

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

REGIONAL CENTER OF ORANGE

COUNTY,

Service Agency.

OAH No. 2013120564

DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on February 4, 2014, in Santa Ana.

Claimant's mother represented claimant. Claimant's father was present at the hearing.

Paula Noden, Fair Hearings Manager, represented Regional Center of Orange County (RCOC).

The documentary and testimonial evidence described below was received, and argument was heard. The record was left open until February 11, 2014, to allow the parties to submit closing arguments, which both parties filed. RCOC's closing brief was marked as Exhibit 15. Claimant's closing brief was marked as Exhibit 17. The record was closed, and the matter was submitted for decision on February 11, 2014.

ISSUE

Should RCOC be required to fund an increase in direct behavioral intervention (1:1) service hours for claimant from 16 hours to 20 hours per week?

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a four-year-old boy who is a consumer of regional center services on the basis of autism. He lives with his parents and his twin sister.

2. Claimant's mother requested a fair hearing to contest RCOC's decision to not fund an additional four hours per week of one-to-one intensive behavioral modification therapy recommended by claimant's provider, Creative Behavioral Intervention (CBI).

CURRENT BEHAVIORAL INTERVENTION SERVICES

3. Claimant currently receives the following behavioral intervention services from CBI: 16 hours per week of direct 1:1 therapy; 18 hours per month of parent consultation and training (which averages 4 hours per week); and 10 hours of supervision. Taken together, RCOC funds CBI's services for 20 hours per week, on average.

4. In February 2013, Denise Eckman, Psy.D., Clinical Director of CBI, conducted a functional behavior assessment of claimant and prepared a written report dated March 3, 2013. CBI recommended that claimant receive 20 hours a week of 1:1 behavioral intervention; 18 hours of parent consultation a month; 10 hours a month supervision, and 3 hours a month of report writing.

5. Between March 2013 and November 2013, RCOC and claimant's mother discussed increasing claimant's 1:1 behavioral intervention hours. Claimant's mother believed that claimant needed 25 hours of 1:1 services. RCOC issued a notice of proposed action on April 11, 2013, to deny claimant's request for 20-25 hours of 1:1 behavioral intervention service hours. The record does not indicate whether claimant requested a fair hearing to contest this action. In

November 2013, claimant's mother asked that claimant's 1:1 behavioral hours be increased. RCOC denied this request in a notice of proposed action dated November 15, 2013, and claimant timely requested a fair hearing on December 13, 2013.

CLAIMANT'S INDIVIDUAL PROGRAM PLAN

6. Pursuant to claimant's individual program plan (IPP) dated May 21, 2013, RCOC agreed to provide ABA (Applied Behavioral Analysis) services . . . per the current (payment of services)." The IPP detailed claimant's behavioral challenges. He has multiple tantrums daily when a desired item is removed or taken away, if he is hungry, or if one of his parents walks away. These tantrums include crying, screaming, jumping up and down, kicking, hitting, biting, and throwing objects on the floor. Often, he bites his teaching aide at school. He also bites himself out of frustration. Claimant's parents are concerned for his safety because he will elope and run from them. He does not have control of his body when he runs and will flop on the floor or run into objects, including windows. His parents reported that claimant often stands on the second story rail at their home. Claimant also picks his nose until it bleeds, bites the inside of his mouth until it bleeds, and bangs his head against a chair, wall, or other object.

7. In his current 16 hour-per-week 1:1 program, CBI works with claimant on 33 goals that were developed in the functional behavior assessment completed in March 2013. The goals address the following areas:

- (1) Mand (request) for desired items/activities, people and locations;
- (2) Mand for break;
- (3) Accepting no;
- (4) Coping;

- (5) Transition from activity to activity without the presence of problem behaviors;
- (6) Wait for a delay of desired activity/item or person;
- (7) Mand for help;
- (8) Reduce tantrums;
- (9) Reduce self-injurious behaviors;
- (10) Identify functional items;
- (11) Choose an item/activity when presented with choices;
- (12) Reduce non-compliance;
- (13) Follow directions/Compliance;
- (14) Retrieve an item or perform an action and return it from various locations;
- (15) Decrease SSB behaviors;
- (16) Imitate gross and fine motor actions;
- (17) Gain attention;
- (18) Reduce eloping;
- (19) Follow safety directions;
- (20) Reference a familiar adult and follow safety instructions or cues;
- (21) Mand for permission to leave room/area;
- (22) Answer safety at least 15 safety directions;
- (23) Cooperatively play;
- (24) Take turns during play;
- (25) Respond to an adult by following adult's point/eye gave;
- (26) Answer simple questions when given simple routines;
- (27) Play with age appropriate toys or activities;

- (28) Increase his ability to stay on tasks and independently complete familiar tasks;
- (29) Match identical and non-identical items;
- (30) Engage in functional pretend play;
- (31) Mand for items/activities that are a functional replacement for sensory needs without inappropriate behaviors;
- (32) Complete at least 8 self-help routines;
- (33) Be able to use the toilet without accidents.

8. According to CBI's Progress Report dated September 9, 2013, claimant showed progress in 10 areas. In addition, he has reduced his incidents of self-injurious behaviors after having tantrums. 16 areas were not introduced or data was not recorded, in part, due to staffing problems at CBI. Claimant was reported to be working on the remaining areas.

CLAIMANT'S SCHOOL PROGRAM

9. Claimant's individualized education program (IEP) meeting with Northeast Orange County School District occurred on May 10, 2012. The IEP team recommended that claimant attend an IBI/ABA clinic five days a week in the mornings; that he be supervised by the school's autism supervisor six times a month for an hour; that he receive occupational therapy two times per week, and that he see an occupational consultation once a month. The IEP reported that claimant's mother disagreed with the level of services the school district provided for claimant.

REQUEST FOR ADDITIONAL BEHAVIOR SERVICES

10. Claimant's mother testified that she believes claimant needs at least 20 hours of 1:1 behavioral intervention services to address his behavioral

problems. These problems include his tendency to elope and to engage in self-injurious behaviors. Claimant's mother also does not believe the school district provides claimant with sufficient IBI/ABA services. In this regard, claimant's mother introduced claimant's daily schedule she received from claimant's school to show that claimant does not receive daily ABA/IBI services at his school. The schedule divides claimant's day from 8:30 to 12:30 into these categories: data; toilet; circle; OT (occupational therapy); and sensory. Claimant's mother did not indicate whether she expressed her concerns regarding the adequacy of claimant's ABA therapy at school to anyone at the school district.

11. Dr. Eckman testified that she recommended that claimant receive 20 hours of 1:1 therapy in order to adequately address his serious behavioral problems. Dr. Eckman noted that claimant has significant delays and that his progress is slow. Based on her observation and assessment of claimant, claimant's behavioral problems will continue to interfere with his school performance, focus, attention and social interactions. Claimant is at a stage of therapy where he is learning to learn. He requires the recommended 20 hours of 1:1 therapy to accomplish this.

12. Dr. Eckman does not believe that claimant gets five hours of ABA/IBI therapy a day at school. She bases her opinion on her observation of claimant at school and on the calendar claimant's mother introduced at the hearing.¹ She

¹ According to claimant's March 2013 functional assessment report, Dr. Eckman directly observed claimant for 2 hours on January 7, 2013, and 2 hours on January 24, 2013. Dr. Eckman's report does not provide a narrative of her observations on these dates.

believes he gets an hour and half of IBI/ABA services, as identified in the calendar as "data." Dr. Eckman did not interpret what was meant by the word "data" or how she interpreted any of the other categories identified in the calendar.

13. Dr. Eckman acknowledged that claimant has made great progress in meeting his goals but explained that she was unable to introduce techniques to address numerous goal areas because she did not feel 16 hours of weekly 1:1 therapy gave her enough time to do that. She also admitted that CBI has not had sufficient staff to accomplish this.

14. RCOC called Michael C. Messina, Psy.D. as a witness Dr. Messina reviewed ICI's reports and other information in the record. He noted that claimant has made impressive progress with fewer hours than claimant requested. He noted that more hours will not be better for claimant because more ABA hours will create "prompt dependency." This means that a child will not develop natural responses. He said that, on average, 40-hours of ABA therapy is the maximum recommended to avoid the problem of prompt dependency. This 40 hour standard is a recognized standard in the field of behavioral psychology. He explained that providing 20 hours a week of ABA therapy outside of school through ICI would result in claimant receiving more than 40 hours a week of ABA therapy when his 5 hours of IBI/ABA services at school are considered.

15. RCOC also called Christina Genter as a witness. Ms. Genter works for RCOC as a Behavioral Services Specialist. Ms. Genter is a board certified behavioral analyst. Ms. Genter testified that, based on her observation of claimant on October 3, 2013, as well as the progress report ICI prepared, claimant is doing well with the hours he has. She noted that he made good gains in using sign language and was able to use signs with indirect prompts. He used sign language when he became frustrated. Ms. Genter noted that claimant appeared to be

benefiting from the program he has with CBI. She recommended that the hours not be increased.

16. Ms. Genter also shared Dr. Messina's concern that claimant may develop prompt dependency if his hours are increased.

//

LEGAL CONCLUSIONS

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

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. (Welf. & Inst. Code, §§ 4646, subd. (a) and 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. (Welf. & Inst. Code, §§ 4512, subd. (b); and 4646.)

3. Welfare and Institutions Code section 4659 requires that regional centers "identify and pursue all possible sources of funding for consumers receiving services." Subdivision (a)(1) of section 4659 identifies such sources as including 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 Welfare and Institutions Code 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. Welfare and Institutions Code 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.”

5. Welfare and Institutions Code section 4686.2, subdivision (d)(1), defines “applied behavioral analysis” 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.”

6. Welfare and Institutions Code section 4686.2, subdivision (b)(3), 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.”

DISCUSSION

7. Claimant’s mother seeks 20 hours of 1:1 services for two reasons: She does not believe he is receiving five hours of IBI/ABA services at his school, and she believes that 20 hours are necessary to address his problem behaviors. Claimant’s mother did not prove that he receives fewer than the 5 hours a day of IBI/ABA hours at school, as is identified in his IEP.² The schedule of claimant’s day at school did not show that claimant receives fewer than these hours. Dr. Eckman’s opinion that claimant receives inadequate IBI/ABA services at school is

² Because claimant did not prove that he receives less than 5 hours a day in IBI/ABA services at school, it is concluded that claimant is currently receiving 40 hours a week of IBI services, which is the maximum number of hours claimant should receive weekly according to Dr. Messina and Ms. Genter to avoid him becoming prompt dependent.

not persuasive. Dr. Eckman based her opinion on claimant's schedule and her own limited observation of claimant in his classroom a year ago.

Because claimant did not prove that he receives fewer than 5 hours a day of IBI/ABA services at school, it is found that claimant currently receives the maximum amount of 40 hours per week of IBI/ABA services, pursuant to Welfare and Institutions Code section 4686.2, subdivision (d)(1).

Claimant also did not prove that he requires 20 hours to address his problem behaviors. Claimant's current program of 16 hours per week of behavior intervention services is effective in addressing his behaviors in a number of goal areas where he has recently shown good progress. In fact, claimant has made progress towards meeting his goal areas even though CBI has not yet applied all of the behavioral modification techniques it has identified.

The appropriateness of the services claimant receives at his school may be an issue. But RCOC is not immediately required to provide these hours if the school is not following claimant's IEP. If claimant's mother does not believe claimant is receiving the IBI/ABA hours he should receive based on his IEP at school, or if she feels the hours provided there are otherwise inadequate, she needs to address her concerns to the school district. RCOC is considered the payor of last resort, but it was not established that the school district has failed or refused to provide a service that claimant needs. (See Welf. & Inst. Code, § 4648, subd. (a)(8) and 4686.2, subd. (b)(3).)

//

//

//

ORDER

Claimant's appeal is denied.

DATED: February 25, 2014

ABRAHAM M. LEVY
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.