

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

Claimant,

v.

KERN REGIONAL CENTER,

Service Agency.

OAH Case No. 2016081202

DECISION

John E. DeCure, Administrative Law Judge, Office of Administrative Hearings, heard this matter on October 19, 2016, in Bakersfield, California.

Claimant<sup>1</sup> was not present, but his mother (Mother) and father (Father) were both present and represented him.

Mark Meyer, Program Manager Specialist, represented Kern Regional Center (KRC, or the service agency).

Evidence was presented and argument was heard. The matter was submitted for decision on October 19, 2016.

ISSUE

Should KRC be required to fund 78 hours per month of Applied Behavior Analysis<sup>2</sup> (ABA) therapy services for claimant?

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<sup>1</sup> Claimant's and his mother's and father's names are withheld to protect their privacy rights.

## FACTUAL FINDINGS

### BACKGROUND INFORMATION

1. Claimant is a 13-year-old KRC consumer based on his 2008 diagnosis of autism spectrum disorder and moderate intellectual disability, with substantial handicaps in the areas of communication, learning, self-care, self-direction and social functioning. He lives with Mother and his two brothers. On Tuesdays, Thursdays, and every other weekend, claimant has visits with Father, who also lives in Bakersfield. He requires assistance and supervision, with verbal prompting, when using the toilet, bathing, dressing, eating, brushing his teeth and with other personal hygiene. He also requires assistance and supervision for safety awareness, with safety skills, and to prevent elopement. Claimant is in excellent health. He is very physically active and demands constant monitoring. In July 2016, he fell while playing on a backyard playset, split open his right leg, and received 30 stitches on the inside and outside of the leg to mend the wound. Claimant attends Rio Bravo Greeley School, where he is enrolled in a Special Day Autism class.

2. Claimant was receiving ABA therapy services through the Center for Autism Related Disabilities (CARD) at a rate of 78 hours per month, consisting of 65 hours of therapy and 13 hours of supervision, until September 1, 2016, when KRC notified claimant of a proposed reduction in ABA funding from 78 hours to 66 hours per month. This proposed reduction came about as follows.

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<sup>2</sup> Applied Behavior Analysis is a scientific discipline involving the systematic application of interventions based upon the principles of learning theory in order to improve socially significant behaviors to a meaningful degree, and to demonstrate that the interventions employed are responsible for the improvement in behavior.

3. Since May of 2015, when claimant was receiving ABA services at a rate of 78 hours per month, the service agency's Autism Committee (the Committee) had raised a concern with claimant's parents that the committee believed these hours should be reduced. The service agency sought this reduction in service hours because, according to Mr. Meyer, who heads the Committee, CARD has not provided documentation of their attempts to reduce, or "fade," their support/intervention role with claimant's family. Mr. Meyer testified that CARD's lack of attempts to reduce claimant's hours was not surprising, as CARD's reputation as a frequent service provider to KRC clients is that they are not inclined to ever recommend reducing service hours they provide. Mr. Meyer, a licensed clinical social worker who specializes in autism-related issues, said the overarching long-term objective in caring for autistic clients is to move them toward living a more normal, non-disabled lifestyle with gradually less intervention from service providers and increased natural supports, including friends and family. This objective is reflected in KRC's purchase of service guidelines. The Committee believed CARD was not acting as responsibly as it should in connection with this objective by failing to even contemplate a reduction in hours.

4. The service agency further justified reducing the level of claimant's monthly ABA services by contending that the Lanterman Developmental Disabilities Services Act (Lanterman Act), which governs this case (Welf. and Inst. Code, § 4500 et seq.),<sup>3</sup> limits a regional center's funding for each claimant's ABA monthly services to 40 hours per month. In support of this argument, KRC noted that Welfare and Institutions Code section 4686.2, subdivision (c)(d)(2), defines "intensive behavioral intervention," or

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

ABA therapy that is “comprehensive, designed to address all domains of functioning, and provided in multiple settings for no more than 40 hours per week . . . .”

#### CARD’S EVALUATION AND REPORT

5(a). CARD issued its most recent clinical evaluation and progress report on claimant on May 21, 2016 (May 2016 CARD report). The May 2016 CARD report and assessment is extensive, containing 23 pages of detailed information regarding claimant’s therapies, his therapy goals, and claimant’s progress related to achieving each goal. According to the report, claimant faces multiple serious challenges. He engages in repetitive behavior by singing, and maladaptive behaviors which jeopardize his safety and the safety of others. His language skills require very substantial support, as he has severe deficits in verbal and nonverbal social communication skills, very limited social interactions, and minimal response to social overtures from others. These severe deficits limit him such that his social, play and cognition skills require very substantial support as well. His therapies have yielded slow progress in these areas. Claimant’s adaptive and motor skills require very substantial support due to the same severe verbal and nonverbal deficits and resulting severe impairments in functioning. Claimant has made slow progress since 2012 in acquiring better skills in this area.

5(b). The May 2016 CARD report also detailed a three-year history, from June 2013 to the present, of multiple medications prescribed to claimant for problem behaviors, including aggressive behavior, head-butting, slapping his own head, tantrums, hyperactivity, crying, yelling, screaming, clenching his teeth, and tensing his body. Multiple objectives were set forth to help claimant decrease these behaviors, including making demands and instructing claimant, waiting for appropriate behavior, redirecting claimant, prompting breaks, and reinforcing appropriate alternative behaviors. CARD also detailed claimant’s repetitive, nonfunctional singing (a form of echolalia) and screeching or screaming behaviors, with goals and objectives set forth to

diminish these behaviors. Claimant was noted to wet himself five times across 10 consecutive days, and the May 2016 CARD report set forth a plan of behavior modification to assist him with this problem.

5(c). CARD described the language lessons it employed to address claimant's language functioning and severe communication delays. Claimant is making progress in this area. In 2013, he could only identify two body parts, but currently he can identify 16. He is also being taught to imitate sounds so he can better form words. He cannot identify rooms or locations, and CARD's goal is for him to identify different rooms and locations from pictures. Claimant also cannot identify objects verbally, name people, or answer "yes" or "no" to questions, answer questions requesting personal information (e.g., what is his name). These are important communication and social interaction functions that need to be improved in order to reduce his challenging behaviors.

5(d). Claimant is still learning how to bathe himself. He does not know how to clean up after himself when eating, cannot brush his teeth without assistance, and needs verbal prompts regarding toilet training. He engages in high rates of maladaptive vocal behavior, but he has made some progress in inhibiting this behavior for up to eight seconds at a time when given a gesture or a visual cue.

5(e). The May 2016 CARD report concluded with caregiver and team training goals and objectives, and discharge criteria which set forth reasons for clients to leave the CARD program, including when services are deemed no longer appropriate, and when the client's excesses and deficits have been addressed and remediated. CARD recommended that claimant not be discharged, and that he receives 86 hours per month of one-to-one therapy, and 8 hours per month of therapy related to his supervision, for a total of 94 hours per month.

## MAPSS' BEHAVIOR ASSESSMENT AND INTERVENTION PLAN

6(a). In July 2016, claimant was assessed by Multilevel Applications and Positive Support Services (MAPSS), a regional center vendor KRC retained to address claimant's needs regarding his challenging behaviors, functional living skills, functional communication and other in-home related skills or behaviors. Gerald Lavarias, MAPSS' co-owner and clinical director, testified about the results of the MAPSS assessment. Mr. Lavarias holds a Bachelors of Arts degree in Psychology from CSU of Bakersfield and a Master's of Science in Psychology: Applied Behavior Analysis (ABA) from California State University of Los Angeles (CSULA). He is a board certified behavior analyst through the Behavior Analyst Certification Board, Inc., and has 20 years of experience.

6(b). Mr. Lavarias detailed the assessment MAPSS performed, which included a review of pertinent school and regional center records, claimant's individualized program plan (IPP), an interview with claimant's mother, and direct observation of claimant. MAPSS noted most, if not all, of the same or similar behavioral challenges, and goals, as detailed in the May 2016 CARD report. In the report's conclusion, Mr. Lavarias summarized his recommendations of monthly service-hours to meet claimant's needs as follows:

**Type:** Treatment Implementation

**Treatment Prescription/Recommendation:** Support is provided within the home by use of direct implementation of ABA treatment service prescription. This means that [claimant] is provided with one-on-one direct therapist or instructional aide trained in [ABA].

**Treatment Dosage:** 60 hours per month.

**Type:** Treatment Supervision

**Treatment Prescription/Recommendation:** Treatment supervision is critical to monitoring treatment prescriptions and dosage over time using direct and indirect methods . . . .

**Treatment Dosage:** 6 hours per month.

6(c). Mr. Lavarias's testimony was only partly persuasive. The MAPSS assessment was reasonably well-detailed, but it did not explain how Mr. Lavarias reached the total of 66 monthly hours recommended above. When asked to be more specific about this issue, Mr. Lavarias said he believed claimant could receive 12 fewer hours per month of therapy in the areas of self-help, coping strategies, and therapies to help claimant learn how to make verbal requests, yet he did not explain why such reductions were called for, or where the reductions would occur. Similarly, Mr. Lavarias did not state why he believed claimant required six hours of supervision services per month instead of the eight hours per month recommended by CARD, or in what specific way this reduction of supervision services should be implemented. Also, Mr. Lavarias did not directly observe claimant as part of the MAPSS assessment. Instead, a MAPSS employee with no educational background in behavior analysis performed that task, which was only the second time she had conducted such an evaluation for MAPSS.

6(d). To his credit, Mr. Lavarias was a candid witness, and he admitted that it was possible some of claimant's challenging behaviors were not observed during the observation portion of the evaluation. Mr. Lavarias also stated that upon KRC's referral of claimant to MAPSS for this assessment, he knew KRC was contemplating a decrease in claimant's monthly ABA services from the current service-provider's recommendation.

## MOTHER'S TESTIMONY

7. Mother agreed with CARD's assessment of claimant's progress. She noted that CARD was actually recommending 94 hours of monthly ABA therapy services for claimant, yet the service agency had already cut those hours down to 78 hours, before making its most recent reduction request to 66 hours per month. Mother believes claimant has made progress with the therapy provided by CARD, but that he is not in a position yet in which a "fading out" of services should occur. Claimant has major challenges in every respect, including dressing, putting his clothes on properly, making minimal eye contact, feeding himself, using utensils, identifying people and locations in photographs, and communicating verbally. Something as simple as brushing claimant's teeth is slow and arduous, as claimant needs constant prompting and supervision to perform each task, step-by-step. Recently, he told Mother, "I love you," which was the first time he had ever expressed himself spontaneously. Otherwise, his speaking must be prompted by others in every situation. In some respects, claimant is regressing. For example, he is at a "starting over" point with learning how to be potty trained, and he wets and soils himself constantly. The fact that a 13-year-old child is not potty trained makes any discussion of "fading" his service hours a point of bitter contention for Mother. In terms of age-appropriate behaviors, claimant is many years behind his peers in virtually every aspect and category of behavior, functioning, communication, and interaction. Mother believes KRC's focus on claimant's case in recent years has been entirely on hours to be funded, not on whether his needs, goals, and objectives for development are being met. Mother felt the KRC case worker assigned to claimant's case file was dismissive and even insulting toward Mother, and she wrongly suggested that Mother and Father were not providing adequate parental involvement with claimant and his needs.



8. The service agency did not dispute any of Mother's testimony, declining to cross-examine her. Commendably, Mr. Meyer praised Mother for expressing claimant's needs and challenges very well. Mr. Meyer apologized to Mother for the difficulties she and Father had experienced in trying to express their views to the service agency regarding claimant's care and treatment.

## LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established.

### THE STANDARD AND BURDEN OF PROOF

2(a). The standard of proof in this case is the preponderance of the evidence, because no law or statute requires otherwise. (Evid. Code, § 115.)

2(b). When one seeks government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) In this case, Claimant seeks to maintain service-funding through KRC which was previously in place, while KRC seeks a change in services. Where a change in services is sought, the party seeking the change has the burden of proving that a change in services is necessary to meet the consumer's needs. (See Evid. Code, §§ 115 and 500.) Thus, the service agency bears the burden of proving, by a preponderance of the evidence, that it is entitled to reduce the level of funding for claimant's ABA services from 78 hours per month to 66 hours per month.

### APPLICABLE STATUTORY LAW AND ANALYSIS

3(a). Code section 4646 states in part:

(a) 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, where 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.

(b) The individual program plan is developed through a process of individualized needs determination. The individual with developmental disabilities and, where appropriate, his or her parents . . . shall have the opportunity to actively participate in the development of the plan. [¶] . . . [¶]

(d) Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer's goals, objectives, and services and supports that will be included in the consumer's individual program plan and purchased by the regional center or obtained from

generic agencies shall be made by agreement between the regional center representative and the consumer or, where appropriate, the parents . . . at the program plan meeting.

3(b). Code section 4646.4 states in part:

(a) Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5 . . . the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following: [¶] . . . [¶]

(c) Final decisions regarding the consumer's individual program plan shall be made pursuant to Section 4646.

3(c). Code section 4646.5 states 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. [¶] . . . [¶]

3(d). Code section 4659 states 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. [¶] . . . [¶]

c) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional centers shall not purchase any service that would otherwise be available from Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, In-Home Support Services, California Children's Services, private insurance, or a health

care service plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage. If, on July 1, 2009, a regional center is purchasing that service as part of a consumer's individual program plan (IPP), the prohibition shall take effect on October 1, 2009. [¶] . . . [¶]

3(e). Code section 4686.2, subdivision (d), provides:

(d) For purposes of this section the following definitions shall apply:

(1) "Applied behavioral analysis" means the design, implementation, and evaluation of systematic instructional and environmental modifications to promote positive social behaviors and reduce or ameliorate behaviors which interfere with learning and social interaction.

(2) "Intensive behavioral intervention" means any form of applied behavioral analysis that is comprehensive, designed to address all domains of functioning, and provided in multiple settings for no more than 40 hours per week, across all settings, depending on the individual's needs and progress. Interventions can be delivered in a one-to-one ratio or small group format, as appropriate. [¶] . . . [¶]

4(a). KRC did not meet its burden of proving by a preponderance of the evidence that claimant's ABA services should be reduced from 78 to 66 hours per month, as set forth in Factual Findings 1-8.

4(b). Claimant's exceptionally high level of need for services is essentially undisputed, and those needs were well-documented by CARD in its most recent evaluation and assessment report. Indeed, MAPSS also documented a high level of need as a result of its evaluation of claimant. CARD's recommendation of 94 hours per month appears justified, yet KRC's current level of funding is for 78 hours per month. KRC provided no justification for this lesser level of funding, but a reasonable inference may be made that the service agency made such a reduction based on the Committee's determination of claimant's needs, and in consideration of its policy to "fade" services for autistic clients at the appropriate time to help clients achieve a long-standing goal of normalcy. At any rate, the reduction from 94 hours to 78 hours was not in dispute as part of this fair hearing. That said, it does provide a historical context for KRC's present objective to reduce claimant ABA therapy services, this time from 78 hours per month to 66 hours per month.

4(c). KRC's reliance upon Code section 4686.2, subdivision (d)(2), was not compelling, as that apparent limitation on service hours, contained in a definition of "intensive behavioral intervention," is not currently being strictly observed by KRC in its funding of claimant's services at 78 hours per month, nor would it be observed if KRC reduced claimant's monthly services to 66 hours. Again, claimant's extraordinary challenges are well known to both parties. Although the Lanterman Act does require regional centers to be cost-effective in providing funding for services, it also places a high priority on delivering necessary services to each individual client.<sup>4</sup> KRC appears to be acknowledging this important objective with its current funding for ABA services.

4(d). The service agency's reliance on MAPSS to justify a reduction of services was ultimately not persuasive, as MAPSS could not articulate with any specificity why its

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<sup>4</sup> See, e.g., Code section 4646, subdivision (a).

recommended reductions were necessary or justified. MAPSS also relied on an employee with no behavior science background to observe claimant, an autistic person burdened by many social, behavioral, functional and communication challenges. This process did little to bolster confidence in MAPSS's findings and recommendations.

4(e). Despite the service agency's concern that CARD did not seem responsive to the issue of gradually reducing claimant's service hours, CARD's assessments and reporting were thorough and not contradicted by any other evidence. The service agency considered Mother a highly credible witness regarding claimant's needs. As such, Mother's endorsement of CARD afforded additional weight to CARD's recommendations.

## ORDER

Claimant's appeal is granted. The service agency shall not reduce claimant's ABA services from 78 to 66 hours per month, until such time as circumstances warrant a change as reflected in claimant's IPP.

Dated: October 30, 2016

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JOHN E. DeCURE

Administrative Law Judge

Office of Administrative Hearings

## NOTICE

This is the final administrative decision. This Decision binds both parties. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.