BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, vs. WESTSIDE REGIONAL CENTER, Service Agency.	OAH No. 2019010726

DECISION

Administrative Law Judge Deena R. Ghaly, Office of Administrative Hearings, heard this matter on May 8, 2019, at the Westside Regional Center (service agency) in Culver City, California.

Lisa Basiri, Fair Hearing Specialist, represented the service agency. Claimant's (mother) [1], represented him.

Oral and documentary evidence was received, the record closed, and the matter submitted on the hearing date.

ISSUE

Should the service agency fund Floortime behavioral intervention therapy for claimant?

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[1] To protect their privacy, mother and claimant are not identified by their full names.

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FACTUAL FINDINGS

1. Claimant is a five-year-old boy, eligible for service agency services under the diagnoses of autism and intellectual disability. He lives at home with his parents and two siblings.

2. a. Claimant has exhibited deficits in communication, productive play and socialization, and self-care. He is also prone to maladaptive behavior, including physical and vocal stereotypy (repetitive movements or utterances), tantrums, and poor sleep.

b. Since 2017, claimant has been receiving Applied Behavioral Analysis or ABA, a type of behavioral intervention training. Currently, during weekdays, he is scheduled to attend clinical one-to-one sessions at the facility of the provider, FirstSteps, from 9:00 a.m. to 12:30 p.m. and home sessions from the same provider from 3:00 p.m. to 6:00 p.m. Claimant also attends speech therapy two hours per week and occupational therapy for one hour per week. In addition, the service agency provides 65 hours of behavioral respite care (care provided by individuals with at least some training of behavioral intervention techniques) and 20 hours of standard respite care per month.

3. a. The ABA training is intended to help claimant's skills improve in several areas: speaking and listening, socially adaptive behavior, and functional behavior; it is also intended to decreased maladaptive or destructive behavior, such as tantrumming and elopement.

b. A recent report prepared by FirstStep's program director shows claimant to have made some progress, particularly in maintaining focus, refraining from

"mouthing behavior" (putting nonedible objects in his mouth), responding to questions such as 'what is your name?', and making eye contact. He continues to exhibit deficits, however, particularly in regulating his behavior when frustrated, playing with others, and maintaining his toileting. He also has difficulty or is non-responsive to open-ended questions such as "what would you like to play today?" Certain program goals – following instructions such as to jump or wave and learning to dress independently – have been put on hold. Attempts to teach claimant to play with others have been discontinued.

c. Despite claimant's limited progress, FirstSteps included a transition plan in its latest report which calls for decreasing the one-to-one training FirstSteps provides and replacing those sessions with an educational program in a school setting.

4. a. During her testimony, mother stated that she had observed some improvement in claimant's behavior as a result of the ABA training and she believes his continued participation in the program remains essential to address claimant's maladaptive behaviors, which can be extreme. She also noted, however, that his verbal skills have not markedly improved. Mother believes that claimant is more encouraged and inclined to speak during his speech therapy session. According to mother, claimant's speech therapist is engaging and warm and able to draw out claimant. Claimant not only speaks more and with more meaning during his session with her, he continues to speak throughout the day of the session.

b. While important for other deficits, mother believes that the ABA training is not engaging claimant in a way that reaches his capacity or desire to speak. Indeed, because it relies heavily on rote exercises, repetition, and discipline, claimant sometimes tantrums in frustration and further recedes into himself.

c. Mother has heard that Floortime, an alternate behavioral intervention program, might be better for developing claimant's verbal skills. She believes that

Floortime's gentler and more open approach is more likely to engage claimant and encourage him to speak. Mother does not want to discontinue ABA; rather, she requested that a Floortime component be added to claimant's current program.

d. In support of her position, mother submitted letters from two of claimant's medical providers to the service agency. One, Joshua Mandelberg M.D., is claimant's developmental behavioral pediatrician. In his letter, Dr. Mandelberg stated in part: "[claimant] seems to respond to play-based strategies with more engagement. As a result, I would recommend that [claimant] receive some therapy in a Floortime model, in addition to current ABA support, to help augment his interventions and to improve his response to therapy" (Exh. 3). Amanda Weiler, M.D. is also one of claimant's treating pediatricians. In her letter, she wrote in part, "[claimant's] learning has plateaued and he is not making enough gains with behavioral therapy alone. A new technique of learning could potentially increase [claimant's] engagement and motivation to learn." (*Id.*)

5. a. Soryl Markowitz is the service agency's autism and behavior specialist. Ms. Markowitz holds an undergraduate degree in psychology, is a certified early childhood educator, and is a licensed clinical social worker. Prior to joining the Service agency, she worked as an in-home behaviorist, assisting autistic and other disabled children. During the first half of her 30-year tenure with the Service agency, Ms. Markowitz was a caseworker and a member of the Service agency's community outreach team. In her current position, Ms. Markowitz oversees and reviews reports from facilities which provide behavioral intervention services and also participates in the service agency's committee for funding services and in its committee for determining applicants' eligibility. Ms. Markowitz has also been a member of a blue ribbon commission mandated to establish best practice guidelines for treating autistic children and participates in a professional group, the California Autism Professional Training and Information Network or C.A.P.T.A.I.N., where professionals who work with autistic

individuals discuss best practices and share information regarding current developments in this area.

b. Ms. Markowitz reviewed claimant's most recent Individual Program Plan and spoke with his caregivers and behaviorists. Based on her review of this information, Ms. Markowitz does not support mother's request to add Floortime training to claimant's program for the following reasons: (i) adding Floortime hours would result in a program schedule of greater than the recommended 40 hours per week; (ii) ABA and Floortime use different and somewhat opposing approaches and attempting to employ both systems simultaneously would be counterproductive and confusing to claimant; and (iii) ABA is an evidence-based and validated protocol which has been proven effective through scientifically validated tests whereas Floortime is only supported by anecdotal evidence of success.

6. In response to some of Ms. Markowitz's comments, mother noted that claimant's ABA training is scheduled for no more than 33.5 hours per week and is usually much less, as the assigned behaviorists often cancel sessions or claimant, aware now of the difficult and tedious training to come, cries so much when the sessions begin that the behaviorists cannot continue. She also disagrees that utilizing both ABA and Floortime would be counterproductive and confusing for claimant. Mother believes each type of therapy has its place and that, given claimant's limited progress under ABA, his situation is extreme enough to warrant trying something new.

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Service Act (Lanterman Act) (Welf. & Inst. Code,[2] § 4500 et seq.), individuals with qualifying developmental disabilities are entitled to state-funded services and supports. "An array of services and supports should be established … to meet the needs and choices of each person with developmental disabilities… . Services and supports should be available to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (§ 4501.)

2. Service agencies are responsible for providing the services and facilities appropriate to the consumers' conditions and needs. (§ 4620.)

3. The determination of which services and supports the service agency shall provide is 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." (§ 4512, subd.(b).)

4. Other provisions of the Lanterman Act more specifically address behavior modification interventions. Section 4686.2 provides in part:

> (b) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional center shall:

[2] All statutory references are to the Welfare and Institutions Code unless otherwise designated.

(1) Only purchase ABA or intensive behavioral intervention services that reflect evidence-based practices, promote positive social behaviors, and ameliorate behaviors that interfere with learning and social interactions.

[¶] ... [¶]

(d) For purposes of this section the following definitions shall apply:

(1) "Applied behavioral analysis" means the design, implementation, and evaluation of systemic instructional and environmental modifications to promote positive social behaviors and reduce or ameliorate behaviors which interfere with learning and social interaction.

(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. Intervention can be delivered in a one-to-one ratio or small group format, as appropriate.

(3) "Evidence-based practice" means a decision-making process that integrates the best available scientifically rigorous research, clinical expertise, and individual's characteristics. Evidence-based practice is an approach to treatment rather than a specific treatment.

> Evidence-based practice promotes the collection, interpretation, integration, and continuous evaluation of valid, important, and applicable individual- or family-reported, clinically-observed, and research-supported evidence. The best available evidence, matched to consumer circumstances and preferences, is applied to ensure the quality of clinical judgments and facilitates the most cost-effective care,

5. As the party initiating this matter, Mother, in her capacity as Claimant's parent, bears the burden of proof to establish grounds for her request. (Evid. Code, § 500.) The standard of proof is preponderance of the evidence. (Evid. Code, § 115.)

6. In the instant case, Mother established that claimant's current behavior intervention protocol is not sufficient. Mother's testimony regarding claimant's limited progress (Factual Finding 4) is corroborated by the FirstSteps' Center's own evaluation. The evaluation reflects that claimant has made limited improvement in certain areas such as answering simple questions or refraining from putting objects in his mouth. There is no meaningful progress in the important areas of communication, self-regulation, socialization, and self-care. Indeed, FirstSteps has abandoned efforts to assist claimant in some of these areas. (Factual Finding 3b.)

7. Because the Lanterman Act's provisions setting out the range of assistance service agencies can provide is limited by its other requirement that service agencies fund only evidence-based behavioral interventions and only in a manner consistent with best practices, mother must not only establish that the current protocol is ineffective, she must also provide sufficient evidence that her proposed addition of Floortime therapy is consistent with these threshold requirements. (Legal Conclusions 1-4.)

8. Mother has not met her burden of proving that the service agency's funding of Floortime is appropriate under the current circumstances. Her testimony, based primarily on personal observations, and the conclusory nature of claimants' doctors' recommendations are not enough to overcome the presumption that the two therapies in consort are counterproductive. The limited information about the actual versus scheduled time currently devoted to behavioral intervention is insufficient to offset the apparent overscheduling resulting from adding more therapy to the existing curriculum. Finally, mother has not provided any scientific evidence supporting the effectiveness of Floortime therapy. Under these circumstances, the appeal cannot be granted.

ORDER

Claimant's appeal is denied. Westside Regional Center shall not fund Floortime therapy for claimant.

DATED:

DEENA R. GHALY
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.