

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

M.B.

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH Case No. 2013100810

DECISION

Laurie R. Pearlman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter at the Harbor Regional Center, in Torrance, California on February 18, 2014.

Claimant M.B.¹ was represented by his mother, L.B. (Claimant's mother), who was present at the hearing, as was his father, M.A. Harbor Regional Center (HRC or the Service Agency) was represented by Gigi Thompson, Rights Assurance Manager. Also present for HRC were Patricia Piceno, Program Manager, and Rebecca Edgecumbe, a Behaviorist at HRC.

Oral and documentary evidence was received and argument made. The record was left open until March 5, 2014 to allow Claimant's Mother to submit Claimant's most current Individualized Education Program (IEP) and for comment thereon by HRC. An IEP dated January 21, 2014 was received, was marked for identification as Exhibit B, and was admitted into evidence. HRC's written response was timely received and was marked for identification as Exhibit 12, but not admitted into evidence. The record was closed and the case was submitted for decision on March 5, 2014.

ISSUE

The parties agreed that the following issue is to be decided by the ALJ:

¹ Claimant and his family are referred to by their initials or family titles to protect their privacy.

May the Service Agency implement the fade plan for Claimant's Applied Behavior Analysis (ABA) services as follows: a reduction from 8 hours per week to seven hours per week beginning November 3, 2013, to four hours per week beginning March 1, 2014, with ABA services ending on June 30, 2014?

FACTUAL FINDINGS

1. Claimant is a ten year-old boy (born on January 21, 2004) who is legally blind, has limited oral communication, and has been diagnosed with Autism, intellectual disability and Cholesteatoma (a condition which can damage hearing and requires ear surgery every six months to remove excess cell growth.) He also has cranio-facial issues, as well as hypoventilation syndrome and hypoglycemia. Claimant requires close supervision at all times and has a history of placing non-edible items in his mouth at school and at home. Claimant lives with his parents and younger brother.

2. Claimant has been an HRC consumer since 2011. Prior to that, he was a consumer at Lanterman Regional Center, where he initially received Early Start Services and then continued to receive services under the Lanterman Act. In 2008, Claimant began receiving ABA services for twenty hours per week, provided by vendor Autism Spectrum Therapy (AST). Over time, his ABA services were gradually reduced (going from 15 hours to 12.5 hours per week.) From August 1, 2012 through May 31, 2013, Claimant received ten hours of ABA services per week. On June 1, 2013, they were reduced to eight hours per week. In October 2013, AST recommended that Claimant's ABA services be reduced to seven hours per week, beginning November 3, 2013, then to 4 hours per week beginning March 1, 2014, and that all ABA services terminate on June 30, 2014.

3. In a Notice of Proposed Action (NOPA) dated October 3, 2013, the Service Agency notified Claimant that it would reduce ABA services as follows: from eight hours per week to seven hours per week beginning November 3, 2013, to four hours per week beginning March 1, 2014, with ABA services ending on June 30, 2014.

4. On October 22, 2013, Claimant's mother filed a Fair Hearing Request, stating that she would like to maintain eight hours per week of ABA hours, with any reduction being based on Claimant's need.

5. Welfare and Institutions Code section 4686.2 governs ABA services. It defines ABA as "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." The Service Agency will only purchase ABA services when the parents of a minor consumer receiving services participate in the intervention plan, given the critical nature of parent participation to the plan's success. Parent participation involves implementation of intervention strategies by the

parents. The Service Agency will discontinue purchasing ABA services for a consumer when the consumer's treatment goals and objectives are achieved.

6. Claimant receives other special education services from his school district, where he attends a full-day Fourth Grade "Autism Class" and has 1:1 para-educator support throughout the school day. His most recent Individual/Family Service Plan² (IFSP), dated January 21, 2014, indicates that Claimant had not met his previous IEP goals, including his social emotional/behavioral goals. Although elopement was previously a problem, the current IEP no longer reflects that.

7. Claimant's great-aunt had been a primary caregiver and was the primary participant in Claimant's ABA program. On November 25, 2013, she moved out of the home. Claimant's great aunt achieved a greater level of skill acquisition than did Claimant's parents, primarily due to the fact that Claimant's mother was attending school on a full-time basis to become a Dental Hygienist and was only able to participate in one 2.5 hour ABA session per week. In May 2013, Claimant's mother agreed that she would increase her participation to two sessions per week (totaling five hours weekly), beginning in August 2013, but she was unable to do so. AST sent notices of excessive cancellations for the periods from October 2012 through January 2013 and September 2013 through October 2013. Claimant and his family were out of the country from mid-November 2013 to mid-January 2014 and were not available for ABA services. The Service Agency emphasized that parent participation and consistency at home between sessions is the most critical aspect of a successful ABA program. HRC asserted that the lack of consistent and regular parent participation has continued to be a major barrier to Claimant's success. HRC recommended a fade plan based upon the length and intensity of the ABA services already provided, the plateauing of progress, lack of parent participation and the clinical opinion of AST.

8. Claimant's most recent progress report from AST covers the period from July 2013 through September 2013. The progress report notes that Claimant's mother has met 61 percent of parent education strategies. The stated goal is for Claimant's caregivers to "independently implement antecedent-based, differential reinforcement, and consequence-based strategies to support [Claimant] in increasing his independence with . . . concerns and goals . . . with 80 percent accuracy across 2 months." The report states that cancellation of eight sessions during this period may have impacted Claimant's progress and that he continues to show deficits with compliance and tolerating changes. Further, Claimant's mother made limited progress due to her limited availability during this reporting period. AST recommended "that ABA services be faded contingent on mom's participation in session and progress towards mastery of parent education goals." (Exhibit 6.)

9. At the hearing, the Service Agency offered the testimony of Patricia Piceno, a Program Manager at HRC, and Rebecca Edgecumbe, a Behaviorist at HRC, regarding the ABA services that have been provided to Claimant and the fade plan. Ms. Edgecumbe stated

² HRC uses the designation IFSP instead of Individualized Program Plan (IPP), to which the Lanterman Act refers. However, any references to IPPs apply to HRC's IFSPs.

that once parents meet between 60-80 percent of parent education strategies, she would expect to start seeing fade proposals for a consumer's ABA services. However, if a parent is only receiving five hours per week of ABA services, she "might wait on fading." Since Claimant is currently receiving only four hours of ABA services, Ms. Edgecumbe would want to see a greater percentage of mastery of strategies by Claimant's mother before discontinuing services in accordance with the current fade plan. She opined that if Claimant's mother could commit to more hours of ABA participation per week, perhaps staying at four hours per week for a longer period should be considered.

10. Claimant's mother testified credibly at the hearing and was respectful of the proceedings. She has completed her studies and is now Claimant's primary caregiver. She wants to spend time with Claimant and his four year-old brother and is not planning to seek employment. She explained that Claimant's absences were occasioned by illness and doctor's appointments. His immune system is vulnerable due to his various medical conditions. Claimant's mother is "100 percent able to participate in the program now." She recognizes that Claimant will not receive ABA services forever. A phase out is acceptable to her, but should be based on her child meeting his goals and on her ability to control his behavior. She feels that ending ABA services on June 30, 2014 is not viable. Her son is not independent in any way and she and her husband "feel lost." They are "fighting a daily battle" and are constantly in fear that Claimant will elope. He has no idea of danger, is rigid in his behaviors and is not independent in dressing or personal hygiene.

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 reduce and ultimately discontinue a service it has previously funded, Service Agency has the burden to demonstrate that its decision is correct. In this case, HRC had the burden to show that Claimant's ABA services should be reduced and ultimately eliminated on June 30, 2014, as set forth in the NOPA.

3. Welfare and Institutions Code 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 an Individualized Program Plan (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. The planning process includes the gathering of information about the consumer and “conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. . . . Assessments shall be conducted by qualified individuals” (§ 4646.5, subd. (a)(1).) Given that services must be cost effective and designed to meet the consumer’s needs, it is clear that assessments must be made so that appropriate services can be provided.

7. Claimant’s mother has requested that the fade plan be delayed until she has obtained greater mastery of the skills necessary to implement intervention strategies and to achieve Claimant’s treatment goals and objectives. Although HRC recommended a fade-plan based upon the length and intensity of the ABA services already provided to Claimant, the evidence presented established that the primary participant in his ABA program was his great-aunt, who is no longer one of his caregivers. Another factor for the fade plan cited by HRC was lack of parent participation. However, Claimant’s mother recently completed her schooling and is now available for full participation in her son’s ABA program. Finally, HRC’s fade plan was based on the clinical opinion of AST. Yet, the Service Agency’s own behaviorist, Ms. Edgecumbe, testified that she would want to see a greater percentage of mastery of strategies by Claimant’s mother before discontinuing services in accordance with the current fade plan (Factual Findings 7-10.)

8. What is missing from the Service Agency’s proposal to reduce and ultimately eliminate the present ABA services for Claimant is specific information on the process to

assess his needs along with the reduction of the existing plan. A plan to fade existing services should be linked to a needs assessment.

9. The Service Agency should allow Claimant the opportunity to demonstrate consistent and regular participation by Claimant and his mother and the Service Agency should not further reduce Claimant's ABA services from the current level of 4 hours per month until Claimant's mother has had an opportunity to achieve an 80 percent mastery of strategies. After providing Claimant's mother a reasonable amount of time to bring her mastery up from 61 percent to 80 percent, an assessment should be performed by the ABA provider. If a fade plan is proposed by AST, that plan should be reviewed by the IFSP team before it is implemented. It is the duty of the Service Agency to assess Claimant's needs for ABA services and, if a need is established, to provide such services.

ORDER

Claimant's appeal of the Service Agency's decision to reduce and then eliminate funding for ABA services is granted in part. Harbor Regional Center shall continue to fund the current level of four hours per week of ABA services for Claimant for the remainder of 2014 in order to allow Claimant's mother the opportunity to increase her mastery of ABA strategies. By December 31, 2014, the ABA provider shall provide an assessment of Claimant's needs and progress, as well as his mother's mastery level, and shall recommend a fade plan, if appropriate. HRC shall not reduce ABA services for Claimant until any proposed plan to fade out services has been reviewed in the IFSP process, which shall include participation by Claimant's parents.

IT IS SO ORDERED.

DATED: March 18, 2014


LAURIE R. PEARLMAN
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.