

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LAILA A.,

Claimant,

vs.

NORTH BAY REGIONAL CENTER,

Service Agency.

OAH No. 2012110732

DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on January 22 and 23, 2013, in Napa, California.

Roberta S. Savage, Attorney at Law, represented claimant, who was not present, and claimant's mother, who was present throughout the administrative hearing.

Nancy Ryan, Attorney at Law, represented the service agency, North Bay Regional Center (NBRC).

The record was left open for submission of closing briefs which were timely received and marked for identification as Exhibits 8 and AA. The matter was deemed submitted for decision on February 7, 2013.

ISSUES

1. Did NBRC err in declining to fund applied behavior analysis services for claimant after January 31, 2013?

2. Is NBRC responsible for compensating claimant for the period between October 2012 and January 31, 2013, when claimant's applied behavior analysis services vendor was unable to provide services due to changes in staffing?

FACTUAL FINDINGS

INTRODUCTION

1. Claimant is a 12-year-old girl who is eligible for NBRC services based upon a diagnosis of autism. Claimant lives at home with her mother and four-year-old sibling who is also autistic and a consumer of NBRC. Claimant is a curious girl who loves to read and performs well in the academic program at her middle school where she is enrolled in regular education classes. Claimant wants to fit in with other children, but has significant challenges navigating social relationships. In addition, claimant exhibits challenging behaviors at home.

APPLIED BEHAVIOR ANALYSIS SERVICES

2. The Lanterman Developmental Disabilities Services Act (Lanterman Act)¹ sets forth the services and supports available to developmentally disabled consumers of regional centers. The consumer's needs, and the services and supports required to meet those needs, are developed through the Individual Program Plan (IPP) process. (§§ 4620,

¹ Welfare and Institutions Code, section 4500 et seq. Further statutory references are to the Welfare and Institutions Code unless otherwise noted.

4646.) Applied behavior analysis (ABA)² is a service funded by regional centers pursuant to the Lanterman Act to meet the needs of its consumers.

3. ABA therapy has proven effective with children afflicted with autism, especially when provided at a young age. In employing ABA therapy, a trained tutor and/or consultant develops a behavior plan with limited goals, targets specific behaviors, identifies events that trigger behaviors, and develops interventions. The tutor and caregiver collect data, analyze behavior and use prompts or interventions to elicit changes in behaviors according to the stated goals of the behavior plan.

4. Section 4686.2, which became effective July 1, 2009, governs the provision of ABA services pursuant to the Lanterman Act. It mandates that ABA vendors shall conduct a behavioral assessment of each consumer to whom the vendor will provide services, and design an intervention plan including the type of services, the number of hours and parent participation needed to achieve the consumer's IPP goals and objectives. The purchase of ABA services is to be discontinued when the consumer's treatment goals and objectives have been achieved. Section 4686.2 requires the participation of the consumer's parent or caregiver in the intervention plan.

5. W. Oran Hutton, Ph.D., a consulting psychologist employed by NBRC since 1997, drafted guidelines for the purchase of ABA services following the adoption of section 4686.2. The NBRC guidelines provide in pertinent part:

- a. Behavior services provided in the home are to be planned [specifically] to target goals, which are to be focused on problem behaviors reflecting the

² ABA is defined in the Lanterman Act 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." (§ 4686.2, subd. (d)(1).)

primary concerns of the [parent] and the interdisciplinary team. The purchase is to be time-limited in nature.

- b. Behavior services are to be focused both upon the client and upon the parent/caregiver, in that interventions are to be devised that are likely to reduce the frequency and intensity of the identified behavior problem behavior(s), and in that the parent/caregiver is expected to learn to successfully implement the interventions and to reinforce the replacement behaviors if such are identified.
- c. Target goals for a single behavior purchase should not exceed five to eight in number.
- d. Specific data reflecting the baseline frequency and/or intensity of target behaviors are to be gathered during the assessment phase.
- e. During the intervention phase, specific data are to be gathered reflecting actual progress or lack thereof for each target goal.
- f. When progress on a given goal nears the 70% success rate, consideration is to be given to considering that goal achieved; at 80%, the goal is to be considered achieved.
- g. When progress on all identified target goals nears the 65-70% success rate, services are to be faded significantly, while continuing to track data.
- h. When all identified target goals achieve 80% success rate, services are to be terminated. Correspondingly, if a majority of the target goals success rates seem "stuck" at a rate of 50% or less, strong consideration is to be given to terminating services.
- i. Similarly, specific goals are to be identified (no more than two or three) to help track the parent/caregiver's progress in learning and implementing the recommended behavior interventions.

- j. The parent/caregiver success rate should approximate the success rate of the client. Therefore, when both are near the 70% success rate, consideration is to be given to considering goal(s) achieved, and support services may be faded; when near the 80% success rate on all identified goals, termination of services is recommended. If parent/caretaker success rates are limited to the 50% level or less for a few weeks, strong consideration should be given to terminating services.

CLAIMANT'S ABA SERVICES

6. Claimant began receiving ABA services funded by NBRC in 2004. On July 2, 2009, claimant's service coordinator contacted claimant's mother to discuss fading claimant's ABA services. At that time, claimant was receiving 15 hours per week of one-on-one services, and 10 hours per month of consultation services. The service coordinator explained to claimant's mother that ABA services usually last approximately two years and the program should fade while she implements the strategies learned. The one-on-one services were thereafter reduced to 10 hours per week, but the consultation hours were maintained at 10 hours per month. After a meeting on October 7, 2009, with the service coordinator, claimant's mother, the family advocate and personnel from claimant's ABA vendor, Behavioral Education for Children with Autism (BECA), it was decided that ABA services would continue at 10 hours per week for one-on-one care, and 8 hours per month of consultation time.

7. On September 15, 2010, a meeting was scheduled between NBRC and claimant's mother to develop claimant's IPP. On September 10, 2010, Dr. Hutton wrote a letter to claimant's mother regarding the upcoming meeting in which he recommended that claimant's ABA therapy be reduced in hours with the intent of terminating the services in a reasonable amount of time. Dr. Hutton advised claimant's mother further that once clients utilizing behavioral services have made satisfactory progress, including

the education and training of her parents/caregivers, consideration must be given to the reduction of services and timely termination of those services.

8. Dr. Hutton also wrote to BECA on September 10, 2010. Dr. Hutton described NBRC's new guidelines for the purchase of ABA services. Dr. Hutton stated that in his opinion, claimant had made very good progress in the ABA therapy, and he felt that sufficient progress had been made to warrant consideration of fading and terminating services. Dr. Hutton therefore advised BECA that the purchase of ABA services would not be continued beyond a reasonable period, and requested BECA to develop a fading plan with a target of termination as of the end of February, 2011.

9. At claimant's IPP meeting on September 15, 2010, claimant's mother identified the following concerns with claimant's behavior: ongoing defiance, non-compliance, and aggression toward her sibling or her mother, and at times toward her tutors. Claimant's mother was also concerned with safety skills, such as approaching a hot stove. Other challenging behaviors were reported to include property destruction, tantrums, attempted elopement, non-response to a demand, verbal protest, talking back and negative self-talk. Claimant was also having difficulty interacting with peers.

10. After the meeting, NBRC agreed to continue funding ABA services of up to 8 hours per week of one-on-one tutoring and up to 12 hours per month of consultation.

11. On the January 24, 2011 IPP Addendum, NBRC agreed to fund up to 47 hours per month of ABA services. The hours of ABA services were maintained at the same level after the July 27, 2011, IPP addendum meeting. The January 30, 2012 IPP Addendum states:

BECA continues to recommend up to 8 hours per week of 1:1, up to 12 hours per month of parent training and support, and up to 3 hours for team meetings per month. NBRC to fund this request for the next three months, in

which time it is expected that BECA [will] begin plan for fading services.

12. On February 1, 2012, claimant's service coordinator contacted BECA to inquire about a possible fading plan because claimant had met nearly all of her goals with over 80 percent accuracy. On March 22, 2012, NBRC sent a letter to BECA requesting that the hours of ABA services being provided to claimant be modified to reflect the success she had made on some of her goals.

13. The April 18, 2012 IPP Addendum states that NBRC agreed to fund up to 45 hours per month of behavior intervention through BECA. The time was to be used for up to eight hours per week of one-on-one tutor hours and up to 10 hours per month of parent training and support. The July 16, 2012 IPP Addendum maintains those ABA service hours through January 31, 2013.

14. Dr. Hutton believed that claimant had achieved significant success from the ABA services to fade and terminate them in 2009. Although other NBRC staff members believed that the ABA services should have been faded and terminated in 2010, they continued to work with the family to allow for a gradual decrease in services, while maintaining a good working relationship.

15. In September 2012, BECA was no longer able to provide claimant with ABA services due to staffing constraints. BECA notified NBRC and claimant's mother of the change in mid-September 2012. On September 18, 2012, claimant's mother requested NBRC to replace BECA's services with the ABA services vendor that works with her other child.

16. A meeting was held on October 19, 2012, between claimant's mother and NBRC staff, during which claimant's mother described ongoing behavioral challenges with claimant at home. On October 29, 2012, NBRC denied the request for continued ABA services.

17. The IPP provided for ABA services through January 31, 2013, however, because BECA was no longer available to provide services, NBRC was unable to continue the purchase. Before purchasing services from a new vendor, that vendor must perform an assessment as mandated by section 4686.2. Obtaining an assessment with a new vendor is costly and takes approximately three months to complete. Because NBRC staff believed that claimant's ABA services should have been faded and terminated, it refused to fund an assessment with a new vendor.

18. On November 20, 2012, NBRC issued a Notice of Proposed Action which stated the reasons for terminating the ABA services as follows:

NBRC had agreed to fund BECA behavior services through 1-31-13, but BECA stopped serving claimant in October 2012. NBRC declines to fund further behavior services with another vendor.

Regional center services are needs and progress based. [Claimant] has made great progress and met most of her goals to an acceptable level over the last 9 years of receiving behavior services. Behavior services are to be time limited intensive services. Regional centers are mandated to use public taxpayer funds in a cost effective manner. Generic resources are available to meet her therapy needs.

Claimant timely appealed the decision and this hearing followed.

NBRC EVIDENCE

19. Dr. Hutton testified persuasively at hearing concerning his understanding of the ABA services provided pursuant to the Lanterman Act, and his opinions of

claimant's current need for ABA services. ABA services are not expected to continue until problematic behaviors caused by autism are eradicated because autism is a lifelong disorder. The goal of ABA services is to give the consumer and the caregiver a means of improving the consumer's function in society to the degree the consumer is able to achieve. The tutor or consultant's role is to work with the consumer and to educate and train the parent to implement interventions and reinforcers. The parent watches in the beginning, but should gradually model data collection and interventions, and eventually assume the role of the consultant and tutor. In Dr. Hutton's opinion, if the ABA services continue for too long, the family becomes dependent on the services, rather than becoming empowered by the training.

20. One of the objectives of claimant's IPP is to decrease her challenging social behaviors and to increase her compliance and positive behaviors. ABA services have been utilized to achieve this objective. After reviewing BECA's quarterly reports, Dr. Hutton and claimant's service coordinator concluded that claimant had achieved adequate success on the objective of the ABA services, and claimant's mother was well-trained in ABA principles. Dr. Hutton opined that claimant's family had become dependent on ABA services, and there was a danger that continued services would negatively impact the family.³

21. BECA's quarterly reports support Dr. Hutton's testimony and demonstrate that claimant has continually made progress on the goals designed to help her interact

³ Dr. Hutton is aware that in April or May 2012, while the BECA tutor was in the home, claimant grabbed a knife and threatened to kill herself. Claimant's mother took the knife away and dissuaded the BECA tutor from contacting the police. Dr. Hutton suggests that mental health services be considered as a result of this incident, but it does not change his opinion as to whether ABA services should be continued.

positively with peers and family members. Thus, claimant has achieved significant progress on her IPP objective of improving her social interactions and redirecting her challenging behaviors. In addition, the BECA reports demonstrate that claimant's mother has been well-trained to implement ABA principles.

CLAIMANT'S EVIDENCE

22. Claimant's mother is a very devoted parent of two autistic children. She has been trained ABA tutors and consultants working with both of her children over many years. During her testimony, claimant's mother demonstrated familiarity with ABA principles. Claimant's mother reports that despite her training in ABA principles, she still needs support. She reports further that claimant's challenging behaviors are continuing, and have increased since ABA services were discontinued.

23. Elizabeth Whitson, M.A., the Associate Director of BECA, testified at hearing. Whitson is familiar with claimant through her position at BECA. Whitson reports that claimant has trouble with regulating her emotions, is very impulsive, has difficulty communicating and complying with basic instructions, and has challenges with social skills. These difficulties impact claimant's ability to function in her home.

BECA set "overarching" goals for claimant, such as "improving peer interactions." Within each overarching goal, BECA's quarterly reports identify the "quarterly" or "current" goals. Once one of the intermediate goals is met, the parent is trained to maintain the goal, and the goal is replaced with another goal. Although BECA's quarterly reports indicate that claimant is meeting the quarterly goals, in Whitson's opinion claimant has not met the overarching goals and still requires in-home ABA services. Whitson agrees that claimant's mother has been trained to gather data and to intervene appropriately when claimant exhibits many of her challenging behaviors. However, Whitson opines that claimant's mother still needs more training and support.

24. Claimant is supported at her middle school by a part-time behaviorally trained aide and through behavior consultation services provided by Jessica Ploeg of Peninsula Applied Behavior Analysis. Ploeg performs assessments, trains the staff and oversees the behavior services program. Ploeg collaborates on goals with the family and the home program. Some of the goals Ploeg is working on with claimant overlap with BECA's goals for claimant, such as, peer interaction, decreasing self-talk and anxiety, increasing responsiveness and emotional regulation. However, the school only addresses behavior which occurs at school.

Claimant initially had a one-on-one aide at school, however, she has now become largely independent in most classes with only prompts from the teachers. In Ploeg's opinion, claimant "holds it in" at school, but exhibits more disruptive behaviors at home. Ploeg meets with claimant's mother in the home on occasion and she has observed claimant talking back, having emotional outbursts and engaging in constant self-talk. Ploeg believes that claimant benefits from in-home ABA services.

SUMMARY

25. Over the past nine years, claimant has made significant progress through ABA services toward her IPP goal of improving her social interactions and controlling her challenging behaviors.

26. At school, claimant no longer requires a one-on-one aide. Instead, her behavior is largely redirected through prompts made by her teachers.

27. At home, claimant's mother has been well-trained in ABA principles to redirect claimant's behaviors.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. Individuals with developmental disabilities have

the right to services and supports directed toward the achievement of the most independent and normal lives possible. (§ 4502, subd. (b).) The Lanterman Act authorizes the Department of Developmental Services to contract with regional centers to provide developmentally disabled individuals with access to the services and supports best suited to them throughout their lifetimes. (§ 4620.)

2. Neither the Lanterman Act appeal process (§ 4700 et seq.) nor its implementing regulations (Cal. Code Regs., tit. 17, § 50900 et seq.) assigns burdens of proof. Here, because NBRC is seeking to terminate services it bears the burden of proof. (Evid. Code, § 500.) And, as there is no statute that provides otherwise, the standard of proof to be applied in this proceeding is the preponderance of the evidence. (Evid. Code, § 115.)

3. The consumer's needs are determined through the IPP process. (§ 4646.) The process "is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments." (§ 4646, subd. (a).)

4. The IPP is developed by an interdisciplinary team and must include participation by the consumer and or his or her representative. The IPP must set forth goals and objectives for the consumer, contain provisions for the acquisition of services (which must be provided based upon the consumer's developmental needs), and reflect the consumer's particular desires and preferences. (§§ 4646, 4646.5, subds. (a)(1), (a)(2) and (a)(4), 4512, subd. (b), and 4648, subd. (a)(6)(E).)

5. Although an IPP must reflect the needs and preferences of the consumer, a regional center is not mandated to provide all the services a consumer may request. A regional center's provision of services to consumers and their families must "reflect the

cost-effective use of public resources.” (§ 4646, subd. (a).) A regional center also has discretion in determining which services it should purchase to best accomplish all or any part of a consumer’s IPP. (§ 4648.) This entails a review of a consumer’s needs, progress and circumstances, as well as consideration of a regional center’s service policies, resources and professional judgment as to how the IPP can best be implemented. (§§ 4646, 4648, 4624, 4630, subd. (b), and 4651; *Williams v. Macomber* (1990) 226 Cal.App.3d 225, 233.)

6. Section 4686.2, which regulates the provision of ABA services, provides that regional centers must discontinue ABA services when the consumer’s goals and objectives are achieved. (§ 4686.2, subd. (b)(4).) That is not to say that services must continue until a consumer no longer exhibits the behaviors caused by the developmental disability. The goal is to provide services to improve the consumer’s deficits and to provide the caregiver the training necessary in order to implement the principles of ABA therapy in responding to the behavior.

7. NBRC’s ABA purchase guidelines, limit the purchase ABA services to a period of time during which the consumer is guided and the caregiver is trained to use the principles effectively. In determining whether the therapy should be discontinued, NBRC looks to the success of the claimant in achieving the goals and objectives of the therapy, and whether the parent or caregiver has been sufficiently trained to assume the role of the tutor. (Factual Finding 5.)

8. In this matter, the evidence established that claimant has made significant progress toward her IPP goal of improving her social interactions and reducing the impact of her challenging behaviors. (Factual Findings 8, 14, 20, 21, 24 through 26.) Because autism is a lifelong disorder, the Lanterman Act does not provide ABA services until all challenging behaviors are eradicated. (Factual Finding 19.) Claimant has achieved the objective of the ABA therapy, and her mother has been trained to

implement the ABA principles. (Factual Findings 22, 23 and 27.) The quarterly reports from BECA support this conclusion, as does her progress at school and the testimony of Dr. Hutton and claimant's witnesses. In order to maintain a working relationship with the family, NBRC continued funding ABA services while directing BECA to fade services over the past three years. (Factual Findings 7, 8, 11, 12 and 14.) NBRC did not err in terminating services as of January 31, 2013, after BECA became unavailable. NBRC properly refused to fund an assessment by a new ABA services vendor.

9. Claimant requests compensation for the lack of ABA services provided between October 1, 2012 and January 31, 2013. While ordinarily the service agency should not discontinue services prior to holding an IPP meeting with the family, in this case, it was not the actions of NBRC that caused services to end prior to the agreed date of January 31, 2013. When the service provider unexpectedly withdrew, NBRC met with claimant's family to discuss options. (Factual Findings 15 and 16.) At the time BECA notified claimant's mother and NBRC that it was unable to continue, NBRC had been requesting BECA provide a fading plan for three years. (Factual Findings 7, 8, 11, 12 and 14.) BECA's unexpected unavailability was unfortunate, but it occurred when NBRC had already determined that the ABA services should be faded and terminated. The Lanterman Act does not provide for compensation to a consumer under these circumstances.

ORDER

Claimant's appeal is denied.

DATED: February 20, 2013

JILL SCHLICHTMANN

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.