

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

**In the Matter of:**

**CLAIMANT,**

**vs.**

**SAN GABRIEL/POMONA REGIONAL CENTER,**

**Service Agency.**

**OAH No. 2020120531**

**DECISION**

Erlinda G. Shrenger, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on February 22 and 23, 2021.<sup>1</sup>

Claimant was represented by his mother (Mother).<sup>2</sup>

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<sup>1</sup> The above-entitled matter was heard simultaneously with claimant's two other matters designated as OAH Nos. 2020120527 (homemaker services) and 2020120529 (assistive technology). Separate decisions are being issued for those two matters.

<sup>2</sup> Claimant and his family members are identified by titles to protect their privacy.

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

Oral and documentary evidence was received. The record closed and the matter was submitted for decision on February 24, 2021.

During her subsequent review of the documentary evidence, the ALJ noted Service Agency's exhibits included an incomplete copy of claimant's individual program plan (IPP), which was admitted as Exhibit 21. On March 4, 2021, the ALJ issued an order reopening the record for Service Agency to file and serve a complete copy of the IPP by March 9, 2021, and for Mother to file a written response, if any, by March 11, 2021. Service Agency filed a complete copy of the IPP. No written response was filed by Mother. The complete copy of the IPP was marked and admitted as Exhibit 26. The ALJ's order reopening the record was marked and admitted as Exhibit 27.

The record closed and the matter was re-submitted on March 11, 2021.

## **ISSUE**

Should Service Agency be required to fund ABA/BCBA services, three hours per day, Monday through Friday, to support claimant in the home with his behaviors and help him access his education (distance learning), in the interim until claimant's school provides the service?

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## **EVIDENCE RELIED ON**

Documentary: Service Agency's exhibits 1-27; claimant's exhibits A-I, K-P, R.

Testimonial: Rosa Chavez, SGPRC Associate Director of Family and Transition Services; Monica Romero, SGPRC Manager of Family Services; Nancy Ojeda, SGPRC Service Coordinator; and Mother.

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. Claimant is a three-year-old boy who is eligible for regional center services based on his diagnosis of Autism Spectrum Disorder.

2. By a letter dated November 18, 2020, and a Notice of Proposed Action (NOPA) dated November 17, 2020, Service Agency notified Mother of its decision to deny her request for funding one additional hour per week of ABA supervision through Center for Autism Related Disorders (CARD) to support ABA service during school hours. (Exh. 16.) The letter explained the basis for the denial, in part, as follows:

Presently, Regional Center is funding 24 hours per week of ABA through CARD with 21 hours monthly of supervision.

Regional Center is funding for behavioral service is [sic] temporarily due to insurance appeal that is yet to be resolved. Supervision for an ABA program is determined based on the hours of direct programming and provided to support consultation, parent education, programming, and

guidance for any given program. Twenty-one hours of supervision is reflective of the clinical recommendation that is made and authorized for [claimant's] current program. Although some direct service hours are presently being allowed to be used to support [claimant] during distance learning, the need for supervision of these hours has not changed. Direct supervision hours can be adjusted to address the program as it is currently being provided, but there is no need for additional hours. It is unknown if [claimant] will be authorized ABA hours via school district funding when his assessments are completed. Still, it is recommended that [claimant's school district] be made aware of any needs for behavioral support that [claimant] has during school hours to see if his needs warrant additional services in this area.

(Exh. 16.)

3. On December 3, 2020, Mother filed a fair hearing request to appeal Service Agency's denial of her request for additional ABA services to support claimant in the home and help him access his education (distance learning). Mother requests ABA and BCBA services, three hours per day, Monday through Friday, until the school district is able to contract with CARD (the current ABA provider). (Exh. 17.)

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## **Claimant's Background**

4. Claimant lives at home with Mother, his father, two brothers (ages 14 and 15), and his sister (age 5). Claimant's father works outside the home. Mother is the primary care giver for claimant and his siblings.

5. Prior to age three, claimant received early intervention services from Service Agency under the Early Start program. Claimant turned three years old on June 24, 2020. Claimant's case transitioned from SGPRC's Early Intervention Unit to the Family Services Unit, which works with families of children ages three to 13 who are eligible for services under the Lanterman Act. A planning team meeting to develop claimant's IPP was held on September 28, 2020. Mother signed the IPP in February 2021.

6. Pursuant to claimant's IPP, Service Agency agreed to fund LVN respite, 64 hours per month, and ABA/behavioral services (ABA), 24 hours per week for direct service and 21 hours per month for supervision. CARD is the provider of claimant's ABA services. In addition, claimant receives speech therapy, occupational therapy, and physical therapy funded by private medical insurance.

7. The IPP states claimant does not yet have an individual education plan (IEP) in place with his school district. The school district's assessments have been delayed due to the COVID-19 pandemic. Claimant has participated in one of three assessment sessions. The IPP states claimant is currently receiving remote educational services via Zoom sessions from 9AM to 11:45AM. Distance learning has been difficult for claimant and Mother. Claimant has a lot of behaviors during class sessions. He has difficulty focusing for extended periods of time. The IPP states: "[Claimant] is not receiving school funded ABA hours specified to assist him with distance learning as the

LEA [i.e., school district] has denied the request to provide him this service to support his distance learning.” (Exh. 26, p. 10.)

### **Request for Additional ABA Services**

8. In October 2020, Service Agency was funding claimant’s ABA/behavioral services of 24 hours per week of direct service and 21 hours per month of supervision. Service Agency’s funding was temporary, until claimant’s ABA services could be transitioned to private insurance. In October 2020, claimant’s primary medical insurance was through Kaiser Permanente, with Medi-Cal as his secondary insurance.

9. In early October 2020, Mother requested in-home ABA services from claimant’s school district to assist with his distance learning. The school district notified Mother it could not make a decision on her request until assessments were completed. Mother filed a due process hearing request with the school district.

10. On October 29, 2020, Mother requested Service Agency provide additional ABA hours to support claimant’s distance learning. Mother reported claimant was struggling to engage in his educational services, and she felt overwhelmed trying to assist him, as well as providing care for her other children who were also at home for their schooling.

11. After considering Mother’s request, Service Agency agreed to allow nine of the 24 hours per week of ABA funded by Service Agency to be used to provide distance learning support for claimant. The remaining 15 hours per week of ABA/behavioral services would continue to be provided as intensive ABA services to work on claimant’s original goals. CARD notified Service Agency it could modify claimant’s ABA plan to support him during distance learning sessions with his school. (Exh. 19, pp. 295-296.) By email dated October 29, 2020, Mother notified claimant’s

service coordinator, Nancy Ojeda, that she agreed to designate nine hours from claimant's intensive ABA services to provide home support for his distance learning. (Exh. 19, p. 293.)

12. According to claimant's IPP, Service Agency agreed to "allow for some of the ABA hours to be used to support [claimant] in accessing his school day on a temporary basis due to [the COVID-19] state of emergency, IEP development status, and current needs in the home." (Exh. 26, p. 14.) The IPP noted Service Agency's funding of ABA "is temporary and being provided due to parents in disagreement with services offered by Private Insurance, and unresolved appeal of appropriate services. Services are to transition to insurance funding, when appropriate." (*Id.*, pp. 14-15.)

13. Monica Romero, Manager of Family Services, testified Mother requested in-home ABA support because claimant did not want home schooling and had an emotional reaction to school. The ABA provider, CARD, indicated it could support claimant's distance learning only with Service Agency's authorization. Service Agency agreed to temporarily allocate nine hours of claimant's weekly ABA hours for distance learning to help get claimant used to school. Ms. Ojeda testified the purpose of the nine hours for distance learning was not to assist in educational goals; rather, the purpose was to provide training for Mother on how to assist claimant during distance learning.

14. In or about February 2021, claimant's family changed their primary medical insurance from Kaiser Permanente to United Healthcare. Medi-Cal remained as claimant's secondary insurance.

15. Ms. Romero testified Kaiser Permanente did not contract with CARD for ABA services for patients, but United Healthcare did. Ms. Romero testified United

Healthcare started funding claimant's ABA services in February 2021. Ms. Ojeda testified Service Agency was informed United Healthcare began funding claimant's ABA services with CARD on February 8, 2021; however, United Healthcare did not authorize any ABA services during school hours. Ms. Ojeda testified Service Agency's funding for claimant's ABA services ended on February 18, 2021.

16. On February 11, 2021, Mother sent an email to Ms. Ojeda requesting Service Agency authorize 16.25 hours per week of ABA/BCBA solely for distance learning. Mother indicated the hours were needed from 8:45 a.m. to 11:30 a.m., Monday through Friday except Wednesday, and 8:45 a.m. to 10 a.m. on Wednesday. Mother's email stated that United Healthcare "will not fund for ABA services during distance learning." (Exh. O.) Mother's email also noted claimant's IEP with his school district had not yet been finalized.

17. Mother testified the ABA hours for distance learning she is requesting from Service Agency is a temporary service until claimant's school is able to provide the service. Mother testified she has a pending due process hearing with the school district on this issue and submitted her closing brief in that matter on February 16, 2021. Mother testified she does not intend that Service Agency would fund ABA services for distance learning if the school district is ordered to do so. Mother explained she is doing everything she can to either have medical insurance or the school district fund claimant's ABA services for distance learning.

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## LEGAL CONCLUSIONS

### Jurisdiction and Burden of Proof

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, §§ 4500 et seq.)<sup>3</sup> A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant, through Mother, timely requested a fair hearing and jurisdiction for this case was established. (Factual Findings 1-3.)

2. When one seeks government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Preponderance of the evidence means evidence that has more convincing force than that opposed to it. (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324.)

3. In this case, claimant requests additional ABA service hours for distance learning that Service Agency has not previously agreed to provide. Therefore, claimant has the burden of proving by a preponderance of the evidence he is entitled to the additional ABA service hours he is requesting. (See Evid. Code, § 500.)

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<sup>3</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

## Legal Principles

4. A regional center is required to secure the services and supports that meet the needs of the consumer, as determined in the consumer's IPP. (§ 4646, subd. (a)(1).) The determination of which services and supports are necessary for each consumer shall be made through the IPP process. (§ 4512, subd. (b).) 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 IPP participants, the effectiveness of each option in meeting the goals stated in the IPP, and the cost-effectiveness of each option. (*Ibid.*)

5. Pursuant to section 4646.4, subdivision (a), when purchasing services and supports for a consumer, a regional center shall ensure the following: (1) conformance with the regional center's purchase of service policies, as approved by the Department of Developmental Services pursuant to section 4434, subdivision (d); (2) use of generic services and supports when appropriate; (3) use of other services and sources of funding as contained in section 4659; and (4) consideration of a family's responsibility for providing similar services and supports for a minor child without disabilities.

6. Pursuant to section 4648.5, subdivision (a)(3), regional centers may not purchase "educational services" for children age three to 17. However, an exemption may be granted pursuant to section 4648.5, subdivision (c), on the basis of "extraordinary circumstances," when the regional center determines "the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs."

7. 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." (§ 4648, subd. (a)(8).)

8. Regional centers are required to identify and pursue all possible sources of funding for consumers receiving regional center services. Such sources of funding include governmental entities or programs required to provide or pay for the cost of providing services, including school districts, and private entities, to the extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer. (§ 4659, subd. (a)(1), (2).)

9. Pursuant to Health and Safety Code section 1374.73, subdivision (a)(1), every health care service plan contract that provides hospital, medical, or surgical coverage "shall also provide coverage for behavioral health treatment for pervasive developmental disorder or autism." Section 1374.73, subdivision (c)(1), defines "behavioral health treatment" to mean "professional services and treatment programs, including applied behavior analysis and evidence-based behavior intervention programs, that develop or restore, to the maximum extent practicable, the functioning of an individual with pervasive developmental disorder or autism." Furthermore, to the extent required by the federal government, such behavioral health/ABA programs are also covered under Medi-Cal for eligible persons with autism under age 21.<sup>4</sup> (Welf. & Inst. Code, § 14132.56, subd. (a)(1).)

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<sup>4</sup> "Medicaid, known as Medi-Cal in California, is a jointly-funded, federal-state health insurance program for certain low income and needy people." (Exh. 3, p. 013.)

10. Pursuant to section 4659, subdivision (c), "regional centers shall not purchase any service that would otherwise be available from Medi-Cal, . . . private insurance, or a health care service plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage."

11. Pursuant to section 4659, subdivision (d)(1), "a regional center shall not purchase medical . . . services for a consumer three years of age or older unless the regional center is provided with documentation of a Medi-Cal, private insurance, or a health care service plan denial and the regional center determines that an appeal by the consumer or family of the denial does not have merit." Subdivision (d)(1) further provides that regional centers may pay for medical services during the following periods: "(A) While coverage is being pursued, but before a denial is made. [¶] (B) Pending a final administrative decision on the administrative appeal if the family has provided to the regional center a verification that an administrative appeal is being pursued. [¶] (C) Until the commencement of services by Medi-Cal, private insurance, or a health care service plan."

## **Analysis**

12. For the reasons explained below, Service Agency is not required to fund additional ABA service hours for claimant's distance learning.

13. Service Agency temporarily funded claimant's ABA services through CARD pursuant to section 4659, subdivision (d)(1), while claimant's parents were pursuing coverage through their private insurance. Service Agency's temporary funding of ABA services ceased when the family's new insurance company, United Healthcare, began providing coverage for the ABA services in February 2021. At that

point, pursuant to section 4659, subdivision (c), Service Agency was prohibited from funding ABA services any further.

14. Mother's current request for 16.25 additional ABA hours is solely for the purpose of supporting claimant during the distance learning sessions for school. Service Agency is prohibited from funding a service the school district has a legal responsibility to provide for claimant. (§ 4648, subd. (a)(8).) Assisting claimant with accessing his educational curriculum through distance learning is the school district's responsibility. Furthermore, the school district and private insurance are generic resources that must be utilized for the additional ABA hours requested by Mother.

15. Mother's request for 16.25 additional hours of ABA services for distance learning is not supported by any assessment or recommendation by a qualified individual that the additional hours are necessary for meeting claimant's needs and goals contained in his IPP. Mother presented no assessment that justifies the need for 16.25 additional ABA hours.

16. The additional ABA hours Mother requests to support claimant's distance learning is an "educational service" that Service Agency is not authorized to purchase, pursuant to 4648.5, subdivision (a)(3). Furthermore, there are no extraordinary circumstances to justify granting an exemption under section 4658.5, subdivision (c). The distance learning that is the basis for Mother's request for additional ABA hours is something that all families with children are facing due to the COVID-19 pandemic and school closures. Claimant is already receiving intensive ABA service hours, which are a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of his developmental disability.

## **ORDER**

Claimant's appeal is denied. Service Agency is not required to fund ABA/BCBA services, three hours per day, Monday through Friday, to support claimant in the home to access his education through distance learning.

DATE:

ERLINDA G. SHRENGER  
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.