BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

JONATHAN M.

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL CENTER,

Service Agency.

OAH No. 2013070975

DECISION

This matter came on regularly for hearing on September 23, 2013, in Alhambra, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Jonathan M.[1] (Claimant) was represented by Mark Woodsmall, Attorney at Law.

Eastern Los Angeles Regional Center (Service Agency) was represented by Judy Castaneda, Fair Hearing Coordinator.

Oral and documentary evidence was received. The record was held open to and including October 31, 2013, for the parties to submit briefs in accordance with a specified briefing schedule. Service Agency's Closing Argument was timely received and marked as

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[1] Initials are used in lieu of Claimant's surname and those of his relatives in order to protect their privacy.

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Exhibit 14 for identification. Claimant's Closing Argument was timely received and marked as Exhibit N for identification. The record was closed on October 31, 2013, and the matter was submitted for decision.

ISSUES

The parties agreed that the following issues are to be determined in this Decision:

1. Should the Service Agency conduct an assessment for augmentative and alternative communication (AAC) services with the information it presently has, or shall the Service Agency's speech/language pathologist determine whether another assessment is necessary after speaking with the Claimant's teacher/therapist?

2. Should the Service Agency fund time for Applied Behavioral Analysis (ABA) services above that agreed to by Claimant's insurance carrier?

EVIDENCE RELIED UPON

1. Service Agency's Exhibits 1 through 13.
2. Claimant's Exhibits A through M.
3. Testimony of Yvonne Bruinsma
4. Testimony of Filipe Hernandez
5. Testimony of Angelica F.

FACTUAL FINDINGS

1. Claimant is a male of almost 13 years. He is a client of the Service Agency with a diagnosis of autism.

THE AAC ISSUE

2. During an individual program plan (IPP) meeting on January 29, 2013, Claimant requested that the Service Agency conduct an AAC assessment to determine

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whether he needed AAC services. Claimant's parents provided the Service Agency with an AAC assessment they had privately funded in August 2012. The assessment had been performed by Susan Berkowitz, M.S., M.Ed. The Service Agency did not conduct an assessment.

3. Claimant complains that the Service Agency neither granted his request for an AAC assessment nor denied it and issued a Notice of Proposed Action (NOPA). The Service Agency claims that it has not denied the request but needs additional, more current information than it presently has. Specifically, it requested the consent of Claimant's parents to allow the Service Agency's Speech/Language Pathologist to speak with the staff at the education center Claimant currently attends and perhaps conduct a classroom observation. Claimant's mother does not oppose those activities. (Testimony of Angelica F.)[2]

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[2] In its Closing Argument, the Service Agency wrote on this issue: "Email correspondence was initiated by this writer to Mr. Woodsmall (9/27/13) asking if parent would sign a consent form giving ELARC permission to speak with education staff. This writer did not receive a response. A follow up email was sent to Mr. Woodsmall on 10/23/13 and again this writer did not receive a response. Mr. Woodsmall and this writer have communicated via email several times in the past. It is reasonable for this writer to assume that parents are not willing to give ELARC permission to speak with staff at the education program that Jonathan attends." (Exhibit 14, page 7.) Those statements were offered only in closing argument and not during the hearing while under oath. Therefore, they do not constitute admissible evidence. However, if true, the words are troubling because they insinuate a lack of trust and cooperation between the adults who control Claimant's life. Such a lack of trust and cooperation inures to Claimant's detriment.

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THE ABA ISSUE

4. Beginning in 2009, Claimant received ABA and Pivital Response Training (PRT) to address a variety of behaviors. The PRT services were formerly provided by Autism Spectrum Therapies (AST) and Behavioral Support Partnership (BSP). However, those organizations terminated their services in September 2011, after working with Claimant for approximately 17 months. Claimant made progress while receiving the ABA and PRT.

5. The Service Agency funded Claimant's services at BSP at the rate of 10 hours per week of direct therapy, 8 hours per month of parent consultation, and seven hours per month of supervision.

6. Claimant had previously received counseling and social skills training from Progressive Resources. Those services were terminated in September 2011, at the request of Claimant's parents.

7. During the January 29, 2013, IPP meeting, Claimant's parents requested that the counseling and social skills services be reinstated. The Service Agency denied that request and issued a timely NOPA.

8. In or around July 2012, Claimant was evaluated by IN S.T.E.P.P.S.[3] (In Stepps). Based on that evaluation, In Stepps recommended "a naturalistic, ABA-based program that incorporates strategies of pivotal response treatment, positive behavior supports, social skills training, and parent education. ABA . . . would focus on developing appropriate social relationships, behavior regulation/emotional control, pragmatic language, self-help and replacement behaviors." (Exhibit C, page 7.) To that end, In Stepps recommended 12 hours per week of direct intervention, two hours per week of parent consultation, and two

[3] IN S.T.E.P.P.S. stands for Support, Treatment, and Education for Parents, Professionals, and Students. Although In Stepps is a vendor for at least one regional center, it is not a vendor for the Service Agency.

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hours per week of supervision.

9. Claimant's parents sought funding for In Stepps' services through their health insurance carrier, Anthem Blue Cross (Anthem), but Anthem denied the claim. Claimant's parents then sought the funding from the Service Agency. The Service Agency encouraged Claimant's parents to appeal Anthem's decision.

10. Claimant's parents filed a request for an independent medical review with the California Department of Managed Health Care. That agency assigned the independent review to MAXIMUS Federal Services Inc. (MAXIMUS). The independent reviewer retained by MAXIMUS determined that the requested services were medically necessary at a rate of 10 hours per week of direct ABA therapy, two hours per month of ABA supervision and one hour per month of parent consultation. Based on that determination, MAXIMUS found that Anthem's denial of those services should be partially overturned. On February 28, 2013, the Department of Managed Health Care adopted MAXIMUS's determination. (Exhibit 7.)

11. In making the determination, the independent reviewer found:

> When reviewing ABA as effectively applied to adolescents and adults, there is limited literature substantiating its favorable effect on this population. As such, the appropriate duration of therapy for adolescents must be determined on an individual basis. In the case of this patient, critical examination of the psychological study performed on 8/30/12, in comparison to earlier assessments, demonstrates the patient has clearly improved. The patient's demeanor and his ability to cooperate during the exam is itself evidence of his significant behavioral improvement. As such, continuation of ABA therapy is medically appropriate and

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> indicated for this patient. All told, 10 hours of ABA therapy per week is medically necessary for the patient. Additionally supervision at a frequency of two hours per month is sufficient. Further, the parents have received much guidance in the past, and as such, one hour per month of parent consult is appropriate for reporting purposes. (Exhibit 7, pp. 7-8.)

12. The Service Agency decided to adopt the MAXIMUS decision as a de facto assessment of Claimant's ABA treatment needs.

13. Claimant's parents believe that the MAXIMUS decision was based on inadequate information in that the evaluator did not take into consideration all available documentary evidence or personally see Claimant.

14. The Service Agency encouraged Claimant's parents to pursue their appeal rights with Anthem. However, on March 1, 2013, Anthem approved and is presently funding 10 hours per week of direct ABA services, two hours per month of clinical supervision, and one hour per month of parent consultation. Claimant's parents requested an appeal of Anthem's decision on September 9, 2013. That matter has not yet been resolved.

15. Yvonne Bruinsma is the Executive Director of In Stepps and a certified behavioral analyst. She testified that, although the amount of necessary supervision should be determined on an individualized basis, generally between one and two hours of supervision per week is appropriate for every 10 hours of direct treatment, and that two hours of supervision per month for 40 hours of treatment would be insufficient because a supervisor must oversee and evaluate what is occurring in the home and in the program. He/she must ensure against unsafe behavior, and ensure that data is reliably collected and progress is being made. Ms. Bruinsma also opined that one hour per month for parent

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meetings is insufficient because, for the child to gain independence, the parent must follow through and implement what the therapist is doing and what their child is learning.

16. Nonetheless, Ms. Bruinsma conceded that Claimant is doing well in the In Stepps program with the number of hours being funded by Anthem. (Testimony of Yvonne Bruinsma.) Claimant's mother denied that Claimant is making any progress. (Testimony of Angelica F.)

LEGAL CONCLUSIONS

1. The Service Agency shall conduct an assessment for AAC services with the information it presently has unless Claimant authorizes the Service Agency's speech/language pathologist to obtain additional, more current information from staff at the education center Claimant currently attends. The Service Agency need not conduct the assessment if it determines that such an assessment is unnecessary because the available information indicates that Claimant requires AAC services which will be funded by the Service Agency.

2. The Service Agency should not be required to fund time for ABA services above that agreed to by Claimant's insurance carrier until a full assessment of Claimant's needs for ABA services has been conducted and additional needs are determined, and Claimant's parents have exhausted their appeal rights with their insurance carrier.

THE AAC ISSUE

3. As referenced above, Claimant argues that the Service Agency failed to grant his request for an AAC assessment, but also failed to deny the request and issue an NOPA. The Service Agency argues that, by withholding consent for its speech/language pathologist to discuss Claimant's case with staff at his education center and perhaps conduct an classroom observation, Claimant is precluding it from making the decision that Claimant is requesting.

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4. Both positions miss the point. A decision regarding AAC must be made for Claimant's benefit. At his age and in his present condition, he cannot decide the issue for himself, and he cannot compel the adults who control his life to act. If Claimant's parents consent to the Service Agency's speech/language pathologist to communicate with the education center's staff, the Service Agency will presumably glean additional, and more current information about Claimant's condition than it presently has. This will enable the Service Agency to make a more-informed decision regarding AAC services. However, if the parents either deny that consent or simply do not respond to the Service Agency's request, the Service Agency cannot remain idle. It must make the assessment with the information it presently possesses and is able to glean from other sources.

THE ABA/INSURANCE ISSUE

5. Welfare and Institutions Code section 4659 states in pertinent part:

(d)(1) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, a regional center shall not purchase medical or dental services for a consumer three years of age or older unless the regional center is provided with documentation of a Medi-Cal, private insurance, or a health care service plan denial and the regional center determines that an appeal by the consumer or family of the denial does not have merit. If, on July 1, 2009, a regional center is purchasing the service as part of a consumer's IPP, this provision shall take effect on August 1, 2009. Regional centers may pay for medical or dental services during the following periods:

(A) While coverage is being pursued, but before a denial is made.

(B) Pending a final administrative decision on the administrative appeal if the family has provided to the regional center a verification that an administrative appeal is being pursued.

(c) Until the commencement of services by Medi-Cal, private insurance, or a health care service plan.

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(2) When necessary, the consumer or family may receive assistancefrom the regional center, the Clients' Rights Advocate funded by thedepartment, or area boards on developmental disabilities in pursuingthese appeals.

(e) This section shall not be construed to impose any additionalliability on the parents of children with developmental disabilities,or to restrict eligibility for, or deny services to, any individualwho qualifies for regional center services but is unable to pay.

6. Claimant bore the burden of proof on the issue of whether the number of hours of direct ABA therapy, supervision and parent consultation are currently appropriate. Ms.Bruinsma is the Executive Director of In Stepps. She has a financial interest in the outcome of this case. The MAXIMUS medical evaluator was neutral and disinterested. In addition, Ms. Bruinsma conceded that Claimant is currently doing well with the services he receives. That concession and the statements of the MAXIMUS independent evaluator, are given greater weight than the testimony of Claimant’s mother, Angelica F., who denies that he is making progress.

7. However, the law is clear as to the weight to be given the testimony of the expert witnesses in this matter. Greater weight is given to the expert who personally treated and/or evaluated Claimant and wrote reports than the report of the evaluator who only conducted a record review and who has never met or evaluated Claimant.

8. In *People v. Bassett* (1968) 69 Cal.2d 122, the Court analyzed the use of expert testimony when the issue is one of mental competence. The Court stated, commencing at page 141:

> Mental illnesses are of many sorts and have many characteristics. They, like physical illnesses, are the subject matter of medical science. They differ widely in origin, in characteristics, and in their effects on a person's mental

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> processes, his abilities, and his behavior. . . . Description and explanation of the origin, development and manifestations of the alleged disease are the chief functions of the expert witness. The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; in the explanation of the disease and its dynamics, that is, how it occurred, developed and affected the mental and emotional processes . . . it does not lie in his mere expression of conclusion . . .both [doctors who testified for the State] conceded on the stand that they had never talked with this defendant, and the record does not disclose they had ever seen him . . . [A] distinguished federal court recently surveyed the medical writings on this subject, and concluded, "The basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject . . ." [The doctors for the state] left no doubt on cross-examination that their regular practice was to conduct personal examinations and that they would have preferred to do so in this case.

9. The *Bassett* Court gave little weight to the testimony of the experts who had not examined the defendant, but only conducted a record review. In contrast, the Court gave substantial weight to the evidence presented by the defendant's experts who thoroughly examined, tested and interviewed the defendant.

10. The MAXIMUS decision was based solely on an independent evaluator's

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record review. Although it appears to be consistent with Ms. Bruinsma's concession that Claimant is doing well with his current ABA services, the independent evaluator's determination does not rise to the level of a comprehensive assessment of this consumer's individual needs.

11. Neither party has adequately performed in resolving this issue. Claimant's parents have not exhausted their appeal rights with their insurance carrier, and the Service Agency has relied on an incomplete evaluation in denying additional supports.

ORDER

1. Claimant is accorded a period of 30 days from the date of this decision to decide, and to notify the Service Agency, in writing, whether he will permit the Service Agency's speech/language pathologist to discuss his case with staff at the education center he attends and/or to conduct a classroom observation.

2. Within 60 days following Claimant's decision or the expiration of the 30-day period referenced in Paragraph 1 of this Order, whichever comes first, the Service Agency shall conduct an AAC assessment unless it determines that such an assessment is unnecessary because the information then available indicates that Claimant requires AAC services which will be funded by the Service Agency.

3. Claimant shall continue to pursue his appeal rights with his insurance carrier and shall continue to do so until the carrier grants additional coverage for ABA services or all appeal rights are exhausted.

4. Within 60 days of the date of this Decision, the Service Agency shall conduct a comprehensive assessment of Claimant's needs for ABA services.

5. If Claimant has unsuccessfully exhausted his appeal rights with his insurance carrier, and if the expert who conducts the ABA assessment determines that additional ABA services are required to meet Claimant's needs over and above those Claimant's insurance carrier will cover, the Service Agency shall fund the difference between the

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services covered by Claimant's insurance carrier and those determined to be necessary by the expert who conducts the ABA assessment. Both of the eventualities referenced in this paragraph shall be conditions precedent to the Service Agency's obligation to fund the services, and the Service Agency shall be under no obligation to fund the services unless both conditions precedent are satisfied.

Dated: November 7, 2013

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H. STUART WAXMAN

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.

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