

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

TREVOR D.,

Claimant,

and

HARBOR REGIONAL CENTER,

Service Agency

OAH No. 2011100221

CORRECTED DECISION

This matter came on regularly for hearing on November 22, 2011, and March 5 and 9, 2012, at Torrance, California, before David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California. Trevor D. (Claimant) was represented by Julie Eby-McKenzie, Community Program Specialist, Area Board X. (Initials are used to protect Claimant's confidentiality.) Harbor Regional Center (Service Agency) was represented by Antoinette Perez, Program Manager, Harbor Regional Center.

Oral and documentary evidence was presented. The record was held open for receipt of written closing arguments, received on March 19, 2012, and marked for identification as follows: from Claimant, Exhibit 40, and from the Service Agency, Exhibit P. The matter was submitted for decision on March 19, 2012.

A Decision was issued April 9, 2012. In error, it was titled "Proposed Decision" and it failed to include a notice at the end. Those errors are corrected in this Corrected Decision.

ISSUES

At the outset of the hearing, the parties agreed that the following two issues were to be determined:

1. Should the Service Agency provide to Claimant direct individual behavior therapy in his home?
2. Should the Service Agency provide to Claimant services by the mobile crisis intervention unit?

In his Closing Argument (Exhibit 40, p. 12), Claimant adds to Issue 1 his request for ten hours per week of direct services and three hours per months for supervision. These hours were not included in the agreed-upon issues; however, the ALJ may nevertheless consider the numbers of hours if the issue is decided in Claimant's favor. Claimant also adds a third issue that, if he prevails, the Service Agency should reimburse Claimant's mother for the costs of an assessment. This issue is rejected because: the issue was not included in the Fair Hearing Request; there was no agreement at the outset of the hearing that it be added; there was no evidence of any request by Claimant or his mother to the Service Agency to pay for the assessment or opportunity for the Service Agency to respond to such a request; and there was no evidence of the cost of the assessment or opportunity for the Service Agency to respond to such evidence.

In its Closing Argument (Exhibit P, p. 2), Service Agency characterizes the two issues as whether it may deny funding for the requested services, and uses different wording for the issue on crisis intervention services.

The ALJ will determine the issues as agreed upon at the outset of the hearing and as set forth above, with orders as are supported by the evidence and the law.

FACTUAL FINDINGS

The Administrative Law Judge finds the following facts:

Jurisdiction

1. Claimant is an 11 year-old male (born in July 2000) who was a consumer of the Tri-Counties Regional Center (TCRC) who moved to Artesia in June or July 2009 and became a consumer of the Service Agency. He is eligible to receive services based on his conditions of mental retardation (sometimes referred to as intellectual disability) and seizure disorder. Claimant and his mother live in her parents' home.

2. In a phone message to the Service Agency counselor on June 10, 2011, and in e-mails to the Service Agency on June 16 and 20, 2011, Claimant's mother included information about a "behavioral meltdown" Claimant experienced on June 10, and requested various services, including "ABA / direct behavior therapy" (ABA is a reference to applied behavioral analysis) and a safety response unit or "appropriate emergency behavior interventions" for Claimant. (Exhibit K, pages 16 [consumer transaction note dated 6/13/11], 49 [consumer transaction note dated 6/16/11] and 18b [consumer transaction note dated 6/21/11].)

3. In a letter dated August 12, 2011, Kelly McBeath, Claimant's counselor at the Service Agency, wrote to summarize two recent meetings to develop Claimant's

Individual/Family Service Plan¹ on July 25 and August 3, 2011. (Exhibit B.) She wrote that, among other things, these requested services, which she described as crisis behavior intervention services and direct individual home behavior intervention therapy, were being put on hold while a behavior assessment was completed by Family Behavioral Services (FBS), a sub-unit of California Mentor.

4. The FBS Functional Assessment and Behavior Intervention Plan was later completed, and signed September 18 and 19, 2011. (Exhibit H.) It will be discussed in more detail below.

5. On October 5, 2011, Claimant's mother signed a Fair Hearing Request indicating, among other things, that the Service Agency refused to provide appropriate supports and requested direct individual behavior therapy in the home and mobile crisis interventions unit services. (Exhibit A.)

Background Information, Prior Services and Relevant Information

6. From the voluminous evidence submitted, only portions will be referred to, as needed, to support the necessary findings. Claimant had a complicated medical history, from his premature birth, including heart surgery and a brain hemorrhage resulting in traumatic brain injury, seizures, a compromised immune system, vision and hearing loss, and adverse reactions to many drugs. Some of these conditions are relevant to the types of services that may be appropriate, or inappropriate, for Claimant.

7. Claimant has had documented behavioral challenges for many years, including non-compliant behavior and tantrum behavior. Among the services Claimant received while he was a consumer of TCRC was a comprehensive parent training course in behavior management for his mother and direct behavioral therapy for Claimant since approximately 2005 or 2007 (different dates appear in different documents). There are three progress reports from the most recent vendor providing behavior and parent training services, California Psychcare (CPC), dated May 7 and October 3, 2008, and March 4 and June 12, 2009. (Exhibit 4.) As of the last report, Claimant's mother had partially completed parent training in crisis prevention intervention (CPI) and was in progress for completing parent training in addressing problem behaviors. Direct services to Claimant addressed areas of attention, play and socialization, self regulation, tacting (recalling previously seen items and labeling), self-help and behavior excesses. Progress had been noted in all domains, although goals still needed to be met and mastered, and it was recommended that Claimant continue to receive services in the amount of 10 direct hours per week and 10 hours of supervision per month.

¹ This is also known as an IFSP. The governing law refers to an Individual Program Plan (IPP), so this Decision will use "IFSP" to describe these meetings and documents and apply the law relating to IPP's.

8. Claimant and his mother moved from San Luis Obispo County to Artesia so that he could receive special education services at the Beacon Day School, described in more detail below. Claimant's placement at Beacon Day School was the result of a due process hearing wherein it was determined that his school district had not afforded him a free appropriate public education. (Exhibit 5.)

9. The first indication of the Service Agency's involvement is a consumer transaction note dated July 31, 2009 (Exhibit 9), indicating contact with Claimant's mother to schedule an initial IFSP meeting. Among other things, the note also refers to IBI services (intensive behavior intervention), which services ended in late June 2009 due to the family moving. The Service Agency counselor indicated these services would not be supplied until the IFSP meeting to assess Claimant's needs, that this service "is typically provided until the age of six and is usually only for a time – limited period," and that Claimant was then nine years old and had been receiving these services since 2009. The counselor met with the program manager, who suggested consulting Dr. Michael Tredinnick, the Service Agency's Director of Children's Services. The counselor noted that Dr. Tredinnick stated the Service Agency typically does not fund ABA services for a client not diagnosed with autism, so any exception would need approval from the executive director. The counselor was advised to discuss a parent education approach with Claimant's mother.

10. Claimant's IFSP from meetings in June and July 2010 is found at Exhibit D (which also includes some updates as of January 2011, not pertinent here). Of note is that Claimant needed assistance and/or prompting with all of his activities of daily living, and that his mother again noted his behavior challenges and requested ABA trained staff to accompany her to medical appointments. The program manager responded that the FBS assessment would address behavioral issues in the community, by use of a parent training model. Several challenging behaviors are noted, including a lack of safety awareness and Claimant's need for constant supervision.

11. The IFSP and other evidence gives more detail of extreme behavior by Claimant on June 10, 2010. Claimant and his mother were at Children's Hospital Orange County where Claimant was to have testing ordered by his endocrinologist. According to his mother's description (Exhibit 10 and testimony), Claimant became agitated during the process and his behavior became aggressive and combative. Although he calmed for a short period, attempts to place an IV escalated his behavior again, to the point that several nurses were needed to restrain him. The test could not be completed, and Claimant was slightly calmed again. However, he escalated again when they got to the hospital lobby, to such an extreme that security guards were called, the hospital lobby was closed and evacuated, and a number of security personnel were needed to finally move Claimant and his mother to her car. The duration of the event was more than three hours.

12. A nursing assessment of Claimant for the Service Agency was prepared on August 10, 2010 (Exhibit 1), to assist in developing a comprehensive care plan. Along with discussion of Claimant's medical needs due to his seizures, headaches and other medical issues, the report also includes information on Claimant's challenging behaviors, difficulties

with activities of daily living, high risk of injury and lack of safety awareness. The nurse recommended, among other things, that the family may benefit from behavior management to assist in de-escalating Claimant's adverse behaviors and re-direction of his behaviors caused by anger.

13. The 2010 functional behavior assessment was performed by FBS but not submitted in evidence. FBS provided services from August to November 2010. The behavioral services provided by FBS were to address Claimant's tantrums, aggression towards others, property destruction, and compliance deficits. (See summary of services, Exhibit G.) Claimant's mother was the primary person receiving the services, and various intervention strategies were identified and implemented. Tantrums and physical aggression, which were extremely high at the beginning of the service, were reported to be substantially reduced both in duration and intensity. However, problem behaviors were not eliminated. For example, there were still one or two small tantrums per week, and compliance had increased to 70 to 80% of the time with one to three verbal prompts. It was reported that physical aggression and property destruction were absent. According to the summary, Claimant's mother was effectively using the intervention techniques she had been taught.

14. Contrary to the FBS reports of reduced or eliminated behaviors, during this same period Claimant's mother was reporting by e-mail to FBS (Exhibit 11) about events both during training sessions and otherwise of increased or sustained behavior issues. For example, on October 2, 2010, she reported a two-week increase in aggressive behaviors and suggested that Claimant also needed to be taught skills to manage his behaviors. She was advised to track data, and did so of two events on October 6, another on October 7, and of significant events the following week. On October 26, she reported three significant behavior events in the prior several days, and November 17 she reported three significant events in the prior week. There is little detail about the nature of these events. However, although the FBS summary seems to indicate a steady reduction in, and some elimination of, problem behaviors, Claimant's mother's e-mails and testimony indicate less than steady progress and that many negative behaviors were not consistently reduced or eliminated.

15. On Friday, June 10, 2011, Claimant's mother left a message reporting to the Service Agency a behavioral outburst by Claimant that was further described in a consumer note dated June 13 (Exhibit K, p. 16) and his mother's testimony. In summary, Claimant's mother used techniques she learned from FBS to prompt Claimant to get ready for school and a planned field trip. Claimant was non-compliant, was not ready to leave for school, and became upset when he realized he would not get to school in time for the field trip. Claimant's aggressive behaviors escalated and his mother used her FBS training to block his physical aggression. However, Claimant was able to grab her thumb and twist it, causing severe pain and a sprain that led Claimant's mother to seek medical intervention. During the episode, which lasted about an hour, Claimant also engaged in extreme property destruction in his bedroom. When Claimant's mother left her message for the Service Agency counselor, she expressed concern about being able to keep Claimant in the home, a possible placement outside the home, and that Claimant was growing bigger, faster and stronger. She also discussed the need to develop short term and long term plans for Claimant at home and

for emergency response services. Without further supports, she would consider placing Claimant outside the home. The phone message, and a follow-up e-mail, and the failure of the Service Agency to supply the requested services set forth in the Issues, above, formed the basis of the Fair Hearing Request.

16. According to consumer transaction notes, in a phone conversation on June 15, 2011, the counselor discussed the use by Claimant's mother of the techniques she had been taught, the availability of generic resources such as calling 911 or the Psychiatric Emergency Team (PET), and the possibility of further parent training by FBS. Claimant's mother added that she was using the techniques she learned but that she could not sustain them due to the extreme nature of Claimant's behavior and she wanted to know about other options. On June 21, Claimant's mother expressed concern about receiving a quick response. (Exhibit K, pp. 18a and 18b.)

17. Subsequent discussions and meetings, internally and between Service Agency staff, Claimant's mother and others, depict a response from the Service Agency that was more deliberate. On June 29 the counselor informed Claimant's mother that there is no crisis response team that it could offer, but that further FBS sessions could be authorized. Also a meeting was being arranged, called a health staffing, to address various issues. On July 5, Claimant's mother filed a Fair Hearing Request relating to the Issues herein as well as a request for counseling. (This request was later withdrawn.) The Service Agency approved funding for FBS to provide further parent training. At a meeting on July 13, 2011, Teresa Warner, Director of FBS, recommended that FBS provide in home training to Claimant in self management, to which Claimant's mother agreed. However, a new behavioral assessment would first be needed, and had been approved. The counselor wrote: "We discussed clarifying [Service Agency] crisis intervention services policy regarding this matter as well as having a Health Staffing in order to clarify all the aspects of [Claimant's] case." (Consumer transaction notes, Exhibit K, pp. 20 to 25a .) Other issues, services and service requests were ongoing and were also discussed. The "clarifying" of crisis intervention services is explained in a later note (dated 7/21/11, Exhibit K, p. 26) in preparation for an IFSP meeting as informing Claimant's mother that the Service Agency does not provide services for what was described as "'just in case' behavioral outbursts" such as the ones Claimant's mother was describing. Further, the counselor planned to better identify the request for IBI services at the IFSP meeting by requesting information on the frequency, intensity and duration of Claimant's behavioral incidents and would "include the process needed to assess for IBI in-home services."

18. The IFSP process began with a meeting July 13, 2011, followed by another meeting August 3, and a draft IFSP (Exhibit E) that was signed by Claimant's mother only to indicate her attendance. Of significance is the fact that the IFSP notes that the FBS behavior assessment would address Claimant's need for help with his activities of daily living, which would also examine the need for direct behavior services. A health staffing would be arranged. The Service Agency continued to explore possible options relating to crisis intervention as well as other pending services and supports, and notified Claimant's mother of the status in a letter dated August 12, 2011. (Exhibit B.) Also noted in the IFSP was that

the Service Agency was “still in the assessment phase” on the request for crisis intervention services (referring to the FBS assessment that was in process), that a mental health staffing to include Claimant’s mother was being arranged, and that the request for IBI “is currently being placed on hold,” again referring to the new FBS assessment. Claimant’s mother responded (Exhibit K, p. 33) that Dr. Econom, who was performing the FBS assessment, told her that it was not within their scope of practice to “assess for crisis,” so she wanted to know what the Service Agency would do.

19. A health staffing occurred on August 17, 2011. Apparently the plan had changed to have the clinicians meet first, without Claimant’s mother, and then allow her to participate in a later health staff meeting (see consumer transaction note dated 8/16/11, Exhibit K, p. 34). (The later health staff meeting to include Claimant’s mother never occurred.) Present were the counselor, program manager, a behaviorist (Rebecca Asdel), a psychologist, a nurse and two managers. According to the note, “It was discussed that [Claimant] presents similar to a child with Autism with regards to his behaviors and sensory issues” but that his last psychological review, dated 1/31/07, needed to be updated “to understand current cognitive functioning” The team suggested having Claimant’s mother ask his neurologist if increasing his seizure medication would help control his behaviors; obtaining a behavior assessment to get more information on the behavioral issues; having Claimant’s mother ask his school to provide behavioral support at home; review the psychoeducational assessment from his “triennial in 2009” (probably a reference to a school district assessment) to see whether Claimant “may have challenges with anxiety”; perhaps obtain a new psychological evaluation after the FBS assessment was completed; and encourage Claimant’s mother to seek counseling services through her insurance. (Exhibit K, p. 35). A separate note was written by a program manager, Betty Tanius, and is consistent with the counselor’s note. (Exhibit K, p. 38.) The counselor informed Dr. Econom at FBS of the results of the health staffing to assist in the pending FBS assessment process. The counselor learned that the assessment would not likely be completed until late September due to vacation plans of Dr. Econom and Claimant’s family.

20. Also on August 17, the counselor received the Individualized Education Plan (IEP) from Claimant’s school. An IEP addresses the services, goals and progress of a student receiving special education services. (Portions of this IEP, dated 5/25/11, are found in Exhibit 6.) The counselor discussed the IEP the next day with a manager, and she noted that, due to Claimant’s disruptive behaviors, his school uses a behavior intervention plan. In her consumer transaction note (8/18/11, Exhibit K, p. 39) she wrote that the primary method used at school to assist Claimant to remain in control is “antecedent manipulation,” and that this supports increased parental training for Claimant’s mother to deal with his behaviors. However, review of the remainder of the school’s IEP as well as testimony from Claimant’s teacher reveals that the school program for Claimant includes a steady program of direct services designed to modify and ameliorate his behavioral issues and that the behavior intervention plan is designed to address those instances wherein Claimant nevertheless exhibits troubling behaviors.

21. Later in August 2011 and early September, Claimant's mother was unhappy with the progress and indicated that if Claimant's needs could not be met she would have to consider placing him out of the home. She also requested that the psychological assessment suggested at the health staffing be completed as soon as possible. With respect to crisis services, the counselor noted (consumer transaction note, 9/1/11, Exhibit K, p. 42a) that she informed Claimant's mother that the Service Agency policy on crisis intervention services "as provided to individuals suffering mental health issues." As noted in more detail below, the service policy (Exhibit L) is not limited as suggested by the counselor. Claimant's mother told the counselor that she had been terminated from her part time job due to her need to address Claimant's increasing behaviors and the inability to find adequate childcare.

22. A meeting took place with the counselor and Claimant's mother on September 8, 2011, to revise the IFSP and discuss issues. Claimant's mother was concerned about the time being taken for assessment and the fact that another assessment, a psychological assessment, was now under discussion. Although they discussed the Service Agency's concern that Claimant's mother was his IHSS worker and that she could seek an IHSS worker to help relieve her from some child care responsibilities, Claimant's mother disagreed, as she was now out of work and more reliant on that funding. Claimant's mother showed that he was not eligible for Medi-Cal, limiting access to some services. A follow up meeting would be needed to revise the IFSP, however, the counselor was not available until mid-October. As there was no immediately available out-of-home placement, Claimant's mother asked what services would be available while Claimant remained at home and was told that once the behavior assessment was completed there could be a recommendation for appropriate services.

23. Over the next weekend, on September 11, 2011, Claimant engaged in escalating behaviors at home that resulted in damage to the kitchen, at which point his mother directed him to the backyard. He continued with tantrum and destructive behavior for 45 minutes when, in fear he would break a glass door, she attempted to capture his arms and move him to his room, and was only partially successful due to his strength and speed. Once Claimant was in his room, his behaviors escalated and his mother attempted to block him as needed. However, as she took a step, he kicked and broke her toe, requiring her to go to the emergency room for treatment. Claimant's mother reported the incident to the Service Agency, and she sent several e-mails trying to spur the Service Agency to action.

24.A. On September 8, 2011, the FBS in-home observation took place and the report was finalized and signed on September 18 and 19. (Exhibit H.) The report was prepared by Elaine Econom, Ph.D., a Board Certified Behavioral Analyst. It notes that the reason for referral is physical outbursts, and that the family completed behavior intervention in November 2010 which targeted tantrums with physical aggression and noncompliance. The report also notes that Claimant's mother was effectively using strategies taught to her previously regarding disengaging from the outburst behavior, giving choices to Claimant, and redirecting him.

24.B. The FBS assessment contains seven recommendations, six of which are relevant here. (1) Claimant should improve his ability to express his feelings; (2) his mother should continue to provide warnings of transitions from one activity to another; (3) the use of social stories to help prepare Claimant for unfamiliar situations; (4) a written schedule to reduce his frustration with transitions; (5) the technique of differential reinforcement of other behavior, to minimize attention given to negative behaviors while also redirecting Claimant to another more positive activity and offering a reward for such positive behavior; and (6) application in the home of Claimant's self regulation techniques learned at school. The treatment recommended was for Claimant's mother to be trained in further behavior modification, even though recommendations 1 and 6 are, by description, more centered on Claimant being directly trained and encouraged to engage in better communication and to use techniques from school at home as well.

24.C. As noted earlier, although the counselor informed Claimant's mother that the FBS assessment was to include reference to crisis services, FBS informed her that this was not to be included, and the report does not, in fact, address the request for crisis services made by Claimant's mother in June 2011. Dr. Econom testified that she did not assess Claimant for either ABA services or crisis intervention services and was not aware that Claimant's mother had requested these services. When asked if ABA would have any functional use to Claimant, she responded that it was hard to say and she did not know.

25. Claimant's mother left several messages for the counselor indicating she did not agree to the FBS recommendations and noting that they did not respond to her requests for direct services for Claimant or for crisis services. On September 26, Claimant's mother wrote an e-mail to the counselor (Exhibit 16) including her frustration with the time it was taking to complete the IFSP, to have the health staffing and to complete the FBS assessment, noting that she had requested direct behavioral therapy and crisis intervention services 107 days earlier and to date, "not one service has been offered or provided." When they spoke later that day, Claimant's mother told the counselor she would engage in further parent training if there were other supports to deal with behavioral outbursts. More specifically, she suggested the need for a behaviorist or other trained person to directly work with Claimant on skills that will decrease the outbursts. When the counselor asked if Claimant's grandmother was open to learning management techniques, Claimant's mother answered that she was probably open to it but that it was not an appropriate role or job of his grandmother to provide the level of behavior intervention required. Also discussed was a health staffing on October 5 for Claimant's mother to attend and a meeting to further revise the IFSP on October 12.

26. In another conversation on September 30, 2011, Claimant's mother asked whether FBS provides direct services and whether it could be done for Claimant. The counselor was unsure and said she would follow up. Claimant's mother again asked for a response to the request for direct services and crisis services, and stated that without these, she did not believe Claimant could be safe at home. The counselor discussed use of a 911 call or a call to PET, however Claimant's mother was concerned that these resources were

not appropriate. The counselor agreed to have a decision letter by their meeting scheduled for October 12.

27. As noted in Factual Finding 5, the Fair Hearing Request was signed October 5, 2011.

28. The health staffing for October 5 could not be arranged as requested by Claimant's mother. The counselor researched crisis services and found Service Agency vendors that are generic resources such as a county emergency hot line phone number, which told her that they would respond by assessing if a disabled child was a danger to himself or others and, if so, they would authorize a three-day hold at a psychiatric hospital including possible use of medications. On October 11, the counselor wrote a note (Exhibit K, p. 55) of her preparation for the meeting the next day and her discussion with her manager that she planned to tell Claimant's mother that the Service Agency was "holding off" on providing a decision letter "in light of the planning meeting tomorrow as this may clarify disagreements and provide direction on an appropriate plan to meet [Claimant's] needs," and that there was no "proposed plan ready to provide to her prior to the meeting as we are still talking to Family Behavioral Services (FBS)." A health staffing was scheduled for October 26.

29.A. There was a further IFSP meeting on October 13, followed by a phone conversation October 17. In a letter dated October 14 (Exhibit C), the counselor noted the requests for direct services and crisis services, and another service, as well as the intent to begin further FBS parent training in November. The counselor would consult with FBS to develop a safety plan for situations where Claimant's mother felt his behavior "has escalated to the point of harming himself or others," and work closely with his school "to ensure consistency in regards to the behavior interventions being utilized." The letter included denials of the requests for services, including direct behavior services and crisis intervention services, for the various reasons set forth below.

29.B. The reasons cited in the decision letter for the denials relate to various aspects of Claimant's mother's situation. For example, the Service Agency recommended that she use her hours of IHSS to employ an outside person to assist in the care of Claimant. The letter acknowledged that Claimant's mother was financially dependent on the IHSS funds, but the Service Agency recommended that she seek outside employment. The Service Agency also suggested that she reconsider not having her parents involved to manage Claimant's behaviors, and also look to the local community to create a "circle of support" to find individuals to help in moments when Claimant was experiencing an extreme behavioral outburst. If Claimant reached the point of possible harm to himself or others, the Service Agency recommended calling PET or the local sheriff. Finally, the Service Agency determined that the request for an assessment by a crisis intervention agency did not fit an exception to their policies and procedures, and enclosed the service policy.

30. Despite the recommendation to employ an IHSS worker, and the suggestion that the Service Agency was aware of such workers assisting consumers with behavioral challenges, Claimant's mother had dismal experience in finding either an IHSS worker or a

respite worker who was reliable, competent and willing to work with Claimant. With respect to her parents as an added resource to help with Claimant's extreme behaviors, Claimant's mother was concerned about their availability to do so, as they both worked and also were out of the home some nights. Claimant and his mother were already guests in their home to take advantage of the school district placement. She also believed that their good relationship as grandparents who already served as part of Claimant's support could be negatively affected. Further, Claimant's mother asserted that, as she was younger and had received training yet was sometimes incapable of containing Claimant's outbursts, it was unlikely that her parents, or a neighbor for that matter, could provide the type of safety net she felt was needed. She also expressed a concern of a stigma that could arise in the neighborhood relating to relying on neighbors to interact with her son if he was having escalating behaviors, and the desire that he be able to have a normal relationship with such neighbors as would any child in the neighborhood. Concerning the use of PET or the sheriff, Claimant's mother gathered information from them and learned that PET would resort to hospitalization and medications, with a concern that Claimant has a documented history of adverse reactions to some medications, and that the sheriff did not have special training to deal with children with developmental disabilities. Claimant's mother made these points to the Service Agency in discussions as well as e-mails and letters. (See, for example, Exhibit 25, a letter following the October 13 meeting to discuss the IFSP and status of the service requests, and Exhibit 23, a letter dated October 23, 2011.)

31. The Service Agency service policy on crisis intervention services (Exhibit L) states, in pertinent part, that the Service Agency supports an array of such services that will help consumers maintain their living arrangements and recognizes the Service Agency's responsibility to assist clients and caregivers "to anticipate and prevent mental health crisis." Such services are "immediate, intensive, brief (time-limited) professional assistance/support to help a person return to a previous level of functioning . . . without being at imminent risk of endangering him/herself or others." Such services may include mobile crisis response team intervention to provide immediate assessment and emergency care, as well as temporary care in a psychiatric hospital or licensed community residential setting, as well as time-limited counseling or psychotherapy. For such services to be supplied, the Service Agency must make an assessment of whether the service is needed, the client must not be eligible for substantially similar services from insurance or other third party payor, and the service does not exceed the specified time limits.

32. In response to the suggestion that Claimant's medication might be adjusted to better modulate his behavior, claimant visited his neurologist on October 6, 2011. A report of that visit (Exhibit 3) includes the following information of note: in his assessment, the doctor noted that Claimant has a history of autism, developmental delay, with current escalating behavior problems and aggressiveness, and paradoxical reaction to several medications. The doctor states Claimant would benefit from receiving some applied behavioral analysis therapy at home as well as having crisis intervention available to his mother to de-escalate his behavior when she cannot control him. The doctor states his belief that these interventions would prevent Claimant from being placed outside the home. The doctor also noted that there were previous trials of medications to restrict his behaviors,

which did not affect the behaviors and caused other negative reactions, such as return of his seizures, which had been eliminated for the prior two and one-half years.

33.A. Claimant's mother arranged for another functional behavioral assessment, performed by Carrine Moore, a Board Certified Behavioral Analyst, based upon document review, interviews, and observations at home and in school in October and November 2011. Ms. Moore prepared a comprehensive report, dated November 10, 2011 (Exhibit 7), which acknowledged that Claimant's mother was seeking to reinstate ABA services, as Claimant had benefited from them in the past. During one of the home observations, Ms. Moore witnessed an incident of escalating negative behaviors, including property destruction and physical aggression which lasted approximately one hour, as well as the efforts of Claimant's mother to deal with the situation. Claimant's mother described this as a typical event, and that sometimes the events are of longer duration. In her testimony, Ms. Moore stated that the incident had high points and low points, and at one point went from aggressive behavior to crisis behavior, based, in part, on the amount of injury being inflicted upon the mother. Ms. Moore believed that Claimant's mother's interventions were effective, were consistent with what she had been taught, but that other interventions could have been beneficial. She also noted that while the school was much more structured, nevertheless Claimant still engaged in some similar behaviors there.

33.B. Ms. Moore's report identifies three target behaviors, as well as intervention strategies. The behaviors are non-compliance, tantrum and perseverative behavior, and in each instance the interventions include specific examples of parent training as well as teaching Claimant appropriate behaviors to replace the maladaptive behaviors. A portion of the report addresses how Claimant should be taught these replacement behaviors, first within structured situations and then in unstructured situations. Six areas are identified as adaptive behaviors designed to address Claimant's skill deficit areas, towards the goal of decreasing his engagement in maladaptive behaviors. These include communication, cognition/executive functioning, functional academics, home living, self-care and social/place skills.

33.C. Ms. Moore recommends that Claimant receive applied behavior analysis intervention, in the amount of ten hours per week of direct services and three hours per month for supervision, programming and curriculum design. The program should be re-assessed in six months. It was also recommended that Claimant's mother receive crisis intervention training in order to protect herself as well as have access to mobile behavioral crisis response teams to help immediately assess and de-escalate a crisis situation.

33.D. Rebecca Asdel is a Board Certified Behavioral Analyst whose company was hired by the Service Agency to review and comment on Moore's report. She observed Claimant at his school, interviewed school administrators and reviewed records. In Ms. Asdel's opinion the services recommended in Moore's report can be provided via parent training alone, including teaching techniques and strategies to be proactive and teaching Claimant's mother to teach new skills to Claimant. She described parents as "being in the trenches" and stated a parent-focused program will provide necessary strategies and skills.

33.E. Ms. Moore testified that indeed some of the strategies in her report can be part of a parent-focused program, but that others, such as increasing adaptive behaviors and addressing skill deficits could not be adequately addressed by parent training alone.

34. Efforts continued to revise and complete the IFSP. On October 20, the counselor noted (Exhibit K, p. 62) Claimant's mother's concern that the IFSP did not "reflect the family's process but rather [Service Agency] perspective." The counselor "agreed to make every effort to reflect what she has been saying regarding [Claimant's] ongoing behaviors in the IFSP." Claimant's mother testified that she did not sign the IFSP because, despite several discussions that included the goal of correcting information that she believed was incorrect, it still contained incorrect information.

35. Claimant's mother continued to report behavioral incidents, including aggression, property damage, injuries and tantrums, that occurred on October 18 and 28. Renewed services by FBS had not yet begun at that time.

36. Amy Motsinger has been Claimant's teacher at Beacon Day School since September 2010. Before being a credentialed teacher for the last five years she worked as a therapist providing ABA services to children in home and school settings. Claimant's school program utilizes ABA strategies including discrete trial training, behavior management and data collection by his one-to-one aid who is also a trained behaviorist, as well as supervision and program modification by a Board Certified Behavioral Analyst. Despite her training and the presence of the one-to-one aid assigned to Claimant, Ms. Motsinger described incidents when Claimant has physically attacked her, another when he fastened himself to her such that she needed assistance to remove him, and another incident when four adults were necessary to address his aggressive behaviors at school. In her opinion, Claimant's mother is very actively involved in his program and effectively practices the techniques she has been taught by the school. However, Ms. Motsinger believes that Claimant requires ABA services at home to compliment his school program and provide consistency. She strongly agrees that Claimant's mother cannot do this alone successfully, should not be required to gather the data necessary under ABA to determine if the program is succeeding, or make the adjustments necessary to meet new behaviors or modify strategies that are not as successful as planned.

37.A. Michael Tredinnick, Ph.D., has been the Director of Children's Services for the Service Agency for four years, oversees 60 counselors who serve approximately 6000 school age children, and also has experience as a crisis de-briefer for the Santa Monica Police Department and as leader of a Red Cross crisis team. With respect to intensive behavioral intervention, he stated that this is usually provided for children as young as possible, under age three, and usually based on a diagnosis of autism. However there have been many exceptions to these requirements at the Service Agency. The focus of the service is on skill development. In Dr. Tredinnick's opinion, Claimant has the skills needed to behave properly but does not use them consistently, and that by comparison to children with

autism, children with mental retardation engage in slower behavioral change but do react to changes in the environment around them, like their parents' behaviors.

37.B. Based on his understanding of some of the reported incidents of Claimant's outbursts, such as that reported by Ms. Moore, Dr. Tredinnick is of the opinion that, had Claimant's mother properly used the techniques taught to her by FBS, the incident would not have escalated. He is in favor of the additional services now being provided by FBS because they were successful in the past.

37.C. Dr. Tredinnick does not believe that mobile crisis intervention services are appropriate for Claimant, for several reasons. First, he described the service as typically provided for adult consumers who live alone without caregivers, or in a supported living environment. Second, he believes a better strategy is to understand what leads to such severe incidents and develop effective strategies to prevent their occurrence. Third, Service Agency employees have contacted several companies offering the service and learned that they are not always available after business hours and may not be able to respond within several hours. By comparison, if needed as a last resort, PET can respond more quickly and, if necessary, implement a mental health hospitalization, which is a fallback that some of the companies indicated they might also use. PET and other generic supports should be considered. Dr. Tredinnick also expressed concern about having new service providers arrive in a crisis situation, and that services are usually approved on the basis that they are needed and provided as scheduled, and not in anticipation of events that may not occur.

38. Claimant's mother contacted several companies that provide mobile crisis intervention services and submitted information she gathered. (Exhibit 30.) She described that they would conduct preliminary interviews and evaluations and offer services, including response if available, to address crisis situations. Also submitted in evidence was a report from the Department of Developmental Services relating to each regional center's crisis intervention services (Exhibit 26). Of the 21 regional centers listed, most include generic resources such as hospitals or mental health agencies as well as non-generic vendors. The Service Agency is one of three regional centers that list only generic resources for this service.

39.A. Several contentions raised in the Service Agency's Closing Argument (Exhibit P) are deserving of note. Some contentions are noted here, and discussed below. For example, Claimant's mother filed a Fair Hearing Request on July 5, 2011, regarding denial of crisis services and home behavior therapy. Service Agency contends that less than one month had passed from the request for services and it was in the midst of ongoing record gathering and review and that it was considering authorizing a behavior assessment, and that no decision letter had yet issued, implying that Claimant's mother was not giving it enough time to respond or was unwilling to cooperate. However, the hearing request was apparently resolved and is not the subject of the present hearing. Further, the functional behavior analysis by FBS was not completed until more than three months after the services were requested, including a request for crisis services, which implies a need that requires a more immediate response. It turns out that the ball was dropped; the counselor believed that FBS

was assessing for crisis services when, in fact, it was not. Nor was FBS assessing for direct behavior services for Claimant. Therefore, the assessment did not address either of the services requested and was of no use for that purpose. The fault for this lies with the Service Agency, not with Claimant.

39.B. The Closing Argument also states that part of the continuing collaboration was a health staffing to provide light on the need for emergency response services, and contends that Claimant's mother was present when this meeting occurred on August 17, 2011. The evidence is to the contrary—Claimant's mother was not present for this meeting, and plans for her to attend a later clinician meeting were changed. And what the Service Agency contends as collaboration was, in large part, (1) communications from Claimant's mother pressing the Service Agency to respond to her original service requests, (2) her agreement to engage in further parent training while stressing the needed for the other services as well, and (3) her telling the counselor about further instances of the very behavior that caused her to make the requests in the first place.

39.C. A psychological assessment discussed at health staffing on August 17, 2011, was finally approved to take place between December 2, 2011, and February 9, 2012, to further assess needs and gather recommendations. This authorization is more than five months after the requests for services were made. As of the conclusion of the hearing, there was no evidence this had taken place. However, a psychological consultation had been provided by Rita S. Eagle, Ph.D., who reviewed records and met with the counselor. In her report dated January 24, 2012 (Exhibit 36), Dr. Eagle agreed that the psychological assessment was needed to confirm or rule out a diagnosis of autism, the assessment had not taken place due to scheduling difficulties, and that another appointment for assessment should be made. "However, even if the assessment does not yield a diagnosis of autism, there would still be a need to find a way to understand and manage [Claimant's] behavior. Given all the medical, psychological, communication, social and cognitive challenges with which he is coping, it is indeed possible that the FBS plan will not be sufficient. It may be necessary to try something like mother is requesting (although I imagine that would need to be time-limited to some extent) and if that does not work, to consider placement"

39.D. The Service Agency asserted that the crisis services located by Claimant's mother would not necessarily be available when needed, and did not guarantee that they would be able to de-escalate Claimant's behaviors, nor guarantee that it still might be necessary to call 911 or PET. This does not resolve the issue. There is no "guarantee" that any particular service will be successful. However, if crisis intervention is able to address the situation more capably than Claimant's mother, the service would be appropriate, even if it is ultimately determined that a 911 call or PET services are required. Because such service may prevent the need for such a call, it should be implemented.

40. In total, the evidence supports the services requested for Claimant and does not support the denial of those services by the Service Agency.

LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judges makes the following legal conclusions:

1. The Lanterman Developmental Disabilities Act (Lanterman Act) governs this case. (Welfare and Institutions Code sections 4500 et seq.)² A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the Service Agency's decision. Claimant properly and timely requested a fair hearing and therefore jurisdiction for this case was established. (Factual Findings 1-5.)

2. Claimant requests services not previously agreed to by the Service Agency. The burden is on that appealing Claimant to demonstrate the Service Agency's decision is incorrect. As set forth in the Issues section above, the agreed issues at the outset of the hearing will not be changed as this may result in a lack of due process to both parties due to lack of notice or an opportunity to be heard.

3. Section 4501 requires the state, through the regional centers, to provide an array of services and supports which is sufficiently complete to meet the needs and choices of each person with developmental disabilities. These are services and supports that will allow them, "regardless of age or degree of disability, and at each stage of life" to integrate "into the mainstream life of the community" and to "approximate the pattern of everyday living available to people without disabilities of the same age." Persons with developmental disabilities have the right to treatment and services and supports which foster the individual's developmental potential and are "directed toward the achievement of the most independent, productive and normal lives possible." The regional centers will work with consumers and their families to secure "those services and supports that maximize opportunities and choices for living, working, learning and recreating in the community." (Section 4502.) Commensurate with this goal is the goal to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community. (Sections 4509 and 4685; see generally *Association for Retarded Persons v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.) Under section 4685, the Legislature recognizes "that children with developmental disabilities most often have greater opportunities for educational and social growth when they live with their families" and "places a high priority on providing opportunities for children with developmental disabilities to live with their families, when living at home is the preferred objective in the child's individual program plan."

4. Section 4646.5 defines the content of the planning process for the IPP. It must include a statement of goals based on the consumer's needs and time limited objectives for implementing the goals. The goals and objectives should maximize opportunities for the consumer to develop relationships, be part of community life and to develop competencies to help accomplish the goals. The IPP process must also include a schedule of the type and amount of services and supports to be purchased by the regional center or obtained from

² All further statutory references are to the Welfare and Institutions Code.

generic agencies or other resources in order to achieve the IPP goals and the identification of the providers of services.

5. Section 4646, subdivision (a), states:

“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. . . . 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, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.”

6. Section 4648 describes what the regional center must do in order to achieve the stated objectives of the IPP. In securing the needed services and supports for a consumer the regional center must find services that are flexible and individually tailored to the consumer. By vendorization or contract the regional center may purchase services from any individual or agency the regional center and consumer determines will best accomplish all or any part of the IPP. Section 4648, subdivision (a)(8), prohibits the use of regional center funds “to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.” These are commonly referred to as “generic resources.”

7. Services provided must be cost effective (section 4512, subdivision (b)), and the Lanterman Act requires the regional centers to control costs so far as possible, and to otherwise conserve resources that must be shared by many consumers. (*See, e.g.*, sections 4640.7(b), 4651(a), 4659, and 4697.) However, section 4659 specifies that it shall not be construed to impose an additional liability on the parents of children with developmental disabilities nor to restrict eligibility for or deny services to a consumer who is unable to pay. To be sure, the obligations to other consumers are not controlling in the decision-making process, but a fair reading of the law is that a regional center is not required to meet a disabled child’s every possible need or desire, in part because it is obligated to meet the needs of many children and families.

8. Although regional centers are mandated to provide a wide range of services to facilitate implementation of the IPP, they must do so in a cost-effective manner. (Sections 4640.7, subdivision (b), and 4646, subdivision (a).) A regional center is not required to provide all of the services which a client may require, but is required to “find innovative and economical methods of achieving the objectives” of the IPP. (Section 4651.) They are specifically directed not to fund duplicate services that are available through another publicly funded agency. This directive is often referred to as “supplanting generic resources.” Where a service is available elsewhere, the regional center is required to “. . . identify and pursue all possible sources of funding. . . .” (Section 4659, subdivision (a).) However, if a service specified in a client’s IPP is not provided by a generic agency, the regional center must fill the gap (i.e., fund the service) in order to meet the goals set forth in the IPP. (Section 4648, subdivision (a)(1); *Association for Retarded Citizens v. Department of Developmental*

Services (1985) 38 Cal.3d 384, 390.) In general, Claimant must first attempt to utilize the generic resource (Medi-Cal, County Mental Health, private insurance) before seeking services from the Service Agency.

9. Direct behavior services such as those requested for Claimant are covered under the Lanterman Act. Under the services and supports referenced in section 4512, subdivision (b), are behavior training and behavior modification programs. More specifically, ABA and IBI are addressed in a recent amendment, section 4868.2, which, among other things, provides that before those services are provided, a behavioral assessment must be conducted and a plan must be designed that meets IPP goals. ABA or IBI services may only be purchased if they “reflect evidence-based practices, promote positive social behaviors, and ameliorate behaviors that interfere with learning and social interactions.” The important terms are described as follows:

“‘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.”

“‘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.”

10. Crisis intervention services are covered under section 4648, subdivision (a)(10): “Emergency and crisis intervention services including, but not limited to, mental health services and behavior modification services, may be provided, as needed, to maintain persons with developmental disabilities in the living arrangement of their own choice. Crisis services shall first be provided without disrupting a person’s living arrangement. If crisis intervention services are unsuccessful, emergency housing shall be available in the person’s home community. If dislocation cannot be avoided, every effort shall be made to return the person to his or her living arrangement of choice, with all necessary supports, as soon as possible.”

11. Although the Service Agency continued to review records and seek further assessments, as noted above, the assessment ultimately provided by FBS did not include assessment for the very services that Claimant’s mother had requested. Ultimately, such assessment was provided by Ms. Moore, who was specifically asked to assess the need for ABA and crisis services. Dr. Econom was not asked to do so. Ms. Asdel, the third BCBA to weigh in on the issues, did not perform a functional behavior assessment but, rather, did a consultation consisting of record review, interviews and observation, and no written report of hers was submitted in evidence.

12. Ms. Asdel believes all of the services in Ms. Moore's report can be provided by parent training. The evidence established that Claimant's mother was trained once through TCRC and twice through FBS. She uses the training in a reasonable and responsible way, however that training is not enough. Even Ms. Motsinger, a trained teacher of students with developmental and learning disabilities, noted that after one and one-half years of experience with Claimant, she would not approach him alone during a behavioral incident. Despite Ms. Motsinger's training, Claimant was able to physically attack her. Although not a Board Certified Behavioral Analyst, Ms. Motsinger holds the unique position of having extensive experience with Claimant in a highly structured environment that utilizes ABA theories. She is aware of ABA services not only in her present educational setting but due to her experience as a provider of those services for many years. Her testimony was given great weight.

13. In addition to failing to arrange for assessment of the services requested, there was no evidence that the Service Agency and FBS worked on a safety plan, which was a component of the counselor's letter denying crisis services and other consumer transaction notes. Nor was there evidence of the collaboration with Claimant's school, which was also promised in the counselor's letter. The psychological assessment discussed at the health staffing in August was finally approved to take place between December 2, 2011, and February 9, 2012, more than five months after the service requests were made, and no evidence was offered that it had occurred.

14. The counselor's suggestion that IHSS hours could be used differently should also be considered as it was part of the basis of the Service Agency's denial. The contention is that IHSS hours are a generic resource that the Service Agency should look to before purchasing a service, and that Claimant's mother should utilize those hours differently. However, the Service Agency cannot force Claimant's mother to use IHSS hours in any particular way. Claimant's mother had compelling reasons to use the hours as she does. For one, she established that the likelihood of finding an IHSS worker to deal with Claimant's behaviors is relatively low. Further, her reliance upon the funding for IHSS services was adequately explained by the evidence.

15. Similarly, PET and 911 are not generic resources for the type of crisis intervention that is requested here. After researching various companies that offer crisis intervention services, Claimant's mother sufficiently established that these are services that would potentially respond to further incidents of behavioral outbursts before it would be necessary to contact 911 or PET. PET and 911 are not designed to deal with persons with developmental disabilities, whereas crisis intervention services are. There is also the issue of Claimant's paradoxical reactions to some drugs, which would not necessarily be accommodated by 911 or PET. Further, the Service Agency's service policy on crisis services describes exactly what has been requested.

16. While developing a circle of natural supports, such as grandparents and neighbors, is encouraged under the Lanterman Act, it is reasonably presumed that this is for a more general sort of support, in the nature of the types of activities and interactions that

grandparents might normally have with their grandchild and neighbors might normally have with any child in the community, perhaps with the added understanding that the child has a developmental disability and interaction will assist that child in staying in the community. However, it is not a natural support, but rather an extraordinary expectation, to expect grandparents or neighbors to be the first responders with Claimant's mother, required to address an extreme behavioral outburst before the Service Agency would consider arranging for other trained crisis response short of a call to 911 or PET.

17. Dr. Tredennick noted that he would expect behavioral change to come slowly to someone with mental retardation, and that he would recommend further services by FBS because it had been successful in training Claimant's mother and reducing problematic behaviors in the past. By a parity of reasoning, ABA services such as those funded by TCRC in the past, which were successful in ameliorating behaviors, should be considered and, as Claimant may take longer to benefit from such services, he should not be limited by a policy that would favor these services to younger children and those with autism. There was no evidence that the policy emphasizing ABA services for younger children is contained in writing so that requirements and exceptions could be examined objectively. At the health staffing the counselor's manager noted that Claimant's behaviors were similar to those of an autistic child and it was determined to have a psychological assessment authorized to look at that issue. Also, the nursing assessment recommended the services and Dr. Eagle believed that ABA services might be called for under the circumstances. Further, Ms. Moore and Ms. Motsinger concluded that ABA services should be provided to Claimant.

18. With respect to the counselor's concern that crisis intervention services are not available for "just in case behavioral outbursts," this is contrary to the description of the services in the Service Agency's service policy, the statutory description of such services, as well as the descriptions of programs available to various regional centers set forth in the DDS report.

19. In summary, the Service Agency did not respond timely to a request for crisis services and promised to, but did not, assess for the requested crisis services or direct behavioral services. Claimant established that he is entitled to both. With respect to the amount of direct behavioral services, the recommendation by Ms. Moore is supported by the evidence.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Claimant's appeal of the Service Agency's denial of his service requests is granted. The Service Agency shall provide mobile crisis intervention services. The Service Agency shall provide direct individual behavioral therapy in the nature of intensive behavioral intervention in the amount of ten hours per week. Services may be reviewed at the next annual review, or sooner if there is a change in circumstances.

ORIGINAL DATED: April 9, 2012.

CORRECTED DECISION DATED: May 14, 2012.

DAVID B. ROSENMAN
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.