

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ANDREW L.,

Claimant,

vs.

SAN GABRIEL POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2013060814

DECISION

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on September 5, 2013, in Pomona, California.

Andrew L. (Claimant) was represented by mother, Jean L. (mother) and father, Trung L. (father).¹ Claimant did not attend the hearing.

Daniela Santana, Fair Hearing Manager, represented San Gabriel Pomona Regional Center (SGPRC or Service Agency).

ISSUE

Should Service Agency continue to fund one hour per week of social skills training?

¹ Claimant, her father and father's friend are identified by first name and last initial to protect their privacy.

FACTUAL FINDINGS

Jurisdictional Facts

1. Claimant is a nine- year -boy who lives with his mother, father and his younger brother. Claimant is eligible for Lanterman Developmental Disabilities Services Act services (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.) on the basis of autism and mental retardation.²

2. By letter dated June 12, 2013, the Service Agency gave Claimant notice of its proposed action (NPA) to terminate Service Agency funding for Progressive Resources social skills training program (Progressive). Progressive was providing one hour per week of training, including social skills group for Claimant, parent training, and the inclusion of Claimant's brother as a typical peer in a group with similarly- aged children with autism. Claimant has been receiving the service since 2008. Service Agency determined that Claimant was making only nominal progress in the Progressive program. Service Agency began to fund Assessment, Consultation & Treatment services (ACT) in April 2012 to address what it considered Claimant's adaptive skills deficits, which were a barrier to successful participation in the Progressive program. The ACT program is ongoing.

3. Claimant disagreed with Service Agency's decision to terminate his social skills training program through Progressive Resources and timely filed a Fair Hearing Request. This hearing ensued. Claimant continues to receive services pending the outcome of this appeal.

Background

4. According to Claimant's July 3, 2013 Service Agency Individual Program Plan (IPP), Claimant is ambulatory and in good general health. He is continent. Claimant is somewhat verbal, is able to use words to express his wants and needs, but continues to require prompts to continue an interaction and to respond to others. In social interactions, each social step must be broken down. Claimant may have sensitivity to others touching him, so that in play activities, he touches others back. This distracts him from the activity at hand. Claimant is learning to take turns. Claimant's attention to tasks is improving.

5. According to his IPP, Claimant wanders away and his parents need to pay close attention to him. He does not understand safety awareness. Claimant tantrums, tests his parent by not listening, and becomes very impatient. Claimant asks repeatedly for what he wants, and when he does not get it, he cries and whines for up to an hour. These behaviors typically occur in the community.

² All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

Claimant's Current School District Assessment and Individual Education Plan

6. Claimant's school district performed a triennial psychoeducational assessment of Claimant in May 2013 (assessment). (Exhibit D.) The assessment includes information from Claimant's special education teacher, the school nurse, his adaptive physical education teacher, his occupational therapist, and the speech and language pathologist. Karol L. Holley, the school psychologist and a Board Certified Behavior Analyst (Holley), contributed to and authored the assessment. Claimant's most recent Individual Education Program meeting (IEP) was held on May 14, 2013. (Exhibit E.) Claimant was in the third grade at the time of the assessment and IEP. Claimant is eligible for special education service due to autistic-like behaviors and intellectual disability. Service Agency submitted Claimant's 2012 IEP into evidence. (Exhibit 7.) It is not clear that Service Agency had the 2013 assessment and IEP available to it at the time of Claimant's July 2013 IPP.

7. Holley reported that on the Southern California Ordinal Scales of Development, a measure of cognitive development, Claimant is functioning in the Preconceptual Stage of Development Stage 1 (2-4 years). This means that he is attempting to use evolving concepts of the environment in order to organize and reason about his perceptions. At this stage of development a child has appreciation for relationships and common properties, but they lack the quality and stability of adult concepts. Consequently a child's concepts are not coordinated, the child has difficulty dealing with more than one concept, and reasoning is illogical. On the high end, Claimant has some skills in the Preconceptual Stage 2-Intuitive Thought Stage 2 (4-7 years). During this stage, children show appreciation for common properties and relationships. Holley estimated that Claimant is functioning in the mild to moderate range of intellectual disability.

8. Claimant attends a special day class. He is working on basic kindergarten skills. According to the assessment, Claimant's motor skills are in the 6 to 7 year old level. His speech and language skills have an average age equivalency of 4 years. While Claimant has a vocabulary of about 50 words, he does not appear to have the will to communicate verbally. Parents reported during the IEP that Claimant has no spontaneous communication.

9. Claimant's general social and emotional development is in the 3 to 4 year range. His teacher reports that Claimant prefers to watch children playing. She also reports Claimant initiates interaction with an adult and selected peers. Claimant requires prompting to play games and follow rules. On the Scales of Independent Behavior-Revised, a norm-referenced assessment of adaptive and maladaptive behavior, Claimant received an age equivalent of 2 years, 10 months of age on Social/Communication skills.

10. Claimant's 2013 IEP contains several pragmatic language, recreation and leisure goals and daily living skills goals that involve his integration with adults and peers. It notes that Claimant responds to greeting from familiar peers while engaged in structured activities in the classroom. He is starting to respond to greetings and requests made by unfamiliar peers and requests or greetings from other students. His educational goals include

responding to requests or greetings from familiar and unfamiliar peers with progressively fewer verbal prompts.

Progressive Resources Social Skills Training

11. Pursuant to his IPP, Claimant has been attending Progressive Resources social skills training since January 2008. Progressive is a group-based social skills training program. Groups typically consist of three staff members and 15 children. The children generally have a diagnosis of autism. In addition to providing training for the children in the group, Progressive provides parent groups and incorporates siblings as typical peers in age appropriate groups. Mother and father report that they attend and participate in parent groups and Claimant's brother participates in groups as a typical peer. Parent's report they get great benefit from the parent groups, learning about their sons' needs, interventions and programs. They also testified that Claimant's younger brother has benefited from the program by acquiring a better understanding of Claimant's needs.

12. Progressive report's Claimant's progress on a semi-annual basis. The first report dated May 19, 2010, indicated that Claimant's overall skill levels were at 2 out of 10. His greatest strength was in his ability to regulate his energy level, which was rated a 4. His greatest weakness was in his ability to demonstrate the ability to engage in abstract and symbolic group play which was rated a 1. Overall, his scores ranged from a low of 1 to a high of 4. Scores in the 1-3 range are considered to be "developing." Scores in the 4-6 range are considered to be "emerging." Scores in the 7-8 range are described as "practicing." Scores in the 9-10 level are considered "developed."

13. Progressive's May 20, 2013 report indicates that Claimant's overall skill level was 3.5 out of 10. His strength continues to be in his ability to regulate his energy level according to the group activity, where he received a score of 5 out of 10. Progressive reports that Claimant is making progress in this area. He is able to identify antecedents related to deregulation, is able to request assistance when feeling deregulated, and is able to use sensory balls and disks to help regulate sensory activity with staff support. He is learning relaxation techniques which are modeled by staff. He is continuing to work on recognizing when he is feeling deregulated and to utilize self-regulation techniques when needed. He is at a 4 in his ability to transition between preferred activities and less preferred activities. All other skill levels are rated a 3. The Progressive report indicates that Claimant has made progress and demonstrates developing skill in his ability to match his tone of voice and sentiment appropriately with his peers. This is considered an important benchmark towards self-expression. He is learning to identify feelings in others. Progressive expects continued progress towards Claimant's goals.

Adaptive Skills Training through Assessment, Consultation & Treatment Services

14. In April 2012, pursuant to Claimant's 2012 IPP, Service Agency authorized funding for an adaptive skills training program through Assessment, Consultation & Treatment (ACT.) ACT's adaptive skills program is a one to one ABA service provided in Claimant's home. In April 2012, ACT completed an adaptive skills training overview and

thereafter was authorized by Service Agency to provide Claimant with 32 hours per month of adaptive skills training services.

15. ACT reports progress on a semi-annual basis. In its November 2012 report ACT reported Claimant's primary barrier to progress was "an overall low level of responsiveness to others. Nearly 99 percent of the time he is seen not responding to the requests and questions of other, but instead continues in previous activity, or another will answer for him, or not require him to respond but simply continue on. Responsiveness is seen as a basic pre-requisite skill for various other social communication skills; ACT has begun to intensively target [Claimant's] overall responsiveness. In addition, [Claimant's] restricted interests pose a barrier to skill acquisition as it has been difficult identifying really strong reinforcers to motivate him to achieve independence. Given these barriers, [Claimant] has an overall rather slow acquisition rate with social communication skills among others." (Exhibit C.)

16. ACT's most recent report for the period November 1, 2012 through April 30, 2013, included four communication goals, four socialization goals, three self-help goals, and two community integration goals. Claimant met two of his communication goals and was progressing with generalization on two others. Notably, Claimant's vocal responsiveness increased from approximately 30 percent in October 2012 to 80 percent in February 2013 in a 15-minute sample at the start of a therapy session, and in March, to approximately 75 percent across a three day data sample. He was progressing with generalization on his four socialization goals. He met one of his self-help goals and was progressing on the other two and he was progressing on his community integration goals.

17. In its April 30, 2012 report, ACT recommended that Claimant continue to receive 32 hours per month of adaptive skills training so as "to continue to generalize multiple skills to his brother and peers including responsiveness, returning greetings, brief eye contact with requests, and crossing the street. Regularly, [Claimant] only has contact with his brother as a peer outside of school. He would benefit from a regularly unstructured play setting with peers where therapists could regularly target generalization of skills acquired during sessions with therapist. Such setting may include after school care, daycare, and/or a summer camp. It is recommended that the [parents] seek out assistance regarding peer-based environments from the regional center." (Exhibit C.) ACT indicated that it would do one community based outing per week with Claimant, his brother and his mother.

18. In its April 2013 report, ACT identified several barriers to Claimant's progress, including Service Agency limitations on funding for applied behavioral analysis services (ABA) and the unavailability of family insurance to privately fund such services. ACT reported "given the increased rate of acquisition of new skills under the Adaptive Skills Training program, it is hoped that the services can continue in order to achieve the communication, social, and self-help skills currently being targeted, as well as the new goals developed . . ." (Exhibit C.)

19. In discussing the barriers to progress, ACT reported, "[Claimant's] limited access to peers in order to generalize skills learned and target new social skills serves as a barrier to progress. While the younger brother is readily available in the home, he may not always be a preferred play partner for [Claimant] nor always cooperative within sessions.

Interventions will increasingly incorporate his brother . . . into sessions and attempt to identify other peer-based environments to target.” (Exhibit C.) During the hearing, parents testified that ACT sometimes brings another client to the session, in order to provide Claimant with an opportunity to interact with someone other than family members.

20. Daniela Santana (Santana), Service Agency’s Fair Hearings Manager, testified that Service Agency decided to fund ACT because Claimant’s progress in the Progressive program was minimal. Santana noted that the areas where Claimant is making some progress at Progressive are in self-regulation and transitioning from a preferred to a less preferred activity. These are areas where interaction with others is not required. Given Claimant’s limited progress over five years of social skills training, Service Agency believes it is time to focus on adaptive skills in a one to one setting using behavioral interventions. Santana noted that the social goals developed by ACT adaptive skills training, such as returning a greeting with prompts, are very basic, especially given that Claimant has received five years of social skills training. According to Santana, Claimant has made more progress with ten months of ACT service than in five years of Progressive services.

Service Agencies Decision to Terminate Funding for Progressive Resource’s Social Skills Training Program

21. Service Agency contends that because Claimant has demonstrated little or no benefit from his participation in Progressive social skills training over the last five years, future funding of the program should be terminated.

22. In May 2013, Service Agency’s Autism Consultation Committee (committee) reviewed Claimant progress in acquiring social skills and recommended Progressive’s social skills training program be terminated. No one from the committee testified at the hearing. Santana explained the committee’s reasoning based on her discussions with a committee member. According the Santana, and as stated in the June 12, 2103 NPA, the committee believes Claimant is not making significant progress and benefiting from group social skills training. In particular, the committee is concerned that Claimant is still functioning in the “emergent” level of social skills. The committee is concerned that Claimant’s lack of progress is due to his lack of critical prerequisite skills. Service Agency acknowledges that the slow progress over five years may be because the Claimant was not developmentally ready when originally placed in the Progressive program in January 2008. Santana said another reason Claimant has had limited progress in the Progressive program may be that the group setting is too stimulating and distracting.

23. Santana further testified that the normal programmatic progression is from an ABA program to an adaptive skills training program to a social skills training program. A social skills training program is designed to give an individual the opportunity to practice (generalize) skills acquired in earlier more intensive programs. Santana testified that Claimant transitioned directly from an ABA program to a social skills training program in 2008. His slow acquisition of social skills may have resulted from the fact that he did not progress through an adaptive skills training program, and may have entered the social skills training program before he was ready. According to Santana, the decision to terminate

Progressive is based on concern that Claimant is not benefiting from the program. According to Santana, the fact that Service Agency has funded Progressive in the past is not considered evidence of its effectiveness. Santana testified that once Claimant meets his socialization goals at ACT, and needs an opportunity to practice what he has learned, Service Agency would consider reintroducing a social skills training program.

Service Agency's Purchase of Service Policy

24. Service Agency developed and approved a Purchase of Service Policy (POS) in December 2009 (Exhibit 8.) The POS was approved by the California Department of Developmental Services in July 2010. The POS states that "social skills training" is provided to children to develop appropriate social interaction skills to facilitate participation at home and in the community. Services are provided in either group or individual sessions. Services address significant needs a consumer may have in one of more the following areas:

1. Engagement and awareness of others; 2. Social interaction; 3. Verbal and non-verbal social communication; and 4. Play skills. It is typically provided one to two times weekly and is time limited, "usually not to exceed one to two years." It involves a detailed curriculum with meaningful and measurable outcomes and parent participation. It should address specific goals and objectives identified by the IPP team and prepare the child to transition to inclusive environments to practice the skills learned and continue to build new ones. (Exhibit 8.)

25. The POS further states that the Service Agency may purchase social skills training if the following criteria are met:

The child exhibits significant needs in communication and social interaction that prevent him . . . from forming relationships in the community or benefitting from social and recreational activities with typical peers,

AND

An assessment conducted by a qualified professional provides evidence that the individual's social skills will improve with a structured, time-limited intervention.

AND

The parents . . . agree to assume a major role in implementing training strategies between sessions. Services will not continue unless the individual, parent . . . and the regional center agree and reasonable progress toward IPP objectives have been made. Progress in reaching the objectives will be reviewed every six months or at the end of a program session.

(Exhibit E)

Parent's Contentions

26. Claimant's parents believe that Claimant benefits from and continues to need Progressive's social skills training. They describe Claimant as very non-assertive. They believe that he especially needs the group setting Progressive provides in order to learn to assert himself. They do not believe that ACT's one to one services provided in the home will help him develop social skills. Parents believe that ACT and Progressive programs complement each other. Father reviewed Claimant's progress in Progressive over the last two and a half years by comparing his baseline scores of 17 in November 2010 with his baseline score in of 20 May 2013. Father noted an improvement of 3 points or 18 percent in Claimant's skill level in the past two and a half years.

27. According to parents, Claimant looks forward to attending Progressive and became mad at his mother on one occasion when she did not take him to group. Parents report that Claimant's also looks forward to ACT services. Parents testified that it is difficult to find children to play with Claimant. Mother reported that Claimant's cousins generally do not want to play with Claimant at family gatherings. She noted that recently Claimant has begun to copy other children at play, including rolling in the sand with his cousins. According to parents, unlike his cousins, the children in the Progressive group show interest in playing with Claimant. Parents also testified that it important that Claimant participate in progressive to learn social skills because Claimant rides the school bus and is mainstreamed in a general education setting at recess.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Act governs this case. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a fair hearing to appeal the Service Agency's proposed termination of funding for his social skills training program at Progressive Resources. Jurisdiction in this case was thus established. (Factual Findings 1-3)

2. The standard of proof in this case is the preponderance of the evidence, because no applicable law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) A regional center seeking to terminate ongoing funding provided to a consumer has the burden to demonstrate its decision is correct, because the party asserting a claim or making charges generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, the Service Agency bears the burden of proof, because it seeks to terminate funding it currently provides for Claimant's social skills training program. (Factual Findings 2.)

Applicable Law

3. The Lanterman Act sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. As the California Supreme

Court explained in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, the purpose of the Lanterman Act is twofold: “to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community” and “to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community.” Under the Lanterman Act, regional centers are “charged with providing developmentally disabled persons with ‘access to the facilities and services best suited to them throughout their lifetime’” and with determining “the manner in which those services are to be rendered.” (Id. at p. 389, quoting from § 4620.)

4. To comply with the Lanterman Act, a regional center must provide services and supports that “enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age.” (§ 4501.) Under section 4512, subdivision (b), the determination of which services and supports are necessary for each consumer shall be made through the individual program plan process (IPP). The determination is made on the basis of the needs and preferences of the consumer, and shall include consideration of a range of service options, the effectiveness in meeting the goal, and the cost-effectiveness of each option.

5. Regional centers provide “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.” (§ 4512, subd. (b).) Services and supports may include “social skills training . . . [and] training for parents of children with developmental disabilities.” (§ 4512, subd. (b).) The Lanterman Act assigns a priority to services that will maximize the consumer’s participation in the community. (§§ 4646.5, subd. (a)(2); 4648, subd. (a)(1) and (2).)

6. The determination of which services and supports the regional center shall provide is made “on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option.” (§ 4512, subd. (b).) As the California Supreme Court recognized in *Association for Retarded Citizens, supra*, 38 Cal.3d at p. 390, while a regional center has “no discretion at all in determining whether to implement” an individual program plan, it has “wide discretion in determining how to implement” an individual program plan.

7. As set forth in section 4646, subdivision (a): “It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be

effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.”

8. Section 4646, provides (d): “Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer’s goals and objectives, and services and supports that will be included in the consumer’s individual program plan and purchased by the regional center or obtained by generic agencies shall be made by agreement between the regional center representative and the consumer or, where appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting.”

9. However, section 4646.4, subdivision (a), provides: “Effective September 1, 2008, regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following: (1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434. (2) Utilization of generic services and supports when appropriate. (3) Utilization of other services and sources of funding as contained in Section 4659. 8. (4) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting. In this determination, regional centers shall take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care.”

10. In addition, a regional center is responsible for using its resources efficiently. Section 4648, subdivision (a)(2), provides that: “In implementing individual program plans, regional centers, through the planning team, shall first consider services and supports in natural community, home, work, and recreational settings. Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family.”

Discussion

11. Service Agency contends that Progressive’s group social skills training is been only minimally effective in helping Claimant meet his socialization goals and that therefore, continued funding is unwarranted and not cost effective. Service Agency believes that the one to one adaptive skills program provided by ACT is most appropriate to teach Claimant prerequisite social skills and has funded 32 hours per month ACT to provide adaptive skills training. On the other hand, Claimant contends that social skills training is part of IPP, that he derives benefit from the Progressive program, that the services provided by ACT have accelerated his overall acquisition of social skills and that he expects that progress will continue. Claimant contends that the ACT and Progressive programs are complementary.

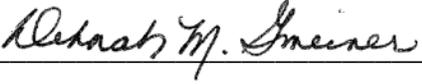
12. For the reasons set forth in Factual Findings 4 through 27 and Legal Conclusions 3 through 11, the Service Agency has not met its burden of proof. While the evidence shows that Claimant's acquisition of social skills has been slow during his time in the program offered by Progressive, he has made some progress. The evidence does not establish that Claimant will receive little or no benefit from continued participation in the program. As noted at Factual Findings 14 through 19, ACT's November 2012 report indicated that Claimant was responding to the requests and questions of others only about 1percent of the time. The April 2013 ACT report demonstrated that Claimant had increased his verbal responsiveness to the 75 to 80 percent level. This is a significant gain by Claimant in about six month's time. Moreover, by April 2013, Claimant was meeting or showing progress/generalizing for all of his socialization goals. This suggests that Claimant's acquisition of social skills has accelerated over the last year. Because ACT is working to generalize the skills Claimant is acquiring to other settings, and because such settings are very limited in Claimant's life, the continuance of Progressive's social skills training program appears to offer the kind of socialization opportunity Claimant needs and will benefit from. And, given Claimant's progress at ACT, Claimant appears to be more ready to access Progressive's social skills training than he has been in the past.

13. The fact that Service Agency may have placed Claimant in a social skills program for which he was not ready, does not justify terminating the same program, as he now appears to be ready to benefit from it. Service Agency has not met its burden of proving that Progressive Resources social skills training should be terminated at this time. Nonetheless, continued review of the effectiveness of the Progressive program, in accordance with the POS, is appropriate.

ORDER

Claimant's appeal is granted. Service Agency is ordered to continue to fund social skills training.

Dated: September 23, 2013



DEBORAH M. GMEINER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

Under the Lanterman developmental disabilities services act, this is a 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.