

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

vs.

THE INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2013110404

DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on December 2, 2013.

Julie A. Ocheltree, Attorney-at-Law, represented Inland Regional Center (IRC).

Chad Carlock, Attorney-at-Law, represented claimant.

Oral and documentary evidence was received and the matter was submitted on December 2, 2013.

ISSUE

1. Is claimant precluded from asking IRC to fund Applied Behavioral Analysis (ABA) services because claimant was determined to be ineligible for ABA services in hearing decision No. 2012110441?

2. If claimant is not precluded from making this request for ABA services, is claimant now qualified for ABA services based on HOPE Counseling's latest report?

FACTUAL FINDINGS

1. Claimant is a 17-year-old male who qualifies for agency services based on a diagnosis of Autistic Disorder.

2. Currently, claimant is receiving the following services outside of the school setting: 188 hours per month of In-Home Supportive Services (IHSS) and 30 hours per month of respite services. Claimant is also receiving behavior modification services through HOPE Counseling. This service is funded by claimant's family's private insurance.

3. In fair hearing decision OAH No. 2012110441, dated March 11, 2013, Administrative Law Judge Roy W. Hewitt addressed the following issue:

What level of ABA service should be provided by IRC until claimant's insurance company begins funding claimant's Applied Behavioral Analysis (ABA) services?

4. ALJ Hewitt found that claimant no longer had a medical, or psychological, or psychiatric need for further ABA services.¹ As a result, ALJ Hewitt determined that IRC may discontinue funding claimant's ABA services.

5. In reaching this decision, ALJ Hewitt rejected HOPE's February 6, 2013 assessment that claimant needed ABA services. ALJ Hewitt accepted the finding ABC, claimant's previous ABA provider, made that claimant no longer had a medical or psychological or psychiatric need for further ABA services.

6. On June 24, 2013, shortly after ALJ Hewitt's decision was issued, claimant's mother, at claimant's annual Individual Program Plan (IPP) meeting, inquired into receiving behavioral modification services funded by IRC through HOPE. Claimant's service coordinator, Krystal M. Spear, apparently not being familiar with ALJ Hewitt's decision, agreed to refer claimant to HOPE to assess his need for ABA services. IRC

¹ Notice is taken that ABA is a method for teaching individuals with autism a wide variety of skills in order to reduce problem behaviors.

referred claimant to HOPE for an assessment and HOPE provided an assessment report in October 2013.

7. In the IPP submitted on July 24, 2013, IRC noted that IRC would refer claimant for behavioral modification services as a goal to improve claimant's behaviors, but stated that such services were to be provided by a generic resource.

8. Subsequently, claimant asked IRC to fund behavioral services for claimant. In a notice of proposed action dated October 29, 2013, IRC denied claimant's request. IRC cited ALJ Hewitt's March 11, 2013 decision as barring IRC from purchasing behavioral services for claimant. IRC also cited Health and Safety Code Section 1374.73, subdivision (a)(1), and Welfare and Institution Code Section 4646, subdivisions (a) and (c), as precluding IRC from purchasing behavioral services. These sections prohibit a service agency from purchasing services that would otherwise be available from private insurance or health service plans.

9. On November 5, 2013, claimant requested a fair hearing. Claimant cited five reasons for this request²:

- IRC refused to fund behavioral modification services that the IPP determined were necessary.
- IRC wrongly denied behavioral modification services because these services are funded through claimant's insurance.
- IRC wrongly refused to accept the number of behavioral modification service hours the provider recommended.

² Claimant raised a sixth issue that was resolved at the hearing by the parties' stipulation.

- IRC wrongly relied on the administrative hearing decision to deny the claim because the subsequent IPP rendered the decision moot and because hearing decisions are not precedential.
- IRC has no discretion in deciding to implement an IPP. Claimant cited *Arc. v. Department of Developmental Services* 38 Cal.3d 384, 390 (1985) as the legal authority supporting this request.

10. On November 19, 2013, IRC filed a motion to dismiss claimant's hearing request. IRC asserted that claimant was attempting to relitigate the identical issue that was litigated in hearing decision No. 2012110441. The motion was denied without prejudice to IRC arguing the motion at the hearing on December 2, 2013.

11. At the hearing, claimant argued that the issues in both administrative matters were not identical. Claimant asserted that behavioral modification services are different than ABA services and, as a result, claimant was not precluded from asking IRC to fund behavioral services. Claimant also argued that IRC made a determination in the IPP that claimant was eligible for behavioral modification services.

12. HOPE's February 2013 and October 2013 assessments are based on the same information. HOPE's Clinical Director, Jamie Juarez, performed both assessments. Director Juarez's February 2013 assessment states the following:

Presenting Concerns: (Claimant's mother) reports seeing regression in the child's abilities and an overall rise in aggression since full integration in a school setting. His behavior has consistently been escalating since 2009, maladaptive behaviors include: self-stimulating behavior, aggression and self injury [sic]. The client used to have well adapted communication skills however those have completely regressed. Client does not engage others, fails to

use nonverbal behaviors to regulate social interaction, lacks socioemotional reciprocity, and he doesn't participate in shared enjoyment. (Claimant) is also lacking fine and gross motor skills.

Services Requested: Applied Behavioral Analysis. Mother reports doing research indicating (ABA) is evidence based for issues her son presents with.

Director Juarez's October 2013, assessment contains the exact same language as follows:

Presenting Concerns: (Claimant's mother) reports seeing regression in the child's abilities and an overall rise in aggression since full integration in a school setting. His behavior has consistently been escalating since 2009, maladaptive behaviors include: self-stimulating behavior, aggression and self injury [sic]. The client used to have well adapted communication skills however those have completely regressed. Client does not engage others, fails to use nonverbal behaviors to regulate social interaction, lacks socioemotional reciprocity, and he doesn't participate in shared enjoyment. (Claimant) is also lacking fine and gross motor skills.

Services Requested: Applied Behavioral Analysis. Mother reports doing research indicating (ABA) is evidence based for issues her son presents with.

In both reports, Director Juarez notes the following:

More recently, (claimant) has been unable to neither remember nor produce some of the basic things that he had known so well, such as: sounding out words and phrases, coordinating his daily visual schedule, and putting things in order from working memory. Recently, (claimant) was unable to work the goals he had previously been able too [sic]. His mother got very concerned that he was regressing and showing more aggression. (Claimant) was placed on Home Hospital Instruction by physician in late October 2012 due to increased levels of anxiety and stress at school.

In addition, in both assessments Director Juarez recites the same "Description of Assessment Activities" including the same "school district, IEE, Psych, med records." In both assessments Director Juarez also recites the same "Measurement Inventories."³ Between the assessments, only the dates for claimant to achieve behavioral goals, the names of these goals, and the service delivery recommendations are different.

EVALUATION

13. Claimant seeks to relitigate whether IRC is obligated to fund ABA services. Claimant's argument that ABA is different from behavioral modification services is without merit. ABA is a technique to modify behaviors, and HOPE assessed claimant for

³ Saliently, at the December 2, 2013, hearing, claimant did not identify facts that have changed since the March 11, 2013 hearing decision.

ABA services, at his mother's request, in February and October 2013.⁴ Claimant's assertion that the IPP determined that claimant required behavioral modification services is also rejected. IRC agreed to refer claimant to HOPE, but IRC did not agree to fund ABA services. In the IPP, IRC specifically noted that behavioral modification services would be funded by "generic services."

Claimant also argued that IRC is required to fund behavioral modification services notwithstanding Health and Safety Code sections 1374.73, subdivision (a)(1), and Welfare and Institutions Code Section 4646, subdivisions (a) and (c). Claimant's argument on this point is also without merit. These sections prohibit a service agency from purchasing services that would otherwise be available from private insurance or health service plans. IRC is not required to fund claimant's behavioral modification services or ABA services because behavioral modification services are available to claimant from his family's private insurance.

⁴ In enacting Health and Safety Code Section 1374.73, subdivision (a)(1), the Legislature recognized that behavioral modification services and ABA are not different treatment modalities. Section 1374.73, subdivision (a)(1), requires health plans to provide "behavioral health treatment." In turn, where private insurance is available to purchase behavioral health treatment, IRC may not purchase behavioral health treatment under Welfare and Institutions Code Section 4646. If behavioral health treatment and ABA services are distinct treatment modalities, this legislation would not prohibit IRC from purchasing ABA services where ABA services are available from private insurance. This is not the case.

LEGAL CONCLUSIONS

1. In *Lucido v. Superior Court* (1990) 51 Cal.3d 335, at 342-344, the California Supreme Court set forth the doctrine of issue preclusion. According to the court, the doctrine of issue preclusion "precludes relitigation of issues argued and decided in prior proceedings" when six criteria are met. These criteria are: (1) "The issue sought to be precluded from relitigation must be identical to that decided in a former proceeding;" (2) the issue to be precluded "must have been actually litigated in the former proceeding;" (3) the issue to be precluded "must have been necessarily decided in the former proceeding;" (4) "the decision in the former proceeding must be final and on the merits;" (5) "the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding;" and (6) application of issue preclusion must be consistent with the public policies of "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation." Application of those criteria to the instant case results in claimant being precluded from relitigating the exact issue litigated and decided in the March 11, 2013 administrative action: "What level of ABA service should be provided by IRC until claimant's insurance company begins funding claimant (ABA) services?"

2. Alternatively, even if the issue had not already been litigated, claimant's request would still be denied because Health and Safety Code sections 1374.73, subdivision (a)(1), and Welfare and Institutions Code Section 4646, subdivisions (a) and (c), require service agencies to utilize generic resources for services, including services from private insurance or a health care service plan. ABA services for claimant that qualify as such a generic resource are available to claimant from his family's private insurance. In fact, claimant's insurance is funding these services.

ORDER

Claimant's appeal is denied.

The agency is not required to fund behavioral treatment services.

DATED: December 16, 2013

ABRAHAM M. LEVY
Administrative Law Judge
Office of Administrative Hearings

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 ninety days.