

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:
CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2015100132

DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on February 1, 2016.

Claimant's foster mother and father, who are her legal guardians, represented claimant.

Stephanie Zermeño, Consumer Services Representative, represented Inland Regional Center.

The matter was submitted on February 1, 2016.

ISSUE

Should IRC be required to continue funding behavior modification services for claimant?

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Claimant is a fifteen-year-old girl who qualifies for IRC services under the

categories of intellectual disability and autism. Claimant lives with her foster parents and receives Supplemental Security Income (SSI) and Adoption Assistance Program (AAP) benefits. AAP is a federally funded adoption subsidy program that provides financial assistance in the form of a "cash benefit" to families who adopt or care for foster children with special needs.¹

2. In a Notice of Proposed Action dated August 26, 2015, IRC proposed discontinuing behavior modification services claimant has been receiving effective September 30, 2015. IRC proposed this action because, as IRC claimed in its notice, claimant resides in a licensed home operated by claimant's foster parents and claimant's foster parents receive AAP benefits to provide behavioral modification services to claimant.²

Claimant has been receiving 35 hours of 1:1 behavior modification services to address problem behaviors that interfere with her social skills. These problem behaviors have included physical aggression and outbursts once a week that require intervention. Claimant will also wander off, if allowed, every day; when upset she hits furniture and others in the household; and she will kick and scratch. IRC did not assert that behavior modification services were not needed to address these behaviors.³

¹ Welfare and Institutions Code section 16115 et seq.

² At the hearing, IRC appeared to assert that claimant's consumer services coordinator incorrectly approved behavior modification services notwithstanding that claimant was receiving AAP benefits.

³ Claimant's problem behaviors and authorization for behavior modification services through the vendor were documented in claimant's March 2, 2015 Individual Program Plan.

On September 30, 2015, claimant submitted a fair hearing request appealing IRC's proposed action. As a reason for their appeal, claimant's foster parents stated that claimant's "continued behaviors (are) beyond the scope of our facility [] therefore we are requesting professional help." They requested that behavior modification services continue.

CLAIMANT'S PLACEMENT IN AN ALTERNATE RESIDENTIAL MODEL LICENSED FACILITY

3. In 2004, the Riverside County Department of Public Social Services placed claimant in the care of her foster parents. Claimant's foster parents operate a small family home that is licensed by the California Department of Social Services under California Code of Regulations (CCR), title 22, section 83000 *et seq.*

In an agreement dated June 2, 2005, between DPSS, IRC and claimant's foster parents, claimant's foster parents agreed to accept and care for claimant in an Alternative Residential Model (ARM) "level 2" small family home. The ARM is a system of residential facility service levels implemented to determine the reimbursement for residential service for regional center consumers in residential care facilities licensed by the Department of Social Services.⁴ Under this agreement, DPSS pays a monthly ARM rate; a Board and Care rate; and pays for claimant's personal and incidental expenses.⁵ The rate of these payments

⁴ http://www.dds.ca.gov/Publications/HistoricPub/2000_CostModelRpt.pdf

⁵ Although DPSS is identified as the payor in this agreement, IRC was identified as the payor during IRC Program Manager Vince Toms's testimony and in claimant's most recent IPP. The agreement allows IRC to become the payor of the ARM rate. It thus appears that once claimant's foster family became vendored by IRC, IRC assumed the role of payor of the ARM rate.

is based on the "level 2" (ARM) service level. The total cash benefit is approximately \$1,275 monthly, as identified in claimant's March 2, 2015, IPP. This cash benefit is under the AAP.⁶

There are four care rate levels, classified from 1 to 4, with four requiring the highest level of service as defined under CCR, title 17, section 56004. Developmentally disabled consumers are assigned to a licensed residential community care facility based upon a particular facility's capacity to meet the consumer's unique needs. The more care that is required to meet a consumer's needs, the higher the monthly rate paid.

4. To become vendored by the regional center as an ARM level 2 small family home, claimant's foster parents created a "Statement of Purpose and Goals" to detail their home's goals and the "entrance criteria" for children in their home. As its general purpose, this document provided that claimant's foster parents will provide direct care, supervision and training to children they accept in their home and, they will "assist consumers in the acquisition of critical skills utilizing the least restrictive training methods in the most 'normalized' environment possible." In addition, the home's Statement of Purpose and Goals states that claimant's foster parents will accept children with specific, relatively minor behavior problems: children who can cause minor property damage a few times a year; resort to verbal abuse or threats on a few occasions causing minor physical injury to themselves a couple times a year; have emotional outbursts three times a month; and become aggressive or hostile when provoked less than one to two times a month. When claimant was initially placed with claimant's foster parents, she was four years old, and it was noted that she "can be aggressive" and she "does wander away."

As further detailed in the home's Statement of Purposes and Goals, claimant's foster parents agreed, "in an effort to modify unacceptable behaviors," to use specific "methods" to "minimize or modify an unwanted behavior." These behavior modification techniques

⁶ Welfare and Institutions Code sections 4684, subdivision (b), and 16121.

were classified by the behaviors the foster parent caregivers seek to address including “(a)ggression” and “temper tantrums.” In the case of aggression, the caregivers will “try to calm consumer by talking quietly to him [sic] and encouraging him [sic] to talk about his [sic] frustration when consumer appears to be agitated”; will assist consumer in releasing his [sic] frustration in a more constructive way”; and will “verbally praise consumer when consumer shows control of frustration.”

As an additional goal, the facility noted the following:

When the needs of the consumers call for outside professional assistance, the appropriate professional will be contacted. This will occur on an as-needed basis, as well as routinely for medical, dental, vision, speech therapy, physical therapy, psychotherapy, etc.

TESTIMONY OF IRC PROGRAM MANAGER VINCE TOMS

5. Vince Toms is the Program Manager for Quality Assurance at IRC. He has worked in this capacity for almost the last four years. He primarily supervises IRC vendors.

Mr. Toms testified that IRC funds the “level 2” Board and Care Rate and incidentals for claimant based on six consumers who live in the home. Mr. Toms emphasized that this “ARM rate” includes funding for behavioral modification services and the funding needs to adhere to the level of design for the funded program. With regard to claimant’s home this funding design is at “level 2” for children with relatively minor problem levels.

Mr. Toms added that claimant’s foster parents agreed to “manage consumers with (specific) behavioral deficits,” as described in the home’s Statement of Purpose and Goals. He stated that under Welfare and Institutions Code section 4684, subdivision (d)(2), the AAP benefits claimant receives are for claimant’s “care and supervision” and, as defined under Welfare and Institutions code section 11460, subdivision (b), “care and supervision”

includes behavioral modification services. As a result, claimant has been “double dipping” and IRC had incorrectly approved behavioral modification services for claimant in the past.

Mr. Toms commented that claimant’s foster parents have provided exceptional care to claimant and other children in their home and he recognized their emotional bond with claimant. He said that they could ask that claimant be removed to a higher level care facility but this would involve claimant leaving their home.

TESTIMONY OF CLAIMANT’S FOSTER PARENT AND DR. MICHELSON’S LETTER

6. Claimant’s foster mother testified that claimant was placed in her home eleven years ago after she suffered extreme neglect and abuse from her natural parents. Claimant has had problem behaviors as a result, but about two years ago claimant became more aggressive and claimant’s foster parents could not manage her behavior. As an example of claimant’s problem behaviors, she described an incident at a restaurant where claimant became upset and bit her foster mother causing severe bruising on her arm. Claimant’s foster mother said that the behavioral modification services have helped reduce claimant’s aggressive behaviors.

She stated that under the Statement of Purposes and Goals, it was understood that “(w)hen the needs of the consumers call for outside professional assistance the appropriate professional will be contacted.” She understood this statement to mean that claimant could receive behavioral modification services from an outside vendor.

In support of her testimony, claimant’s foster mother submitted a letter dated November 10, 2015, from claimant’s pediatric neurologist, David Michelson, M.D. Dr. Michaelson stated that over the last eleven years he has worked closely with claimant and her foster parents to diagnose and treat claimant’s “very significant cognitive, emotional, and behavioral disturbances” and claimant has done remarkably well considering what she has been through. Dr. Michelson noted specifically that claimant benefited greatly from ongoing behavior therapy and he believed that it would be in claimant’s best interest to

continue this therapy because it has been working well for so many years.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. Each party asserting a claim or defense has the burden of proof for establishing the facts essential to that specific claim or defense. (Evid. Code, §§ 110, 500.) In this case, IRC bears the burden to demonstrate that claimant is no longer eligible to receive behavioral modification services.

2. The standard by which each party must prove those matters is the “preponderance of the evidence” standard. (Evid. Code, § 115.)

3. A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

APPLICABLE PROVISIONS UNDER THE LANTERMAN ACT REGARDING BEHAVIORAL MODIFICATION SERVICES

4. “Services and supports” are defined in Welfare and Institutions Code section 4512, subdivision (b):

“Services and supports for persons with developmental Disabilities” means 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 habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and

maintenance of independent, productive, and normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. . . .

5. A regional center is required to secure the services and supports that meet the needs of the consumer, as determined in the consumer's Individual Program Plan (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.)

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

7. 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.”

8. Welfare and Institutions Code section 4686.2, subdivision (b)(1), allows regional centers to “(o)nly purchase. . . intensive behavior intervention services that reflect evidence-based practices, promote positive social behaviors, and ameliorate behaviors that interfere with learning and social interactions.” Under subdivision (d)(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 or small group format, as appropriate.”

APPLICABLE PROVISIONS REGARDING ARM AND APA BENEFITS

9. Welfare and Institutions Code section 4684, subdivision (d)(2), states that “AFDC-FC (Aid to Families with Dependent Children-Foster Children) and AAP benefits shall be for care and supervision, as defined in subdivision (b) of Section 11460, and the regional centers shall separately purchase or secure other services contained in the child’s . . . IPP pursuant to section 4646 to 4648. . . . Notwithstanding any other provision of law or regulation, the receipt of AFDC-FC and AAP benefits shall not be cause to deny any other services that a child or family for which the child or family is otherwise eligible pursuant to this division.”

10. Welfare and Institutions Code section 11460, subdivision (b), defines “care and supervision” as follows:

- (b) "Care and supervision" includes food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which he or she is enrolled at the time of placement. Reimbursement for the costs of educational travel, as provided for in this subdivision, shall be made pursuant to procedures determined by the department, in consultation with representatives of county welfare and probation directors, and additional stakeholders, as appropriate.
- (1) For a child or youth placed in a short-term residential treatment center or a group home, care and supervision shall also include reasonable administration and operational activities necessary to provide the items listed in this subdivision. . . .

EVALUATION AND DISPOSITION

11. Claimant's appeal of IRC's Proposed Action dated August 25, 2015, is granted. Contrary to IRC's assertion, "care and supervision" is not defined to include behavior modification services as an AAP benefit under Welfare and Institutions Code sections 4648 and 11460, subdivision (b). "Care and supervision" is defined under Section 11460, subdivision (b), to include supervision, travel, general child care, and reasonable operational activities to provide care and supervision. In addition, and more fundamentally, Section 4648 states that the receipt of AAP benefits is not cause to deny any other service that a child is eligible to receive under the Lanterman Act. Claimant has been "eligible to receive" behavior modification services because these services have helped to alleviate her developmental disability and/or have helped her social, personal, physical, or economic habilitation or rehabilitation.

IRC's argument that claimant is not eligible to receive behavior modification services has an additional problem. IRC did not provide evidence that that the specific

"methods" to "minimize or modify an unwanted behavior(s)" identified in the Statement of Purpose and Goals document were, in fact, behavior modification services. Claimant's foster parents created the Statement of Purpose and Goals document and no evidence was presented that they are specialists in the area of behavior modification interventions. It appears that the methods are practical approaches to addressing common behavior problems in children. Moreover, their Statement of Purpose and Goals document clearly indicated that outside services would be provided when needed. No evidence was introduced that claimant did not need behavior modification services.

The regional center is, thus, required to continue to fund claimant's behavioral modification services.

ORDER

Claimant's appeal is granted. IRC will continue to provide behavior modification services to claimant.

DATED: February 12, 2016.

_____/s/_____

ABRAHAM M. LEVY

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision.