

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

In the Matter of:

CLAIMANT

v.

SAN DIEGO REGIONAL CENTER

Service Agency

OAH No. 2022080755

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter remotely using the Zoom application on October 4, 2022. All parties and witnesses appeared by video.

Neil Kramer, San Diego Regional Center (SDRC) Fair Hearings Manager and Executive Director Designee, represented San Diego Regional Center (SDRC).

Claimant's mother represented claimant, who was not present.

Oral and documentary evidence was received. The record was closed, and the matter submitted for decision on October 4, 2022.

ISSUES

1. Should SDRC fund out of pocket monthly costs for private insurance so claimant can get Applied Behavioral Analysis services from the Center for Autism and Related Disorders (CARD)?
2. Should SDRC fund a day program for claimant?

FACTUAL FINDINGS

Background

1. Claimant is a 23-year-old man who qualifies for regional center services based on diagnoses of intellectual disability and epilepsy. Claimant also has Autism Spectrum Disorder and other chronic medical conditions.
2. According to claimant's most recent Individual Program Plan (IPP) completed on June 21, 2022, claimant was attending a day program through CARD, which was funded by his insurance, and SDRC assisted with copays. Claimant has both private insurance (Blue Shield) and Medi-Cal. Claimant's mother provides 283 hours per month of In-Home Supportive Services. Claimant's mother desired to explore a day program as well, and to learn more about the self-determination program.
3. Claimant needs physical assistance with all of his self-care tasks. Claimant's mother dresses, bathes, and completes all of claimant's hygienic needs. Claimant can eat with a fork and spoon with assistance but also receives supplementation through his gastrointestinal tube. Claimant utilizes an adaptable wheelchair when he is sick. Claimant uses sign language and gestures to communicate

his wants and needs. He is learning how to use a feature on his iPad to communicate as well. Claimant enjoys spending time with his family and being out in the community but now that he is out of school and has medical issues that require constant attention, he needs a day program that can accommodate those special needs.

4. A notice of proposed action was not included in the exhibits stating precisely what SDRC denied (i.e. the basis for this action); however, based on the informal meeting letter, discussed below, SDRC denied claimant's mother's request to pay monthly out-of-pocket costs of his private insurance so claimant could attend ABA through CARD; and although it did not deny funding for a day program, SDRC indicated that due to claimant's medical needs, it was difficult to locate a day program.

5. Claimant's mother filed a fair hearing request on August 17, 2022, requesting reimbursement for out-of-pocket costs of private insurance so claimant could continue to access ABA services through CARD. Claimant's mother also requested SDRC provide a day program for claimant.

6. The parties held an informal meeting on September 8, 2022, concerning the fair hearing request. Also in attendance at that meeting were claimant's consumer service coordinator, a manager of client services, and a coordinator of behavioral services. In a letter dated September 12, 2022, memorializing that meeting, Mr. Kramer wrote:

During our informal meeting you shared that [claimant] has been receiving ABA services through CARD, which has been covered by his health insurance benefits. You also shared that you currently pay approximately \$700 each month to keep your son in his private insurance plan. In addition,

[claimant] receives health care coverage through Medicaid as his supplemental insurance. The Medicaid program will no longer cover the costs for [claimant's] ABA services. In order for your son to continue to access ABA services, you will need to continue to pay the monthly private insurance costs, which has [s/c] become a financial burden in your current situation.

We discussed that his services through the CARD program have assisted your son with communication skills, safety issues, and connecting with others. You believe that ABA services are an essential service required to meet your son's current needs.

You shared that his services thorough the CARD program have assisted your son with communication skills, safety issues, and connecting with others. You believe that ABA services are an essential service required to meet your son's current needs.

You shared that [claimant] has regressed in many areas because he is not receiving day program services. He has been refusing to eat and is not using vocalizations to express his needs as frequently as he has in the past. You also expressed that [claimant] needs more socialization opportunities to assist with his emotional well-being.

We also discussed the SDRC's efforts to secure an appropriate day program to meet [claimant's] current needs. Due to your son's medical needs, SDRC staff shared the limited options available for day program services for your son. **SDRC staff have not denied funding for day program services;** however, they have been not able to locate a program at this time. [Claimant's] Service Coordinator, Ms. Pringle, assured us that she will continue to search for day program options for your son.

Based on the information presented at the informal meeting

1. Your request for SDRC to reimburse you for monthly out-of-pocket costs for [claimant's] private insurance coverage is denied; however the SDRC will provide funding for your son to receive ABA services through CARD for a period of six months. The SDRC will fund 45 hours for the first two months, 36 hours for the following two months, and 27 hours for the final two months. . . .

[¶] . . . [¶]

2. The SDRC has not denied funding for day program services for [claimant]; however, I understand the challenges both you, and your son, are currently facing [because we have not been able to locate an appropriate day program to meet his needs]. Ms. Pringle will continue her efforts to

search for alternative day program options for your consideration.

In order to provide additional relief to you, the SDRC will increase the level of respite service . . . from 40 hours each month/120 hours each quarter to 80 hours each month/240 each quarter. . . .

Evidence Presented by Regional Center

7. The following findings are based on testimony of the below-referenced witnesses and documentary evidence presented.

8. Melissa Melgar is the Coordinator of Behavior Services for SDRC and has been in that position for five years. Ms. Melgar holds a B.A. in psychology, an M.A. in clinical psychology, and is a board-certified behavioral analyst. She works with both children and adults. Ms. Melgar is familiar with claimant and reviewed the documentary evidence in this case. Ms. Melgar made the recommendation in the informal meeting that SDRC should fund ABA services for six months, tapering off by the hours indicated in the informal meeting letter. Ms. Melgar feels that many of the goals worked on in ABA can be addressed through independent living services (ILS). For example, things like doing chores, taking out trash, clearing a plate, waiting for his teeth to be brushed, etc. When Ms. Melgar reviewed claimant's goals, she saw that most of claimant's goals were met, so under Welfare and Institutions Code section 4686.2, subdivision (b)(1), ABA services should be phased out. Also, under Welfare and Institutions Code section 4686.2, subdivision (a)(4), when goals are achieved or the behaviors exhibited do not require ABA, any ABA services are supposed to be terminated. ABA is meant to help create replacement behaviors for challenging

behaviors and after reviewing all the documentary evidence, she believes the tapered plan offered in the informal meeting whereby claimant's ABA services would be discontinued after six months is appropriate.

9. Rachel Vedder holds a B.S. in psychology and biology; an M.A. in clinical psychology; and a Ph.D. in clinical psychology. Dr. Vedder has spent years working with individuals who have a developmental disability in a variety of settings and is now a staff psychologist for SDRC. Dr. Vedder has written thousands of reports and made corresponding eligibility decisions. Dr. Vedder is familiar with claimant's case and has discussed it with SDRC staff. Dr. Vedder was asked to make a determination whether claimant needed ABA services based on his level of functioning. She did not dispute that claimant needs assistance in virtually every level of functioning, however, she felt that claimant's functional abilities at present are "pretty much" where he is going to remain. She agreed with Ms. Melgar's testimony that, in reviewing claimant's records, the intensive ABA is not effective because claimant's functioning between 2018 and 2022 has not changed.

10. Robin Bello is the manager of client services at SDRC. She has a B.A. in human services and an M.S. in public health. Ms. Bello has also held positions at SDRC as a consumer services coordinator and program manager. Ms. Bello is familiar with claimant and, as explained by Ms. Melgar and Dr. Vedder, does not feel ABA is appropriate going forward. Instead, ILS is a more appropriate service to meet claimant's needs. If requested, SDRC – as it had offered in claimant's most recent IPP meeting - would fund ILS based on an assessment of claimant's needs. ILS can help claimant with skills such as cooking, cleaning, and community access (such as grocery shopping).

11. Mr. Kramer reiterated that SDRC has not denied the day program; rather, SDRC has been unable to find one that meets claimant's needs due to claimant's medical condition. He had no objection to continuing to search for an appropriate day program. In the meantime, he represented that SDRC would be able to increase the respite hours currently received to 120 hours per month/360 per quarter. Mr. Kramer also indicated, at the end of the hearing, that the ABA could be continued for the next six months and then reassessed at that time since CARD is an ABA vendor of IRC. With respect to claimant's request for out-of-pocket reimbursement for private insurance, Mr. Kramer indicated that the law only provides for copayment assistance for a service or support. As much as he would prefer to have SDRC fund the more cost-effective option of \$700 per month so the private insurance could provide the ABA services as opposed to having SDRC fund the entire cost of ABA services, there is no statutory mechanism to do that.

Evidence Presented on Behalf of Claimant

TESTIMONY OF EMPLOYEES OF CARD

12. Brittany Monclus is a group clinical manager for CARD and has been in that position for 18 years. She holds a B.A. in psychology, an M.A. in behavior analysis, and is a board-certified behavioral analyst. Her duties include overseeing clinical progress of patients and training the board-certified behavioral analysts that work for CARD. ABA is a science of behavior, systematically applying strategies to improve socially significant behaviors. The goal is always to see a decrease in inappropriate behaviors and an increase in good behaviors, while working on social deficits. ABA has been proven effective for every age; what research does not show is what the appropriate duration of ABA would be for each age group. Much more research is needed in that area. At CARD, there are clients that are claimant's age. All services are

individualized; they look at a consumer's needs and if the consumer continued to learn then the ABA is considered effective. They do not base their decisions to continue with ABA simply on a records review; progress is determined by ongoing assessments. This is always done because the only way they know if their interventions are working is if there is progress. They look for a consumer to be able to generalize all skills taught across multiple environments. Eventually, they will begin to fade and remove the level of service, but as this is done, they want to ensure continued success. Sometimes, when tapering down services happens too quickly, regression can occur. So, although ABA is not intended to last forever, the tapering process must be informed by personal observation of the board-certified behavioral analyst and data collection.

13. Marissa Brown is a CARD clinical supervisor and has worked for CARD for seven years. She holds a B.S. in kinesiology, an M.A. in applied behavior analysis, and is a board-certified behavioral analyst. She is also "Magellan" certified, which is a special credential in the field of applied behavior analysis. Ms. Brown supervises approximately 15 to 17 board-certified behavioral analysts. Ms. Brown concurred with the testimony of Ms. Monclus, especially on the point that ABA has been proven effective for all age ranges. Based on the data she reviewed, ABA is still appropriate for claimant. Ms. Brown testified concerning an ABA progress report, entitled "Magellan Progress Report," dated June 3, 2022. She noted that the report, in most areas, shows a steady rate of acquisition and skills. She reviewed all of the different curriculums and noted that the graphs all show claimant was benefiting from each intervention used in connection with the various curriculums. Overall, claimant has made significant progress but still has room to progress even more. Although other services such as ILS might help claimant meet his goals, claimant needs a lot of prompting and someone who is adequately trained in each skill set; based on CARD having worked with

claimant for the past five years, a person with lesser training than a board-certified behavior analyst might not be successful in helping claimant continue to progress.

CLAIMANT'S MOTHER'S TESTIMONY

14. Claimant's mother's testimony is summarized as follows: Claimant has been placed in a very difficult position because of the death of his father. Claimant has been receiving ABA services and was doing wonderful. The ABA services were funded by claimant's private insurance. Prior to claimant's father's death, the out-of-pocket costs for claimant's private insurance were paid for by the Health Insurance Premium Payment program (HIPP), offered through the California Department of Health and Human Services. When claimant's father died, claimant became eligible for Medicare. When this occurred, claimant's HIPP assistance was discontinued. The \$700 out-of-pocket costs that claimant's mother is now responsible for, in order to continue to pay for private insurance so claimant' can obtain his ABA services through CARD, is a financial burden.

Claimant's mother believes claimant benefits greatly from ABA services, and while she understands they cannot continue indefinitely, claimant currently needs those services. Claimant enjoys being out in the community, socializing, and spending time with people. Claimant needs constant supervision due to safety concerns and behaviors (when out in the community) that are not socially acceptable. ABA therapy is appropriate despite claimant being an adult because it has helped him – she sees evidence of that. While ILS might help claimant, many of those programs are not available and claimant's needs do not change simply because a service is not available. Personal assistant services are not appropriate because those services do not address behavior issues. Claimant's mother referred to a letter from claimant's doctor, Bretten D. Pickering, M.D., who indicated claimant has benefitting significantly from ABA, by

way of improved communication skills, social skills, and safety skills. Claimant's mother, also supported by the letter of Dr. Pickering, stated that claimant will regress if the ABA does not continue.

At present, claimant is receiving nine hours of ABA through CARD and those services are meeting claimant's needs. Claimant's mother would like to continue those services rather than tapering them down as suggested at the informal meeting because the services should not be tapered unless an assessment of his functioning is completed. She also reiterated that everything was going fine with claimant's ABA services until claimant's father died in June of 2020 and it triggered claimant's eligibility for Medicare, which caused him to lose HIP. Claimant's mother explained the unique circumstance that she is in as follows: the purpose of HIP is essentially to save the state money by encouraging consumers to get private insurance, which can fund things like ABA. That way, HIP pays the minimal out-of-pocket while the private insurance pays for the ABA, which is expensive. When claimant became eligible for Medicare, he lost his HIP assistance and claimant's mother cannot afford the \$700 out-of-pocket costs to maintain private insurance. If SDRC were to fund ABA in its entirety, it would also be expensive. Thus, it seems reasonable and cost-effective for SDRC to pay the \$700 per month towards claimant's private insurance, which is why she requested that remedy.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish by a preponderance of the

evidence that IRC should fund the requested service. (Evid. Code, §§ 115, 500; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.)

The Lanterman Act

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

3. Welfare and Institutions Code section 4512, subdivision (b) defines "services and supports" as:

[S]pecialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of

independent, productive, normal lives. 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 . . . Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.

4. The department is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.) In order to comply with its statutory mandate, DDS contracts with private non-profit community agencies, known as "regional centers," to provide the developmentally disabled with "access to the services and supports best suited to them throughout their lifetime." (Welf. & Inst. Code, § 4620.)

5. A regional center's responsibilities to its consumers are set forth in Welfare and Institutions Code sections 4640-4659.

6. Welfare and Institutions Code section 4646 requires that the IPP and provision of services and supports be centered on the individual and take into account

the needs and preferences of the individual and family. Further, the provision of services must be effective in meeting the IPP goals, reflect the preferences and choices of the consumer, and be a cost-effective use of public resources.

7. Welfare and Institutions Code section 4648 requires regional centers to ensure that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and to secure services and supports that meet the needs of the consumer, as determined by the IPP. This section also requires regional centers to be fiscally responsible.

8. In implementing IPPs, regional centers are required to first consider services and supports in natural community, home, work, and recreational settings. (Welf. & Inst. Code, § 4648, subd. (a)(2).) Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family. (*Ibid.*) A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer in order to best accomplish all or any part of the IPP. (Welf. & Inst. Code, § 4648, subd. (a)(3).)

9. The regional center is required to consider all the following when selecting a provider of consumer services and supports: a provider's ability to deliver quality services or supports to accomplish all or part of the consumer's individual program plan; provider's success in achieving the objectives set forth in the individual program plan; the existence of licensing, accreditation, or professional certification; cost of providing services or supports of comparable quality by different providers; and the consumers, or, where appropriate, the parents, legal guardian, or conservative of a consumer's choice of providers. (Welf. & Inst. Code, § 4648, subd. (a)(6).)

10. The regional center is also required to consider generic resources and the family's responsibility for providing services and supports when considering the purchase of regional center supports and services for its consumers. (Welf. & Inst. Code, § 4646.4.)

11. Welfare and Institutions Code section 4659.1, subdivision (a), provides that a regional center may pay a copayment, coinsurance, or deductible towards private insurance under certain circumstances.

Evaluation

12. Claimant had the burden of proving that he is entitled to the relief sought in the fair hearing request. Claimant did not meet his burden with respect to requiring SDRC to pay \$700 per month out-of-pocket costs toward claimant's private insurance; and he did meet his burden in establishing that SDRC should provide a day program, to be explained more fully below.

13. With respect to the out-of-pocket costs, no applicable law provides that a regional center is obligated or permitted to pay out-of-pocket costs for private insurance. As such, although claimant's expenses may be a financial burden, there is no mechanism to permit SDRC to pay the \$700 per month premium cost. While doing so would certainly be more cost-effective and make more sense than regional center having to fund the full cost of ABA services, there still must be a statutory basis for regional center to do so. Accordingly, SDRC cannot pay \$700 a month towards a private insurance premium.

14. A preponderance of the evidence did establish, however, that claimant is continuing to benefit from nine hours per week of ABA services. Though there is some disagreement in the field as to whether adults benefit from ABA, Ms. Brown and Ms.

Monclus both established that the issue is not settled. In claimant's case, Ms. Brown established through her testimony and the Magellan Progress Report that claimant is continuing to benefit from ABA; as such, he should continue to receive ABA at the same level until a functional behavioral assessment or other assessment indicates he will no longer benefit from that level of service. SDRC can provide funding for CARD, who is a vendor that provides ABA services, for six months and make a determination at that time whether continued services are appropriate.

15. Finally, with respect to the day program, SDRC has not denied this service. SDRC does not dispute claimant needs this service. However, SDRC cannot control the fact that claimant has unique medical needs that render finding a day program difficult. SDRC is obligated to continue searching for an appropriate day program. In the meantime, unless and until one is found, SDRC has offered to provide increased respite at a rate of 120 hours per month/360 per quarter. SDRC shall continue to provide those respite hours, unless and until a replacement service is identified that might better address claimant's needs, or a day program becomes available.

ORDER

Claimant's appeal is granted in part and denied in part.

1. Claimant's appeal for SDRC to fund \$700 per month in out-of-pocket costs for private insurance is denied.

2. SDRC shall fund ABA services through CARD for a period of six months following the effective date of this decision, at the current level of nine hours per month, unless otherwise determined by an ABA progress report or functional

behavioral assessment that nine hours per month is no longer appropriate. After the six months, SDRC may re-evaluate the propriety of continuing to fund ABA services at that level and make adjustments as necessary, or offer other services is deemed necessary, to help claimant continue to meet his IPP goals. If any changes are made to the nine hours of ABA services and claimant's mother does not agree to those changes, SDRC shall issue a notice of proposed action.

3. SDRC shall continue to put forth best efforts to find an appropriate day program for claimant. Until an appropriate day program can be found, SDRC shall fund respite for claimant at a rate of 120 hours per month/360 per quarter, unless a replacement service or support that meets claimant's needs is identified. In the event SDRC determines respite services at that level is no longer appropriate or decides to replace all or part of the respite services with another service or support, SDRC shall follow the normal procedure and issue a notice of proposed action.

DATE: October 17, 2022

KIMBERLY J. BELVEDERE

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.