

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ISAI A.

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH Case No. 2012060279

DECISION

David Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter at the Eastern Los Angeles Regional Center, in Alhambra, California, on July 19, 2012.

Claimant Isai A. was represented by his mother and father, Julio and Matilda A. (Initials are used to protect confidentiality.) The Eastern Los Angeles Regional Center (ELARC or the Service Agency) was represented by Antonio R. Flores, Supervisor. Spanish interpretation was provided by Paola Gazzaneo.

Oral and documentary evidence was received and argument made. The record was closed and the case was submitted for decision on July 19, 2012.

ISSUE

May the Service Agency terminate discrete trial training services for Claimant and, instead, provide behavior modification services?

FACTUAL FINDINGS

1. Claimant is a 12-year-old boy (born December 15, 1999). Claimant was diagnosed with autism in March 2009. He has also been diagnosed with mental retardation and Attention Deficit Hyperactivity Disorder.

2. The Service Agency currently funds discrete trial training (DTT) services for Claimant in the amount of 15 hours per week of 1:1 direct services, six hours per month of supervision services, and two hours per month for team meetings. The services are provided by Pacific Child & Family Associates (Pacific), a vendor that is approved by the Service Agency.

3. In a Notice of Proposed Action (NOPA) dated May 23, 2012 (Exhibit 6), the Service Agency notified Claimant that it would terminate DTT services as of June 30, 2012, and recommended a transition to behavior modification services. This recommendation was based on review of Pacific's progress report dated April 13, 2012, by ELARC clinical psychologist Dr. Bienstock and her conclusion that the DTT services "cannot be clinically justified" and her recommendation that there be a transition to behavior modification services.

4. Claimant's parents filed a Fair Hearing Request dated May 30, 2012 (Exhibit 6), and this hearing was scheduled.

5. Claimant has received DTT services from Pacific since March or May 2009. His most recent Individual Program Plan (IPP), dated December 13, 2011 (Exhibit 1), indicates that Claimant receives this service due to his needs and challenging behaviors. For example, DTT from Pacific is to work on his behaviors, adaptive skills, communication, socialization and independent daily living skills. The main focus of the DTT program is to target behaviors and maladaptive behaviors, such as aggression, temper tantrums and screaming, and to acquire communication skills. Minimal progress was noted and the IPP states that Claimant "will continue to require detailed assistance to reach the aforementioned goals" and that Pacific was to address all developmental domains. The IPP also states that according to Claimant's parents the DTT program focused on communication, self help/toileting skills, compliance skills, receptive language/self awareness skills and behavior reduction. The IPP notes that Pacific's progress reports to ELARC focus only on behavior reduction and that the service coordinator explained to his parents that behavior services would be more appropriate, and that the parents would address the issue of the limited focus of the progress reports directly with Pacific.

6. Other evidence indicates that ELARC has been concerned for some time about the limited focus of Pacific's progress reports, as well as timeliness. Exhibit 3 includes emails from Claimant's file created by Cecilia Cortez, his service coordinator, and Dr. Bienstock. In an email dated September 2, 2011, Dr. Bienstock expresses several concerns including that the vendor's focus is mostly on reducing maladaptive behaviors. In an undated email on the same page, Dr. Bienstock recommends, among other things, a meeting with the vendor to discuss concerns including late reports and that the goals remain focused on behavior, despite significant progress by Claimant noted in the data. On January 24, 2012, Ms. Cortez wrote to Dr. Bienstock that she had spoken with the family, who insisted that Pacific was working on all areas of DTT. Dr. Bienstock wrote to Ms. Cortez on May 11,

2012, that the progress reports were late, and although there were “very brief and general statements regarding self-help skills and eye contact,” progress on these goals did not appear based on prior data and “the main focus continues to be on maladaptive behaviors and given my prior reviews, b-mod [behavior modification] would be a more appropriate service at this time.” As the vendor was not addressing her concerns, Dr. Bienstock concluded that she could not clinically approve the service.

7. The only Pacific progress report in evidence is dated April 23, 2012 (Exhibit 2) and covers services and progress since December 2011. It states that the focus of the services are on decreasing problematic behaviors, such as aggression, tantrums and screaming, while teaching Claimant positive replacement skills, such as sign language for communication, and self-help skills. The report includes specific information on Claimant’s behaviors of aggression, tantrums and screaming, including strategies often based upon increasing Claimant’s communication skills to avoid these problematic behaviors. Over the reporting period, Claimant’s average frequency of manding increased. Pacific was trying to increase this behavior, and revised the goal to encourage more progress. Significant progress was also noted in Claimant’s use of sign language instead of screaming. A goal was revised to encourage more use of a picture exchange system. The progress report also discusses skill acquisition, including brief sections on Claimant’s dressing, community outings and safety, and parent training. In the section on summary and recommendations, the report notes that Claimant has made steady progress reducing aberrant behaviors and he continues to require assistance to reach his goals, and recommends that services continue for the same number of hours.

8. Claimant receives special education services from his school district. An Individualized Education Program dated May 18, 2011 (Exhibit A) lists several services, including that Claimant receives behavioral support that has had some success--his noncompliance reduced from an average of 13 per day to 10 per day. Some behaviors noted are that he will leave his chair, grab things in the classroom, and he bites and chews on wood and cardboard puzzles. Delays and difficulties are noted in several academic areas and, as relevant here, in his social development, self-care skills, language development and communication.

9. The school district recently prepared an occupational therapy assessment report dated May 11, 2012 (Exhibit D). Of note is that Claimant requires “stand by assistance for safety due to impulsivity” both in the classroom and in community settings.

10. Claimant’s pediatrician, Dr. Carolina Pena-Ricardo, submitted a letter dated July 9, 2012 and attached clinical notes (Exhibit C), indicating she has treated Claimant since May 2011. Dr. Pena-Ricardo writes that behavior therapy in the form of DTT is “crucial to improve his clinical response and promote his development, especially now that with the medication he would be more receptive to it.” The current DTT “has helped him with toilet training and other activities of daily living.” The main therapy addressing safety issues is DTT which she believes should be continued at the level of 15 hours per week.

11. At the hearing, the Service Agency did not initially offer any testimony. However, Mr. Flores eventually testified to the effect that there are differences between DTT and behavior modification services, that they cannot be provided at the same time, and that aggressive behavior can be addressed under behavior modification services. Mr. Flores did not explain whether it was Service Agency policy, or some scientific basis, on which he concluded that the two services could not be provided at the same time. Mr. Flores testified there are diminishing returns over time from DTT services, which Claimant has received since age five or six. If DTT services are not meeting Claimant's needs, it would be better to provide behavior modification services.

12. Claimant's father and mother testified at the hearing. The services provided by Pacific address not only Claimant's behaviors but also his self-improvement in daily living skills such as dressing, brushing teeth, washing hands, using utensils to eat and cleaning up. Pacific works on sign language and a picture exchange system, helps with safety training, and works with Claimant on walks in the community. Claimant's parents did not interpret the NOPA as offering sufficient alternative services for Claimant. They would prefer to continue the present hours of service.

LEGAL CONCLUSIONS AND DISCUSSION

Based on the foregoing findings of fact, the Administrative Law Judge makes the following legal conclusions:

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code §§ 4500 et seq.) 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 1-4.)

2. Where, as here, Service Agency seeks to discontinue a service it has previously funded, Service Agency has the burden to demonstrate that its decision is correct. In this case, Service Agency had the burden to show that funding for the existing hours of DTT services should be eliminated, as set forth in the NOPA.

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 such persons, "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 habilitation 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." (Welf. & Inst. Code § 4502.)

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

5. Welfare and Institutions Code section 4646, subdivision (a), states, in pertinent part:

“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. Under Welfare and Institutions Code section 4647, subdivision (a), “service coordination shall include those activities necessary to implement an individual program plan, including, but not limited to, participation in the individual program plan process; assurance that the planning team considers all appropriate options for meeting each individual program plan objective; securing, through purchasing or by obtaining from generic agencies or other resources, services and supports specified in the person's individual program plan; coordination of service and support programs; collection and dissemination of information; and monitoring implementation of the plan to ascertain that objectives have been fulfilled and to assist in revising the plan as necessary.”

7. Under Welfare and Institutions Code section 4648, subdivision (a)(1), “In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities including . . . Securing needed services and supports. It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. The regional center shall secure services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan”

8. The evidence in this matter does not support the Service Agency's decision to terminate Claimant's DTT services. First, there are inconsistencies concerning the nature of Claimant's progress with DTT. Dr. Bienstock's undated email (Factual Finding 6) refers to his “significant progress” noted in the data. Yet the IPP in December 2011 (Factual Finding 5) notes that there has been minimal progress. Then the Pacific progress report in April 2012 (Factual Finding 7) notes significant progress in one area, some revised goals, and overall steady progress, with the recommendation of continued services. Second, the concerns expressed by the Service Agency appear to not only relate to the possibility of substituting behavior modification for DTT, but also that Pacific is not providing timely progress reports and does not include detailed information about services other than those that address Claimant's behaviors. Admittedly the Service Agency is tasked with making sure that

Claimant's needs are being met and monitoring the vendor for its effectiveness. However, it is not appropriate to terminate a service because the vendor is not providing complete and timely reports.

9. Further, the evidence established that Pacific provides services addressing Claimant's needs beyond behavior management, including communication skills, activities of daily living, socialization and community access. Also, there is no indication if Dr. Bienstock relied upon anything other than the progress reports in reaching her conclusion that she could not clinically approve Pacific's services. In contrast, Claimant's pediatrician submitted her opinion (Factual Finding 10) that DTT services should continue based on her familiarity by having treated Claimant since May 2011 as well as recent examinations and clinical notes. School related documents also support Claimant's need for DTT services.

10. The Service Agency may not terminate Claimant's DTT support services based upon the evidence presented at the hearing.

ORDER

Claimant Isai A.'s appeal of the Service Agency's decision to terminate funding for DTT services is granted. Eastern Los Angeles Regional Center may not terminate funding for Claimant's DTT services at this time.

IT IS SO ORDERED.

DATED: July 26, 2012.

/s/

DAVID 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.