

**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. 2022050108

PROPOSED DECISION

Eileen Cohn, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on June 30, 2022 and July 8, 2022 via videoconference.

Naomi Hagel, M.S., Founder, Phoenix Facilitation of California, LLP, represented Claimant. Claimant's mother was present throughout the fair hearing and was assisted by a certified Korean-language interpreter. (To maintain their privacy, the names of Claimant and family are not referenced.)

Dana Lawrence, Fair Hearing and Administrative Procedures Manager, represented North Los Angeles County Regional Center (Service Agency).

Oral and documentary evidence was received. The parties stipulated to the submission of written closing argument. The following briefs were marked and lodged: Service Agency's Closing Brief was marked as ALJ-1, Claimant's Closing Brief was marked as ALJ-2, and Claimant's Rebuttal Brief was marked as ALJ-3 and lodged. The record was closed, and the matter was submitted for decision by stipulation on August 1, 2022.

Oral and documentary testimony was completed for this matter on July 8, 2022. This matter was initially consolidated with OAH No. 20222050117, referred to as the secondary case and an additional fair hearing date to hear the secondary case was set for July 26, 2022. Prior to the additional fair hearing date, the parties jointly requested bifurcation of the two cases and a continuance of the secondary case. On July 26, 2022, OAH issued an order granting the parties' request. As such, the exhibits submitted for OAH No. 2022050117 as part of the consolidated matter were excluded from the record.

ISSUE

Whether personal assistance and respite services using specialized behavioral support should be funded for the full second-year of the Self-Determination Program ending March 31, 2023, with "culturally-sensitive" staff?

SUMMARY

Service Agency notified Claimant in March 2022 it was discontinuing the specialized behavioral support with staff trained in Applied Behavior Analysis (ABA) for Claimant's personal assistance and respite services for the second year of the two-year

Self-Determination Program (SDP) budget. Service Agency maintains Claimant no longer requires this higher level of support based upon the information it obtained from the vendor providing ABA training and interventions. Claimant objects based upon ongoing maladaptive behaviors at home and in the community, which manifest most critically in the area of elopement. Claimant uses one provider for both services and protests the recommended change in providers who are not proficient, as this provider is, in the Korean-language to effectively communicate with Claimant's parents, and who are not culturally-sensitive.

During the hearing, Service Agency agreed to fund six more months of continued specialized behavior support for Claimant's personal assistance and respite services.

The weight of the evidence supports the continuity of a full-year of specialized behavioral support for these two services with the same staff person who is proficient in the Korean-language to communicate with Claimant's mother. A full year of behavioral staff is valuable at this time to stabilize Claimant's behaviors, particularly, his pattern of elopement. Claimant's maladaptive behaviors were potentially exacerbated by a break in his services due to the confusion and delay caused by the Service Agency's review of the propriety of using behaviorally-trained staff for social recreation services, and the instability in Claimant's household related to the birth of a medically-fragile sibling. Prior to the end of the second-year of the SDP, Service Agency with the family's cooperation, will have an opportunity to re-evaluate Claimant's behavioral support requirements at home and in the community, and the parties together will be able to review Claimant's progress and determine whether the higher level of support is still required.

Claimant's appeal is granted with conditions.

EVIDENCE

The following evidence was considered in this decision, whether or not it was expressly cited: For the Service Agency, Exhibits 1-17, 35-36, 46-49 and the testimony of Josh Kaplan, Consumer Services Supervisor, Debbie Rombeau, Consumer Services Supervisor, Santa Clarita Office, former SDP specialist, and Dr. Arpi Arabian, Ph.D., Behavioral Services Supervisor, and were considered; For the Claimant, Exhibits C-[Claimant's initials]-1 through C-[]-11, 25-26 & 30, and the testimony of Naomi Hagel and Claimant's mother were considered.

Background and Jurisdictional Matters

1. Claimant is currently seven years of age, was made eligible for services under the Lanterman Act as an individual with an autism spectrum disorder (Autism) after his diagnosis in May 2018 and participates in the SDP. The SDP was developed with a two-year schedule with the first year ending March 31, 2022, and the second year ending March 31, 2023.

2. Claimant, who is considered intellectually gifted, lives with his family of two parents, an older sibling, also a Service Agency client, and a younger sibling, born within the last 12 months with medical challenges. Claimant's father works full-time outside the home. Claimant's mother is the primary caretaker, the individual implementing In-Home Supportive Services (IHSS) at a rate of approximately 204-230 hours per month, and the main beneficiary of weekly respite and personal assistant services. (Exs. 7, 13 and 16; Mother's testimony.) Personal assistant services have been provided as a "second pair of hands" to assist Claimant's mother with his support. (Ex. 3.) Respite services have been provided to allow Claimant's mother to leave the home to do errands, tend to Claimant's siblings and rest. (Ex. 9.) Claimant's family does not

have the support of other family members because they live in another country. (*Ibid.*) With additional challenges of a medically-fragile newborn the ability of Claimant's mother to provide Claimant with direct support without respite and personal assistance so he can participate in the community has been compromised. As of the Individual Program Plan (IPP) dated March 17, 2021, Service Agency agreed behavioral respite and personal assistance was justified due to the frequency and intensity of behaviors. (Ex. 9.)

3. On March 11, 2022, Claimant's family was informed the behavioral rate for respite and personal assistance services was being discontinued in the second-year of the Self-Determination Program (SDP) "based upon how the funds are being utilized (social recreation for which there was not a policy in place at the time) and the current rates of behavior." (Ex. 36.)

4. Service Agency's decision to terminate behavioral respite and personal assistance was raised through communications between the parties after an IPP, where it was never discussed, approximately two weeks prior to the end of the first-year SDP. Service Agency's concern over services focused in part on using the services for social recreation. Service Agency's denial was based on its delay in promulgating its own policy.

5. The Service Agency did not issue a timely Notice of Proposed Action (NOPA). The parties had been communicating from about February 2022 about the second-year SDP and specifically about behavior support using ABA for respite and personal assistance. Claimant's family acknowledged in its fair hearing request it was notified March 11, 2022 Claimant would be denied behavior services as an adjunct to respite and personal assistance services. (Exs. 35 and 36.) The Service Agency acknowledged it was an error not to issue a formal NOPA. The failure to issue a formal

and timely NOPA was a procedural error which did not affect the jurisdiction of this matter.

6. On April 13, 2022, Service Agency received Claimant's Fair Hearing Request dated April 11, 2022, naming Naomi Hagel the authorized representative.

7. On May 23, 2022, Service Agency memorialized an informal meeting with Ms. Hagel and Claimant's mother where it confirmed Claimant's Fair Hearing Request to appeal Service Agency's decision to change Claimant's personal assistance and respite service from behavioral to non-behavioral services.

8. Service Agency did not dispute the provision of non-behavioral respite and personal assistant services during the current SDP plan year at the current level of services. By the time of the fair hearing, Service Agency had withdrawn its objection of the use of the SDP budget, including respite and personal assistant services, for social recreation purposes. Claimant brings the confusion and delay in Service Agency's decision making regarding social recreation into this fair hearing to underscore the resulting interruption of aide-paid-pending services to Claimant. However, social recreation as a service for which personal assistance and/or respite staff can be used has been resolved and is not disputed.

9. Service Agency filed the Fair Hearing Request with OAH and this matter proceeded to hearing. All jurisdictional requirements have been satisfied.

Claimant's Request for Continued ABA-trained and Culturally Sensitive Staff Support

10. Claimant does not currently have access to insurance for coverage of ABA services and from the evidence presented it does not appear the appeal process

has been exhausted. On September 25, 2020, the insurer notified parents the data it received from Claimant's provider at that time by the previous provider, was not supported by clearly defined and measurable goals, a realistic transition plan and discharge criteria, and there was insufficient data on parent/caregiver participation and progress on learning basic behavioral principles of ABA. (Ex. 4.)

11. Claimant's mother has had the support of an individual who provides both respite and personal assistance services and is a Korean-language speaker with an understanding of the family's Korean culture. Claimant's ability to access the community and participate in social recreation was further impeded by the Covid-19 pandemic. Claimant participates in a general education elementary school class at the local public school and has an Individual Education Plan (IEP). The services requested herein are within the scope of the Lanterman Act's focus on access to the home and community. Claimant also has demonstrated, at the time of the hearing, insurance was not available.

12. One staff person trained in ABA and monitored and trained by a Board-Certified Behavior Analyst (BCBA) has been used for personal assistance and respite during social recreation activities, in the home and in the community. Claimant's mother insists behavioral support is required because the behavioral staff is specially trained to address his needs.

13. During the hearing Claimant's mother's insistence the staff, be "culturally-sensitive" appeared to be a requirement for respite and personal assistance staff to be proficient in the Korean-language, and as such, Korean-language proficiency was considered in this decision. Otherwise, there was a lack of specificity as to what was meant by "culturally-sensitive." Claimant is fully integrated in the public

school system in a general education elementary classroom without a one-on-one aid and there is no evidence he requires someone fluent with the Korean-language.

SERVICE AGENCY'S REVIEW OF BEHAVIORAL ASSESSMENTS AND POSITION

14. The dispute over behavioral-level support for respite and personal assistant services is directly related to the assessments and reports of Claimant's ABA providers who work with Claimant and provide Claimant and parent training on strategies and tools to minimize Claimant's maladaptive behaviors.

15. On February 15, 2022, Achieve Behavioral Associates (Achieve) prepared an ABA Behavioral Assessment Report after Claimant's mother elected to stop services with another provider who had been providing services to Claimant for four years. Claimant's mother sought the services of Achieve because they provided in-clinic intervention services which were necessary to minimize in-home contact with Claimant's medically-fragile sibling. (Exs. 12 and 32.)

16. Achieve confirmed Claimant's maladaptive behaviors manifested in the home or community, not school, environment. Achieve also observed during the assessment process, in the presence of the assessor, Claimant attempted to elope. Achieve chronicled the progress made during Claimant's behavior services with the prior provider. Claimant's baseline rate of elopement was reported as occurring three times per month and reduced to once monthly by the previous provider. Claimant's baseline rate of physical aggression with his parents and older brother had improved from three times per month, to zero over two consecutive months, Claimant's throwing behavior which mother reported as multiple times a day, reduced to zero across three months, climbing reduced from a baseline level of 18 times per month to

one occurrence per month, and tantrums reduced from a rate of six times per month to zero over a three-month period. (Exs. 12 and 32.)

17. At the conclusion of Achieve's report, which consisted of observations, parent interviews and various standardized assessment tools measuring Claimant's adaptive functioning, verbal behavior and barriers to learning, Achieve provided goals and objectives to mitigate Claimant's maladaptive behaviors and increase parent understanding of ABA tools. (Exs. 12 and 32.)

18. Achieve concluded Claimant's behaviors posing the "most significant risk to [Claimant's] and others' safety are the behaviors of physical aggression, climbing and elopement." (Exs. 12 and 32.) During the assessment process, Achieve observed elopement and tantrum behaviors without tears, and one-time climbing behavior. Achieve acknowledged the reduction in behaviors reported by the prior service provider, but concluded the behaviors still required intervention. From Achieve's report, elopement behavior was the key behavioral challenge; although it had been reduced from 18 occurrences to one occurrence according to the prior service provider, Achieve concluded it "was on an increasing trend returning to baseline levels just prior to the termination of services" from the prior service provider. (*Ibid.*)

19. Achieve recommended Claimant and his family receive behavioral services at a reduced rate of 10 hours per week of direct service and 10 hours a month of supervision inclusive of a fade-out plan for Claimant and parent training to effectively learn behavioral strategies and tools in the home and community setting. (Exs. 12 and 32.) The recommended rate is lower than previous recommendations. The need for ABA training services is not disputed; the rate and duration of these services is not an issue in this proceeding.

20. Claimant exhausted the primary source of funding for ABA services, Claimant's insurer. Service Agency's agreed to extend behavioral-level respite and personal assistance despite its concerns with the comprehensiveness of the data or the necessity of behavioral-level service and to provide Claimant's family time to pursue an appeal with their insurer for ABA services. Service Agency requested the ABA provider develop goals and a behavioral plan for community settings to assist Service Agency in its assessment of further behavioral support for these services. The Service Agency also requested Claimant continue pursuing private insurance and/or Medi-Cal. (Ex. 16.) During the hearing, Claimant's mother confirmed she was still pursuing an appeal,

21. During discussions between Service Agency and Claimant about the second-year SDP, Service Agency revised its offer to extend behavioral respite and personal assistant services. Service Agency prepared several revisions to the SDP budget. (Exs. 46-48 and 49.)

22. In its letter dated May 23, 2022, the Service Agency agreed to add an additional six weeks of behavioral respite services to the SDP budget with behavioral services for both respite and personal assistances scheduled to end August 5, 2022.

23. During the hearing, Service Agency submitted a third revision of the SDP budget extending behavioral respite and personal assistant services for a total of six months of the second SDP plan-year, which began on April 1, 2022, to September 30, 2022.

24. The third revised SDP budget with an effective date of April 1, 2022, increased the SDP budget to accommodate the increased cost of behavioral respite and personal assistant services for a total period of six months, until September 30,

2022. The hourly cost of the behavioral respite and personal assistant services is \$39.70. Behavioral respite is currently authorized at 35 hours per month for a total of \$1,389.50 per month. Behavioral personal assistant services is currently authorized for 17 hours per week. (Ex. 49.) The third revised budget was approved four months into the second SDP plan-year.

25. In the third revision of the SDP, the Service Agency reduced the non-behavioral respite and personal assistant services from nine months to six months with a start date of October 1, 2022. The Service Agency did not change the agreed-upon number of hours offered for both services. The rate for non-behavioral respite and personal assistant services is \$22.32 an hour. (Ex. 49.)

26. Service Agency remains unconvinced behavioral-level personal assistant services and respite are required and has refused to extend the services for the remaining six months of the second SDP plan year, from October 1, 2022, to March 31, 2023.

27. Service Agency contested the use of behavioral respite and personal assistant services based upon the progress report and results achieved and reported by the prior service provider which showed Claimant's rate of maladaptive behaviors had been reduced. (Ex. 36.)

28. Service Agency provided the testimony of well-qualified and competent staff to explain its decision to deny behavioral-trained staff for respite and personal assistance. However, the staff members were limited in their personal knowledge of Claimant and the duration of their interactions as staff members with the family. Although staff members demonstrated skill as Service Agency SDP and service

providers, their relative lack of familiarity with Claimant diminished the value and the weight of their testimony.

29. Josh Kaplan, the Service Agency, Consumer Services Supervisor and the staff member responsible for oversight of SDP funding, explained the SDP does not allow Claimant wholesale permission to use the budget for any services. Service Agency had not had an internal policy for the use of these services for social recreation at the time of its earlier communications with Claimant, but by the fair hearing understood it to be an acceptable use of SDP funds. Claimant protested Service Agency's reason for this delay since social recreation had been approved as a statewide service since June 2021.

30. Before choosing behavioral-ABA trained and BCBA certified-personnel, consumers are still required to be forthcoming with documentation substantiating the need for such services. Service Agency's clinical team must review the information, and the IPP process must be used to establish it as an acceptable service. Mr. Kaplan had met Claimant three years prior, was not personally involved in any observations of Claimant's behavior and was generally unaware of whether the behaviors reported by parents in the packet they developed for the Person-Centered Plan (PCP) in January 2021, (Exhibit 6), or January 2020, (Exhibit 7), were resolved.

31. Debbie Rombeau, Consumer Services Supervisor of the Service Agency's Santa Clarita office and formerly an SDP specialist for Service Agency, demonstrated familiarity with the history of the dispute and the process Service Agency follows to determine the level of behavioral support required for personal assistant and respite staff. Ms. Rombeau had been Claimant's assigned service coordinator until she was appointed supervisor in October 2021 but continued in an unofficial capacity until January 2022 when Claimant's new service coordinator was assigned. As of February

28, 2021, Claimant had exhibited behaviors supporting continued ABA services. (Exs. 8-10.)

32. Ms. Rombeau was aware of the special challenges for Claimant's parents after the birth of their medically fragile third child and confirmed the Service Agency's approach is to review the total circumstances. She confirmed Service Agency was not satisfied it had the information required to support behavioral respite and personal assistance, based upon the information Service Agency received from the insurer, and the prior behavior provider. (Exs. 3, 4.)

33. Ms. Rombeau confirmed the Service Agency agreed to continue funding behavioral level of support for these services after the private insurer denied the services for six months to allow the family an opportunity to appeal the decision of the insurer. Service Agency performed a review of the behavioral services on June 16, 2021, at which time the denial from the insurance company had not been resolved. (Ex. 10.) Based upon the consultant's conclusion, Claimant made significant progress, but concerns remained about the same behaviors reported above in the community and home setting. The consultant recommended six additional months of ABA services at 12 hours direct per week and 14 hours supervision. (Ex. 10.)

34. On March 10, 2022, Service Agency secured another review of behavioral services with a behavior consultant. Service Agency's consultant reviewed Achieve's report and progress reports, including the most recent behavioral progress report, of the prior service provider. (Ex. 15.) Service Agency's consultant acknowledged the behaviors reported by the service providers were established, but at very low rates.

35. Service Agency's consultant acknowledged the elopement and tantrum-related safety concerns reported by Claimant's mother. The consultant recommended

continued funding for ABA services until insurance funds the services but did not recommend continued funding for behavioral-level respite and personal assistant services based on the reported rates of behaviors. (Ex. 15.)

36. Arpi Arabian, Psy.D., BCBA, Behavioral Support Supervisor for the Service Agency, formerly its Autism Clinical Specialist, (Exhibit 1), provided further explanation of the Service Agency's decision process when faced with a change in the level of services, here behavioral to nonbehavioral respite and personal assistant services. She was familiar with Claimant's documentation and circumstances but had never personally assessed or observed him. She examined the early behavior reports the behavior consultants retained by the Service Agency had also reviewed, including the ABA report dated February 28, 2021, from the prior behavior service provider, (Exhibit 8), and Claimant's progress on reducing the incidents of maladaptive behaviors noted by the prior behavior service provider and memorialized in Achieve's report, above. Dr Arabian considered Achieve's recommendation of a reduced rate of behavior services as a recognition of Claimant's lower rate of maladaptive behaviors.

37. Dr. Arabian reached the conclusion there was insufficient data that Claimant required a higher level of support to access the community and for social recreation and based upon the current data it was not a cost-effective use of resources to retain behavioral support staff for respite or personal assistance. Data should be provided every six months. She emphasized to assess the effectiveness of behavior interventions appropriate goals directly related to the behaviors must be developed, and a behavior plan implemented as a basis for data collection. However, Achieve had prepared goals as had the previous provider and Dr. Arabian did not establish whether Achieve's goals were insufficient.

38. Dr. Arabian commented, staff providing personal assistance as a “second set of hands” are not there to determine appropriate structured interventions. A behavioral level of services are only needed where the intensity or frequency of behavior requires a heightened level of care. The respite and personal assistant is guided by the goals and behavior plan. ABA services are supposed to be applied consistently across settings and with all people interacting with Claimant.

39. During cross-examination, Dr. Arabian disagreed the behavioral respite and personal assistant services were properly made part of the exception criteria to the criteria requiring reliance on generic resources. She stated the respite and personal assistant services are part of the exception criteria because there is a general expectation such services are part of parental responsibility; however, the exception criteria does not apply here to a behavioral-level staff. Per Dr. Arabian, it is the responsibility of the ABA provider to develop goals for the home and community environments where Claimant interacts, e.g., restaurants, and to provide guidance to people who interact with Claimant.

40. It was Dr. Arabian’s opinion staff members who do not have formal ABA training can follow the guidance of the ABA behaviorists for this Claimant who has exhibited low levels of maladaptive behaviors including periods of no adverse behaviors. Dr. Arabian found notable Achieve recommended a lower level of behavioral intervention than the previous provider confirming her opinion Claimant’s behaviors have improved such that behavioral-level support was no longer required.

41. Dr. Arabian conceded the purpose of respite is different than that of a personal assistant who often accompanies Claimant’s mother. Claimant’s mother uses respite to do her errands and other appointments without Claimant and as such the

respite worker is alone. Additional support may be required in some cases, but it was not recommended here because of the low rate of behaviors reported.

CLAIMANT'S EVIDENCE

42. Claimant disagreed with the Service Agency's conclusion that a non-behaviorally trained respite and personal assistant could safeguard Claimant. Claimant's family has particular challenges with a newborn, Claimant and Claimant's older brother, both children with special needs. Claimant's witness and advocate Naomi Hagel testified and provided insightful and un rebutted testimony about the confusion and delay about continuing Claimant's social recreation support. According to Ms. Hagel, based upon the Service Agency's delay Claimant had been deprived of services, including social recreation and personal and respite services between April and late-May 2022. Claimant's mother did not have the resources to continue paying existing staff and did not know whether she could use the existing SDP budget to provide aide-paid-pending services until the dispute was resolved.

43. Claimant has participated in a variety of social recreation activities authorized as part of SDP goods and services under the category of Community Integration, Service Code 331, (Exhibits 70 and 71), which further his participation in the community including: Afterschool Program; Marshal Arts, Art Class, Computer Coding Class; Adaptive Ski Lesson; Horseback Riding; Social Skill Class and Swimming Lessons (Ex. C-26.) The Service Agency withdrew its objection to social recreation and as such, using staff to participate in social recreation once it confirmed its policy.

44. Claimant's mother testified and provided substantial and convincing evidence of Claimant and the family's ongoing challenges to support the continuation of behavioral respite and personal assistance. Claimant's mother has been unable to

fully help Claimant navigate the home, community and participate in social recreation unassisted due to the demands of the older sibling, also a Service Agency consumer, but most significantly, her need to attend to a medically-fragile newborn. Mother does not have the support of other family members because they reside outside the United States. Claimant's mother insisted she is still pursuing the insurer for coverage but has thus far been unsuccessful.

45. Claimant's mother's observations, and that of her current ABA provider, Achieve, of Claimant's behavior were given greater weight than the conclusions reached by the previous provider because the Achieve observation closer to the birth of Claimant's third child and the disruption in the family. Claimant requires a lot of stimulation and activities to reduce his behaviors. He has exhibited maladaptive behaviors in 2022 toward his medically-fragile younger sibling, who has been made eligible for Early Start services. Mother confirmed what Achieve noted, Claimant's maladaptive behaviors have increased with the added stress of a younger sibling. He engages in physically aggressive behaviors once or twice daily by pinching, punching and scratching for upwards of an hour, throws objects once or twice daily, engages in elopement behaviors two to three times weekly, e.g., most recently trying to leave the house unsupervised by unlocking the doors, and tantrums two to three times weekly. He also continues to climb on furniture at the risk of his own safety, three to four times daily.

46. Mother's frustration addressing Claimant's needs while dealing with a medically-fragile infant was palpable during the hearing. Claimant needs constant stimulation and his behaviors become worse when he is bored or wants attention. She cannot go out with him unaccompanied by an aide. Claimant requires social interaction and recreation in the community, and she had to curtail his social

recreation activities when she did not have access to staff. Claimant's father is largely unavailable because of his work, but to accommodate his family has adjusted his hours and has taken time off of work.

47. Claimant's mother has some experience looking for staff. Claimant's mother has the additional challenge of not been able to use all her IHSS hours for Claimant and his older sibling based on limits imposed on her by IHSS rules, she needs to hire staff for some of the hours. She found it was difficult to find anyone to work with a child with special needs at an affordable hourly rate. She has sought providers with special behavior management training and has also sought providers who are Korean-language speakers and are familiar with the Korean community. Claimant's mother relied upon an interpreter during the fair hearing, has requested Korean-language interpretation at IPP meetings, and appears to be more comfortable speaking Korean.

DISPOSITION

48. The testimony and exhibits provided confirm Claimant's principle challenge for which specialized services are required is his capacity and skill at elopement, and to a lesser extent other behaviors reported by Achieve and Claimant's mother. Significantly, the evidence provided demonstrates the unique circumstances for which behavioral respite is required. Claimant's mother has multiple and competing obligations as Claimant's principal caretaker which increases the risk of his maladaptive behaviors escalating. To adequately attend to Claimant given her current competing obligations she requires reliable and behaviorally-trained staff who are also proficient in the Korean-language at least during this SDP plan year.

49. Service Agency requires documentation of goals every six months to adequately measure progress. Service Agency's agreement to extend behavioral level services until September 30, 2022, is an acknowledgement of the confusion and delay caused by the absence of a social recreation policy.

50. The weight of the evidence supports funding for the full second year of the SDP, through March 30, 2023, not six months. If needed, updated goals and objectives should be incorporated into the IPP and as highlighted by Dr. Arabian, data must be taken at least every six months to measure progress on the goals and objectives. Any absence of such goals and objectives in the IPP was not the fault of Claimant and is not a basis for curtailing services. There appears to be confusion as to what specificity is needed in the IPP regarding personal assistance support for specific community integration activities, like social recreation, or whether that was understood as part of the parental choice imbedded in the SDP. Time is needed to implement the goals and objectives proposed by Achieve, to continue parent training, and to allow more time for Claimant's primary caretaker to manage for the benefit of Claimant, with assistance, the multiple pressures she is facing, exhaust the appeal process with Claimant's insurer or submit another claim based upon more recent data, and adjust to any change in staff at the end of the plan year. Ideally, the ABA provider shall be responsible for staff training of future non-behavioral respite and personal assistance staff. If needed the budget should be enlarged to accommodate the transition to non-behavioral staff, if appropriate, in the future.

51. Claimant's mother insists that staff must be "culturally sensitive." It is reasonable under all of the aforementioned circumstances for Claimant to be provided with staff that can communicate in Korean, his family's language of choice, and are respectful of any identified culture-specific issues. However, Claimant's mother may

not dictate the race or ethnicity of staff. For the remainder of this SDP plan year, the weight of the evidence supports retaining the current behavioral staff, if available, who can communicate with Claimant's mother in the Korean-language. While this may not be necessary at the end of the two-year term of the SDP, given the competing demands on Claimant's mother, and the impact this has on Claimant, she requires an ease of communication with the staff.

LEGAL CONCLUSIONS

1. An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a contrary regional center decision. (Code §§ 4700-4716.)¹ Claimant's family timely appealed the service agency's decision to terminate an existing service, and therefore jurisdiction exists for this appeal. (Factual Findings 1-9.)

2. When one seeks government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) Where a change in services is sought, the party seeking the change bears the burden of proving that a change in services is necessary. (See Evid. Code, § 500.) Here, the service agency is seeking to change the services it offered and as such has the burden of proof. The standard of proof in this case is a preponderance of the evidence because no law or statute (including the Lanterman Act) requires otherwise. (See Evid. Code, § 115.) This standard is met when the party bearing the burden of

¹ Undesignated statutory references are to the Welfare and Institutions Code.

proof presents evidence that has more convincing force than that opposed to it.
(*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Relevant Provisions of the Lanterman Act

3. A service agency is required to ensure the provision of services and supports to consumers that meet their individual needs, preferences, and goals as identified in their individual program plan. (Welf. & Inst. Code, §§ 4501; 4512, subd. (b); 4646, subd. (a).)

4. A. Code section 4685.8 governs regional center consumers participating in the SDP. The purpose of the SDP is to provide consumers (also referred to as participants) and their families, within an individual annual budget, increased flexibility and choice, and greater control over decisions, resources, and needed and desired services and supports to implement their IPP. (*Id.*, subd. (a).)

B. "Self-determination" is defined in the statute as a voluntary delivery system consisting of a defined and comprehensive mix of services and supports, selected and directed by a participant through person-centered planning, in order to meet the objectives in their IPP. Self-determination services and supports are designed to assist the participant to achieve personally defined outcomes in community settings that promote inclusion. (*Id.*, subd. (c)(6).)

C. When developing the individual budget, the IPP team determines the services, supports, and goods necessary for each consumer, based on the needs and preferences of the consumer, and when appropriate the consumer's family, and the effectiveness of each option in meeting the goals specified in the IPP, and the cost effectiveness of each option, as specified in section 4648, subdivision (a)(6)(D). (*Id.*, subd. (b)(2)(H)(i).)

D. The participant shall utilize the services and supports available within the SDP only when generic services and supports are not available. (*Id.*, subd. (d)(3)(B).) Generic services and supports should be used when appropriate. (Code § 4646.4.) It is the intent of the Legislature in implementing the IPP, the planning team first consider services and supports in the natural community, home, work and recreational settings. (Code § 4648, subd. (a)(2).)

E. Services and supports mean specialized services and supports or adaptations of generic services and supports directed toward the alleviation of the developmental disability or toward the social, personal, physical or economic habilitation or rehabilitation of an individual with a developmental disability...and shall include, but are not limited to, the diagnosis, evaluation, treatment, personal care, daycare, domiciliary care, special living arrangements, physical, occupational, and speech therapy, training, education, supported and sheltered employment, mental health services, recreation, counseling adaptive equipment and supplies, behavior modification.” (Code § 4512.)

F. Other sources of funding including government, such as Medi-Cal, Medicare, school districts, federal supplemental security income, and other entities or programs should be used for regional center services. (Code § 4659.)

5. Pursuant to Code section 4685.8, subdivision (n)(1), the IPP team shall determine the initial and any revised individual budget for the participant using the following methodology:

(A)(i) Except as specified in clause (ii), for a participant who is a current consumer of the regional center, their individual budget shall be the total amount of

the most recently available 12 months of purchase of service expenditures for the participant.

(A)(ii) An adjustment may be made to the amount specified in clause (i) if both of the following occur:

(I) The IPP team determines that an adjustment to this amount is necessary due to a change in the participant's circumstances, needs, or resources that would result in an increase or decrease in purchase of service expenditures, or the IPP team identifies prior needs or resources that were unaddressed in the IPP, which would have resulted in an increase or decrease in purchase of service expenditures.

(II) The regional center certifies on the individual budget document that regional center expenditures for the individual budget, including any adjustment, would have occurred regardless of the individual's participation in the Self-Determination Program.

6. In requiring a regional center to certify its expenditures would have occurred regardless of the consumer's participation in the SDP, it is clear that other provisions of the Lanterman Act not expressly exempted in Code section 4685.8 still apply to funding determinations within the SDP process. For example, there is nothing in section 4685.8 exempting the Legislature's intention set forth in Code section 4646, subdivision (a), "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."

7. The SDP process is relatively new. The multiple revisions made by the Service Agency to the SDP Budget were in keeping with its effort to reconcile its understanding of the data it had reviewed regarding Claimant's need for behavioral-level support for respite and personal assistance, Claimant's need to pursue insurance, and its delay in accepting social recreation as an appropriate use of staff respite or personal assistance.

8. In its third revision of the SDP budget, Service Agency did present a compromise which it thought would allow time for Claimant to exhaust efforts to obtain insurance coverage, and perhaps to transition to non-behavioral staff. Given the recent notice of the revised budget in July, Claimant will have less than three months to transition to non-behavioral resources. The evidence does not support the termination of behavioral-level services on September 30, 2022.

9. Service Agency's did not satisfy its burden of proof that Claimant does not require behavioral-level respite and personal assistant services, including for social recreation, by reason of the factual findings. Claimant's appeal is granted with conditions set forth below.

ORDER

1. Claimant's appeal is granted.

2. Claimant shall be entitled to behavioral-level ABA respite and personal assistance staff services, including social recreation, through the end of the second SDP plan year, March 31, 2023, with staff competent in the Korean-language.

3. The parties shall cooperate to obtain and share data on Claimant's progress and implementation of goals and objectives developed by Achieve or another vendor retained by Claimant, on no less than a six-month basis.

4. Claimant's family shall provide Service Agency with written documentation of all efforts to pursue insurance coverage for ABA services.

5. Claimant shall request Achieve or another vendor develop a transition and training plan for parents and/or staff providing IHSS, respite and personal assistant services for Claimant.

6. Service Agency shall increase the budget for the current plan year to include the rate of behavioral-level respite and personal assistant services through March 31, 2023, and any additional costs required for transition plan development for parents and staff not included in the ABA service budget.

DATE:

EILEEN COHN
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.