

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT

and

SAN DIEGO REGIONAL CENTER,

Service Agency

OAH No. 2019090393

DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on October 31, 2019, in San Diego, California.

Ron House, Attorney at Law, represented the San Diego Regional Center (SDRC).

Claimant's father represented claimant.

Oral and documentary evidence was received. The record remained open until November 8, 2019, to allow the parties to submit written closing statements. The record was closed and the matter was submitted for decision on November 8, 2019.

ISSUES

The following three issues were addressed in this hearing:

- Is SDRC required to provide claimant a placement in a day program or equivalent program that does not apply Applied Behavior Analysis (ABA) principles?
- Did SDRC fail to provide proper notice of a reduction in respite hours?
- Should SDRC fund services for claimant at the Alternative Teaching Strategy Center (ATSC)?

Jurisdictional Matters and Background

1. Claimant is a 23-year-old male consumer of services at SDRC pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code, section 4500, et seq. Claimant is eligible for services based on his diagnosis of autism spectrum disorder (ASD or autism). Claimant lives at home with his parents and his mother is his primary caregiver.

2. On September 12, 2018, claimant's parents agreed with SDRC for an increase in respite hours from 90 hours per month to 120 hours per month for a three-month period beginning in October 2018.

3. Claimant's parents met with SDRC on December 12, 2018, and the parties agreed to extend the 120 hours per month of respite hours until the end of the fiscal year, which is June 30, 2019.

4. On July 3, 2019, claimant's parents again met with SDRC. During this meeting claimant's parents requested an increase in respite hours from 120 hours per month to 180 hours per month, and also requested an unknown number of personal assistance hours for claimant. During the meeting the parents stated that they use the hours to work with claimant on typing skills and taking hikes with claimant, which calm him. SDRC also discussed with claimant's parents the need to access generic resources such as In-Home Support Services (IHSS) for additional support in the home.

5. On July 8, 2019, SDRC issued a Notice of Proposed Action to deny claimant's request for an increase in respite hours from 120 hours per month to 180 hours per month, and to deny claimant's request for personal assistance services. The Notice of Proposed Action provided the following reason for the action:

Based on current review of your case, the current level of respite provided is appropriate to meet your needs. There are generic services such as In-Home Supportive Services which can be accessed to meet personal care activities in the home.

6. On August 23, 2019, claimant's father signed a Fair Hearing Request, which was received by SDRC on August 29, 2019, wherein he stated the reason for requesting the hearing as follows:

Retaliation for request in change of services by senior manager at Regional Center. Other issues about services as well.

In this Fair Hearing Request claimant's father wrote in response to the question of "Describe what is needed to resolve your complaint":

My son has not received services besides respite for over 1 year. We would like to meet with Carlos Flores to resolve this once and for all.

7. On August 30, 2019, Carlos Flores, Executive Director of SDRC, sent a letter to claimant's father denying his request for a Fair Hearing because his request was untimely. In the letter Mr. Flores explained that if the claimant was dissatisfied with any decision in a Notice of Proposed Action, then a fair hearing request must be filed within 30 days of the Notice of Proposed Action. In this case the Notice of Proposed Action was sent on July 8, 2019, and the fair hearing request was received by SDRC on August 29, 2019, well after the 30-day deadline.

8. On September 11, 2019, claimant's father filed a Fair Hearing Request directly with OAH. The Fair Hearing Request was received by SDRC on September 12, 2019. In this document claimant's father wrote as the reason for requesting the fair hearing as follows:

Services modified with no notice of action and different to the previous notice of action as part of retaliation by senior manager at the SDRC for request for change of services. Part of a pattern of thwarting services for my son who has not received the correct services for over a year.

In response to the question of "Describe what is needed to resolve your complaint" claimant's father wrote:

Would like appropriate program implemented for my son. Previously requested meeting with Dan Clark (Director of Case Management) to resolve this but he refused to take

the meeting. At this point, we would like to meet with Carlos Flores to resolve the issue.

9. On September 13, 2019, Carlos Flores, on behalf of SDRC, sent a letter to claimant's father informing him that SDRC had received the Notice of Fair Hearing filed with OAH and had scheduled an informal meeting on September 25, 2019, to meet with claimant's parents in an attempt to resolve the issues.

10. On October 2, 2019, Neil R. Kramer, on behalf of SDRC, sent claimant's parents a letter summarizing the informal meeting. In the letter Mr. Kramer wrote that he attempted to identify the issues for resolution at the Fair Hearing for this matter during the meeting, and claimant's father responded that he intended to use the Fair Hearing process as a mechanism to "discuss the case management issues for [his] son" generally. Mr. Kramer further wrote in the letter that SDRC is not able to identify a service issue to be resolved in the Fair Hearing process.

11. On September 16, 2019, OAH issued a Notice of Hearing setting this hearing for October 31, 2019. At the outset of this hearing, claimant's father agreed to the three issues for resolution in this matter as listed above. During the hearing, claimant's father provided arguments regarding a plethora of other issues including the assertion that SDRC failed to respond to requests for electronic information, the assertion that claimant's Individual Program Plan (IPP) document was changed after claimant's parents signed the document, and other issues not related to the three issues listed above. Those additional arguments are not relevant to the three issues agreed to by the parties for resolution at this hearing and are not addressed in this decision.

Evidence Presented by SDRC

12. SDRC presented evidence at the hearing regarding the issues listed above, including documentary evidence of the two fair hearing requests and related letters, a letter summary of the informal meeting of September 25, 2019, claimant's IPP dated August 28, 2019, as well as an IPP addendum dated September 17, 2019, a brochure from the Alternative Teaching Strategy Center, and email correspondence between the parties. SDRC also presented testimony from Kate Kinnamont and Kimberly Anne Gaines-Williams, which is summarized below.

TESTIMONY OF KATE KINNAMONT

13. Kate Kinnamont is employed by SDRC as a regional manager. She has worked for SDRC for 20 years. Her duties as a regional manager include supervising other case managers and overseeing a team of case management units to assist with operations and providing services to clients of SDRC. Ms. Kinnamont started working at SDRC in January 1999 as an intake service coordinator and her duties in that position included assistance with assessing individuals for a determination of eligibility for services at SDRC. Thereafter, she worked at SDRC as a case manager for clients managing services for those clients. She was then promoted to the position of program manager for the South Bay office of SDRC. She was again promoted to the position of Manager of Intake Services at SDRC where she was responsible for oversight of eligibility assessments. In May 2017, Ms. Kinnamont was promoted to her current position as regional manager. Ms. Kinnamont is familiar with claimant, supervises Michael Huffman, who is claimant's case manager, and has been involved in meetings with claimant's parents and the development of claimant's IPP. Ms. Kinnamont first became involved in claimant's case in September 2018 during the time

that claimant was “aging out” of his school district services and SDRC assigned claimant to an adult unit that provides programs more suitable to adult clients.

14. Ms. Kinnamont testified that SDRC has made multiple attempts to provide a day program service to claimant. In June 2018 a program manager from SDRC met with claimant’s family and provided them with a list of day programs recommended for claimant. In August 2018, Michael Huffman met with claimant’s parents and discussed a specific day program for claimant, but claimant’s parents refused to participate in that program because they were concerned claimant would pick up bad behaviors from the program. Claimant’s August 28, 2018, IPP document states as follows:

[Claimant] is currently not in a program or going to school. Day programs were discussed, however [claimant’s] mother, states [claimant] would pick up new behaviors and she is not interested in a day program at this time. TDSO programs were discussed and [claimant’s mother] will research agencies.

Ms. Kinnamont testified that TDSO is Taylor Day Service Option, an individualized day program designed by determining what the claimant wants to do in the community and helping the claimant accomplish that goal. In claimant’s IPP addendum dated September 19, 2019, the following additional outcome was added to claimant’s IPP:

[Claimant] will research, locate and participate in a program to prepare him for employment by 8/2021.

As part of the steps to accomplish this outcome, the IPP addendum provided:

SDRC will fund day program or supported employment program per POS guidelines.

Ms. Kinnamont testified that POS stands for purchase of service, and this refers to the purchase of service guidelines of SDRC.

15. Ms. Kinnamont testified that on September 12, 2018, she had a conversation with claimant's parents regarding their request for an increase in respite hours from 90 hours per month to 120 hours per month based upon a terminal illness of a direct family member affecting claimant's mother's availability. SDRC and claimant's parents agreed to increase the respite hours to 120 hours per month from October 2018 until December 31, 2018. During the September 12, 2018, conversation with claimant's parents, Ms. Kinnamont also discussed day programs for claimant and recommended a behavioral consultant to determine the best program. Ms. Kinnamont testified that claimant's mother did not agree to the consultant and informed Ms. Kinnamont that she would develop a plan for claimant and discuss it with Ms. Kinnamont. Ms. Kinnamont also recommended IHSS for additional support services for claimant.

16. In December 2018, Ms. Kinnamont met with claimant's parents and notified them that claimant was selected for the "self-determination program," and SDRC and claimant's parents agreed to continue the respite hours of 120 hours per month until June 30, 2019. In that December 2018 meeting Ms. Kinnamont reiterated that claimant's parents should seek IHSS for additional support in the home. Ms. Kinnamont testified that claimant was still currently receiving 120 hours per month of respite as of the date of the hearing. Ms. Kinnamont explained that the self-determination program is a service delivery system at SDRC where the family has flexibility to use their budget to pay for services for the claimant as they see fit, and

claimant was selected for the self-determination program through a lottery system. She further testified that claimant's parents attended the mandatory orientation for the self-determination program, but ultimately decided not to utilize the program. An email dated July 17, 2019, from claimant's parents to Ms. Kinnamont and Michael Huffman was received into evidence. The email provides in part as follows:

We have decided that we are not going to continue with Self Determination for [claimant] at this time. The program is too disorganized and there are too many unanswered questions that would need to be resolved and that will take a minimum of 4-6 months if not more to resolve. In the meantime [claimant] is not getting the services he needs and has not received any for the past year. As you both have already refused our request for increased respite hours, we would like to meet to discuss potential programs for [claimant] etc. . . .

17. On July 3, 2019, Ms. Kinnamont again met with claimant's parents to discuss another day program, specifically a program called Community Integration Transition Program (CITP) offered by Community Interface Services (CIS). CITP is a one-on-one program that is customized for claimant. Claimant's parents agreed to meet with CIS to consider the CITP. During the July 3, 2019, meeting claimant's parents requested an increase in respite hours from 120 hours per month to 180 hours per month, and also asked for personal assistance hours. During the meeting Ms. Kinnamont asked claimant's parents if they had accessed IHSS for additional support, but they did not tell her that they had done so. On July 8, 2019, Ms. Kinnamont issued

the Notice of Proposed Action denying claimant's request for additional respite hours and personal assistance hours.

18. Case notes kept by SDRC show that on July 18, 2019, Mr. Huffman met with claimant's parents and discussed having a behavioral consultant assess claimant for a behavior plan for claimant, and claimant's parents declined to have a behavioral consultant evaluate claimant. Mr. Huffman also discussed CITP with claimant's parents and they agreed to consider the program. During the meeting with Mr. Huffman, claimant's parents requested that SDRC fund Alternative Teaching Strategy Center (ATSC) for claimant and admitted that ATSC is not vendored, but they would like SDRC to contract with ATSC. Mr. Huffman explained that ATSC must be vendored in order to be paid by SDRC, and claimant's parents requested to talk to someone from SDRC Community Services regarding vendorization. Ms. Kinnamont testified that ATSC is a type of therapy from a program owned and operated by claimant's parents.

19. On July 22, 2019, Mr. Huffman emailed claimant's mother regarding their request for vendorization of ATSC. The email provides in relevant part:

I spoke to community services regarding the Alternative Teaching Strategy Center, and RC does not fund it. It is considered educational and RC is not allowed by law to fund educational services. . . .

20. On August 22, 2019, Ms. Kinnamont met with claimant's parents again to discuss services for claimant. During that meeting claimant's parents informed Ms. Kinnamont that they were not interested in the CITP for claimant because it utilizes ABA principals, and instead claimant was already attending the ATSC five days per week for six to seven hours per day. At the August 22, 2019, meeting claimant's

parents requested that SDRC fund the therapy provided by ATSC for claimant. Ms. Kinnamont explained to claimant's parents during the meeting that in order to fund ATSC, it must first be a vendor for SDRC, and she explained the vendorization process. Claimant's parents requested that SDRC enter a contract with them for ATSC while the paperwork was in process to vendorize ATSC. Ms. Kinnamont testified that claimant's parents believe that they don't have to go through the vendorization process and instead SDRC can simply contract with them to provide services by ATSC. Claimant's parents provided Ms. Kinnamont with a copy of a decision from OAH in another matter to support their argument that SDRC can simply contract with ATSC and vendorization is not required.

21. While anyone can contract with a regional center for services, the service provider ordinarily must first be vendorized, which is a vetting process used by regional centers, before payment by SDRC may be made. SDRC may contract with a service provider that is not officially vendorized only if that service provider has been properly vetted to ensure that the service provider is in compliance with the requirements of the Lanterman Act and applicable state regulations.

Ms. Kinnamont assured claimant's parents she would look into the vendorization process for ATSC. In late August 2019 Ms. Kinnamont communicated by email with claimant's parents regarding their application for vendorization for ATSC. At some point Ms. Kinnamont received the vendorization application of claimant's parents. Ms. Kinnamont forwarded the application to Lori Sorenson, the director of SDRC's Community Services Department, the SDRC department responsible for the vendorization process. Ms. Sorenson had previously visited the site where ATSC operates sometime in March 2018 and Ms. Sorenson sent an email to claimant's parents informing them of the requirements of a day program and applicable rates

paid by SDRC for day programs. As of the date of the hearing ATSC has not been vendorized or properly vetted as a provider for SDRC.

22. Ms. Kinnamont testified that case notes in SDRC files show that Mr. Huffman again met with claimant's family on September 18, 2019, and discussed day programs for claimant. The case note from that date specifically states:

[Claimant] is currently attending the "Alternative Teaching Strategy Center" that is privately funded by his family. Day programs and TDSO programs have been discussed, however his family state that they are not appropriate for [claimant]. [Claimant's] family would like RC to fund the Teaching center. There is currently a fair hearing scheduled to discuss the funding. [Claimant's] family would like to identify a program to increase his vocational skills to hopefully find [claimant] employment in the future.

TESTIMONY OF KIMBERLY ANNE GAINES-WILLIAMS, PH.D

23. Kimberly Anne Gaines-Williams, Ph.D. currently works at SDRC as the Coordinator of Autism Services, a position she has held for the last six years. Her responsibilities in that position include overseeing contracts for services and providing consultation to vendors and families as part of a team at SDRC. Prior to this position she worked for 10 years at SDRC as the Coordinator of Autism Services for the Early Start Program of SDRC. Prior to that position she was a vendor for SDRC for 10 years. Dr. Gaines-Williams has been working with or at SDRC for the past 26 years. Dr. Gaines-Williams received her Ph.D. in 1991 in Clinical Psychology from United States International University, which is now called Alliant University. She has been licensed in

the State of California as a psychologist from the California Board of Psychology since 1993. She received her Master's Degree in Counseling Psychology from Chapman University, and she received her Bachelor's Degree in Psychology from San Diego State University. Dr. Gaines-Williams started working in the field of behavioral psychology at Children's Hospital approximately 37 years ago. During her career as a psychologist, she has written and implemented many behavioral plans in a variety of settings, including children's hospitals, community centers, residential treatment centers, and psychiatric hospitals for children and adults. Dr. Gaines-Williams has utilized ABA therapy working with thousands of children during her career.

24. Dr. Gaines-Williams testified she is very familiar with the scientific literature regarding ABA services and has practiced in the field for the past 37 years. Dr. Gaines-Williams stated that ABA therapy was developed many years ago by Dr. Lovaas and applies evidence-based practices to change behaviors based upon the motivations of the cause of behaviors. ABA therapy utilizes desirable consequences to strengthen behaviors to obtain needed skills. She testified that ABA therapy is based upon over 60 years of evidence-based research, including peer reviewed articles and control groups utilizing rigorous research methods. Dr. Gaines-Williams explained that ABA therapy must be customized to meet the needs of the child and takes into consideration frequent assessments of the child with parental input to ensure the desired outcome will be reached utilizing the ABA techniques without causing undesirable behaviors. Dr. Gaines-Williams is aware that claimant's parents believe that ABA therapy has caused trauma to claimant and has caused him to be "prompt-dependent." Dr. Gaines-Williams is familiar with problems such as "prompt-dependence," which occurs when an individual becomes dependent on prompts from others before acting. She stated that prompt-dependence should be avoided. However, she stated that ABA is not the direct cause of problems like prompt-

dependence. Instead, the techniques of ABA require frequent assessment to ensure that problems such as prompt-dependence are addressed. Dr. Gaines-Williams has never heard of ABA being the direct cause of trauma to a child. She testified that autism or ASD is a neurodevelopmental disorder, but is also behavioral in nature and that ASD is diagnosed based upon behaviors. Dr. Gaines-Williams disagrees with the assertion of claimant's parents that claimant is suffering from post-traumatic stress disorder (PTSD) and prompt-dependence as a result of ABA therapy. Instead, these problems are unique to the individual claimant and not attributable to ABA therapy.

25. Dr. Gaines-Williams stated she is familiar with the Lanterman Act and its requirements regarding the purchase of services for clients. She testified that every client of regional centers is required to have a behavioral assessment outlining the target problems needed to be addressed and the techniques used to treat them. The clients need to be reassessed every six months with parent participation to ensure proper progress. Regional centers are restricted to purchasing only evidence-based services for the treatment of clients.

26. On cross-examination Dr. Gaines-Williams admitted that ABA therapy has been historically effective, but if additional evidence is obtained to show that new research-based methods of treatment are superior, then those methods will be used for treatment of autism. However, Dr. Gaines-Williams stated she is not aware of any such new research-based methods that are superior at this time. Dr. Gaines-Williams testified further during cross-examination that she is not aware of any research of information suggesting that ABA therapy constitutes torture to an autistic child as claimant suggests, or that forcing a child with autism to make eye-contact is experienced by the child as similar to physical torture. Dr. Gaines-Williams stated that while there may be challenges to the application to ABA therapy with specific

individuals, it is improper to jump to conclusions that ABA therapy constitutes torture and should be discarded completely as a mechanism of treatment.

Claimant's Evidence

27. Claimant presented evidence at the hearing regarding the issues listed above, including documentary evidence of email correspondence between claimant and SDRC, SDRC case notes, an article published July 2019 in "Cogent Psychology" titled "How much compliance is too much compliance: Is long-term ABA therapy abuse?", a document stamped "accepted manuscript" to be published in "Cogent Psychology" titled " Treating Self-Injurious Behaviors in Autism Spectrum Disorder", a published manuscript titled "The Trauma of Inclusion in Students with Autism Spectrum Disorder", documents from Disability Rights California, and an OAH decision dated September 17, 2018, related to regional center services. The authors of each of the published articles, the accepted manuscript, and the unpublished article are claimant's parents and Aileen Herlinda Sandoval. Claimant also presented testimony of claimant's father and Aileen Herlinda Sandoval, which is summarized below.

Testimony of Aileen Herlinda Sandoval, Ph.D.

28. Aileen Herlinda Sandoval, Ph.D. is currently employed by ATSC as its clinical director. ATSC is owned and operated by claimant's parents. Dr. Sandoval is also an assistant professor at Point Loma Nazarene University and at Chicago School of Psychology where she teaches neuropsychology and assessment courses. In 2018 Dr. Sandoval received her Ph.D. in Psychology with emphasis on neuropsychology from Chicago School of Psychology. She also received her Bachelor's degree in Psychology from Loyola Marymount University and her Master's degree in Clinical Psychology from Chicago School of Psychology. Dr. Sandoval testified on direct

examination that she is “registered with the Board of Psychology.” On cross-examination, Dr. Sandoval admitted she is not licensed as a psychologist in California or any other state. She is registered as a Psychological Assistant with the California Board of Psychology. Her registration does not allow her to practice as a psychologist, but she is allowed to practice psychology and counseling under the supervision of a psychologist licensed in the State of California. Dr. Sandoval testified she is currently supervised by a psychologist licensed in California named Jamal Rogers. Dr. Rogers is not employed by ATSC and has her own private practice of psychology. Dr. Sandoval testified she has only provided clinical psychology work in connection with her training and education, but has not practiced psychology in a private practice setting. Dr. Sandoval testified she has experience with ABA from her education and training and her teaching.

29. Dr. Sandoval testified that autism is a neurodevelopmental disorder, but not a behavioral disorder. She stated that ABA therapy is based exclusively on behavioral principles, and the research related to ABA therapy to treat autism “is usually with verbal children;” non-verbal children are typically excluded from the research. Dr. Sandoval testified that there are “plenty of side effects” of ABA therapy, which are negative both physically and psychologically. She stated that one side effect of ABA therapy is prompt-dependence, which destroys the individual’s autonomy and self-esteem. Dr. Sandoval opined that another side-effect of the long term use of ABA therapy is anxiety, depression, suicide, and PTSD. Dr. Sandoval stated that ABA therapy utilizes “eye gaze” with autistic children, which is forcing a child to make eye contact. She stated that forcing a child with autism to make eye contact “takes away their ability to cope” and makes them afraid and can cause PTSD. Dr. Sandoval stated that the more you push the intervention of forcing eye contact, it causes anxiety and is “the equivalent of torture.” Dr. Sandoval testified that putting an adult “who has been

exposed to ABA” back into ABA therapy “is triggering” to the individual and “puts them back into the problem.”

30. Dr. Sandoval stated that autism is a spectrum disorder and about 95 percent of children with autism have heightened sensory issues. These children are unable to regulate their senses, creating an “overload” on their brain, which is painful to them. She testified that the “inclusion model” to have autistic children go into the community can cause painful cognitive overload without taking into consideration the sensory issues of autistic children. Dr. Sandoval further stated that “for the most part” children with autism “need isolation because that is how their brain functions.” She opined that ABA therapy is about behaviors, that autism is not a behavioral disorder, and that ABA therapy courses do not require any training in autism. Dr. Sandoval testified that ABA therapy presumes that all behaviors are “external” and an “ABA technician” will look at a child’s behavior to try to determine what caused it, but they are merely guessing. Dr. Sandoval stated that ABA therapy uses “punishment and reward” to change behavior, and the ABA therapy “destroys autonomy and the ability to regulate emotions and freedom,” creating depression. She opined that 90 percent of autistic children have psychiatric disorders and when those children are exposed to ABA therapy it makes the depression worse. Dr. Sandoval further testified that putting an autistic individual into a community program that follows the tenants of ABA constitutes institutional trauma. She defined institutional trauma as when an institution (such as a church, club, school, etc.) perpetuates a trauma further by not supporting the victim, which is a particular type of betrayal.

31. Dr. Sandoval testified she is very familiar with claimant and his condition. She stated that claimant has symptoms of PTSD such as hypervigilance and difficulty regulating emotions and anxiety, which are common in autistic individuals. She stated

that claimant is also prompt-dependent and very compliant. Dr. Sandoval opined that "you can get [claimant] to do anything you want using what he learned from ABA."

32. Dr. Sandoval testified about the mechanisms of treatment used by ATSC to treat PTSD and prompt-dependence with an autistic individual who is non-verbal. She explained that ATSC uses "experience theory" for treatment utilizing cognitive behavioral therapy that is trauma focused. The first step of treatment with experience theory is to prepare the individual by teaching them relaxation and communication and thereafter one creates an experience for them to practice emotion regulation and how to communicate their pain and frustration. Dr. Sandoval testified that Visual Communication Analysis (VCA) is an experience therapy used by ATSC to treat autistic individuals. VCA uses an activity or task to build autonomy and self-confidence, taking into consideration the autistic brain, which is heavily visual. Dr. Sandoval stated that ATSC uses VCA with the self-determination theory to treat autism. The self-determination theory has three tenants for psychological wellbeing: (1) autonomy, (2) competence, and (3) relatedness or connective-ness. Dr. Sandoval testified that VCA is "peer reviewed," replicated, and has been presented at conferences as continuing education.

33. Dr. Sandoval co-authored, with claimant's father, an article published by Cogent Psychology, a publishing company that publishes journals, titled "How Much Compliance is Too Much Compliance: Is Long Term ABA Therapy Abuse?" Dr. Sandoval admitted that she paid Cogent Psychology to have "open-access" to the public for this article. A second article that was stamped "accepted manuscript" and is to be published by Cogent Psychology titled "Treating Self-Injurious Behaviors in Autism Spectrum Disorder" was co-authored by Dr. Sandoval and by both of claimant's parents. Dr. Sandoval testified that this article was published with open access by

Cogent Psychology without payment from the co-authors. The final draft article titled "The Trauma of Inclusion in Students with Autism Spectrum Disorder" is again co-authored by Dr. Sandoval and both of claimant's parents. It is still under review and not yet published or accepted for publication.

Testimony of Claimant's Father

34. Claimant's father testified his son received ABA therapy from SDRC from 2002 to 2009 and that ABA therapy has damaged his son by causing him to have PTSD and to become prompt-dependent. He testified that claimant is so prompt-dependent from the ABA therapy that claimant is "afraid there is a wrong answer" and as a result has a "learned helplessness." Claimant's father testified that ABA has traumatized his son and putting him back into a day program that utilizes ABA techniques will further traumatize and damage claimant. Claimant's father testified that he and his wife (claimant's mother) started ATSC in 2012 because they saw the way kids with autism were treated and how it caused those kids to have trauma. Claimant's father opined that to treat autistic children with ABA therapy constitutes torture. Claimant's parents "invented the process" used by ATSC to treat autistic individuals. Claimant's mother is the executive director of ATSC. In that role she develops the program and provides training to ATSC personnel. ATSC currently has nine employees. ATSC works with South Bay Union School District and has trained its teachers. Claimant's father is the Director of Research and Administration for ATSC and has conducted research in the field of autism. Claimant's father is not a psychologist and has no degree or formal educational background in psychology, but testified he considers himself an expert in the field of autism. Claimant's father has co-authored six articles related to autism and has presented at a conference related to autism in Amsterdam, the Netherlands. During cross-examination, claimant's father admitted that during his research he has

not found any publications that find that ABA therapy causes trauma other than his own articles. However, claimant's father insisted that his articles are peer-reviewed, and other articles cited therein essentially "say the same thing" and he aggregated those articles to make his argument in his publications.

35. Claimant's father stated that there is a "wave of research" showing that ABA therapy causes trauma and autistic children are being harmed as a result. Claimant's parents want to use their son as a method to "pave the way" for others with autism and to "fix" the day programs utilizing ABA so that thousands of other children with autism will not be harmed by them. Claimant's father testified that they are seeking funding from SDRC as a stop-gap to pay for ATSC therapy until Medi-Cal steps in to pay for the ATSC therapy, which has not yet happened.

36. Claimant's father asserts that SDRC must provide claimant with a day program that does not apply ABA principles, and all of the options provided by SDRC for claimant to day have utilized ABA principles. Claimant's father believes that SDRC's position that claimant has rejected all options provided for day programs and as a result the parties are "at an impasse" is not legal. Claimant's father believes that SDRC must be creative to find a solution to provide services to claimant and that claimant's parent's choices in this regard are important as dictated by Welfare and Institutions Code section 4501. Claimant's father specifically relies on the following portion of Welfare and Institutions Code section 4501:

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream

life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

...

Claimant's father asserts that placing claimant in any of the day programs provided by SDRC violates claimant's rights under both federal and state law. He argued that the United States Supreme Court has held in *Olmstead v. L.C.*, 257 U.S. 581 (1999) that public entities are required to provide community-based services to persons with disabilities when the services are appropriate, the affected person does not oppose community-based treatment, and the services can be reasonably accommodated taking into account other resources.

37. With regard to the issue of proper notice for the reduction of respite hours, claimant's father admitted that SDRC provided a Notice of Proposed Action that respite hours would not be increased from 120 hours per month to 180 hours per month. However, he stated that his reimbursement through the financial management system for SDRC did not reimburse claimant for more than 90 hours of respite as of August 2019. Claimant's father also stated that claimant is not currently seeking any increase in respite hours than what he currently receives. However, claimant's father believes that claimant did not receive proper notice for the reduction of respite hours to 90 hours per month.

38. With regard to whether SDRC should fund payment for services from ATSC, claimant's father asserts that SDRC should fund ATSC through a contract even if ATSC is not vendorized. He also stated that ATSC is a service that should be funded by Medi-Cal insurance, but he conceded that ATSC is "not yet on a panel for Medi-Cal."

Claimant's father is asking SDRC to fund the ATSC service for his son until Medi-Cal steps in to pay. He argued that ATSC does not have to be vendorized in order for SDRC to pay for its service. Specifically, he cited to another OAH decision from September 17, 2018, in another matter wherein funding was provided for tuition to a vocational school for autistic individuals through a contract where the service was not vendorized. Claimant's father also stated that while SDRC allowed claimant to participate in the self-determination program to use its funding as it sees fit, which could eventually fund ATSC, this was not a solution for claimant because it would take about five-and-a-half months to get approval for payment through the self-determination program; such a delay is not acceptable. Claimant's father described the self-determination program as "too disorganized" and "un-implementable" right now.

LEGAL CONCLUSIONS

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, claimant bears the burden to demonstrate that he is entitled to the services and supports he seeks. The standard by which each party must prove those matters is the "preponderance of the evidence" standard. (Evid. Code, § 115.) 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.)

The Lanterman Act

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, 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. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.).

3. Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals. That section states:

[T]he Legislature finds that the mere existence or the delivery of services and supports is, in itself, insufficient evidence of program effectiveness. It is the intent of the Legislature that agencies serving persons with developmental disabilities shall produce evidence that their services have resulted in consumer or family empowerment and in more independent, productive, and normal lives for the persons served. It is further the intent of the Legislature that the Department of Developmental Services, through appropriate and regular monitoring activities, ensure that regional centers meet their statutory, regulatory, and

contractual obligations in providing services to persons with developmental disabilities.

4. Welfare and Institutions Code section 4512, subdivision (b) defines "services and supports" as:

[S]pecialized 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, 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 . . . Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.

5. The Department of Developmental Services (DDS) is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.) In order to comply with its statutory mandate, DDS contracts with private non-profit community agencies, known as "regional centers," to provide the developmentally disabled with "access to the services and supports best suited to them throughout their lifetime." (Welf. & Inst. Code, § 4620.)

6. A regional center's responsibilities to its consumers are set forth in Welfare and Institutions Code sections 4640-4659.

7. Welfare and Institutions Code section 4646 requires that the IPP and provision of services and supports be centered on the individual and take into account the needs and preferences of the individual and family. Further, the provision of services must be effective in meeting the IPP goals, reflect the preferences and choices of the consumer, and be a cost-effective use of public resources.

8. Welfare and Institutions Code section 4648 requires regional centers to ensure that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and to secure services and supports that meet the needs of the consumer, as determined by the IPP. This section also requires regional centers to be fiscally responsible.

9. In implementing IPPs, regional centers are required to first consider services and supports in natural community, home, work, and recreational settings. (Welf. & Inst. Code, § 4648, subd. (a)(2).) Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family. (*Ibid.*)

10. Welfare and Institutions Code section 4648, subdivision (a)(3) specifically provides that in order to achieve the objectives of a consumer's IPP, a regional center shall conduct activities, including securing needed services and supports by:

A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer from an individual or agency that the regional center and consumer or, if appropriate, the consumer's parents, legal guardian, or conservator, or authorized representatives, determines will best accomplish all or 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 a vendorization decision made by the department or regional center.

(D) A regional center may vendorize a licensed facility for exclusive services to persons with developmental disabilities at a capacity equal to or less than the facility's licensed capacity. A facility already licensed on January 1, 1999, shall continue to be vendorized at their full licensed capacity until the facility agrees to vendorization at a reduced capacity.

(E) Effective July 1, 2009, notwithstanding any other law or regulation, a regional center shall not newly vendor a State Department of Social Services licensed 24-hour residential care facility with a

licensed capacity of 16 or more beds, unless the facility qualifies for receipt of federal funds under the Medicaid program.

11. Regulations regarding the requirements for regional centers when entering a contract with a service provider or the vendorization process are set forth in California Code of Regulations, title 17, section 50607 et. seq. The requirements of this section include that contracts must set forth information regarding the service provider's program design, and must include program related documentation, staff qualifications, job descriptions for all positions, staff training plan and other matters necessary for proper vetting of a service provider.

12. The regional center is required to consider all the following when selecting a provider of consumer services and supports: a provider's ability to deliver quality services or supports to accomplish all or part of the consumer's individual program plan; provider's success in achieving the objectives set forth in the individual program plan; the existence of licensing, accreditation, or professional certification; cost of providing services or supports of comparable quality by different providers; and the consumers, or, where appropriate, the parents, legal guardian, or conservative of a consumer's choice of providers. (Welf. & Inst. Code, § 4648, subd. (a)(6).)

13. The regional center is also required to consider generic resources and the family's responsibility for providing services and supports when considering the purchase of regional center supports and services for its consumers. (Welf. & Inst. Code, § 4646.4.)

14. Additionally, Welfare and Institutions Code section 4648, subdivision (a)(16) provides:

Notwithstanding any other law or regulation, effective July 1, 2009, regional centers shall not purchase experimental treatments, therapeutic services, or devices that have not been clinically determined or scientifically proven to be effective or safe or for which risks and complications are unknown. Experimental treatments or therapeutic services include experimental medical or nutritional therapy when the use of the product for that purpose is not a general physician practice. For regional center consumers receiving these services as part of their individual program plan (IPP) or individualized family service plan (IFSP) on July 1, 2009, this prohibition shall apply on August 1, 2009.

Evaluation

ISSUE # 1 – IS SDRC REQUIRED TO PROVIDE A DAY PROGRAM THAT DOES NOT APPLY ABA PRINCIPLES?

15. A preponderance of the evidence established that SDRC has provided every possible day program option to claimant, including programs specifically tailored to claimant's needs regardless of the principles applied. Specifically, SDRC has also provided the option of the self-determination program to claimant whereby claimant may use the funding provided as claimant sees fit – even to pay for ATSC if claimant sees fit to do so. However, claimant has refused every option provided, even self-determination program funding. Claimant argues that self-determination funding would take too long to approve for the ATSC program, but provided no evidence to support that contention. SDRC also provided the CITP program as a day program option to claimant, which is specifically tailored to his needs. However, claimant

rejected that option claiming that ABA principles are utilized with the CITP program and therefore it is not acceptable. Claimant failed to provide any evidence to support its contention that the CITP program applies principles that are not acceptable or even if it applies ABA principles. The only option acceptable to claimant is ATSC, which SDRC will not fund because it is not vendorized, has not met the requirements for contract with a regional center, and has not been clinically determined or scientifically proven to be effective or safe or for which risks and complications are unknown as discussed below. A preponderance of the evidence demonstrated that SDRC has provided appropriate day programs for claimant, but claimant's parents refuse to utilize those services.

ISSUE #2 – DID SDRC FAIL TO PROVIDE PROPER NOTICE OF THE REDUCTION IN RESPITE HOURS?

16. A preponderance of the evidence demonstrated that SDRC has provided proper notice of the reduction of respite hours to its current level. It is noted that the evidence was inconclusive as to whether the current level of respite hours is 90 hours or 120 hours per month. Ms. Kinnamont testified that she believes that the current respite hours provided to claimant remains at 120 hours per month, despite the fact that the evidence demonstrates that the approval for the 120 hours per month was temporary and only applied until June 30, 2019, after which the respite hours would revert to 90 hours per month. The July 8, 2019, Notice of Proposed Action was sufficient notice to claimant that SDRC did not increase the respite hours from 120 to 180 hours per month as requested. Claimant's father argued that the current respite hours are reimbursed at 90 hours per month as of August 2019. The reduction from 120 to 90 hours per month is reflected in the notices provided that the respite hours of 120 hours per month were only approved until June 30, 2019. Claimants' father also

testified that claimant is not seeking an increase in respite hours from its current level. Accordingly, a preponderance of the evidence established that SDRC provided sufficient notice of a reduction of the respite hours to its current level, regardless of whether that level is 120 hours or 90 hours per month.

ISSUE #3 – SHOULD SDRC FUND ATSC SERVICES?

17. A preponderance of the evidence demonstrated that SDRC is not required to fund ATSC services for claimant. Specifically, a preponderance of the evidence shows that the services provided by ATSC have not been clinically determined or scientifically proven to be effective or safe or for which risks and complications are unknown. As a result SDRC is forbidden pursuant to Welfare and Institutions Code section 4648, subdivision (a)(16) from funding those services. The testimony of Dr. Gaines-Williams testimony in this matter that ABA therapy has been rigorously vetted through over 60 years of scientific research, control group studies, and clinical application with thousands of autistic children with success and no indication to be the cause of harm to individuals was credible. Dr. Gaines-Williams has over 37 years of experience as a licensed psychologist with clinical application of ABA therapy. She credibly explained that while some autistic individuals may have prompt-dependence, there is no indication that ABA therapy in and of itself is the cause of that prompt-dependence and the more likely reasons are individual specific.

By comparison, claimant presented evidence of one published article, one "to-be" published article and one draft article, all written by complainant's parents and Dr. Sandoval to support his conclusion that the services provided by ATSC are scientifically proven to be effective and safe. While those articles may be peer-reviewed, they are minimal in substance compared to the over 60 years of research supporting ABA therapies. Additionally, claimant's parents have no formal education in psychology and

no clinical experience other than the treatment of claimant. Additionally, Dr. Sandoval is not a licensed psychologist and has had no clinical experience as a practicing psychologist other than that she acquired during her training and education. She only recently obtained her Ph.D. in 2018 and has very limited experience in the field of psychology in comparison to Dr. Gaines-Williams. After consideration of all evidence provided, on balance a preponderance of the evidence does not support the conclusion that the services provided by ATSC have been clinically determined or scientifically proven to be effective or safe or for which risks and complications are unknown.

Finally, claimant's father argues that SDRC may contract directly with ATSC without the need to undergo the vendorization process as required in Welfare and Institutions Code section 4648 because that section also allows for funding of services to a non-vendored service provider through a contract. While claimant's father is technically correct that SDRC may fund a service through a contract instead of the vendorization process, SDRC must still undergo a vetting process to ensure that the service meets the requirements of California Code of Regulations, title 17, section 50607 et. seq. and is properly vetted. Claimant's father relies on another decision of OAH wherein funding was provided for tuition to a vocational school for autistic individuals through a contract where the service was not vendorized. However, in that case the vocational school had already entered into contracts with three other regional centers and satisfied the requirements of California Code of Regulations, title 17, section 50607 et. seq. and had been properly vetted. Nothing in Welfare and Institutions Code section 4648 allows for the circumvention of those requirements. Regardless, for the reasons stated above SDRC is prohibited from funding, either by contract or otherwise, any service that has not been clinically determined or

scientifically proven to be effective or safe or for which risks and complications are unknown.

ORDER

Claimant's appeal from San Diego Regional Center's determination that it has provided appropriate day program options for claimant, that it has provided proper notice of a reduction in respite hours, and that it is not required to fund services from ATSC is denied.

DATE: November 25, 2019

DEBRA D. NYE-PERKINS
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.