

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

In the Matter Of:

CLAIMANT

V.

SAN DIEGO REGIONAL CENTER, Service Agency

OAH No. 2022070573

DECISION

Robert Walker, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 16 and September 8, 2022. The proceeding was conducted by video conference.

Claimant's mother represented claimant.

Bridgette Webster, Attorney at Law, represented San Diego Regional Center.

The record was closed and the matter was submitted for decision on September 8, 2022.

EXHIBITS

Before the hearing on August 16, 2022, regional center uploaded Exhibits 1 through 9 into Case Center. Claimant was having difficulty using Case Center, and as an accommodation, regional center uploaded certain documents for claimant as Exhibit 10. Claimant uploaded Exhibits C 1 through C 9. Those exhibits, which were uploaded before the hearing, were admitted in evidence.

At the end of the hearing on August 16, 2022, the record was held open to permit claimant to submit additional evidence that his primary and secondary insurers denied his request for a particular service. Claimant uploaded Exhibits C 10 through C 17.

In a telephone conference on September 2, 2022, regional center objected that many of the documents in Exhibits C 10 through C 17 were not evidence of the insurers' denials. That objection was sustained. Exhibit C12, a denial by claimant's secondary insurer, was admitted in evidence. However, Exhibits C 10, C 11, and C 13 through C 17 were excluded.

ISSUE

Is claimant entitled to have San Diego Regional Center fund a second registered behavior technician (RBT) so that claimant can receive applied behavioral analysis (ABA) services?

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a regional center consumer. He is 19 years old and is eligible for Lanterman Act services pursuant to a diagnosis of autism spectrum disorder. (The Lanterman Developmental Disabilities Services Act is found at Welfare and Institutions Code section 4500 et seq.)

2. Claimant lives with his parents and sisters. His maternal grandmother resides in the home four days per week. Claimant attends a non-public school, TERI Learning Academy. San Marcus Unified School District pays the tuition.

3. Claimant has been diagnosed with autism spectrum disorder. The regional center acknowledges that claimant is autistic and is entitled to Lanterman Act services. On May 11, 2021, Jessica Hogan, Psy.D., and Pantea Sharifi-Hannauer, M.D., assessed claimant. Dr. Sharifi-Hannauer is claimant's neurologist. The assessment included classroom observation, consultation with claimant's teacher, and a clinical interview with claimant's mother. Dr. Hogan administered the Childhood Autism Rating Scale - second edition, the Autism Spectrum Rating Scales – parent report, and the Vineland Adaptive Behavior Scales – parent report. Dr. Sharifi-Hannauer reviewed claimant's medical records. Dr. Hogan and Dr. Sharifi-Hannauer's diagnostic impressions were: "Autism Spectrum Disorder – level three, requiring substantial support." Their specific recommendations regarding claimant's needs included: Intensive one-on-one speech therapy for at least two hours per week; occupational therapy for at least one hour per week; in-home ABA services for at least 30 hours per week; a one-on-one aide to help claimant engage in tasks, daily living, and social

interaction; and an individualized education plan that provides for extensive special services.

4. As of June 28, 2022, claimant was authorized to receive 120 hours of respite per quarter. The ratio of respite workers to claimant is 2 to 1. TERI is the respite provider.

Claimant's Behaviors Pose a Threat to His Safety and the Safety of Others

5. Claimant's behavior is unpredictable. He has emotional outbursts. He is physically aggressive and injures himself and others. He causes his mother to have bruises on her arms and legs. He hits his face and head against car windows, punches walls, kicks, hits, and slaps. Claimant hits his face and eyes with his knees. Claimant is six feet tall and weighs over 200 pounds. He poses a threat to his own safety and to the safety of people around him.

6. The regional center required that claimant have an adaptive behavior support plan, i.e., a behavior intervention plan. The plan provides: The Claimant's behaviors can be severe, and when they are staff should use a blocking pad to prevent him from hitting his head with his knees or table. Multiple staff should be ready to intervene. When emergency procedures are required, staff should use padded block shields, personal protective equipment, claimant's helmet, padding for hard services, assaultive behavior safety training, a two-person escort, two-person standing containment, two-person seated containment, and basket hold. These emergency procedures should be used only when claimant's behavior presents a serious risk of harm to claimant or others. Claimant's self-injurious behavior can be severe. His

aggression can be severe. His school team reports requiring two or more people to safely navigate responding to the self-injurious behavior and the aggression.

Claimant's ABA services

7. Claimant's individual program plan (IPP) dated November 25, 2020, provided that, as of that date, the regional center was funding applied behavioral analysis (ABA) services until December 31, 2020. Claimant's private insurance was expected to fund the ABA services after that. In an IPP dated June 28, 2022, there is no mention of ABA services.

8. For some time, claimant received ABA services from TERI. Claimant's primary insurer, BlueCross BlueShield of Texas (BCBSTX), provided the funding. TERI advised claimant's parents that, in order to continue providing services to claimant, they would need funding for a second RBT. The 2 to 1 ratio was necessary for claimant's safety and the safety of the RBT. The parents authorized TERI to seek that funding from BCBSTX.

9. In approximately September or October 2021, TERI stopped providing the ABA services.

10. Someone applied to BCBSTX for funding for a second RBT. There is no evidence as to who filed the application. By a letter dated January 23, 2022, addressed to claimant, BCBSTX denied the request to fund a second RBT. BCBSTX said the reason for the denial was "Medical Necessity Criteria Not Met." The letter said:

The clinical rationale for the denial of the request for benefit/service is:

You need a test from a doctor that says you have Autism every three years. A test and not just a letter. The clinic also needs to test you every six months to continue care. Your provider is asking for more staff to keep you safe. Your provider can do this with the codes you have now. The type of care requested is not the type of care that will be provided. You can get that type of care that will keep you safe at another type of clinic. From the information provided, you can be safely treated with the currently authorized 24 hours per week (20 hours of direct treatment + 2 hours of supervision + 2 hours of parent training) of ABA Services authorized from 1.4.22 – 7.4.22. The last covered day is: No days/units of 0373T¹ authorized. The last covered day of the previously approved, concurrent authorization is 7.4.22.

11. Claimant's parents do not want to institutionalize him. They want him to live at home.

12. On February 3, 2022, TERI filed an appeal with BCBSTX. And by a memorandum dated February 11, 2022, BCBSTX Notified TERT that the appeal was denied.

¹ Apparently, whoever filed the request for a second RBT used the current procedural terminology code (CPT Code) "0373T."

13. BCBSTX provided claimant with a copy of the BCBSTX policy concerning ABA reimbursement for a patient who exhibits destructive behavior. There is a reference to CPT Code 0373T. The policy provides that funding pursuant to that code must be for assessment or direct treatment of severe maladaptive behavior, must be administered by a qualified health care professional who is on site with the assistance of two or more technicians, and must be completed in an environment that is customized to the patient's behavior.

14. On March 3, 2022, TERI applied to the secondary insurer. Medi-Cal is claimant's secondary insurer, and Molina Healthcare of California (Molina), is the carrier for Medi-Cal. By a fax dated March 7, 2002, Molina advised TERI that the application TERI submitted did not include a denial letter from the primary insurer. "Please re-submit the completed Molina service request along with the current progress notes and the denial letter from the primary insurance"

15. By a letter dated March 9, 2022, BCBSTX responded to a request for an external review of the denial of a second RBT. The letter is addressed to TERI, attention [claimant's grandmother], so it is not exactly clear who requested the external review. The reviewer upheld BCBSTX's denial of a second RBT.

16. Claimant's parents applied to the regional center to fund a second RTB.

17. By a notice of proposed action dated June 22, 2022, the regional center advised claimant's mother that the regional center denied the request to fund a second RBT. The reason for the denial was that "Generic resources (primary and secondary insurance) should be accessed for ABA services."

18. At hearing, the regional center asserted two additional grounds for denying the request. The regional center contended that it cannot fund ABA services

for an adult because it is not evidence based, i.e., the regional center contended that there is inadequate evidence that adults benefit from ABA services. Further, the regional center contended that it cannot fund a second RBT because the purpose of having a second RBT is to be able to restrain claimant, and claimant has a right not to be restrained.

19. By a fair hearing request dated July 12, 2022, claimant's mother appealed the regional center's denial of the request to fund a second RBT. And that appeal is the subject of the present proceeding. In the fair hearing request, she wrote:

SDRC denied the request to fund a second RBT for intensive ABA services. We exhausted all the resources available through private insurance and Medi-Cal We contacted several agencies to no avail. Teri is capable to address [claimant's] severe maladaptive behavior if 2 to 1 staffing is provided.

As payor of last resort, SDRC must fund the additional RBT so [claimant] can receive the ABA services he desperately needs. [Claimant] benefitted from receiving ABA services in the past and has regressed significantly in the 9 months he has been without therapy.

20. By a memorandum dated August 18, 2022, Molina denied coverage. The following is a summary of the memorandum: Primary coverage is through BCBSTX, and Autism treatment is covered. The primary insurer has authorized some services for autism treatment but denied some as not medically necessary. Medi-Cal, as a secondary insurer, covers services only when the primary insurer excludes the benefit

from coverage. That was not the case here. Medi-Cal, as a secondary insurer, does not cover a partially denied service.

Testimony of Melissa Melgar

21. Melissa Melgar is the San Diego Regional Center Coordinator of Behavioral Services. She has been with the regional center for five years. She holds a master's degree in clinical psychology. Before coming to the regional center, she worked in outpatient programs.

22. Claimant's family requested the regional center to fund both respite care and a second RBT. The regional center approved the request for respite.

23. Ms. Melgar referred to the BCBSTX policy statement about CPT Code 0373T. She said the assessment or treatment must be in an environment customized to the patient's needs. The requirement that the assessment or treatment must be completed in an environment customized to the patient's behavior does not necessarily mean that the patient must be institutionalized outside the home.

24. When a regional center consumer has insurance and requests the regional center to provide a service, the consumer must show a denial by both the primary and secondary insurer.

25. Ms. Melgar said it appears that CPT Code 0373T was the wrong code, and that was TERI's fault. The February 2022 denial was because TERI used the wrong code.

26. Ms. Melgar said that another reason BCBSTX denied the request for a second RBT was that ABA services for claimant, at his age, would not be evidence based. In the independent external review provided to TERI under cover of the letter

dated March 9, 2022, the reviewer said the clinical information provided does not indicate that the patient continued to benefit from ABA services despite several years of treatment. The patient appears to have reached maximum benefit from ABA services.

27. In support of her testimony that ABA services are not evidence based for an adult with autism spectrum disorder, Ms. Melgar referred to Exhibit 5, Matrix of Evidence-Based Practices, Outcomes, and Age Categories. It is published by the California Autism Professional Training and Information Network. It is a review of autism evidence and practice. In columns, the matrix lists 13 skills, abilities, and activities. On lines, the matrix lists 27 interventions for treating autism. Ms. Melgar testified about two of the 27 interventions as examples of ABA interventions. One example was antecedent-based interventions. The matrix represents that for children 15 to 22 years, it can be beneficial regarding five of the listed skills, abilities, and activities. It can be beneficial regarding academic/preacademic, adaptive/self-help, challenging interfering behavior, communication, and mental health. The other example Ms. Melgar testified about was discrete trial training. The matrix represents that for children 15 to 22 years, it can be beneficial regarding two of the listed skills, abilities, and activities. It can be beneficial regarding academic/preacademic and communication. Based on the matrix, Ms. Melgar testified that, for adults, ABA is not evidence based.

28. Ms. Melgar noted that the external reviewer pointed to the fact that TERI intended to use the second RBT during regular treatment in order to provide safety, administer holds, and remove the patient to a safer location. This is not an approved use of CPT Code 0373T.

29. Ms. Melgar observed that claimant was receiving services in TERI's clinic.

30. Ms. Melgar testified that claimant has not satisfied the requirement that he attempt to secure the service through his insurance companies because he used the wrong CPT Code.

31. The regional center urged claimant's family to try to find some other ABA provider who would be willing to provide ABA services to claimant with only one RBT, which would avoid the whole issue of BCBSTX being unwilling to fund a second RBT. Rebecca Hamada, a program manager with the regional center, communicated with claimant's grandmother about that. Ms. Hamada sent claimant's grandmother an e-mail dated June 14, 2022, saying the documentation we would need to see would be:

Written denials form other ABA agencies saying they cannot work with [claimant] 1:1

Copies of assessments that ABA agencies completed before declining to work with [claimant]

Documentation of any follow-up calls with ABA agencies regarding waitlists

Denial from BCBSTX showing that you have sent them the denials from ABA agencies proving no agency is willing to serve him & BCBSTX us still denying the additional staff

Denial from Molina showing you have sent them the denials from BCBSTX & Molina is still not funding the service

32. But even if the regional center had denials from both of the insurers, the regional center could not fund a second RBT because, at claimant's age, ABA services

are not evidence based, i.e., there is insufficient evidence that an adult can benefit from ABA services.

33. Ms. Melgar testified that the regional center cannot fund a second RBT because he or she might need to restrain claimant.

Claimant's Mother's Testimony

34. Claimant's conduct poses serious risks to his safety. His neurologist, Dr. Hannauer, prescribed a helmet. When claimant has an episode at home, his mother puts the helmet on him. At times, he needs to be restrained because he knees himself in the face. He could, for example, detach a retina. He is over six foot tall and weighs over 220 pounds. He is strong.

35. Claimant did submit a report diagnosing autism. Claimant submitted it to BCBSTX and to Molina. Dr. Hannauer diagnosed level three autism. She administered standardized tests, including the Childhood Autism Rating Scale (CARS) and the Vineland. And claimant submitted that to the insurance companies.

36. The clinic at TERI provides an environment that satisfies the requirements of claimant's behaviors.

37. TERI stopped providing ABA services because it was not safe for claimant or the RBT.

38. When TERI was providing ABA services, claimant made progress. He learned letters and numbers. He expanded his vocabulary and learned to read.

Claimant's Grandmother Testified

39. Claimant's grandmother's testimony focused primarily on demonstrating that BCBSTX's decision to deny the request to provide a second RBT was incorrect. Particularly, she presented evidence that BCBSTX's reading of CPT Code 0373T was incorrect and too restrictive.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500.) "'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.) Claimant has the burden of proving that she is entitled to the service she is requesting.

2. The standard of proof is proof by a preponderance of the evidence. (Evid. Code, § 115.)

Statutory Provisions Regarding the Extent of Entitlement to Services

3. Welfare and Institutions Code section 4512, subdivision (b), provides:

"Services and supports for persons with developmental disabilities" means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability

or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of an independent, productive, and normal life. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, 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 of the individual with a developmental disability and of the individual's family, protective and other social and sociolegal services, information and referral services, follow-along services, adaptive equipment and supplies, advocacy assistance, including self-advocacy training, facilitation and peer advocates, assessment, assistance in locating a home, childcare, behavior training and behavior

modification programs, camping, community integration services, community support, daily living skills training, emergency and crisis intervention, facilitating circles of support, habilitation, homemaker services, infant stimulation programs, paid roommates, paid neighbors, respite, short-term out-of-home care, social skills training, specialized medical and dental care, telehealth services and supports, as described in Section 2290.5 of the Business and Professions Code, supported living arrangements, technical and financial assistance, travel training, training for parents of children with developmental disabilities, training for parents with developmental disabilities, vouchers, and transportation services necessary to ensure delivery of services to persons with developmental disabilities. This subdivision does not expand or authorize a new or different service or support for any consumer unless that service or support is contained in the consumer's individual program plan.

4. Welfare and Institutions Code section 4646, subdivision (a), provides:

It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, when

appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

5. Welfare and Institutions Code section 4648, subdivisions (a)(1)-(a)(3) provide, in part:

In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities, including, but not limited to, all of the following:

(a) Securing needed services and supports.

(1) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities to achieve the greatest self-sufficiency possible and to exercise personal choices. The regional center shall secure services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan, and within the context of the individual program plan, the planning team shall give highest preference to those services and supports that would allow minors with developmental disabilities to live with their families, adult

persons with developmental disabilities to live as independently as possible in the community, and that allow all consumers to interact with persons without disabilities in positive, meaningful ways.

(2) In implementing individual program plans, regional centers, through the planning team, shall first consider services and supports in natural community, home, work, and recreational settings. *Services and supports shall be flexible and individually tailored to the consumer* and, if appropriate, the consumer's family.

(3) *A regional center may, pursuant to vendorization or a contract,* purchase services or supports for a consumer from an individual or agency that the regional center and consumer or, if appropriate, the consumer's parents, legal guardian, or conservator, or authorized representatives, determines will best accomplish all or part of that consumer's program plan. (Italics added.)

Regional Center's Obligation to Identify and Acquire Funding

6. Welfare and Institutions Code section 4659 provides, in part:
 - (a) Except as otherwise provided in subdivision (b) or (e), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

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

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

The Purpose of the Lanterman Act

7. Welfare and Institutions Code section 4501 sets out the purpose of the Lanterman Act. That section provides, in part:

The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors, and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance.

The complexities of providing services and supports to persons with developmental disabilities requires the coordination of services of many state departments and community agencies to ensure that no gaps occur in

communication or provision of services and supports. A consumer of services and supports, and where appropriate, his or her parents, legal guardian, or conservator, shall have a leadership role in service design.

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

Regional Centers Have an Obligation to be Cost Conscious

8. As noted above, Welfare and Institutions Code section 4512, subdivision (b), provides, in part:

The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in

the individual program plan, *and the cost-effectiveness of each option.* (Italics added.)

9. As noted above, Welfare and Institutions Code section 4646, subdivision (a), provides, in part:

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

10. Welfare and Institutions Code section 4646.4, subdivision (a)(2), provides that regional centers shall ensure “utilization of generic services and supports if appropriate.”

11. Welfare and Institutions Code section 4648, subdivision (a)(8), provides, in part:

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

Securing Services and Supports that a Consumer Needs Is the Primary Focus of Regional Centers

12. As noted above, Welfare and Institutions Code section 4646, subdivision (a), provides:

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

13. Welfare and Institutions Code section 4648, subdivision (a)(1), provides, in part:

In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities, including, but not limited to, all of the following: Securing needed services and supports. It is the intent of the Legislature that services and supports assist individuals with developmental disabilities to achieve the greatest self-sufficiency possible and to exercise personal choices.

14. Welfare and Institutions Code section 4659, subdivision (a), provides:

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

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

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

ABA Services Shall Not Be Discontinued Without a Review

15. Welfare and Institutions Code section 4686.2, subdivision (b), provides, in part:

(b) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional centers shall:

(1) Only purchase ABA services or intensive behavioral intervention services that reflect evidence-based practices, promote positive social behaviors, and ameliorate behaviors that interfere with learning and social interactions.

(2) Only purchase ABA or intensive behavioral intervention services when the parent or parents of minor consumers receiving services participate in the intervention plan for the

consumers, given the critical nature of parent participation to the success of the intervention plan.

(3) Not purchase either ABA or intensive behavioral intervention services for purposes of providing respite, day care, or school services.

(4) Discontinue purchasing ABA or intensive behavioral intervention services for a consumer when the consumer's treatment goals and objectives, as described under subdivision (a), are achieved. ABA or intensive behavioral intervention services shall not be discontinued until the goals and objectives are reviewed and updated as required in paragraph (5) and shall be discontinued only if those updated treatment goals and objectives do not require ABA or intensive behavioral intervention services.

(5) For each consumer, evaluate the vendor's intervention plan and number of service hours for ABA or intensive behavioral intervention no less than every six months, consistent with evidence-based practices. If necessary, the intervention plan's treatment goals and objectives shall be updated and revised.

Right to Be Free from Unnecessary Physical Restraint

16. Welfare and Institutions Code section 4502 provides for rights of persons with developmental disabilities. That section provides, in part:

(a) Persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the United States Constitution and laws and the Constitution and laws of the State of California. An otherwise qualified person by reason of having a developmental disability shall not be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity that receives public funds.

(b) It is the intent of the Legislature that persons with developmental disabilities shall have rights including, but not limited to, the following:

[¶] . . . [¶]

(8) A right to be free from harm, including unnecessary physical restraint, or isolation, excessive medication, abuse, or neglect.

Regional Centers Are the Payers of Last Resort

17. If a regional center consumer is entitled to a service or support pursuant to the Lanterman Act, the regional center must ensure that he or she receives it. If some other source of funding such as a school district or insurer also has a duty to provide the service or support but refuses to do so, the regional center must provide it. The regional center is the payer of last resort. Welfare and Institutions Code section 4659.10 provides:

It is the intent of the Legislature that this article shall be implemented consistent with the responsibilities of the department and the regional centers to provide services and supports pursuant to the requirements of this division and the California Early Intervention Program. It is further the intent of the Legislature that the department and the regional centers shall continue to be the payers of last resort consistent with the requirements of this division and the California Early Intervention Program.

Analysis

18. The regional center funded ABA services at the end of 2020 while claimant was applying for funding from BCBSTX. It appears that claimant continued to receive ABA services until TERI stopped providing the services for safety reasons. Claimant applied to his primary insurer, BCBSTX to fund a second RBT, but the company declined the request. Claimant appealed, and the denial was upheld. Claimant requested an external review, and again, the denial was upheld.

19. Claimant applied to the regional center to fund a second RBT, contending he was entitled to regional center funding because the regional center is the payer of last resort. The regional center denied the request on the ground that claimant had not exhausted the possibility of obtaining funding from private insurance.

20. Claimant then applied to the secondary insurer, Molina, but they, also, denied the request. The grounds for Molina's denial were such that one would have expected an appeal to be futile.

21. Claimant appealed the regional center's decision. At the hearing, the regional center asserted two additional grounds for denying claimant's request. The regional center contended that it cannot fund ABA services for an adult because it is not evidence based, i.e., the regional center contended that there is inadequate evidence that adults benefit from ABA services. Also, regional center contended that it cannot fund a second RBT because the purpose of having a second RBT is to be able to restrain claimant, and claimant has a right not to be restrained.

22. Regional Center failed to prove that claimant will not benefit from additional ABA services. Claimant has the burden of proof with regard to whether he is entitled to have the regional center provide a second RBT. But with regard to regional center's defense that ABA services are not evidence based for an adult, the regional center has the burden of proof.

23. In support of her testimony that ABA services are not evidence based for an adult with autism spectrum disorder, Ms. Melgar referred to Exhibit 5, Matrix of Evidence-Based Practices, Outcomes, and Age Categories. It is published by the California Autism Professional Training and Information Network. It is a review of autism evidence and practice. In columns, the matrix lists 13 skills, abilities, and activities. On lines, the matrix lists 27 interventions for treating autism. Ms. Melgar testified about two of the 27 interventions as examples of ABA interventions. One example was antecedent-based interventions. The matrix represents that for children 15 to 22 years, it can be beneficial regarding five of the listed skills, abilities, and activities. It can be beneficial regarding academic/preacademic, adaptive/self-help, challenging interfering behavior, communication, and mental health. The other example Ms. Melgar testified about was discrete trial training. The matrix represents that for children 15 to 22 years, it can be beneficial regarding two of the listed skills,

abilities, and activities. It can be beneficial regarding academic/preacademic and communication. Based on the matrix, Ms. Melgar testified that ABA is not evidence based.

24. However, the statute regarding evidence-based practices is not so blunt. It speaks discretely in terms of those services that reflect evidence-based practices. Disallowing all ABA services as not being evidence based for a particular population is inconsistent with the statute. Welfare and Institutions Code section 4686.2, subdivision (b)(1), provides that regional centers shall purchase only those "ABA services . . . that reflect evidence-based practices, promote positive social behaviors, and ameliorate behaviors that interfere with learning and social interactions." Thus, the statute requires addressing each ABA service that is proposed for a consumer and determining whether that ABA service is evidence based.

25. There was no evidence as to the nature and character of the various ABA services claimant was receiving. Ms. Melgar did not testify that certain ABA services claimant was receiving were not evidence-based for him. She simply treated all ABA services as not being evidence-based for adults. The statute requires a more refined and discrete analysis.

26. It is true that the reviewer who performed the external review for BCBSTX said that claimant had reached maximum benefit from ABA services, but he or she provided no evidence to support that conclusion. Moreover, in the paragraph prior to the one in which the reviewer expressed that conclusion, the reviewer says there is emerging evidence for the benefit of ABA services in adults with significant functional impairments related to autism spectrum disorder. Also, claimant's mother testified that, when TERI was providing ABA services, claimant made progress. He learned

letters and numbers. He expanded his vocabulary and learned to read. On this record it cannot be found that ABA services would not be evidence based for claimant.

27. And while Welfare and Institutions Code section 4686.2, subdivision (b)(4), deals with discontinuing ABA services, it is instructive. It provides that "ABA . . . services shall not be discontinued until the goals and objectives are reviewed and updated."

28. Regional center contends that it cannot fund a second RBT because the purpose of having a second RBT is to be able to restrain claimant, and claimant has a right not to be restrained. That simply is not true. Welfare and Institutions Code section 4502, subdivision (a)(8), provides that persons with developmental disabilities have a right to be free from harm, "including unnecessary physical restraint" The evidence is clear that there likely will be times when claimant will need to be restrained for the sake of his safety or the safety of people around him. Physical restraint should be a last resort. It should be as minimal as possible. People without appropriate training should not attempt it. Claimant's behavior intervention plan anticipates that it may be necessary to use two-person standing containment, two-person seated containment, and basket hold. These emergency procedures should be used only when claimant's behavior presents a serious risk of harm to claimant or others. But the fact that a second RBT may have to provide physical restraint is not a valid reason to refuse to fund a second RBT.

29. Ms. Melgar testified that TERI used the wrong CPT Code, but that was not a ground on which BCBSTX denied claimant's request. There is no evidence that there was a different code that claimant should have used. Ms. Melgar points out that BCBSTX focused on the fact that TERI was providing "regular" ABA services, but there is nothing in the language of BCBSTX's policy that suggests that a treatment must be

other than regular. Ms. Melgar points out that TERI was providing ABA services in its clinic. But BCBSTX's policy does not suggest a clinic would be inappropriate for "day treatment or intensive outpatient day treatment," – so long as the environment meets the patient's needs.

30. The regional center urged claimant's family to try to find some other ABA provider who would be willing to provide ABA services to claimant with only one RBT, which would avoid the whole issue of BCBSTX being unwilling to fund a second RBT. But that was not a response to claimant's request or appeal. There is evidence that claimant needs a second RBT for his safety and the safety of others. Finding an ABA provider who was willing to work with only one RBT would not have addressed the safety problem.

31. Claimant proved that he is entitled to have regional center fund a second RBT.

ORDER

San Diego Regional Center shall fund a second RBT to provide ABA services for claimant.

DATE: September 21, 2022

ROBERT WALKER
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.