

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

IRFAAN S.,

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH CASE No. 2012020294

DECISION

This matter came on regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on March 30, 2012, in Torrance, California.

Marianne Bowers, Parent Advocate, represented Claimant.

Gigi Thompson, Manager of Rights Assurance, represented Service Agency.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

ISSUES

1. Should Service Agency fund up to 20 hours per week of Applied Behavior Analysis (ABA) services?

2. Is Claimant entitled to receive additional ABA hours as replacement for those claimed to have been lost between February 1, 2012 and the present?¹

¹ As more fully set forth below, on March 19, 2012, Service Agency concluded that Claimant was eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq., thus resolving one of the issues which had been raised in the Fair Hearing Request.

FACTUAL FINDINGS

1. Claimant is a three-year-old Service Agency consumer who started participating in the Early Start² Program, in August 2010, because of delays in the areas of expressive language, adaptive behavior, and social-emotional development. His date of birth is January 19, 2009. He resides with his parents and his older brother, who is also a Service Agency consumer.

2. As set forth in a Revised Individual/Family Service Plan (IFSP) dated June 11, 2011, Service Agency agreed to fund the following Early Start services: speech and language therapy starting June 1, 2011; occupational therapy starting June 15, 2011; and 20 hours per week of in-home ABA services from Behavior Frontiers starting April 1, 2011.

3. Behavior Frontiers started providing the ABA services on April 1, 2011, and submitted regular reports to Service Agency. In its last report, dated January 31, 2012, and covering the last quarter of 2011, Christa Nettles, M.S. (Nettles), Claimant's Case Manager, and Kelly Kratzer (Kratzer), Behavior Frontiers Clinical Director, report progress in goals in communication, self-care and behavior. They conclude: "It is recommended that HRC continue to fund for Irfaan's behavior intervention to be provided across settings for the four month period from February 1st, 2012 to June 30, 2012 so that Irfaan's parents may continue to learn the techniques necessary to increase his communication, community use, home living, and self-care behaviors as well as to reduce his maladaptive behaviors and new behavior of aggression. Communication continues to be a significant concern at this point for his parents due to his increase in his maladaptive behavior and aggression. Supervision hours are recommended to be added in addition to his direct services. These recommendations have been formulated specifically to address the goals provided for Irfaan in this report. . . ." (Service Agency Exhibit 15, at p. 18.) Behavior Frontiers did not recommend a specific number of hours at Service Agency's request, but Kratzer testified that their intent was to maintain services at the existing level of 20 hours per week.

4. Claimant has been attending a private preschool program at the Amaanah Greenbrier Montessori School in Anaheim, California, since November 2011. His residence is located within the boundaries of the Norwalk-La Mirada Unified School District (District).

² "Early Start" is the name used in California to reference a federally-funded program for young children at risk for certain disabilities. The federal law is found in the Individuals with Disabilities Education Act (IDEA), Part C, Infants and Toddlers with Disabilities (20 U.S.C. § 1431 et seq.) and the applicable federal regulations (34 C.F.R. § 303 et seq.). The state statute setting forth the State's participation in the program is the California Early Intervention Services Act (CEISA), which is found at Government Code section 95000 et seq.

5. In October or November 2011, Service Agency authorized Gabrielle du Verglas, Ph.D. (du Verglas), to conduct an assessment to assist in the determination of Claimant's eligibility for services under the Lanterman Act once he turned three years old. Dr. du Verglas met with Claimant on January 4 and 5, 2012, twice at Service Agency's offices and once at Claimant's home. Dr. du Verglas reviewed two prior assessments, one completed by B.J. Freeman, Ph.D. (Freeman), on September 23, 2010, which diagnosed Autism Disorder, and one done by Dr. du Verglas in November 2010, which issued a provisional diagnosis of Autism Disorder. She administered cognitive and other testing, and observed Claimant during one of his ABA therapy sessions. Dr. du Verglas learned about Claimant's preschool attendance on January 4, 2012, and, given her other professional commitments, did not have time to conduct a school observation before Claimant's third birthday, the date Service Agency wanted to her report completed in order to make the eligibility decision.

6. On January 18, 2012, Dr. du Verglas issued her report, diagnosing Claimant with Pervasive Developmental Disorder, Not Otherwise Specified, in part because he had made gains in social interaction since her prior assessment. Dr. du Verglas made several recommendations, including observation in his preschool program, review of other independent assessments, and reassessment between his fifth and sixth birthdays to trace his progress. With respect to the school observation, Dr. du Verglas wrote: "In the future, an observation of Irfaan's participation in a school setting is recommended. However, due to time constraints this assessment could not be completed prior to his third birthday. Mother did sign consent for a school observation to be completed in the future. Description of his abilities to participate in a regular preschool program could be obtained through a collateral report completed through Norwalk School District, as a school observation was reportedly completed as part of his assessment through the school district." (Service Agency Exhibit 10, at p. 12.)

7. Service Agency initially concluded that Claimant was not eligible for services under the Lanterman Act, and formally notified his family by letter dated February 3, 2012. Service Agency informed the family that in order to assist with the transition to District-provided educational services, it would fund 10 hours of ABA therapy until February 17, 2012.

8. a. The District conducted, or caused to be conducted, three separate assessments not available to Service Agency at the time of its initial decision. On December 1, 2011 and January 3, 2012, the District conducted a Psychoeducational Multidisciplinary Assessment, which included the administration of multiple tests and the review of the reports of experts who had diagnosed Claimant with Autism Disorder, namely, those of Robin L. Morris, Psy.D. (Morris), who had made her diagnosis on September 19, 2011, Dr. Freeman, and Dr. du Verglas (November 2010 report). Of note, pre-academic social and cognition skills were areas of need; test results indicated weak receptive and expressive language skills; adaptive skills were measured as moderately low in behavior and motor skills and as adequate in socialization, communication and daily living skills; gross motor skills were adequate; and in school setting

observations, Claimant demonstrated significantly delayed socialization and communication skills, which were impacting his participation in school. The evaluators concluded that Claimant was eligible for special education services on the basis of autistic-like behaviors and speech/language impairment, and recommended the convening of an individual education plan (IEP) team meeting for a formal determination of eligibility and development of a plan to meet his educational needs.

b. The IEP team met on January 19, 2011, and agreed that Claimant was eligible for special education services. A second meeting was held on February 8, 2012. The IEP team is in the process of working on a plan that is acceptable to Claimant's family.

9. On December 15, 2011, Gallagher Pediatric Therapy conducted an occupational therapy evaluation. Adrienne Lee, O.T.R./L., found Claimant to have age-appropriate fine motor skills, visual motor skills, gross motor skills, and self-care skills. Areas of concern were tactile processing inconsistencies and decreased food repertoire, for which occupational services were recommended, at the rate of 25 minutes per week for a trial period of four months.

10. The District conducted a functional behavior assessment and issued a report on January 13, 2012. Ann Dalena (Dalena), Behavior Specialist, observed Claimant at school, at home, and during a diagnostic assessment appointment. Dalena observed Claimant during an ABA session at home, on December 13, 2011, from 2:00 to 3:45 p.m. Behavior Frontiers Case manager Nettles provided a list of maladaptive behaviors in which Claimant had engaged in the past: tantrums, non-compliance, self-stimulation, throwing objects, verbal stimulation, elopement, and perseverations. However, Claimant did not display any of these behaviors during any of Dalena's observations, and Dalena did not recommend direct behavior intervention services from the District's Autism Student Support Intervention Service Team. Nevertheless, because of the Behavior Frontier report, Dalena recommended monitoring of Claimant by the IEP team in case the maladaptive behaviors emerged in the school setting. She also made recommendations for instructional staff to prevent the maladaptive behaviors from emerging at school. For example, suggestions are made to avoid reinforcing tantrum behavior, such as not to give him access to desired objects until he displays appropriate behavior.

11. At Claimant's family's request, Dr. Morris conducted observations of Claimant at school and at home, and prepared a report dated January 19, 2012. Dr. Morris observed Claimant at school for 90 minutes and at home for 60 minutes during an ABA session. Claimant was one of ten students in the class, and the teacher was very active with the students. Claimant was aware of his peers and imitated their play. He required prompts and direction from the teacher to participate in activities, particularly if transitions were involved. During the home observation, Dr. Morris observed several instances of noncompliance. Dr. Morris noted that Claimant had benefited from ABA and that he had shown marked growth in foundational skills, and opined that Claimant would continue to benefit from the therapy.

12. On February 28, 2012, Dr. du Verglas conducted a one-hour observation at school. In her school observation, Dr. du Verglas did not see any hand flapping, rocking or toe walking. Claimant had appropriate eye contact with other children and the teacher. Claimant did not engage in any spontaneous verbalization or initiation of social interaction, but he did respond when approached by other children, leading Dr. du Verglas to conclude that Claimant's rate of spontaneous language and social interaction with peers is delayed. Dr. du Verglas also reviewed the District's January 13, 2012 psychoeducational evaluation and Dr. Morris' September 25, 2011 psychological evaluation. As a result of the new information and insight gained from it, including the consensus among experts on the diagnosis, Dr. du Verglas revised her diagnosis to Autistic Disorder. She recommended reevaluation at age five.

13. On March 19, 2012, a Service Agency eligibility determination committee met to review Dr. du Verglas's updated opinion, as well as the newly-acquired information from the District and Dr. Morris. The committee concluded that Claimant was eligible for services under the Lanterman Act, with a diagnosis of Autism Disorder.

14. Behavior Frontiers continued to provide ABA services until the February 17, 2012 deadline contained in Service Agency's letter of dated February 3, 2012. Claimant has not received any ABA services since February 17, 2012.

15. In Kratzer's opinion, and as set forth in the last report from Behavior Frontiers, Claimant has continuing needs in the areas of functional communication, self-care, replacement behavior, and noncompliance, and can benefit from continued ABA services. Because of the break in service, she would not recommend any reduction the number of hours, from 20 per week, while a functional behavior assessment is performed. In her experience, autistic children who have a gap in therapy tend to regress in their development.

16. Claimant's mother testified that his maladaptive behaviors increased after cessation of ABA therapy. His noncompliance, tantrum, hand-flapping, toe-walking, object-throwing, and biting behaviors all increased. His eye contact has decreased. He needs greater prompting to follow two-step directions. Claimant continues to have deficits in the areas of self-care, social skills, communication, and fine motor skills.

17. a. Jenna Mattingly, B.C.B.A. (Mattingly), a behaviorist employed by Service Agency, agreed that Claimant needs behavior services. However, a new behavior plan has to be prepared now that Claimant is older than three years and best practice standards require the completion of a functional behavior assessment before a behavior plan is implemented, particularly if, as in Claimant's case, there has been a gap in therapy. Mattingly estimated that it would take approximately two months to complete a functional behavior assessment, and that an expedited one could be completed in two to four weeks. She agreed therapy should take place while the assessment is completed, and wanted to discuss Claimant's

case with Behavior Frontiers before offering a specific service level recommendation.

b. Mattingly reviewed the January 31, 2012 report from Behavior Frontiers and questioned whether some of the goals then in effect were educational and the responsibility of the District. Mattingly has made initial contacts with the family and their advocate, and with Helen Mader, M.A., B.C.B.A., the principal at Frontier, to start the assessment process. The functional behavior assessment had not started at the time of the hearing.

18. Claimant's family filed the Fair Hearing Request on February 6, 2012, soon after receipt of Service Agency's letter of February 3, 2012.

LEGAL CONCLUSIONS

1. Government Code section 95014, subdivision (b), provides that the Department of Developmental Services and regional centers shall be responsible for the provision of appropriate early intervention services that are required for California's participation in IDEA for children found eligible for services. Government Code section 95004 provides that the regional centers that are established under the Lanterman Act shall serve the developmentally disabled as the conduit for Early Start services. California Code of Regulations, title 17, section 52108, requires that early intervention services be "provided, purchased or arranged" by the regional centers. The services for eligible infants and toddlers are provided through a shared responsibility between the regional centers and the local education agencies (LEAs). (Gov. Code, § 95006.) The Early Start services must be provided, however, pursuant to the Early Start federal law, the corresponding state statute, and the implementing federal and state regulations.

2. Once the regional center evaluates and determines a child is eligible for Early Start services, the regional center is responsible for instituting a planning process for the child's early years. (20 U.S.C. § 1436, 34 C.F.R. § 303.344, Gov. Code, § 95028, and Cal. Code Regs., tit. 17, § 52106.) This planning process includes the preparation of an IFSP that is developed at a conference with the child's family representatives, the regional center representatives, and other appropriate participants. The IFSP must include a list of services to be provided to the child, as well as other information.

3. Under Early Start, intervention services are defined as services that "are designed to meet the developmental needs" of an infant or toddler with a developmental disability. (20 U.S.C. § 1432, subd. (4)(C).) The services provided should support and enhance a family's ability to meet the special developmental needs of their child with disabilities. (Gov. Code, § 95001, subd. (a)(3).) The regional center is required to provide early intervention services that are "designed to meet the developmental needs of each eligible infant or toddler and the needs of the family related to the infant's or toddler's development." (Cal. Code Regs., tit. 17, § 52000, subd. (b)(12).)

4. The Lanterman Act is a comprehensive statutory scheme designed to provide supports and services for persons with developmental disabilities. The Lanterman Act has a two-fold purpose: (1) to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community; and (2) to enable developmentally disabled persons to approximate the pattern of living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (Welf. & Inst. Code, §§ 4501, 4509, and 4685; see generally *Association for Retarded Persons v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

5. As the foregoing makes clear, the goals of the Early Start program and the Lanterman Act are, essentially, the same. Both statutory schemes are similarly focused on providing opportunities for individuals with developmental disabilities to realize their potential.

6. The eligibility requirements for Early Start services are much broader than those for Lanterman Act services, and it is possible for child to meet Early Start eligibility requirements but not the more narrow requirements of the Lanterman Act. As a result, a planning process is built into the Early Start framework to transition special education and related responsibilities to the LEAs and, if a child is eligible, responsibilities for Lanterman Act services to the regional centers once a child reaches the age of three.

7. a. The CEISA and its implementing regulations contain requirements to ensure a smooth transition for children who will continue to receive specialized services after age three. In pertinent part, Government Code section 95020, which mandates the IFSP, provides: “[d] The individualized family service plan shall be in writing and shall address all of the following: [¶] . . . [¶] (8) The steps to be taken to ensure transition of the infant or toddler upon reaching three years of age to other appropriate services. These may include, as appropriate, special education or other services offered in natural environments.”

b. California Code of Regulations, title 17, section 52112, dictates specific steps and timelines to ensure that children potentially eligible for special education services are evaluated for such services and that they receive timely delivery of services. Of note, regional centers may continue to temporarily fund Early Start services after a child attains age three: “Regional centers may continue providing or purchasing services for a preschooler who has been determined eligible for regional center services: [¶] (1) Until the beginning of the next school term after the toddler’s third birthday during a period when the LEA special education preschool program is not in session; and, [¶] (2) When the multidisciplinary team determines that services are necessary until the LEA special education program resumes.” (Cal. Code Regs., tit. 17, § 5200, subd. (f).)

8. In this case, Claimant’s transition from Early Start to Lanterman eligibility has

not been smooth. He was initially found not eligible, and ABA services ceased on February 17, 2012. However, as set forth in factual finding numbers 3, 14, 15, 16, and 17, he continues to need those services. In fact, the absence of services has made some of the behaviors worse, as set forth in factual finding number 16.

9. Service Agency argues that Claimant's current behavior needs must first be examined before services are reinstated. It correctly points out that the Lanterman Act has a planning process separate from that undertaken in Early Start. However, this argument ignores the fundamental purpose of the Lanterman Act to provide for the needs of developmentally disabled individuals. The functional behavior assessment Service Agency seeks will take between two weeks and two months to complete, and, absent an interim agreement by the parties, Claimant may continue without services for the period of the assessment and that involved in the development of an individualized program plan (IPP) under the Lanterman Act. The potential harm to Claimant in continuing to be denied services pending the completion of the IPP process outweighs the potential harm to Service Agency in paying for services it may not have been required to provide, assuming it is concluded after the functional behavior assessment that less than 20 hours per week of ABA therapy are required. Such denial of services is inconsistent with the purpose of the Lanterman Act.

10. The Lanterman Act provides that a regional center may be required to continue providing services to a consumer during the pendency of an appeal. (Welf. and Inst. Code, § 4715, subd. (a).) However, this requirement only applies to consumers who are already receiving services under the Lanterman Act, pursuant to an individual program plan. (*Ibid.*) Because Claimant was not receiving services under the Lanterman Act at the time his parents filed his appeal, the provisions for continuing services pending his appeal are inapplicable. Nonetheless, the provision demonstrates a legislative intent to retain in place agreed upon services while the wisdom or need for changes is decided. Moreover, the Lanterman Act does not specifically prohibit the continuation of services for participants in the Early Start Program who are eligible for services under the Lanterman Act, particularly since the obligation to provide non-educational services to eligible children remains the responsibility of the regional center after the age of three.

11. In addition, the equitable remedy of maintaining the status quo with respect to the provision of services is codified under the IDEA. Federal and state special education laws generally provide that a special education student is entitled to remain in his or her "then-current educational placement" pending the completion of due process hearing procedures unless the parents and the public educational agency agree otherwise. (20 U.S.C. § 1415, subd. (j); Educ. Code, § 56505, subd. (d).) The current educational placement is typically the placement called for in the student's IEP that has been implemented prior to the dispute arising. (*Thomas v. Cincinnati Board of Education* (6th Cir. 1990) 918 F.2d 618, 625.) The purpose of the "stay put" is to maintain the status quo of the student's educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent School Dist.* (5th

Cir. 1983) 695 F.2d 949, 953; *Zvi D. v. Gordon Ambach* (2nd Cir. 1982) 694 F.2d 904.) While the Early Start programs and the Lanterman Act do not have as extensive an equitable provision as that found in the IDEA, the intent of all programs is to place the needs of the child first. Thus, under all of the circumstances of this particular case, the most equitable result is for Respondent to reinstate Claimant's Early Start ABA services pending the completion of the IPP process.

12. The only specific recommendation regarding the appropriate number of therapy hours per week was that of Behavior Frontiers. The 20-hour per week level was that previously found appropriate and will be retained.

13. Claimant's family also seeks compensatory services for the services lost after February 3, 2012. When a school district has failed to provide appropriate services and a consumer's parents obtain such services privately, reimbursement is an appropriate remedy. (*School Committee of the Town of Burlington, Mass. v. Dept. of Ed. of Mass.* (1985) 471 U.S. 359 (*Burlington*); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141 (decided under Part C); *Still v. DeBuono* (2nd Cir. 1996) 101 F.3d 888 (decided under former Part H, now Part C.) Because Congress did not intend the IDEA to benefit a disabled child only if the child's parents are able to pay for private placement, courts have extended *Burlington* to provide for compensatory services as an alternative to reimbursement in order to remedy violations of the IDEA. (See, e.g., *Pihl v. Massachusetts Dept. of Ed.* (1st Cir. 1993) 9 F.3d 184, 188-190 (*Pihl*)). Compensatory services have not been limited to cases in which the consumer remains under the age limit for entitlement to services, whether under Part B or Part C of the IDEA. (*Pihl, supra*, 9 F.3d 184, 189; *Wagner v. Short* (D. Md. 1999) 63 F.Supp.2d 672, 676-677; *Still v. DeBuono, supra*, 101 F.3d 888, 892.) "To give meaning to the state's obligations under part C of the IDEA, compensatory education must be an available remedy for children who establish Part C violations but have since reached the age of three. Otherwise, . . . agencies could abrogate their responsibilities under the IDEA and escape any accountability simply by relying on the time-consuming appeals process." (*Wagner v. Short*, 63 F.Supp.2d at p. 677.)

14. Claimant's advocate argues that compensatory service concepts developed in the special education arena should be imposed in Lanterman Act cases. She further argues that but for Service Agency's failure to timely evaluate Claimant he would have continued to receive services past age three and that the denial of such services warrants compensatory services. Service Agency argues that such remedy is unavailable under the Lanterman Act. It is unnecessary to decide whether the authority developed under the IDEA governs this case. Largely due to Dr. du Verglas's busy schedule, Claimant was not observed in the school setting before Service Agency made its initial determination. However, it was not a foregone conclusion, as Claimant's advocate seems to argue, that once the observation was conducted Claimant's eligibility would be indisputably established. Two additional key pieces of information, Dr. Morris' report confirming an earlier diagnosis by Dr. Freeman and the

District's assessment, were reviewed by Dr. du Verglas after the school observation. In her report, Dr. du Verglas placed great reliance on the experts' consensus regarding the diagnosis, which consensus was not apparent to her before the additional evidence was received. Service Agency thus had a reasonable basis on which to stop funding the services. Moreover, since it had a plausible argument that services under Lanterman should await completion of the IPP process, compensatory services will not be ordered to the date of eligibility. Therefore, Claimant's request for compensatory services is denied.

15. By reason of factual finding numbers 1 through 18, and legal conclusion numbers 1 through 14, Service Agency shall fund 20 hours per week of in-home ABA therapy during a reasonable transition period, not to exceed six months, for the functional behavior assessment to be completed and for the IPP process to run its course.

ORDER

Claimant's appeal is granted, and Service Agency shall continue to fund 20 hours per week of in-home ABA therapy during a reasonable transition period, not to exceed six months, for the functional behavior assessment to be completed and for the IPP process to run its course.

Dated: _____

Samuel D. Reyes
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.