goals and objectives, as described under subdivision (a) are achieved. ABA or intensive behavioral intervention services shall not be discontinued until the goals and objectives are reviewed and updated as required in paragraph (5) and shall be discontinued only if those updated treatment goals and objectives do not require ABA or intensive behavioral intervention services.
- (5). For each consumer, evaluate the vendor's intervention plan and number of service hours for ABA or intensive behavioral intervention no less than every six months, consistent with evidence-based practices. If necessary, the intervention plan's treatment goals and objectives shall be updated and revised.
- (6). Not reimburse a parent for participating in a behavioral services treatment program.
- (c). For consumers receiving ABA or behavioral intervention services on July 1, 2009, as part of their IPP or IFSP, subdivision (B) shall apply on August 1, 2009.
- (d). For purposes of this section the following definitions shall apply;
 - (1). "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.
 - (2). "Intensive behavioral intervention" means any form of applied behavioral analysis that is comprehensive, designed to address all domains of

functioning, and provided in multiple settings for no more than 40 hours per week, across all settings, depending on the individual's needs and progress. Interventions can be delivered in a one-to-one ratio or small group format, as appropriate.

- (3). "Evidence-based practice" means a decision making process that integrates the best available scientifically rigorous research, clinical expertise, and individual's characteristics. Evidence-based practice is an approach to treatment rather than a specific treatment. Evidence-based practice promotes the collection, interpretation, integration, and continuous evaluation of valid, important, and applicable individual- or family-reported, clinically-observed, and research-supported evidence. The best available evidence, matched to consumer circumstances and preferences, is applied to ensure the quality of clinical judgments and facilitates the most cost-effective care.
- (4). "Parent participation" shall include, but shall not be limited to, the following meanings:
 - (A) Completion of group instruction on the basics of behavior intervention.
 - (B) Implementation of intervention strategies, according to the intervention plan.
 - (C) If needed collection of data on behavioral strategies and submission of that data to the provider for incorporation into progress reports.
 - (D) Participation in any needed clinical meetings.
 - (E) Purchase of suggested behavior modification materials or community involvement if a reward system is used.

4. It is undisputed that claimant presents with severe maladaptive behaviors, which hinders his integration into the mainstream of life in his community. Psychotropic medications alone are a proven ineffective course of treatment for claimant's behavioral

deficits. Claimant requires extensive ABA services to meet his unique developmental needs. KRC cannot limit the frequency of the ABA services required to address claimant's specific needs on the basis of an inflexible internal guideline. Such a determination is contrary to the purpose and objectives of the Lanterman Act. (See *William v. Macomber* (1990) 276 Cal.App.3d 225.) The CARD assessment, which KRC does not dispute, establishes that claimant requires 52 hours per month of one-on-one therapy in his home and day care environments; five hours per month of supervision; four hours per month of direct parent training; and four hours per month of clinical attendance. Nothing established that claimant's needs are not met with a total of 65 hours per month of ABA services.

ORDER

1. Claimant Luis R.'s appeal is granted.
2. Kern Regional Center shall fund 65 hours per month of ABA services for Luis R. until such time as changed circumstances or a new IPP warrants otherwise.

Dated: August 3, 2012

/s/

JENNIFER M. RUSSELL

Administrative Law Judge

Office of Administrative Hearings