

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

In the Matter of:

CLAIMANT

vs.

NORTH LOS ANGELES COUNTY REGIONAL CENTER,

Service Agency

OAH No. 2019090459

DECISION

Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on January 13, 2020, in Chatsworth, California.

Claimant's mother represented claimant,¹ who did not appear at the hearing.

Stella Dorian, Fair Hearing Representative, represented North Los Angeles County Regional Center (NLACRC or Service Agency).

¹ Names are omitted and family titles are used throughout this Decision to protect the privacy of claimant and his family.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on January 13, 2020.

ISSUE

Should NLACRC fund Applied Behavioral Analysis (ABA) services for claimant for three to four hours per day while he attends school?

EVIDENCE

Documentary: Exhibits 1, 3 through 29; C-1 to C-5, C-7 to C-14, and C-16

Testimonial: Jennifer Thurm, Consumer Services Supervisor; Rocio Salazar, Consumer Services Coordinator; Monica Munguia, Educational Advocate; claimant's mother.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a four-year-old boy who qualifies for regional center services based on a diagnosis of intellectual disability due to Down Syndrome. He lives at home with his parents and two siblings.

2. On August 21, 2019, Service Agency sent claimant a Notice of Proposed Action (NOPA) letter notifying him that his request for funding of ABA services while

he attends school was denied. Citing to Welfare and Institutions Code² section 4686.2, the NOPA stated that any ABA service provided by regional center requires parent participation and must be conducted in the home. (Ex. 1, pp.16-17.)

3. On August 28, 2019, claimant filed a request for a fair hearing appealing the denial. This hearing ensued.

Claimant's Individual Program Plan

4. Claimant's most recent individual program plan (IPP), dated June 18, 2018, contains Service Agency's and claimant's family's agreements, sets forth specific objectives and goals, and contains the services and supports to achieve them. It also describes claimant's needs and behaviors.

5. A. As set forth in the IPP, claimant is non-verbal but uses sign language. He requires assistance in all daily living skills, such as dressing and bathing. He is not toilet-trained and uses diapers. Claimant can feed himself with a fork and spoon, with minimal spilling.

B. The IPP indicated that as of June 2018, claimant attended a public preschool. Claimant was enrolled in a special education program in which he received adaptive physical education and occupational therapy from his school district. No behavioral issues in the school setting were noted in the IPP.

C. However, the IPP indicated that in the home setting, claimant experiences behavioral challenges. For example, claimant engages in physical

² All further references are to the Welfare and Institutions Code, unless otherwise designated.

aggression, including yelling, crying, and pinching and pushing other family members. Claimant also has a tendency to elope if left unsupervised. (Ex. 7, p. 1.) In light of claimant's behavioral issues at home, Service Agency funded an optional Behavioral Orientation and 16 hours of Parent Education Group training. (*Id.*, p. 6.)

6. On March 27, 2019, an addendum modified claimant's IPP to reflect that Service Agency was funding an assessment for ABA services based on a request from claimant's family. The selected vendor for the ABA assessment was Elite Behavioral Therapies (Elite). (Ex. 8, p.1.)

The ABA Assessment by Elite

7. In May 2019, Dawn S. Fassih, Executive Clinical Director of Elite, conducted an assessment of claimant and set forth her findings in an ABA Functional Assessment Report. Ms. Fassih performed the ABA assessment based on interviews with his caregivers and direct observations of claimant in the home and community settings.

8. This report noted that claimant exhibits several behaviors that are below his developmental age milestones. For example, he is not toilet-trained and depends on prompts to perform tasks. Claimant also exhibits significant delays in functional verbal behavior and attention, has great difficulty communicating his basic needs, lacks age-appropriate social skills, engages in physically aggressive behavior, and has a history of bolting and eloping. (Ex. 15, p. 4.)

9. The ABA Functional Assessment Report also described intervention strategies in eight areas where claimant exhibits deficits, including physical aggression, safety awareness, staying on task, and functional communication, among others. Most of the intervention strategies were designed to be implemented during ABA sessions

outside the school setting. For example, in the area of safety awareness, the intervention strategy requires claimant's caregivers to teach claimant to stay within a close proximity (no more than three feet away) of his caregivers at all times while in public. The skill is to be taught and practiced at home by taking short walks down the sidewalk around the block, with claimant's mother instructing claimant on the correct behavior before the walk. (Ex. 15, p. 9.) Other intervention strategies, however, were designed to be implemented throughout day, including times that claimant attends school. For example, in the area of toilet-training, Ms. Fassih recommended setting specific times throughout the day, in intervals of two hours, to direct claimant to sit on the toilet for periods of 30 to 60 seconds. (*Id.*, p. 24.) Nevertheless, the clear focus of Ms. Fassih's assessment was on claimant's functional skills in the home and community settings because the ABA Functional Assessment Report did not include any observations of claimant while he was in school or any interviews with claimant's teachers.

10. Based on the information and data she collected, Ms. Fassih recommended that claimant receive 40 hours of ABA therapy per week and 20 hours of clinical ABA supervision per month for six months to address claimant's behavioral excesses and skill deficits.

11. In light of these recommendations, NLACRC began funding ABA services for claimant in July 2019. Because claimant's school was not in session for the summer break in July, claimant's family and NLACRC agreed that Service Agency would initially fund 30 hours per week of ABA services and 15 hours per month of supervision until claimant's school resumed, at which point the amount of ABA service and supervision hours would be reassessed. The ABA services and supervision hours funded by NLACRC were provided by Elite, in claimant's home and not at his school.

Claimant's Enrollment in Catholic School

12. In June 2019, claimant's parents attended an Individualized Education Plan (IEP) meeting with claimant's school district to determine claimant's educational goals and supports for the upcoming school year. Claimant's parents advocated for claimant to exit the special education program so that he may participate in general education classes with his typical peers. However, claimant's school district offered to place him in special education programs. Given this disagreement, a 2019 IEP was not developed for claimant, and a functional assessment of claimant in the school setting was never conducted.

13. Sometime between June 2019 and August 2019, on a date not established by the record, claimant's parents enrolled him in a private Catholic school, which claimant continues to attend until the present day. Claimants' parents chose the private Catholic school over the public school program because they wished for their son to receive a Catholic education similar to his two other siblings and because the Catholic school allowed claimant to participate in a general education program with his typical peers.

Claimant's Request for Funding

14. On August 9, 2019, claimant's mother contacted NLACRC and requested that NLACRC fund ABA services for claimant while he attends school. Claimant's mother clarified that the ABA services she sought for claimant in the school setting does not necessarily require a licensed ABA therapist. She is requesting a one-on-one behavioral support aide, such as a Registered Behavioral Technician (RBT), to assist claimant at his school. In support of this request, claimant's mother submitted a letter, dated July 25, 2019, from claimant's pediatrician, Daniel Bruckner, MD, which stated:

For [claimant] to participate fully in his education, in the Least Restrictive Environment, modeling and observing typical behavior would be preferred going forward. In order for him to do so with the most success, Applied Behavior Analysis therapists in an educational setting, as well as at home with his family, are required.

Our goal is for [claimant] to be able to be a fully functioning member of society, going to work and school and living on his own. It's possible and doable if we have the proper direct supports in place. It is critical that he has an ABA aide, full time, in the *educational setting*.

(Ex. 4, p.1.)(Italics in the original.)

Provision of ABA Services by Medi-Cal

15. In September 2019, claimant's parents changed claimant's health insurance plan based on advice from Service Agency. Previously, claimant had a private health insurance plan as his primary insurance and the Medi-Cal Fee for Service plan as his secondary insurance. Under this insurance scheme, claimant's prior requests for funding of his ABA services were denied. However, by September 2019, claimant had switched to the Medi-Cal Managed Care plan as his secondary insurance while still maintaining his private health insurance plan as his primary insurance. After this switch, the Medi-Cal Managed Care plan approved funding for 40 hours per week of ABA services to be provided to claimant, beginning on September 17, 2019, until March 14, 2020. (Ex. 17, p. 3.)

16. Because Medi-Cal was funding all of claimant's required ABA service hours, NLACRC terminated its funding of 30 hours per week of ABA services and 15 hours per month of supervision for claimant, effective November 8, 2019. (Ex. 18.)

17. The 40 hours of ABA services approved by Medi-Cal are not restricted to the home setting. Indeed, since September 2019 until the present day, claimant has received ABA services, in the form of a one-on-one behavioral support aide, while he attends school. However, this one-on-one behavioral support aide is funded by Medi-Cal, not NLACRC.

Testimony of Claimant's Mother

18. At the hearing, claimant's mother explained that she would like NLACRC to fund claimant's ABA services while he attends school because she wishes to switch back to the Medi-Cal Fee for Service plan. Claimant's mother believes that she is not legally allowed to maintain her private health insurance and Medi-Cal Managed Care plan at the same time, although she presented no evidence to support this belief. Claimant's mother further stated that she wishes to switch back to the Medi-Cal Fee for Service plan because she is afraid that her son may lose his doctors under the Medi-Cal Managed Care plan. However, upon further questioning, claimant's mother conceded that claimant has maintained the same doctors under the Medi-Cal Managed Care plan as he had under the Medi-Cal Fee for Service plan.

19. On cross-examination, claimant's mother also admitted that she has made no attempt to engage in the IEP process with claimant's school district and that she has not sought any ABA functional assessment of claimant in the school setting. Claimant's mother stated that while the school district could also provide ABA services to claimant while he attends private school, the IEP process is cumbersome and time-

consuming and she does not have the time and the resources to engage in that process.

20. Claimant's mother expressed frustration with the manner in which Service Agency handled claimant's request for ABA services while he attends school. Specifically, claimant's mother was puzzled by the rationale for denial of the service stated in the NOPA, that all ABA services funded by the regional center required parent participation pursuant to section 4682.2. After claimant's mother attended an informal meeting held by Service Agency on September 19, 2019, however, Service Agency's rationale for the denial of service was revised. The informal meeting letter dated the same date states: "As noted in [sections 4648 and 4648.5], NCLACRC is prohibited from purchasing educational services and supplanting the budget of another agency; in this case, [claimant's school district] is responsible for funding related services such as development of positive behavior intervention strategies, for students." (Ex. 16, p. 9.)

21. Claimant's mother testified that due to Service Agency's denial of claimant's request for ABA services in the school setting, she paid an aide out of her own pocket to assist claimant at his school before she was able to obtain funding from Medi-Cal for the aide. However, claimant's mother clarified that she is not seeking any reimbursement for those out-of-pocket expenses. She is requesting funding from NLACRC for claimant's ABA service needs at school, going forward, because she wishes to return to Medi-Cal Fee for Service plan as claimant's secondary insurance. Furthermore, claimant's mother also confirmed that the 40 hours of ABA services currently approved by Medi-Cal covers all of claimant's ABA service needs at home and at school. She does not believe that claimant has any additional ABA service needs beyond 40 hours per week.

LEGAL CONCLUSIONS

Standard and Burden of Proof

1. The burden of proof is on the party seeking government benefits or services. (See, e.g., *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that Service Agency is required to fund ABA services for claimant for three to four hours per day while he attends school. (Evid. Code, § 115.) Claimant has not met his burden.

Applicable Law

2. The Lanterman Developmental Disabilities Services Act (Lanterman Act)(§ 4500 et seq.) sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. As the California Supreme Court explained in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, the purpose of the Lanterman Act 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." Under the Lanterman Act, regional centers are "charged with providing developmentally disabled persons with 'access to the facilities and services best suited to them throughout their lifetime'" and with determining "the manner in which those services are to be rendered." (*Id.* at p. 389, quoting from § 4620.)

3. To comply with the Lanterman Act, a regional center must provide services and supports that "enable persons with developmental disabilities to

approximate the pattern of everyday living available to people without disabilities of the same age.” (§ 4501.) The types of services and supports that a regional center must provide are “specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives.” (§ 4512, subd. (b).) The determination of which services and supports the regional center 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.” (*Ibid.*) However, regional centers have wide discretion in determining how to implement an IPP. (*Association for Retarded Citizens, supra*, 38 Cal.3d at p. 390.)

4. As set forth in section 4646, subdivision (a):

It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the

Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

5. Section 4646.4, subdivision (a), provides, in relevant part:

Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer’s individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

[¶] . . . [¶]

(2) Utilization of generic services and supports when appropriate. . . .

6. Section 4648, subdivision (a)(8), provides:

Regional center funds shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.

7. Section 4659, subdivision (a), provides:

(a) Except as otherwise provided in subdivision (b) or (e), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.

(2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer.

Disposition

8. As an initial matter, there was insufficient evidence on this record to establish the nature and quantity of claimant's ABA services needs while he attends school. Claimant submitted a letter, from his pediatrician, Dr. Bruckner, urging for an ABA aide to be provided in the education setting. Nevertheless, Dr. Bruckner is not an ABA therapist, and his letter does not constitute an ABA assessment. Although Ms. Fassih conducted an ABA functional assessment of claimant, that assessment was performed in the home setting, and it did not involve observations of claimant's behavior in school and interviews with claimant's teachers. Consequently, Ms. Fassih's

recommendation of 40 hours of ABA services per week was limited to the home setting. Without a functional assessment of claimant's ABA needs at school, it is impossible to determine what type of aide (whether a licensed ABA therapist or an RBT) and the number of hours of ABA service claimant requires in the school setting. Therefore, an ABA functional assessment of claimant in the school setting must be performed before granting any funding for a behavioral support aide to assist claimant at his school.

9. Furthermore, pursuant to section 4659, subdivision (a), Service Agency is mandated to identify and pursue generic resources for consumers before using regional center funding. In this case, two generic resources are available to claimant. First, claimant's school district must provide special education to students with disabilities, pursuant to the Individuals with Disability Education Act (IDEA)³ and the California Education Code. Specifically, claimant's school district is obligated to provide "designated instruction and services,"⁴ which is defined under Education Code

³ Enacted by Congress in 1975 as the primary objective of the Individuals with Disabilities Education Act is "to assure that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400, subd. (d)(1).

⁴ Federal statute and regulations refer to similar services as "related services." Title 20 United States Code section 1401, subdivision (26)(A), as well as Title 34 Code of Federal Regulations section 300.34, subdivision (a), provide that related services generally means "transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy,

section 56363 as supportive services, such as ABA therapy, that “may be required to assist an individual with exceptional needs to benefit from special education.” Even if claimant’s mother finds the IEP process to be cumbersome and time-consuming, Service Agency is required by statute to pursue funding for claimant’s ABA service needs through claimant’s school district before expending regional center funds.

10. Notwithstanding the issues described above, however, a second generic source, Medi-Cal, is currently funding all of claimant’s ABA service needs both at home and at his school. By claimant’s mother’s admission, the Medi-Cal Managed Care plan provides 40 hours per week of ABA services to claimant, part of which is used for a one-on-one behavioral support aide for claimant while he attends school. Claimant has no additional ABA service needs beyond the 40 hours per week that Medi-Cal currently funds. Claimant’s mother believes that she will not be able to maintain both her private health insurance plan and the Medi-Cal Managed care plan in the long term because it is illegal. However, no evidence was presented to support this belief. In fact, claimant has had private health insurance as his primary insurance and Medi-Cal

recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.”

Managed care plan as his secondary insurance since September 2019 without suffering any negative consequences, as he has been able to maintain the same physicians he had when he was under the Medi-Cal Fee for Service plan.

11. Under these circumstances, NLACRC is prohibited from funding three to four hours of ABA services for claimant while he attends school, pursuant to sections 4648, subdivision (a)(8), and 4659, subdivision (a).

ORDER

Claimant's appeal is denied. NLACRC shall not be required to fund three to four hours of ABA services for claimant while he attends school.

DATE:

JI-LAN ZANG

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.