

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2018080925

DECISION

James Michael Davis, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard this matter on March 11, 2019, in Pomona, California.

Claimant¹ was represented by his mother (Representative or Mother). Claimant did not attend the hearing. Zenith Hernandez, Hanna Interpreting, provided Spanish translation services.

Daniel Ibarra, Fair Hearing Specialist, represented the San Gabriel/Pomona Regional Center (Service Agency or RC).

Oral and documentary evidence was received and argument was heard. The matter was submitted for decision on March 11, 2019.

ISSUE

The parties agreed the issue is whether the RC must fund social skills training for Claimant through the ACES Weekend Applied Behavior Analysis program.

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¹ Party and family titles are used in lieu of names in order to protect Claimant's privacy.

EVIDENCE RELIED UPON

In reaching the Decision, the ALJ relied upon exhibits 1-14, submitted by the Service Agency; exhibits A and B, submitted by Claimant; the testimony of Yaned Busch, RC Family Services Manager, and the Representative's testimony.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant, who is five and a half years old, is eligible for RC services based upon a diagnosis of Autism Spectrum Disorder (ASD). He currently attends elementary school within the Arcadia Unified School District, which provides him with speech therapy twice a week and 30 minutes per week of occupational therapy.

2. Claimant's latest Individual Program Plan, dated May 9, 2018, identifies that "[p]arents would like [Claimant] to continue to reduce maladaptive behaviors and for functional communication to increase." As part of the RC's support, it has committed to funding Applied Behavior Analysis (ABA) therapy. Claimant has been receiving ABA therapy through ACES, but Mother is not satisfied with Claimant's progress. Mother notes that Claimant is withdrawn and non-communicative around peers and is unable to defend himself in play situations when other children want something that Claimant is playing with. ACES informed Mother that it conducts a Weekend ABA program called "WABA" that involves child participants coming to their training center and, with a counselor present, the participants engage with other children in supervised social skills training. Mother has requested funding for this program.

3. The RC denied funding for ACES's WABA social skills training in a Notice of Proposed Action issued on August 6, 2018. Claimant timely filed a Fair Hearing Request and this matter ensued. All jurisdictional requirements have been met.

CLAIMANT'S FUNDING REQUEST

4. Claimant lives with his biological mother and father. His sister is 21 years old and lives away from home. Mother stays at home to support Claimant. Father works for Union Pacific railroad. Claimant's academic programming is provided by his local school district, which funds special education services. Since Claimant's Individualized Education Plan has not been updated since 2016, the record is not clear as to what other services, besides those mentioned above, is provided by Claimant's school.

5. Claimant has been receiving ABA services from ACES for approximately three years. However, as Claimant gets older, his parents have been increasingly concerned about his deficient social skills training. For example, just over a week ago, he went to a play area which had a number of balls. He ended up having an issue with other kids taking his balls. Claimant tried to get the balls back, and other children's parents yelled at him. This problem is an outgrowth of his lack of social skills. Mother is concerned that he cannot engage with children his own age. She is also concerned that Claimant cannot defend himself against possible aggression from his peers.

6. ACES has recommended WABA training, eight hours per week, three on Saturday at ACES's clinic (center-based training) and the other five hours completed at home. All eight hours have a parental involvement and parental training component. (See Exhibit B.)

7. The Service Agency agrees that Claimant needs social skills training but has been unable to get WABA vendorized. Since 2017, the Service Agency has asked for a specific curriculum for their weekend ABA training (see exhibit 10) and the credentials of those who conduct the training. To date, ACES has not provided the requested information.²

² ACES provided a WABA curriculum (exhibit 12), but the Service Agency has deemed it is too general for it to support contracting or vendorization.

8. Mother is frustrated that the Service Agency cannot overcome what was described to her by representatives of ACES as administrative challenges to get WABA funded. She asserts that a large number of insurers have authorized ACES's WABA training (see exhibit A), but no evidence was introduced that these insurers were, like the Service Agency, governed by the Lanterman Act or a similar statutory mandate.

9. The Service Agency contends that without ACES providing a detailed curriculum and the credentials of its WABA training staff, the Service Agency cannot meet its legal mandate to ensure that consumers receive quality training. Moreover, the Service Agency cannot retain WABA's services by contracting with them because of the same problem: ACES has not provided a detailed WABA curriculum and its employees' credentials.

10. The Service Agency further contends that it has several options for Claimant to receive center-based ABA training through programs already vendorized. Claimant does not believe there are any such programs because Mother attended a provider fair to learn what vendors were available. Mother testified that she has tried several of the vendors but they did not provide the center-based training offered by ACES. Instead, the programs took the participants to parks, stores, and into the community. Unlike WABA, these programs did not have instructors overseeing the participants. Further, Mother states that none of these vendors have worked with her son and therefore do not know him the way that ACES knows him.

11. At hearing, RC Family Services Manager Yaned Busch, who has worked at the Service Agency for 20 years, testified to the availability of several vendorized programs that offer center-based ABA social skills training. Two such programs were mentioned: Education Spectrum and Blast. Mother was asked which programs she tried and found lacking. But she did not identify those programs by name.

12. At hearing, Mother testified that the real need for ACES's WABA training was because it was center based, unlike the other social skills training formats she previously tried. In those programs, Claimant merely goes to the park or the mall and works on his social skills with random children who happen to be there. This approach is

ineffective because Mother has observed that parents of other children tend to either direct their children to avoid Claimant (see also exhibit B, Recommendations) or are hostile toward Claimant when he interacts with their child.

LEGAL CONCLUSIONS

1. The burden of proof is on the Claimant to establish that the Service Agency is required to fund the requested services. (Evid. Code, § 500.) The standard is a preponderance of the evidence. (Evid. Code, § 115.)

2. “Preponderance of the evidence means evidence that has more convincing force than that opposed to it.’ [Citations.]” (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.) “The sole focus of the legal definition of ‘preponderance’ in the phrase ‘preponderance of the evidence’ is on the quality of the evidence. The quantity of the evidence presented by each side is irrelevant.” (*Ibid.*, italicized emphasis in original.) “If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation].” (*People v. Mabini* (2001) 92 Cal.App.4th 654, 663.)

STATUTORY AUTHORITY REGARDING THE STATE’S RESPONSIBILITIES TO PERSONS WITH DEVELOPMENTAL DISABILITIES

3. The Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq., governs the state’s responsibilities to persons with developmental disabilities, including ASD.

4. Welfare and Institutions Code section 4502, subdivision (b)(6), (8) and (10), further provides that :

It is the intent of the Legislature that persons with developmental disabilities shall have rights including, but not limited to, the following:

[¶] . . . [¶]

- (6) A right to social interaction and participation in community activities.

[¶] . . . [¶]

- (8) A right to be free from harm. [and]

[¶] . . . [¶]

- (10) A right to make choices in their own lives, including, but not limited to, where and with whom they live, their relationships with people in their community, the way they spend their time, including education, employment, and leisure, the pursuit of their personal future, and program planning and implementation.

5. "Services and supports for persons with developmental disabilities" are wide-ranging and encompass "consideration of a range of service options" for social skills training. (Welf. & Inst. Code, § 4512, subd. (b).)

- 6. Welfare and Institutions Code section 4502.1 states:

The right of individuals with developmental disabilities to make choices in their own lives requires that all public or private agencies receiving state funds for the purpose of serving persons with developmental disabilities, including, but not limited to, regional centers, shall respect the choices made by consumers or, where appropriate, their parents, legal guardian, or conservator. Those public or private agencies shall provide consumers with opportunities to exercise decisionmaking [sic] skills in any aspect of day-to-day living and shall provide consumers with relevant information in an understandable form to aid the consumer in making his or her choice.

7. Welfare and Institutions Code section 4648, subdivision (a)(3), (4) and (5), permits a regional center to purchase services and supports through vendorization or through contracts, and subdivision (a)(6) lists factors that the regional center and the consumer shall consider when choosing a service provider. Specifically, the referenced parts of Welfare and Institutions Code section 4648, subdivision (a) state (boldened emphasis added):

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- (a) . . . (3) A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer from any individual or agency that the regional center and consumer or, when appropriate, his or her parents, legal guardian, or conservator, or authorized representatives, determines will best accomplish all or any part of that consumer's program plan.
- (A) Vendorization or contracting is the process for identification, selection, and utilization of service vendors or contractors, based on the qualifications and other requirements necessary in order to provide the service.
- (B) A regional center may reimburse an individual or agency for services or supports provided to a regional center consumer if the individual or agency has a rate of payment for vendored or contracted services established by the department, pursuant to this division, and is providing services pursuant to an emergency vendorization or has completed the vendorization procedures or has entered into a contract with the regional center and continues to comply with the vendorization or contracting requirements. The director shall adopt regulations governing the vendorization process to be utilized by the department, regional centers, vendors, and the individual or agency requesting vendorization.
- (C) **Regulations shall include, but not be limited to: the vendor application process, and the basis for accepting or denying an**

application; the qualification and requirements for each category of services that may be provided to a regional center consumer through a vendor; requirements for emergency vendorization; procedures for termination of vendorization; and the procedure for an individual or an agency to appeal any vendorization decision made by the department or regional center.

[¶] . . . [¶]

- (4) Notwithstanding subparagraph (B) of paragraph (3), a regional center may contract or issue a voucher for services and supports provided to a consumer or family at a cost not to exceed the maximum rate of payment for that service or support established by the department. If a rate has not been established by the department, the regional center may, for an interim period, contract for a specified service or support with, and establish a rate of payment for, any provider of the service or support necessary to implement a consumer's individual program plan. Contracts may be negotiated for a period of up to three years, with annual review and subject to the availability of funds.
- (5) In order to ensure the maximum flexibility and availability of appropriate services and supports for persons with developmental disabilities, the department shall establish and maintain an equitable system of payment to providers of services and supports identified as necessary to the implementation of a consumer's individual program plan. The system of payment shall include a provision for a rate to ensure that the provider can meet the special needs of consumers and provide quality services and supports in the least restrictive setting as required by law.
- (6) The regional center and the consumer . . . shall, pursuant to the individual program plan, consider all of the following when selecting a provider of consumer services and supports:

- (A) **A provider’s ability to deliver quality services or supports that can accomplish all or part of the consumer’s individual program plan.**
- (B) **A provider’s success in achieving the objectives set forth in the individual program plan.**
- (C) **Where appropriate, the existence of licensing, accreditation, or professional certification.**
- (D) The cost of providing services or supports of comparable quality by different providers, if available, shall be reviewed, and the least costly available provider of comparable service, including the cost of transportation, who is able to accomplish all or part of the consumer’s individual program plan, consistent with the particular needs of the consumer and family as identified in the individual program plan, shall be selected. In determining the least costly provider, the availability of federal financial participation shall be considered. The consumer shall not be required to use the least costly provider if it will result in the consumer moving from an existing provider of services or supports to more restrictive or less integrated services or supports.
- (E) The consumer’s choice of providers, or, if appropriate the consumer’s parent’s choice of providers

8. Welfare and Institutions Code section 4651, subdivision (a), states that “[i]t is the intent of the Legislature that regional centers shall find innovative and economical methods of achieving the objectives contained in individual program plans of persons with developmental disabilities.”

REGULATIONS REGARDING VENDORIZATION OF SERVICES

9. Under California Code of Regulations, title 17, section 54310 (boldened emphasis added):

An applicant who desires to be vendored shall submit Form DS 1890 (7/2011), entitled Vendor Application, and the

information specified in (1) through (10) below, to the vendoring regional center.

- (1) Applicant's name, including the name of any governing body or management organization;
 - (2) Applicant's Social Security Number, Federal Tax ID number, or a copy of any document accepted by the federal government which establishes identity of applicant;
 - (3) Applicant's mailing address;
 - (4) Address of service, if applicable;
 - (5) Name of family member, owner or executive director, as applicable;
 - (6) Types of service to be provided;
 - (7) Telephone number;
 - (8) Facility capacity, if applicable;
 - (9) Identification of the type of consultants, subcontractors and community resources to be used by the vendor as part of its service.**
 - (10) Copies of:
 - (A) Any license, credential, registration, certificate or permit required for the performance or operation of the service, or proof of application for such document;**
 - (B) Any academic degree required for performance or operation of the service[.]**
10. Under California Code of Regulations, title 17, section 54320, subdivision (a) (boldened emphasis added):

The vendoring regional center shall review the vendor application identified in Section 54310(a) and, as applicable, (d) or (e) within 45 days after receipt from the applicant, to ensure all of the following:

- (1) The vendor application is complete;**
- (2) The applicant has complied with provisions of Sections 54342 through 54355 of these regulations, as applicable;
- (3) Any required license, credential, registration, accreditation, certificate or permit:**
 - (A) Is current,**
 - (B) Has been issued for the service to be vendored, and**
 - (C) Has a current address that matches the address on the vendor application.
 - (4) Staffing ratios and qualifications as specified in Section 56724, and 56770, if applicable, and Section 56756 or 56772 of these regulations are consistent with the program design as required in Section 56712 and Section 56762 of these regulations, if applicable, for applicants seeking vendorization as community-based day programs.
 - (5) The applicant has signed the Home and Community Based Services Provider Agreement (6/99), if applicable pursuant to Section 54310.
 - (6) That the applicant or person(s) disclosed pursuant to Section 54311 has not been determined to be an excluded individual or entity as defined in Section 54302(b)(1) and is not under investigation pursuant to the criteria in Section 54311(a)(6).

11. "The vendoring regional center shall approve vendorization within 45 days of receipt of all information which specifies that the applicant is in compliance with Section 54320(a). [¶] . . . [¶] (e) A vendoring regional center shall deny an application for vendorization within 45 days of receipt of a completed vendor application if the applicant fails to comply with the requirements of Section 54320(a) of these regulations, as applicable..." (Cal. Code Regs., tit. 17, § 54322, subds. (a) & (e).)

APPLICABLE CASE LAW

12. Under the Lanterman Act, RCs must investigate every appropriate and economically feasible alternative for care of a consumer that is available within its

region. (*Macomber v. San Gabriel/Pomona Regional Center* (1990) 226 Cal.App.3d 225, 232; citing Welf. & Inst. Code, § 4652.)

13. "A 'regulation' is a rule, regulation, order or standard, which has the 'force of law,' which has been adopted by an employee or agency of the United States or of a public entity pursuant to authority vested by constitution, statute, charters or ordinance in such employee or agency to implement, interpret, or make specific the law enforced or administered by the employee or agency." (*Posey v. State of California* (1986) 180 Cal.App.3d 836, 848-49, citing Gov.Code, §811.6.) Accordingly, the Service Agency, as an agent for the public entity (Department of Developmental Services,) must therefore follow the Lanterman Act and the regulations arising therefrom.

DISPOSITION

14. It is Claimant's burden to prove by a preponderance of the evidence that the Service Agency must fund ACES's WABA social skills training. As set forth in Factual Finding 7, the Service Agency recognizes Claimant's need for social skills training and contends that it has several center-based social skills training programs that are available through approved vendors. (Factual Findings 10 & 11.) Claimant disagrees but is unable to name the allegedly deficient programs that were tried and deemed inadequate. (Factual Finding 11.) Claimant's must prove that only WABA can adequately meet his social skills training needs, thereby compelling the Service Agency to fund ACES's WABA program. Since the Service Agency has put forth several alternatives which Claimant could not prove were inadequate, Claimant has not met his burden of proof.

15. Here, the denial of funding for WABA does not arise from the Service Agency's failure to consider every appropriate alternative,³ but it is due to ACES's failure to provide the details of its WABA curriculum and the credentials of its instructors. (Factual Finding 9.) As set forth in Legal Conclusion 7, the Service Agency must ensure that funds

³ (See *Macomber v. San Gabriel/Pomona Regional Center, supra*, 226 Cal.App.3d 225, 232.)

are spent judiciously and that retained services are effective. This requirement is not optional. (Legal Conclusion 13.) ACES's failure to provide specific information on its WABA program requires the Service Agency to reject its vendorization request. (See Legal Conclusion 11.) As set forth in Factual Finding 12, Claimant's mother does not need WABA specifically, but a center-based social skills program. ACES's WABA program is an advantage in Mother's eyes because they have worked with Claimant for several years, but this factor alone is not dispositive. Accordingly, Claimant has not met his burden of proof compelling the Service Agency to fund ACES's WABA social skills program. Therefore, as set forth in the order below, Claimant's appeal must be denied.

ORDER

Claimant's appeal is denied.

DATED:

JAMES MICHAEL DAVIS
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.