

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

J. D.,

Claimant,

OAH No. 2012100511

and

HARBOR REGIONAL CENTER,

Service Agency.

DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Torrance, California on November 16, 2012. Claimant's parent represented claimant.¹ GiGi Thompson, Manager Rights Assurance, represented Harbor Regional Center (HRC or service agency).

The matter was submitted for decision on November 16, 2012. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUE

The sole issue presented is whether claimant has current needs requiring a continuation of 1:1 Applied Behavioral Analysis (ABA) services.

FACTUAL FINDINGS

1. Claimant is a nine-year-old consumer of HRC based on his qualifying diagnosis of Autism. Claimant resides with his mother
2. Since February 2006, HRC has been funding ABA services for claimant, whose most recent ABA service provider is Autism Spectrum Therapies (AST). In April 2012, AST recommended a phase out of claimant's 1:1 therapeutic services. By letter dated

¹ Initials are used to preserve confidentiality.

September 5, 2012, HRC notified mother of its position that AST has successfully taught mother techniques for managing claimant's behaviors and that the appropriate service to increase claimant's independence and safety at home and in the community is "parent training focused in order to acquire knowledge of the strategies and practice to provide for consistent implementation." (Ex. 3.) The September 5, 2012 letter continues, "HRC has assessed the need for a program of 40 hours of Positive Behavioral Services (PBS) to be provided by Family Behavioral Services (FBS). This program will focus on training you how to teach [claimant] . . . about community safety awareness skills as well as address the concern of his self inflicting behaviors (biting). An assessment will be requested by FBS to assist in finalizing appropriate methods to target the goals for the program. With that being said, HRC is offering a Functional Assessment along with 40 hours of PBS modeled ABA services to be completed by FBS." (Ex. 3.)

3. On October 10, 2012, HRC received a Fair Hearing Request from mother objecting to the proposed phase out of 1:1 ABA services. Thereafter, these proceedings ensued.

4. According to claimant's most recent Individual Program Plan (IPP) prepared in conjunction with a July 17, 2012 annual review, claimant "exhibits deficits in the area of communication, community use, health and safety, leisure, self-care, self-direction, and social skills as measured by ABAS-II (Parent Edition) as of September 2011." (Ex. 8, at p. 3.) As noted in claimant's IPP, AST provided claimant with interventional behavioral therapy to decrease "inappropriate behaviors such as eloping, vocal stimulatory behaviors, and vocal protests. They were also teaching [mother] . . . to have him wait for access to a preferred item, following directions, engage in functional communication, coping strategies, and to complete daily living routine. [Claimant] . . . is also learning functional communication skills through spontaneous language. They are also working with [mother] . . . on teaching [him] . . . to answer social questions for safety concerns." (Ex. 8, at p. 8.)

5. Claimant's IPP indicates that "[a] plan was previously developed and agreed upon between HRC and AST with a fade plan to end services by August 12, however, the plan was changed to continue services until [mother] . . . has mastered 80% of the skills then to recommend graduating services. [Mother] . . . has mastered 84% of the behavioral strategies, however, [claimant] . . . continues to show areas of need in relation to behaviors as a result of new or non preferred task being presented, generalizing skills across all settings, and being impulsive in gaining access to preferred items/activities. Per conversation with AST supervisor on May 16, they suggested to put services on hold as [mother] . . . is not showing receptiveness to any suggestions made by case supervisor and a consultation program was offered. On May 23, 2012, AST submitted a progress report recommending a discontinuation of services effective June 30, 2012 due to parent mastery of strategies at 84%." (Ex. 8, at p.8.)

6. Mother's several concerns are enumerated in an undated AST communication to LaKieya Williams, an HRC counselor, along with an AST recommended course of action or response as follows:

Remaining engaged appropriately: Please not that although he may not be engaged in what one would consider age appropriate behavior he does not engage in maladaptive behavior (he will sit and look out the window, sit and fiddle with cars, rock back and forth on his scooter, sit on the couch or bed).

Crossing the street on his own and not eating things on the ground: Given supervision he is able to safely cross the street following parent's direction and when on a DRO system will refrain from eating things he is not supposed to.

Attending overflow room at church without supervision: [Claimant] . . . will do this for a limited amount of time but AST has communicated that it is not realistic for him to do this for several hours.

Reinforcement and maintenance of skills: Parent expectations is that maintenance is not necessary once [claimant] . . . learns skills. However working on maintenance is necessary.

Generalization of parent education: Parent is taught a strategy to address a concern but sometimes is in disagreement to use that strategy across similar situations i.e. DRO.

Stopping whining or crying in the middle of the night: Sometimes [claimant] . . . becomes deregulated especially on days when mom is not able to give the sensory. For example on a rainy day: The supervisor suggested she bundle up and bring an umbrella to make sure gets his exercise, giving him extra showers, jumping or dancing in the house (for sensory input). Parent communicated that this is not a solution because it is not in their schedule or routine and she does not want him to overgeneralize and ask for extra showers or jumping around the house at other times.

(Ex. 4.)

7. On August 3, 2012, HRC's Behavior Services Team, responding to mother's concerns, conducted an observation of claimant at his home and during an outing to the market. An observation summary prepared by Rebecca Asdel, Board Certified Behavior Analyst, reports the following:

At the beginning of the observation, [mother] . . . met [claimant] . . . as he got off the bus. The two of them walked into the apartment building and into their home without incident. Once inside, [mother] . . . attended to chores while [claimant] . . . roamed the apartment. After the counselor and program manager arrived, [claimant] . . . sat on the couch between them.

His mother asked [him] . . . if he was hungry, he indicated that he was both by signing eat and saying "I want to eat," and "hungry." When his lunch was ready, [mother] . . . physically pulled [claimant] . . . by the arm to stand up to

go to the table to eat. [Claimant] . . . responded by pulling away from his mom, yelling out, and biting his wrist. When his mom let go, [he] . . . sat at the table and ate, while continuing to yell. He calmed and ate quietly after about a minute or so. From time to time as [claimant] ate, he pushed a bit of food out from between his lips and either held it on his lip for a second or two, or pushed the food onto the spoon before sucking it back into his mouth. [Claimant] ate two servings of pasta with alfredo sauce and spinach. His mother prompted him several times throughout the meal to eat with his utensils, rather than with his fingers. When [claimant] . . . was finished eating he took his dish to the sink, washed his hands and his face, and hung the apron he had been wearing during his meal. [Mother] . . . provided him with only a few prompts to thoroughly wash his face. When [claimant] . . . attempted to drink water from the faucet in the cup he had just eaten ice cream out of, his mother told him to get a clean cup and drink filtered water instead and [claimant] . . . complied without further prompting.

Next it was time to get ready to go to the market. When [claimant] . . . returned to the kitchen with his jacket on, his mother told him to remove it, telling him he did not need it. [Claimant] . . . yelled in protest and resisted attempts to remove the jacket. Once his mother was able to explain that it is hot outside that he does not need his jacket, but that they are going out, [claimant] . . . calmed and removed the jacket. He put on his socks and shoes and eagerly paced back and forth making eye contact and smiling with everyone present, saying “go, go, go” as if attempting to communicate how excited he was to be going out.

[Claimant] . . . walked with his mom down the street and to the bus stop where he waited patiently for roughly 10 minutes for the bus to come. As they walked [claimant] . . . held on to his mother’s arm. [Claimant] . . . boarded, rode and exited the bus without incident. At the market, [claimant] . . . pushed the cart and at other times leaned on the cart while his mom pulled it. He followed his mom throughout the store without her prompting. A few times [claimant] . . . bumped lightly into other shoppers, at other times his mom stopped the cart before he bumped into merchandise or fellow shoppers.

When finished shopping, [claimant] . . . helped his mother carry groceries to the bus stop. He waited patiently for the bus and boarded without protest. When it was time to get off the bus, [claimant] . . . resisted and engaged in yelling. His mother pulled him to his feet and took him by the hand as he stomped off the bus. As they walked from the bus toward the intersection, [claimant] . . . dropped to the ground, yelling and biting his wrist and hand multiple times. He bit hard enough [to] leave teeth marks and redden the skin. His mother stood next to him, took his hand and prompted him to get up by pulling on his arm and telling him to get up. After 2-3 prompts [claimant] . . . got up and crossed the intersection, yelling. As they approached the next crosswalk, [claimant] . . . again dropped to the ground, bit his hand and arm

and yelled in protest. Again his mother took his hand and attempted to pull him to his feet a few times while telling him to get up. After 3 or so prompts [claimant] . . . got up and crossed the street. He continued to vocally protest and dropped to the ground one more time. This time, after he got up in response to his mother's prompting, he appeared to be laughing. He continued to smile and laugh intermittently the rest of the way home. There was no further incident after the third time he dropped to the ground. [Claimant] . . . entered the home, took off his shoes and said goodbye to the visitors, as the observation was concluded at this point.

(Ex. 6.)

8. Ms. Asdel's observation summary included a recommendation stating that "[o]verall, [claimant] . . . was compliant with his mother's instructions and prompts." The observation summary's recommendation continues as follows:

The one escalation at lunch time could potentially have been avoided had [mother] . . . first told [claimant] . . . verbally that it was time to eat instead of immediately physically prompting him to eat.

When [claimant] . . . dropped to the ground in the community, [mother] . . . responded appropriately by verbally and physically prompting him to get up, then waiting when he did not respond. Each instance of dropping to the ground lasted no more than 2 minutes or so. It is anticipated that with consistency and continued outings that the dropping behavior will be extinguished. [Mother] . . . could perhaps employ additional priming and reinforcement strategies to facilitate easier transitions when it is time to go home. It will be important to continue to monitor this behavior to ensure that it is reducing. This behavior could potentially become more problematic over time as [claimant] . . . grows, making it more difficult for his mother to physically manage him and take him on outings in the community.

(Ex. 6.)

9. Ms. Asdel testified during the hearing, and her hearing testimony was consistent with the information included in the observation summary she prepared. Ms. Asdel additionally testified that HRC received progress reports from AST updating HRC on both claimant's and mother's achievements. For example, an April 2012 Progress Report indicates that within a six-month period claimant's scaled scores in five out of nine skill areas improved from a scaled score of one to scaled scores ranging between two and seven on the ABAS-II (Parent Edition). According to Ms. Asdel's testimony, a child with autism is not expected to fall within the same classification range as a typical child. The important focus is on the autistic child's improvement, which in this case is apparent. Ms. Asdel further testified that the April 2012 Progress Report indicates that mother achieved 84 percent mastery of behavioral strategies needed to manage claimant's behaviors. In relevant part, the April 2012 Progress Report states the following:

[Mother] has been consistent in her participation in [claimant's] . . . program. Parent education is the primary focus of [claimant's] . . . program and [mother] . . . participates 100% of the time. [Mother] . . . **has mastered 84% of behavioral strategies.** She has demonstrated excellence in her ability to generalize the use of these strategies outside of session and apply them to various situations. However at times [mother] . . . struggles with generalizing the use of strategies when presented with novel situations.

(Ex. 5, at p. 8. [Bold emphasis in original])

10. The April 2012 Progress Report concluded with the following recommendation:

Due to [claimant's] . . . progress and current level of need, AST recommends a discontinuance of [claimant's] . . . intensive behavior intervention program.

11. Betty Tanius, a HRC program manager familiar with claimant and this matter, testified at the hearing that components of an ABA program may be analogized to a scale of balance. For example, on one pan there may be 1:1 therapy while on the other pan there may be PBS. As a child's skills develop through 1:1 therapy, more emphasis is placed on PBS to ensure the parent's ability and confidence in understanding and managing the child's challenging behaviors across varying settings. Ms. Tanius explained that PBS is intended to equip mother with skills and strategies for identifying the different functions served by claimant's behaviors in order to respond appropriately. Ms. Tanius testified, for example, that claimant's escape or elopement may take the form of refusing to complete homework as well as leaving his mother's side while in a store to get a desired object. An appropriate response to the homework situation may be for mother to implement an award system for claimant to acquire a desired object for working a predetermined number of hours on homework. An appropriate response to the store situation may be for mother to prime claimant before going to the store—instruct claimant that the purpose of going to the store is to purchase item "X" and not item "Y" in advance of the store outing.

12. According to Ms. Tanius' testimony, 80 percent achievement of an autistic child's behavior goals through 1:1 therapy, as is the case with claimant, is deemed a success. As a consequence, less emphasis is placed on 1:1 therapy for claimant, and the balance is tipped in favor of more PBS which identifies the consequences maintaining claimant's challenging behaviors and environmental stimuli and changes required to reduce and eliminate those behaviors. Ms. Tanius acknowledges that maladaptive behaviors may recur in different forms as claimant matures through phases of childhood and adolescence. In which case, Ms. Tanius testified, there will be new assessments for age-appropriate behaviors, the articulation of behavioral goals, and the provision of behavioral therapy as indicated.

13. Ms. Tanius' testimony persuasively establishes that at this time PBS is an appropriate course of action for meeting claimant's current needs.

14. Mother is frustrated with HRC's handling of claimant's case. Mother asserts that behavioral therapists failed to work on specific behaviors or incompetently implemented behavioral strategies. Mother maintains that the full extent of claimant's on-going, inappropriate behaviors were not apparent during an observation lasting only a few hours, and that the observation summary omitted "details." (Ex. 7.)

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act. (Welf. & Inst. Code, § 4500 et seq.) The Lanterman Act mandates that an "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream of life in the community." (Welf. & Inst. Code, § 4501.) Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Regional centers are responsible for developing and implementing individualized program plans (IPP) for consumers, for taking into account individual consumer needs and preferences, and for ensuring service cost effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

2. The services and supports to be funded for a consumer are determined by the IPP process, which involves collaboration with the consumer and service agency representatives. Services and supports for persons with developmental disabilities are defined as "specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives." Services and supports can include those providing behavior training and behavior modification programs. (Welf. & Inst. Code, § 4512, subd. (b).)

3. Welfare and Institutions Code section 4686.2, which regulates the provision of ABA services, states the following:

(a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, any vendor who provides applied behavioral analysis (ABA) services, or intensive behavioral intervention services or both, as defined in subdivision (d) shall:

(1) Conduct a behavioral assessment of each consumer to whom the vendor provides these services.

(2) Design an intervention plan that shall include the service type, number of hours and parent participation needed to achieve the consumer's goals and objectives, as set forth in the consumer's individual program plan (IPP) or

individualized family service plan (IFSP). The intervention plan shall also set forth the frequency at which the consumer's progress shall be evaluated and reported.

(3) Provide a copy of the intervention plan to the regional center for review and consideration by the planning team members.

(b) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional centers shall:

(1) Only purchase ABA or intensive behavioral intervention services that reflect evidence-based practices, promote positive social behaviors, and ameliorate behaviors that interfere with learning and social interactions.

(2) Only purchase ABA or intensive behavioral intervention services when the parent or parents of minor consumers receiving services participate in the intervention plan for the consumers, given the critical nature of parent participation to the success of the intervention plan.

(3) Not purchase either ABA or intensive behavioral intervention services for purposes of providing respite, day care, or school services.

(4) Discontinue purchasing ABA or intensive behavioral intervention services for a consumer when the consumer's treatment goals and objectives, as described under subdivision (a), are achieved. ABA or intensive behavioral intervention services shall not be discontinued until the goals and objectives are reviewed and updated as required in paragraph (5) and shall be discontinued only if those updated treatment goals and objectives do not require ABA or intensive behavioral intervention services.

(5) For each consumer, evaluate the vendor's intervention plan and number of service hours for ABA or intensive behavioral intervention no less than every six months, consistent with evidence-based practices. If necessary, the intervention plan's treatment goals and objectives shall be updated and revised.

(6) Not reimburse a parent for participating in a behavioral services treatment program.

(c) For consumers receiving ABA or behavioral intervention services on July 1, 2009, as part of their IPP or IFSP, subdivision (b) shall apply on August 1, 2009.

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

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

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

(3) “Evidence-based practice” means a decision making process that integrates the best available scientifically rigorous research, clinical expertise, and individual’s characteristics. Evidence-based practice is an approach to treatment rather than a specific treatment. Evidence-based practice promotes the collection, interpretation, integration, and continuous evaluation of valid, important, and applicable individual- or family-reported, clinically-observed, and research-supported evidence. The best available evidence, matched to consumer circumstances and preferences, is applied to ensure the quality of clinical judgments and facilitates the most cost-effective care.

(4) “Parent participation” shall include, but shall not be limited to, the following meanings:

(A) Completion of group instruction on the basics of behavior intervention.

(B) Implementation of intervention strategies, according to the intervention plan.

(C) If needed collection of data on behavioral strategies and submission of that data to the provider for incorporation into progress reports.

(D) Participation in any needed clinical meetings.

(E) Purchase of suggested behavior modification materials or community involvement if a reward system is used.

4. HRC, as the party seeking a modification of an existing service or support, bears the burden of proving by a preponderance of evidence that a change is warranted. (Evid. Code, §§ 115 and 500.) HRC has met its burden.

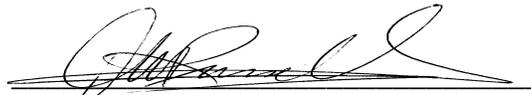
5. Cause exists pursuant to Factual Findings 4 through 14, inclusive, and Legal Conclusions 1 through 4, inclusive, for HRC to discontinue funding 1:1 ABA services for claimant and for HRC to fund 40 hours of PBS for claimant. A preponderance of the evidence establishes that at this time parental implementation of intervention strategies are required to redress claimant’s current needs. PBS, a form of ABA, is intended to provide

mother with knowledge, skills, and strategies for managing claimant's challenging behaviors. The use of PBS at this phase in the efforts to manage claimant's problem behaviors does not preclude future services for 1:1 ABA should a functional behavioral assessment indicate that such future behavioral interventional services are necessary for claimant's social habilitation and integration into the mainstream of life in his community.

ORDER

1. Claimant J.D.'s appeal is denied.
2. Harbor Regional Center may discontinue funding 1:1 Applied Behavioral Analysis services for claimant J.D.
3. Harbor Regional Center may fund 40 hours of Positive Behavioral Services for claimant J.D.

Dated: January 25, 2013


JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.