

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

REGIONAL CENTER OF THE EASTBAY,

Service Agency.

OAH No. 2016090443

DECISION

Administrative Law Judge Regina Brown, Office of Administrative Hearings, State of California, heard this matter on October 11, 2016, in San Leandro, California.

Claimant was represented by his mother.

Mary Dugan, Fair Hearing Specialist, represented service agency Regional Center of the East Bay (RCEB).

The record closed and the matter was submitted on October 11, 2016.

ISSUE

Whether RCEB is required to continue to provide Intensive Behavioral/Social Skills services to Claimant.

FACTUAL FINDINGS

1. Claimant is an 11-year-old boy who lives with his mother. His father does not live in the home, but visits and carries Claimant on his private health insurance. Claimant receives services from RCEB with a diagnoses of PDD-NOS, intellectual

disability severity unspecified, and a chromosomal deletion (3rd chromosome sections 13-22). He attends a special day class and has an Individualized Education Plan (IEP) through the Oakland Unified School District. He is described as a sweet boy who enjoys listening to music and playing on his iPad. He is mobile with appropriate gross motor function. He is predominately non-verbal, but uses a communication book, pictures, body movements, and gestures to express his wants and needs. He uses eating utensils independently. He wears diapers and needs assistance with bathing, hygiene, and some dressing. He requires supervision at all times.

2. Claimant has an Individual Program Plan (IPP) with RCEB.<sup>1</sup> On August 20, 2015, RCEB conducted an annual review of the IPP. In describing his current emotional situation for "severity/frequency/duration," the IPP indicated that Claimant's behaviors had "not changed over the last year and some old behaviors [had] reemerged" including, banging his head and crying when frustrated, flapping his hands, hitting and scratching others, throwing items, and mouthing objects to play with them. One of the objectives identified in the IPP stated, "[Claimant] will no longer engage in temper tantrums when frustrated. Continue. There has been no change in this area over the last year." The annual review did not mention whether Claimant received any Intensive Behavioral/Social Skill (IBSS) services. However, the evidence established that Claimant has been receiving IBSS services through Ala Costa Centers (Ala Costa) at least since June 2014.

3. Claimant also has a recent IEP through his school district, dated April 8, 2016. His primary disabilities are described as autism and intellectual disability. The IEP indicates that, "[Claimant's] areas of need include acquiring abilities in using his

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<sup>1</sup> The evidence did not establish when the IPP was initially established, but it appears to have been in effect at least since July 2013.

Expressive Language, Social/Emotional Behavioral, Pragmatics, Self-Help, and Pre-Academic Skills.” Also, the IEP indicates that Claimant’s behavior did not impede his learning or others.

4. In Spring 2016, a new RCEB case manager was assigned to Claimant’s case. She noticed that Claimant was receiving IBSS services and sought to investigate available generic services.

5. At the request of the case manager, on July 15, 2016, Ala Costa issued an Individual Service Plan (ISP) report for Claimant. In the social/behavior segment of the ISP, the author of the report wrote the following:

[Claimant] is a happy person. He joins big and small group activities. He is able to understand and follow adult directions and perform simple tasks when focused. He is able to maintain on task behavior depending on his mood or condition (i.e. if he did not sleep well or is hungry), and the stimulus/distraction around him. [He] likes to bite the edges of books. He also likes to chew on shoelaces, and his sleeves, his backpack strings. [Claimant] has self-stimulatory behavior (stimming) humming, screaming, laughing with no direct cause or source, flapping arm, and rocking his body and other repetitive movements. He will cry and cover his ears when he is hurting or can’t express his needs. When he can’t express himself, he may get up in staff or classmates faces to get attention. He will swing his arms around and hit or grab staff and/or other students, then sometimes laugh.

The ISP report did not identify any social/behavior goals for Claimant. The author of the report recommended and requested that a Purchase of Service (POS) be reauthorized for Claimant, for 1:3 ratio at \$16.37 per hour. This amount is more than the hourly rate for daycare. The RCEB case manager contacted Ala Costa to discuss the omission of behavioral goals for Claimant. She was told that Ala Costa "stood by the report." No one from Ala Costa stated that Claimant did not qualify for IBSS services.

6. On July 20, 2016, Claimant's mother and the RCEB case manager met for Claimant's triennial review. In the social/behavior section of the IPP, it was noted that Claimant had tantrums about three times per week which could last between 10 and 45 minutes. These tantrums are characterized by crying, banging his head against a wall or a door, hand-flapping, throwing items, and hitting/scratching others. The stated objective in the IPP for social/behavior was to "give continued modeling and instruction of appropriate behavior, and [Claimant] will manage his behaviors and reduce the frequency and intensity of his tantrums."

7. The July 20, 2016 IPP also noted that Claimant attends Ala Costa for "IBSS Day Care" after school and during breaks. The IPP further noted that his mother, the school district, and Ala Costa staff would continue to intervene when his behaviors began to escalate. The case manager suggested exploring applied behavioral analysis (ABA) services through private insurance to help with these behaviors in the home. His mother indicated that she would like to focus on his communication skills and try ABA later. His mother requested that he continue to receive IBSS services at Ala Costa. The case manager indicated that she would investigate the need for continued "IBSS day care services" through Ala Costa and get back to the parent.

8. On July 28, 2016, RCEB determined that the current POS for "IBSS Day Care" at Ala Costa would expire on July 30, 2016. In an addendum to the IPP, the RCEB case manager noted that this "did not allow for sufficient time to assess [Claimant's]

eligibility for IBSS nor explain to the parent the difference between IBSS and Day Care at a 1:3 ratio." The funding for "IBSS Day Care" was extended to August 31, 2016.

9. After reviewing the previous case manager's notes, the new RCEB case manager was confused and thought Claimant was only receiving daycare services at Ala Costa. She found out that children receiving IBSS services at Ala Costa were integrated with the daycare kids and this made it difficult to determine how Claimant was receiving specialized IBSS services. After reviewing the ISP from Ala Costa, the RCEB case manager concluded that Claimant could not continue with IBSS services at Ala Costa. However, she believed that he could continue at Ala Costa as a daycare student with the same 1:3 ratio, but payment at a lower rate. The RCEB case manager admitted that RCEB may not have done a thorough job when approving Claimant for IBSS services. Claimant's mother was understandably confused about the situation.

10. Claimant's mother was told that IBSS services would be discontinued because Claimant had no behavioral plan included in his IEP. His most recent IEP had no noted behavior interventions, strategies, supports, or goals as part of the IEP. Claimant's mother convened an IEP team meeting at his school on September 6, 2016. The IEP team discussed Claimant's behaviors at school. As a result, the IEP was to be amended to include a behavior intervention plan.

11. On September 7, 2016, Claimant's mother sent an email to RCEB seeking clarification. She informed RCEB of the IEP meeting and that a behavioral plan would be included as an amendment to the IEP. She also stated that Ala Costa had made several reports to her about Claimant hitting other students and staff and hurting himself out of frustration.

12. On September 9, 2016, Claimant's mother filed a fair hearing request stating that IBSS services were terminated without good cause.

13. On September 14, 2016, RCEB's planning team met to discuss Claimant's request to continue to fund the purchase of IBSS services. In a confirming letter to Claimant's mother, the case manager wrote the following:

Per our discussion, [Claimant] no longer meets the qualifications for IBSS services, as outlined in RCEB's Board Policy for IBSS. Specifically, [Claimant] did not have a behavior support plan in place through his IEP, at the time of this assessment. Further, Ala Costa Center's ISP for [Claimant], dated 7/15/16, did not provide sufficient evidence of severe behavioral challenges and did not include a behavior management goal. In our meeting on 7/20/16, we had discussed ABA services to help you with [Claimant]'s behaviors in the home through your health insurance as a generic resource and we offered to assist you with securing ABA services, however you declined to explore this resource. As stated in the Lanterman Act, RCEB is required to exhaust all generic resources prior to purchasing related services.

As I explained, RCEB is unable to meet your request. A 60-day extension of IBSS services at Ala Costa will be made, effective 9/1/16-10/31/16, to allow you time to provide us with the necessary documents detailing his continued need for IBSS services. The volume of care will be 71 hours for September 2016 and 77 hours for October 2016. During the appeal process, which will be explained further in this letter,

RCEB will continue to fund IBSS until the Fair Hearing is resolved.

14. RCEB issued a Notice of Proposed Action (NOPA) discontinuing IBSS services, effective October 31, 2016, indicating that Claimant no longer met the requirements.

15. On September 16, 2016, Claimant's IEP was amended to include a behavior intervention plan. According to the plan, the behavior that was impeding his learning was the following: "Non-compliance, refusing to begin a task, having a tantrum and becoming upset. Follows with vocalizations of protest, light hitting towards staff." The need for the behavior intervention plan was listed as "early stage intervention" as opposed to "moderate," "serious," or "extreme." RCEB was given a copy of the behavior intervention plan.

16. ABA is "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." (Welf. & Inst. Code, § 4686.2, subd. (d)(1).) Intensive behavioral intervention is any form of ABA 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," delivered in a one-to-one ratio or small group format, as appropriate." (Welf. & Inst. Code, § 4686.2, subd. (d)(2).)

17. RCEB's Purchase of Service Policy No. 3404.1 addresses IBSS services which are defined as:

[S]ervices that combine positive behavior supports/intervention, social skill development and the development of peer relationships and social networks for

children and adolescents with severe behavioral and social skill challenges. Such services are provided during the week when children of similar age are involved in after school recreation/leisure time activities and/or on vacation from structured educational programming or interventions. To the maximum extent possible, such structured intervention to develop and increase social skills and positive behaviors and to develop peer relationships and a social network, should be provided in integrated/natural community settings with and among non-disabled peers in age-appropriate settings.

Under the policy, IBSS services are provided when a child's IPP identifies the need and the following:

- The individual is eligible for and enrolled in a public school
- The individual has "exhibited recent, identified and documented severe behavior challenges across environments (school and home) such as self-injurious acts, assaultive acts, or property destruction"
- Consideration of group training for parents on IBSS techniques
- Services that "reflect evidence-based practices, promote positive social behaviors, and ameliorate behaviors that interfere with learning and social interactions"
- Parents of minor consumers participate in the intervention plan
- No purchase of IBSS for purposes of respite or day care
- For each consumer, RCEB will "evaluate the vendor's intervention plan and number of service hours for ABA or intensive behavioral intervention no less than every six months, consistent with evidence-based practices. If necessary,



the intervention plan's treatment goals and objectives shall be updated and revised"

- RCEB will "not reimburse a parent for participating in a behavioral services treatment program"
- Intensive behavioral services will not exceed a continuous three-year period unless an exceptional level of need is apparent.

Under the policy, IBSS services can only be discontinued under the following circumstances:

[RCEB will] discontinue purchasing ABA or intensive behavioral intervention services for a consumer when the consumer's treatment goals and objectives, as described under Welf. & Inst. Code section 4686.2, subd. (a), are achieved. ABA or intensive behavioral intervention services shall not be discontinued until the goals and objectives are reviewed and updated as required in paragraph Welf. & Inst. Code section 4686.2, subd. (b)(4) and shall be discontinued only if those updated treatment goals and objectives do not require ABA or intensive behavioral intervention services.

According to the policy, IBSS services may be purchased when, among other things, a recent and thorough behavioral assessment has been completed by a qualified clinician and reviewed by the consumer's planning team. Also, natural supports and generic community services must have been explored and exhausted and determined to be unable to meet the need. Furthermore, the assessment and accompanying service/support plan specifies the development of positive behavioral and social skills. Moreover, a continuous progress review of not less than every six months reveals

whether the intensive need continues and the plan of service has demonstrated success in meeting consumer outcomes.

18. Vanessa Clemente-Walters is Claimant's current case manager and testified at hearing. According to Clemente-Walters, ABA is the "go to therapy" for children with autism, and she has "never seen a child with autism" receive IBSS services. ABA is considered a generic service which occurs in the home and can be funded through private health insurance or Medi-Cal. After receiving the ISP from Ala Costa which had no clear behavior goals and reviewing the IEP with no mention of Claimant exhibiting troubling behaviors, Clemente-Walters believed that Claimant probably never qualified for IBSS. She stated that his behaviors, although challenging, did not seem to meet the level to require IBSS services. Also, there was no functional behavior assessment performed by the school district. Ultimately, Clemente-Walters believed that she had enough information to make the determination to discontinue IBSS services to Claimant.

19. Liz Vollmer, RCEB supervising case manager, testified about the requirements for IBSS services. According to Vollmer, it is the level of intensity of behaviors that dictates whether IBSS services are required. To determine the level of intensity, a functional behavior assessment should be done through an IEP to determine if the behaviors are across domains including school, home, and community. She also stated that IBSS services are designed to be implemented for a limited period of time, up to three years.

Vollmer acknowledges that Claimant exhibits some concerning behaviors, including self-injurious behavior, but she does not believe that they rise to the level to require the intensive behavioral services of IBSS. She noted that Claimant is a happy child and he had no documented behavioral issues or goals in the IEP or ISP report. Also, his behaviors only occurred at home. Vollmer opined that Claimant initially may

have qualified for IBSS services. However, Vollmer assumed that, over the “past three years,” he has improved and no longer needs the services. She based her conclusion on her assessment of the reports and the parent’s reporting (or lack thereof) of behaviors outside the home in those reports. According to Vollmer, she looked at the preponderance of the evidence and decided that Claimant was not eligible for IBSS services. Vollmer acknowledged that she did not have the current amended IEP at the time of denial. However, Vollmer stated that the district’s behavior intervention plan was not persuasive to establish that Claimant’s behaviors met the required level of intensity to qualify for IBSS services.

Vollmer states that RCEB does not need a behavior assessment to end IBSS services. Also, RCEB cannot request that the school district perform a functional behavior assessment. A parent must make such a request which can take between three to six months before completion depending on the circumstances. Vollmer believes it is unlikely that Oakland Unified School District will perform a full behavior assessment in this case because the initial IEP did not include a behavior plan and the amended IEP includes the behavior plan at the level of early stage intervention. Vollmer agreed that she told Claimant’s mother that he needed a behavior plan in his IEP. Vollmer acknowledged that there may have been confusion because she expected a functional behavior assessment to be performed by a behavior clinician, which was not done. Vollmer acknowledged that a functional behavior assessment can also be obtained through ABA services offered through RCEB, where he could be observed in the home, school and daycare to establish the existence of behaviors across domains. Claimant could have concurrent functional behavior assessments.

20. Claimant’s mother testified at hearing. She confirmed that Claimant began receiving intensive behavioral services at Ala Costa in June 2014, which is less than three years. She credibly testified as to his behaviors at home. When Ala Costa informed her

about his behaviors, she realized that he was displaying these behaviors across environments. According to Claimant's mother, Claimant had an ABA assessment through his private health insurance. She discussed ABA therapy with the therapist, but she was concerned that it was reward-based which did not motivate Claimant and she wanted to focus on his communication issues.

After the issue was brought to her attention, Claimant's mother took the steps to have a behavior plan included as an addendum to his IEP. However, she was later told that it was insufficient because a functional behavior assessment had not been conducted by a qualified clinician. Understandably, Claimant's mother was upset. In any event, Claimant's mother is willing to request that the school district perform a functional behavior assessment of Claimant, if required.

Claimant's mother questions the reliability of the ISP issued by Ala Costa. First, the person who is the most knowledgeable and observed Claimant's behaviors was out on an extended leave and was not the person who wrote the ISP. It is unclear if the individual who wrote the ISP is sufficiently familiar with his behaviors. Second, this is the first ISP issued by Ala Costa. Claimant's mother also contends that he did not have an assessment performed demonstrating that he no longer needs IBSS services. She believes that RCEB's policy is vague and provides no specific guidelines on what constitutes intensive behaviors to qualify for IBSS services.

21. The evidence established Claimant was found eligible for IBSS services and has been receiving such services at Ala Costa since June 2014. Claimant's current IPP has stated objectives to address his behaviors, noting that Claimant has tantrums about three times per week which can last between 10 and 45 minutes. These tantrums are characterized by crying, banging his head against a wall or a door, hand-flapping, throwing items, and hitting/scratching others. He also mouths objects to play with them. There is also evidence that these are old behaviors that have reemerged. Claimant's

mother's credible testimony of his behavior at home and at Ala Costa, together with his apparent behaviors at school that warranted a behavior intervention plan, establish that some sort of behavioral interventions are necessary. The requirements of section 4686.2 and RCEB's own policy set forth a framework upon which RCEB may determine whether IBSS is warranted and how it can be discontinued. It is RCEB's responsibility to comply with the Lanterman Act and its own policy. Unfortunately, RCEB did not employ the framework in this case.

## LEGAL CONCLUSIONS

1. The standard of proof in this case is preponderance of the evidence because no law or statute requires otherwise. A regional center seeking to terminate ongoing funding provided to a consumer has the burden of demonstrating its decision is correct. (*Hughes v. Bd. of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9 [party asserting a claim or making charges generally has the burden of proof in administrative hearings].) In this case, RCEB bears the burden of proof, because it seeks to terminate funding for IBSS services it currently provides to Claimant.

2. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Lanterman Act). (Welf. & Inst. Code, § 4500, et seq.<sup>2</sup>) The Lanterman Act provides that an "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community." (§ 4501.) The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of

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<sup>2</sup> All references are to the Welfare and Institutions Code unless otherwise indicated.

developmentally disabled persons and their dislocation from family and community (§§ 4501, 4509, 4685), and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (§§ 4501, 4750-4751.)

3. DDS is the state agency charged with implementing the Lanterman Act and provides services to consumers through a network of regional centers. (§§ 4620, 4621.) Regional centers are charged with the responsibility of carrying out the state's responsibilities to the developmentally disabled under the Lanterman Act. (§ 4620, subd. (a).) The Lanterman Act directs regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP states the consumer's goals and objectives and delineates the services and supports needed by the consumer. (§§ 4646, 4646.5, & 4648.) In order to achieve the goals and objectives set forth in a consumer's IPP, regional centers "shall secure services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan . . . ." (§ 4648, subd. (a)(1); see also §§ 4646.5, 4647.) Conversely, a regional center may only secure those services and supports where they are contained in the IPP. (§ 4512, subd. (b).) These services and supports should reflect the preferences and choices of the consumer and reflect the cost-effective use of public resources. (§4646, subd. (a).)

4. In 2009, the Legislature added section 4686.2, to the Lanterman Act setting forth the requirements to implement ABA and intensive behavioral intervention services for a consumer. A vendor must: (a) conduct a behavioral assessment; (b) design an intervention plan that includes the service type, frequency at which consumer's progress will be evaluated and reported; number of hours and parent participation needed to achieve consumer's goals, as set forth in the IPP, and; (c) provide a copy of the intervention plan to the regional center for review and consideration by IPP team members. (§ 4686.2, subd. (a).)

5. Pursuant to section 4686.2, a regional center must: (a) only purchase behavioral services that reflect evidence-based practices,<sup>3</sup> promote positive social behaviors, and ameliorate behavior that interfere with learning and social interactions; (b) only purchase behavioral services when the parents of minor consumers participate in the intervention plan for the consumer, given the critical nature of parent participation to the success of the intervention plan; (c) not purchase behavioral services for purposes of providing respite, day care, or school services; and (d) discontinue purchasing behavioral services when the consumer's treatment goals and objectives under the intervention plan are achieved. Behavioral services must not be discontinued until the goals and objectives are reviewed and updated after the regional center evaluates the intervention plan and number of service hours for behavioral services no less than every six months, consistent with evidence-based practices, and if necessary the intervention plan's treatment goals and objectives shall be updated and revised. Behavior services can only be discontinued if the updated treatment goals and objectives do not require ABA or intensive behavioral intervention services. (§ 4686.2, subd. (b).) RCEB's policy on IBSS services incorporates this section.

6. In 2015, the Legislature amended section 4659 to the Lanterman Act to require a regional center to identify and pursue all possible sources of funding for the consumers receiving services, including governmental entities and private entities that are liable for the cost of services, aid, insurance or medical assistance to the consumer. (§ 4659, subd. (a)(1)(2).) A regional center is also required to exhaust all generic services

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<sup>3</sup> Evidence-based practice is defined as, among other things, "an approach to treatment rather than a specific treatment," and is matched to consumer circumstances and preferences and "applied to ensure the quality of clinical judgments and facilitates the most cost-effective care." (§ 4686.2, subd. (d)(3).)

and supports when appropriate before purchasing related services. (§ 4646, subd. (a)(1)(2).)

7. Claimant contends that RCEB has wrongfully terminated Claimant's IBSS services. In effect, Claimant is arguing that RCEB has not met the requirements of section 4686.2. Claimant's contentions have merit.

8. RCEB was required to meet its obligations under the Lanterman Act and its own policy, and did not do so in Claimant's case. It is undisputed that Claimant has documented behavioral difficulties. It is also undisputed that, at some point, RCEB approved IBSS services for Claimant at Ala Costa. Therefore, RCEB recognized Claimant's need for behavioral services.

What is missing in this case was a documented initial functional behavioral assessment which would have allowed for the creation of specific goals and objectives for RCEB to review and update as required in order to reach an evidence-based, accurate, and reliable conclusion in support of the proposed action of terminating the IBSS services. This was not done. Now, RCEB relies primarily on the ISP in issuing the NOPA. However, this document is unreliable as there were no behavioral goals and objectives to determine if they had been met to justify terminating the services. The service provider, Ala Costa, also failed to provide consistent evaluations of Claimant's progress toward any behavior changes since he started the program. If this had been done, this would have likely provided for a limited amount of time for services and a fading plan of behavioral services to be created. Furthermore, the evidence did not establish whether the author of the ISP had the necessary background, training or expertise to provide an assessment of Claimant's current needs and the appropriateness of any given level of services for behavioral interventions. Therefore, the conclusions in the ISP are inherently suspect. A functional behavioral assessment by a qualified specialist and evaluation of Claimant's current needs, skills, and capabilities is long



overdue, and should be a condition precedent to any determination that IBSS services are ready to be terminated. Apparently, this can be obtained either through the school district or a RCEB-funded ABA assessment.

Therefore, RCEB's conclusion that IBSS services should be discontinued is based on unreliable information. It is not sufficient to rely on evidence from presumably non-clinicians to decide that Claimant's behaviors do not meet the severity or level of intensity to qualify for IBSS. Instead, given that one was not done in the first place, a functional behavioral assessment is required to end the services in this case. Thus, the decision to terminate IBSS is premature, as there are a number of missing pieces that should be present in order to make an accurate determination as to when it is appropriate to discontinue the services. IBSS services to Claimant should continue until such time as discontinuance of these services fully conforms to the requirements of section 4686.2, and is, among other things, factually supported on reliable, evidence-based conclusions and a current functional behavioral assessment by a qualified clinician. It would also be helpful to include a plan for transition to ABA or other successor services and supports so as not to leave Claimant with a potentially significant gap in services that could cause Claimant harm by loss of some of the behavioral gains he has made to date.

9. RCEB did not meet its burden of demonstrating that a discontinuation of IBSS services is warranted. Neither did RCEB meet its burden to demonstrate that the requirements of section 4686.2 were met. (Factual Findings 2 through 21.) Accordingly, the appeal will be sustained.

## ORDER

Claimant's appeal is granted. RCEB may not discontinue funding IBSS services at this time.

DATED: October 21, 2016

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REGINA BROWN

Administrative Law Judge

Office of Administrative Hearings

## NOTICE

**This is the final administrative decision in this matter. Judicial review of this decision may be sought in a court of competent jurisdiction within ninety (90) days.**