

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

In the Matter of:

CLAIMANT,

vs.

REGIONAL CENTER OF ORANGE COUNTY,

Service Agency.

OAH No. 2022030560

DECISION

Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on September 1, 2022.

Claimant was represented by his mother (Mother). Claimant was not present for the hearing. (Claimant and his family members are identified by titles to protect their privacy.)

Paula Gray, Manager, Fair Hearing and Mediations, represented Regional Center of Orange County (Service Agency or RCOC).

A Vietnamese-language interpreter provided interpreter services during the hearing.

Oral and documentary evidence was received. The record closed and the matter was submitted for decision on September 1, 2022.

ISSUE

Should Service Agency be required to fund applied behavior analysis (ABA) services with Creative Behavior Interventions (CBI) for claimant?

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-11; claimant's exhibits A-CC.

Testimonial: Khanh Dinh, RCOC Service Coordinator; Christina Genter, RCOC Behavior Services Specialist; Rebecca Sirbu, RCOC Behavior Services Specialist; Xi Chen, CBI Clinical Supervisor; and Mother.

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a 21-year-old conserved male who is eligible for regional center services based on mild intellectual disability and autism. Claimant's parents and his older sister are his co-conservators.

2. In October 2021, Mother requested that Service Agency fund claimant's ABA services, provided by CBI, after claimant turned 21. Since 2016, claimant's ABA services were funded by Medi-Cal. By law, the Medi-Cal coverage for claimant's ABA services would terminate on his 21st birthday, in January 2022.

3. On February 15, 2022, Service Agency notified Mother, in writing, it was denying her request for funding of ABA services for claimant. However, Service Agency also recommended Mother consider exploring other alternatives such as behavioral respite services, which Service Agency considered to be more appropriate given that claimant had been receiving ABA services for 13.5 years.

4. On March 7, 2022, Mother filed a fair hearing request, on claimant's behalf, to appeal Service Agency's denial of her funding request for ABA services. Mother wrote the reason she requested a fair hearing was: "Denial of ABA services that Medi-Cal stopped funding at age 21." (Exh. 1.) Mother indicated what was needed to resolve her complaint was: "RCOC to fund ABA services as per his ABA provider to meet his needs." (*Ibid.*)

5. On March 14, 2022, Service Agency held an informal meeting, by conference call, with Mother to discuss her funding request for ABA services. Based on information presented at the informal meeting, Service Agency offered to fund 12 hours per month of parent consultation services with an ABA vendor with Vietnamese speaking capabilities. Service Agency conveyed the offer to Mother by a letter dated March 18, 2022. (Exh. 2.) Mother declined the offer.

Claimant's Background

6. Claimant lives at home with his parents. Claimant has an older sister who attends college and lives away from home. Claimant's father works outside the home. Mother is a homemaker and claimant's primary caregiver. Both Vietnamese and English are spoken in the home.

7. Pursuant to claimant's Individual Program Plan (IPP) dated January 19, 2022, the services and supports currently funded by Service Agency for claimant are

in-home respite of 24 hours per month (not to exceed 288 hours per year) and parent mentor services of 10 hours per month. (Exh. 4, pp. A33-A34.) Parent mentor services are services to assist a consumer's family with accessing community or generic resources, typically when there are cultural or language barriers to accessing services.

8. Claimant currently attends an adult transition program through his school district. Pursuant to claimant's individualized education program (IEP), the school district provides claimant with specialized academic instruction; language and speech; travel training; and work experience education. (Exh. 4, p. A25; Exh. EE.) In addition, claimant receives 243 hours per month of In-Home Supportive Services (IHSS), funded by Medi-Cal, to address his daily living needs. (Exh. 4, p. A20.) Mother is the provider for claimant's IHSS hours. (*Id.*, p. A24.) All of claimant's medical expenses are paid for by Medi-Cal/Cal Optima.

9. Claimant has received ABA services for the past 13.5 years. Service Agency funded claimant's behavioral services from 2009 to 2016. Starting in 2016 and continuing until claimant's 21st birthday, Medi-Cal was the funding source for claimant's ABA services. Medi-Cal covers behavioral health treatment, including ABA services, for individuals with autism under 21 years of age. (Welf. & Inst. Code, § 14132.56, subds. (a)(1), (a)(3).) CBI was the provider of claimant's ABA services funded by Medi-Cal.

Service Agency's Evidence and Contentions

OBTAINING CURRENT BEHAVIORAL INFORMATION

10. Khanh Dinh testified at the hearing. Ms. Dinh has been employed by RCOC and assigned as claimant's service coordinator for one year. Prior to her employment with RCOC, Ms. Dinh worked as an ABA interventionist.

11. When Mother requested funding from Service Agency for claimant's ABA services in October 2021, Service Agency did not have current information about claimant's behavioral needs. Service Agency's previous funding of behavioral services for claimant ended in 2016 when Medi-Cal became the funding source, at which point Service Agency no longer had any oversight responsibilities for claimant's ABA services. Ms. Dinh asked Mother to complete RCOC's behavior services questionnaire, which is part of Service Agency's process for obtaining information from a consumer's family about the consumer's behavioral needs. Ms. Dinh received Mother's completed questionnaire in November 2021. (Exh. FF.) Ms. Dinh also requested a progress report from CBI, which she received in December 2021. (Exh. 5.) The CBI progress report covered the six-month period February to August 2021. Thereafter, Ms. Dinh consulted with RCOC's behavior services specialist, Christina Genter.

ABA SERVICES GENERALLY

12. Christina Genter testified at the hearing. Ms. Genter has been employed with RCOC for over 20 years and has held the position of Behavior Services Specialist since 2010. Ms. Genter holds a bachelor's degree in psychology and a master's degree in behavioral psychology. She has been certified as a BCBA since 2003. Ms. Genter's professional experience is summarized in her curriculum vitae, which was presented at the hearing and admitted as Exhibit 11.

13. Ms. Genter explained that ABA is a service provided to individuals with challenging behaviors. The purpose of ABA is to help the consumer's family learn tools and techniques to manage the consumer's behaviors at home and in the community. ABA is generally considered a short-term intervention.

14. Ms. Genter explained that ABA is generally comprised of one-to-one services, parent consultation, and supervision. Under regional center funding for ABA services, the one-to-one service is provided by an entry level person with either a high school diploma and registration as a behavior technician, or a bachelor's degree and 40 hours of education and training. Regional center funding for ABA services also requires a BCBA to provide the parent consultation and supervision. The BCBA provides direct supervision of the one-to-one staff to make sure they are running the program correctly. Ms. Genter testified that a BCBA is a person with a master's degree in behavioral psychology, who has completed certain educational requirements and a number of supervised hours, and has passed a board examination.

15. Ms. Genter explained the general course of ABA services starts with the assessment. Then the one-to-one staff begins working with the consumer to stabilize any behavioral challenges and concerns and build foundational learning skills. At the same time, parent consultation is provided to give the consumer's family a basic foundational learning and framework, prior to the family learning to implement the behavioral strategies on their own.

16. Ms. Genter explained that Medi-Cal will pay for behavioral services so long as there is a medical necessity for the service and the consumer is under age 21. Service Agency has no oversight responsibility for any ABA services funded by Medi-Cal. Claimant's ABA services with CBI were funded by Medi-Cal through CalOptima. Ms. Genter explained that CalOptima operates a three-tier model to provide ABA services: the one-to-one service is provided by a paraprofessional; there is mid-level staff who holds a master's degree or other license; and supervision is provided by a BCBA. As noted above, RCOC operates a two-tier model, with the one-to-one service

provided by an entry-level paraprofessional and a BCBA providing the parental consultation and supervision.

17. RCOC's Purchase of Service Guidelines (POS Guidelines) for behavioral services was presented. (Exh. 9.) The POS Guidelines, which were approved by the California Department of Developmental Services (DDS), govern RCOC's funding of various services, including behavioral services.

18. The POS Guidelines define behavioral services as follows: "Behavioral services follow the principles of applied behavior analysis and are designed to assist consumers in learning important social and adaptive skills in combination with educating parents or primary caregivers in the effective use of positive behavior supports. Behavioral services are individualized to the needs of the consumer." (Exh. 9, p. A146.)

19. The POS Guidelines include provisions for assessing the effectiveness of behavioral services. Section B(1)(c)(ii) states: "All behavioral services shall be assessed for effectiveness at the frequency described in the treatment plan, but at a minimum of every three months." (Exh. 9, p. A147.) Section B(1)(c)(iii) states: "Before making a determination for continuing, modifying, or terminating behavioral services, objective measures of the behaviors identified in the agreed-upon treatment plan must be available for review. Measurement of parents'/caregivers' ability to implement treatment plans across all environments must be included to ensure the generalization of learned skills." (*Ibid.*) Section B(1)(c)(v) states: "When progress toward behavioral objectives is not being made, barriers to progress will be determined by the Multidisciplinary/Planning Team to determine whether behavioral services should be continued, modified, or terminated." (*Ibid.*)

20. The Ethics Code for Behavior Analysts was presented. (Exh. 6.) Ms. Genter explained the Ethics Code sets forth the requirements for ethical and professional conduct that BCBAs must abide by in their practice. Section 3.15 of the Ethics Code, titled "Appropriately Discontinuing Services," provides that BCBAs may consider discontinuing services when "the relevant stakeholders are not complying with the behavior-change intervention despite appropriate efforts to address barriers." (Exh. 6, p. A131.

RECOMMENDATION OF Ms. GENTER

21. Ms. Genter's duties as a behavior services specialist include reviewing progress reports and consulting with service coordinators. In December 2021, Ms. Dinh brought claimant's case to Ms. Genter for review and consultation. As part of the consultation, Ms. Genter reviewed all available information regarding claimant's behavioral services, including the CBI progress report obtained by Ms. Dinh. On January 6, 2022, Ms. Genter conducted a home observation of claimant via Zoom that overlapped with his in-home ABA session. Ms. Genter documented her observations in an Interdisciplinary (ID) Note. (Exh. 8.)

22. Ms. Genter reviewed the CBI progress report, which contained data for the six-month period February to August 2021. (Exh. 5, p. A58.) The POS Guidelines require behavioral services to be assessed for effectiveness every three months. (Exh. 9, p. A147.) Ms. Genter noted the data reported by CBI in the progress report indicated claimant was meeting his behavioral goals when working with CBI staff, but he was not generalizing his skills to his parents. In the "Barriers to Progress" section of the CBI report, the parents' difficulty with implementing behavioral strategies effectively and consistently was noted as follows:

Per parent report, [claimant] continues to take his frustration out by engaging in tantrum and self-injurious behaviors with his mom during non-therapy time. The overall magnitude and duration of self-injurious behavior and tantrums with family remain the same. Per mom's report and CBI supervisor's observations, [claimant's] family continue to struggle to implement behavior strategies correctly due to spontaneous environmental changes and time constraints. . . .

[¶] Per parent report, elopement continues to occur in the community during this reporting period. The use of social stories to prime [claimant] of behavior expectation in the community is not consistently effective without presence of CBI staff. Due to the safety concerns parents have with [claimant] on outings, parent has not increased community outings with him. . . . Though [claimant] does not elope during session, per parent report, mother continues to struggle with [claimant] engaging in noncompliance to parent's safety directions.

(Exh. 5, pp. A61-A62.)

23. The CBI progress report also noted Mother has not followed through with the CBI supervisor's recommendation of "removing [claimant's] accessibility to the front door (i.e., installing new locks, digital door lock) late at night to prevent him from eloping and address parents' concerns about [claimant's] safety. However, parent has not been able to follow through with CBI supervisor's recommendation because parent

reports concern that [claimant] may engage in severe SIB [self-injurious behavior] and tantrum with restricted accessibility.” (Exh. 5, p. A63.)

24. The CBI progress report included behavioral data regarding claimant’s challenging behaviors, such as tantrums, aggression, self-injurious behaviors, perseveration, and elopement. Ms. Genter noted the behavioral data indicated claimant met his goals in each of these areas when working with CBI staff, but he continued to engage in the behaviors with his family during non-therapy time. For example, claimant met his tantrum goal with CBI staff (meaning zero occurrences of the behavior for at least one year), but tantrums occurred with the family an average of 4.1 times per month. (Exh. 5, pp. A66-A67.) Similarly, for self-injurious behavior, claimant met his goal with CBI staff but continued to engage in self-injurious behavior an average of 6.57 times per month. (*Id.*, p. A69.) In the area of perseveration, claimant met his goal with CBI staff but the behavior continued with claimant’s family an average of 53 times per month. (*Id.*, p. A72.)

25. After reviewing the CBI progress report, Ms. Genter requested to conduct a home observation of claimant that overlapped with his in-home ABA session with CBI. Ms. Genter conducted the observation on January 6, 2022. Ms. Genter observed that claimant was overall compliant during his ABA session with the behavior interventionist.

26. Ms. Genter presented her clinical observations and recommendations at the planning team meeting held on February 9, 2022. Mother and Xi Chen, CBI’s ABA case supervisor, attended the meeting. Ms. Genter testified that, during the meeting, claimant’s history of behavioral services was discussed, including that RCOC had funded claimant’s behavioral services from 2009 to 2016 before the funding changed to CalOptima. Ms. Genter expressed concern that claimant was not generalizing skills

to other settings after receiving 13.5 years of ABA services. Ms. Genter reviewed the information and data from the CBI progress report regarding the parents' difficulties with consistently implementing claimant's behavioral health plan. Ms. Genter explained that inconsistency in the implementation of the behavior plan increases the likelihood that maladaptive behaviors may become resistant to change and increase in frequency.

27. During the February 9, 2022 planning team meeting, there was also discussion about language barriers between Mother and the CBI staff providing parent consultation. As summarized in Service Agency's February 15, 2022 letter, Xi Chen, CBI's ABA case supervisor who attended the meeting, shared that "there seems to be discrepancies in results when parents implements [*sic*] [claimant's] behavior plan and when behavioral interventionists are working with [claimant]" and that claimant "is more resistant and less compliant when his parents are implementing his behavioral plans." (Exh. 3, p. A11.) Ms. Chen "attributed this discrepancy to potential language barriers and inaccuracy in the process of implementing behavioral plans from parents." (*Ibid.*)

28. During the February 9, 2022 planning team meeting, Service Agency recommended that claimant "move forward from receiving Applied Behavior Analysis (ABA) Services and begin exploring other alternatives that will serve as a prolong supporting service for [claimant] and family." (Exh. 3, p. A11.) Ms. Genter had noted that "13.5 years is a lengthy amount of time for ABA services and this service is meant to serve as an intervention rather than as a prolong supporting service." (*Ibid.*) During the meeting, one alternative offered by Service Agency was behavioral respite services. It was noted that behavioral respite staff "are usually provided by ABA agencies and are trained to implement behavior health plans and strategies" and would be able to

“support [claimant] with generalizing his skills and assist Mother with caring for [claimant] both in home setting and on outings.” (*Ibid.*) Mother did not agree with transitioning claimant to behavioral respite services.

29. Ms. Genter testified she attended the informal meeting Service Agency held with Mother, by conference call, on March 14, 2022. Mother was reminded ABA is considered a form of therapy and not intended to last indefinitely. Behavioral respite was discussed at the meeting. Mother was advised that “[b]ehavioral respite providers are trained to follow behavior plans and take data” and can take claimant out in the community and allow him “to practice generalizing his skills beyond his ABA sessions.” (Exh. 2.) Service Agency offered Mother 12 hours per month of parent consultation services with an ABA vendor with a Vietnamese speaking BCBA. Mother did not agree with the offer.

30. Ms. Genter reviewed the videos included in claimant’s evidence in this matter. After reviewing the videos, Ms. Genter noted the intensity of claimant’s behaviors was higher in the older videos. In the more recent videos, there were similar behaviors but the intensity was much lower. Ms. Genter noted the videos are “short snap shots” that do not show the surrounding circumstances for the behavior. As such, the videos are not enough to understand claimant’s entire behavioral situation.

31. Ms. Genter’s clinical opinion is Mother struggles with claimant’s difficult behaviors. Mother does not have adequate instructional control of claimant, and claimant’s skills have not generalized over to Mother. Ms. Genter’s current recommendation is to implement behavioral respite services as a support for claimant and parent consultation services with a BCBA who speaks Vietnamese. Ms. Genter explained that prolonged one-to-one ABA services can result in the individual and their family becoming dependent on the service and feeling like they cannot go on

without it. Ms. Genter reiterated that behavioral respite staff are trained in proactive and reactive strategies that enable them to manage a consumer's behaviors appropriately.

RECOMMENDATION OF Ms. SIRBU

32. Rebecca Sirbu testified at the hearing. Ms. Sirbu has been employed at RCOC as a Behavior Services Specialist for five years. Ms. Sirbu holds a bachelor's degree in political science and a master's degree in exceptional student education. Ms. Sirbu has been certified as a BCBA since 2011. Ms. Sirbu's professional experience is summarized in her curriculum vitae, which was presented at the hearing and admitted as Exhibit 10.

33. Ms. Sirbu testified she became involved in claimant's case when she was asked to do a case review and provide a second opinion. For the case review, Ms. Sirbu reviewed the CBI progress report (Exhibit 5), claimant's history of behavioral services, and reports available in RCOC's charting system, including the observation by Ms. Genter. Ms. Sirbu's testimony regarding the case review was consistent with the summary contained in her ID Note, which states as follows:

Per the report, [claimant] continues to engage in significant behaviors with his family members, but there are no behaviors with CBI staff, and CBI also reported that parents are not or cannot follow the behavior plan that has been successful with staff. [Claimant] also appears to lose skills after he has learned them, which can be indicative of poor maintenance of the skill in the natural environment. Both

continuation of maladaptive behaviors, and failure to maintain skills, could be the result of many different causes.

Given the many factors that could be contributing to lack of generalization and maintenance of behavior across individuals and settings, it is recommended that the IPP team consider offering the family a new FBA [functional behavior assessment] with a different provider that provides a new analysis of behaviors, an extensive ecological assessment, and a behavior plan and skill development plan that is tailored to his individual needs, his family's capabilities, and that takes into account future plans for living arrangement and support.

(Exh. 7.)

34. At hearing, Ms. Sirbu explained that when a regional center consumer under age 21 receives behavioral services funded by Medi-Cal, it is not assumed or implied that the regional center will begin funding the service after age 21. This is because the criteria for accessing behavioral services is different depending on the funding source. Medi-Cal determines behavioral services based on medical necessity. Regional centers determine behavioral services based on the consumer's ability to attain skills to function in the natural environment.

35. Ms. Sirbu's recommendation is for claimant to have a functional behavior assessment (FBA) completed by a behavioral services provider other than CBI. Ms. Sirbu explained that having a new provider is important. Since CBI has been working with claimant and his family for a long time, CBI may have observer bias, in that CBI

has become so accustomed to seeing patterns of behavior that they may miss nuances in claimant's behavior and will see what they expect to see rather than his actual behavior.

36. Ms. Sirbu testified it is important that the vendor conducting the FBA and providing services speak the family's language, Vietnamese, because not all ABA terms are easily translated to other languages. Individuals who provide parent consultation need to have a grasp of the parents' language and how to translate concepts so the parents can understand.

37. Ms. Sirbu agrees with Ms. Genter's recommendation of behavioral respite and parent consultation services by a Vietnamese-speaking BCBA to address claimant's challenging behaviors. Ms. Sirbu testified her recommendation of an FBA funded by RCOC was offered to claimant's family and the family declined the offer.

Claimant's Evidence and Contentions

38. Mother testified at the hearing. She believes ABA is a "prospering" service for claimant. She thought funding for claimant's ABA services would transition from CalOptima to RCOC when claimant turned 21. Mother attended the planning team meeting on February 9, 2022, and was shocked that RCOC did not want claimant to continue receiving ABA services, which he had received for the last 13 years, and instead wanted him to transition to behavioral respite. Mother wants claimant's ABA services with CBI to continue. Mother is shocked and disappointed that claimant has lost his ABA service hours because she feels he needs ABA services.

39. On February 18, 2022, Mother filed a consumer complaint with DDS, pursuant to Welfare and Institutions Code section 4731, claiming RCOC (1) failed to inform Mother of its funding decision regarding ABA services until after the CalOptima

funding ended on January 18, 2022; (2) failed to provide Mother with the ID Note by Ms. Genter regarding the January 6, 2022 observation prior to the February 9, 2022 planning team meeting; and (3) failed to provide Mother with the ID Notes she requested at the February 9, 2022 planning team meeting within three business days. (Exh. A.)

40. By letter dated March 21, 2022, DDS responded to Mother's consumer complaint, finding that her claims regarding ID Notes (items 2 and 3) were "unfounded" but finding her claim regarding RCOC's funding decision for ABA services (item 1) was "substantiated." The letter explained DDS's decision on item 1 as follows:

Although RCOC did follow the correct steps to follow up on your request for RCOC to assume funding of ABA services, it did not follow them in a timely manner, given that the behavioral services packet was received from you on November 18, 2021 and that the ABA provider's most recent report was received on December 2, 2021. Notably, an Individual Program Plan (IPP) meeting was held on January 19, 2022 in which RCOC's response to your request was not discussed. Instead, this specific request was discussed at a February 9, 2022 PTM [planning team meeting]. RCOC should have responded to your request more quickly and utilized the required PTM process to do so. In order to address this issue, RCOC will ensure that the staff members involved in [claimant's] case receive training to avoid any future similar delays.

It should be clarified, however, that RCOC did not terminate funding for a service - CalOPTIMA did. While you would have been able to file for a Fair Hearing (as you have done) at the time that RCOC denied your request, [claimant] would not have been eligible for aid paid pending because RCOC had not been funding the requested service.

(Exh. A, pp. B4-B5.)

41. Mother testified she wants CBI to remain as claimant's ABA provider. She claimed that CBI has two Vietnamese "counselors" to help her son. CBI is already familiar with claimant's behavior. She feels claimant's personality does not work well with changes to his environment. New staff will need time to understand claimant's personality. Mother feels a lot of time will be lost if claimant changes to a new provider. Mother does not want claimant to lose any more time. She feels Service Agency has not offered a good recommendation.

42. Xi Chen testified at the hearing. Ms. Chen has been employed by CBI since 2012. She is currently employed by CBI as clinical supervisor, a position she has held since 2018. Her duties as clinical supervisor include training staff to implement behavior plans, providing parent consultation as needed, and preparing progress reports every six months. Ms. Chen holds a master's degree in clinical psychology. She is a licensed marriage family therapist (LMFT). She holds a graduate certification in ABA. She is not a BCBA.

43. Ms. Chen testified she has been supervising claimant's ABA program with CBI since 2018. The program focused on claimant's adaptive functioning and generalization of skills. CalOptima's funding of claimant's ABA program terminated

when he turned 21 in January 2022. CBI is currently not providing any services for claimant.

44. Ms. Chen testified CalOptima notified CBI it would no longer fund claimant's ABA services after age 21. Ms. Chen testified CBI was "aware the [ABA] services would transition to a different funding source and would not end." Ms. Chen testified the insurance coordinator with CalOptima told CBI that when claimant turned 21, funding for his ABA services "would just transition to RCOC." No documentation was presented to corroborate this testimony.

45. Ms. Chen recommends that claimant continue with ABA services as he transitions to adulthood. Claimant needs to learn different skills as an adult that are required for him to become an independent member of society. Ms. Chen testified the ABA services provided by CBI were used to provide consultation and training to those who worked with claimant. Ms. Chen testified claimant's ABA services stopped in March 2020 due to Covid, causing claimant to lose 1.5 years of in-person service, which has been a barrier to his progress.

46. On cross-examination, Ms. Chen testified she was not aware that Service Agency recommended parent consultation hours for claimant's family. Ms. Chen was aware Service Agency offered to fund for an updated FBA, but she was not aware Service Agency recommended that a new provider conduct the FBA. Ms. Chen opposes having a new provider work with claimant and his family. Ms. Chen testified she does not understand the reasoning to force Mother into starting services with a new provider because the ABA services provided by CBI were effective. Ms. Chen asserted that CBI is an appropriate service provider for claimant, based on the progress CBI has made with him. Ms. Chen testified she was aware that RCOC requires its behavioral services vendors to use a BCBA for parent consultation and supervision. Ms. Chen

testified she is not a BCBA and she does not speak Vietnamese. The CBI progress report indicates the report was completed by Ms. Chen and Genny Nolasco, Psy.D., who is identified as "BCBA, QBA Clinical Supervisor." (Exh. 5, p. A57.) No evidence was presented that Ms. Nolasco speaks Vietnamese.

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.) (All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.) 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 1-4.)

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 a 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 seeks funding from RCOC for ABA services provided by CBI, his family's preferred provider. Therefore, claimant has the burden of proving by a preponderance of the evidence he is entitled to the ABA funding he is requesting. (See Evid. Code, § 500.)

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. The planning process for an IPP shall include “[g]athering information and conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. . . . Assessments shall be conducted by qualified individuals and performed in natural environments whenever possible.” (§ 4646.5, subd. (a)(1).)

6. Pursuant to section 4648, subdivision (a)(6), when selecting a provider of consumer services and supports, the regional center and the consumer shall consider the following factors:

(A) A provider’s ability to deliver quality services or supports that can accomplish all or part of the consumer’s individual program plan.

(B) A provider’s success in achieving the objectives set forth in the individual program plan.

(C) If appropriate, the existence of licensing, accreditation, or professional certification.

7. Pursuant to section 4648, subdivision (a)(7), a service or support shall not be continued "unless the consumer . . . is satisfied and the regional center and the consumer . . . agree the planned services and supports have been provided, and reasonable progress toward objectives have been made."

8. 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. (§ 4646.4, subd. (a).)

9. 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).)

10. 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, such as Medi-Cal, 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).)

11. Pursuant to section 14132.56, subdivision (a)(1), "behavioral health treatment (BHT) shall be a covered Medi-Cal service for individuals under 21 years of

age.” Under section 14132.56, subdivision (a)(3), “behavioral health treatment” is defined as “professional services and treatment programs, including applied behavior analysis (ABA) and evidence-based intervention programs, that develop or restore, to the maximum extent practicable, the functioning of an individual with pervasive developmental disorder or autism, and are administered by the department [State Department of Health Services] as described in the approved state plan.”

12. 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.”

Analysis

13. For the reasons discussed below, Service Agency properly considered and denied Mother’s funding request for ABA services with CBI for claimant. Claimant’s appeal shall be denied.

14. ABA is a time-limited intervention to stabilize maladaptive behaviors, generalize skills, and assist the family in learning strategies and techniques so they are able to manage behaviors independently. Claimant has received ABA services for 13.5 years, with CBI providing his ABA services since 2016. Reasonable progress towards meeting his ABA goals has not been made. Data reported by CBI shows that claimant does not engage in maladaptive behaviors during his ABA sessions with CBI staff, but the maladaptive behaviors continue to occur with his family during non-therapy time. Claimant’s parents continue to have difficulty with implementing the behavior plan and strategies. The purpose of ABA is to teach the family strategies and techniques so they can, on their own, manage the consumer’s behaviors at home and in the

community. After 13.5 years of ABA services, claimant's parents are still unable to manage his behaviors on their own, outside of the ABA session. The lack of progress demonstrates that ABA is no longer effective in addressing claimant's behavioral needs.

15. There is also a concern about CBI's ability to deliver quality ABA services for claimant and his family due to a language barrier. Service Agency requires, for ABA funding, that the parent consultation and supervision for ABA services must be provided by a BCBA. Ms. Chen was the supervisor for claimant's ABA program with CBI. Ms. Chen is not a BCBA and she does not speak Vietnamese, which is the family's preferred language. Parents' difficulty with implementing claimant's behavior plan appears to be due, in part, to a language barrier between the parents and CBI staff (including Ms. Chen), which would adversely affect the parent consultation component of claimant's ABA program. Further, even if Service Agency was ordered to fund behavioral services for claimant with CBI, Ms. Chen would not qualify to provide parent consultation and supervision for the services because she is not a BCBA. Moreover, no evidence was presented that CBI has a BCBA who speaks Vietnamese who could provide parent consultation and supervision for claimant and his family.

16. Service Agency does not dispute claimant has behavioral issues that require intervention. The preponderance of the evidence established claimant has not made reasonable progress with his behaviors after 13.5 years of ABA services, and ABA services, at this point in claimant's life, are no longer effective for him. Service Agency presented compelling evidence to support its recommendations of behavioral respite services, parent consultation services with a Vietnamese-speaking provider, and funding for a functional behavior assessment by an RCOC behavioral services vendor.

Mother has declined all of the recommendations. Therefore, Service Agency will not be ordered to implement any of the recommendations.

ORDER

Claimant's appeal is denied. Service Agency is not required to fund ABA services with Creative Behavior Interventions for claimant.

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.