

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

Claimant,

OAH No. 2014020130

v.

FRANK D. LANTERMAN REGIONAL
CENTER,

Service Agency.

DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on March 19 and 20, 2014, in Los Angeles, California.

Pat Huth, Attorney at Law, represented the Frank D. Lanterman Regional Center (FDLRC or Service Agency). Claimant (Claimant) was represented by her father (Father).

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on March 20, 2014.

ISSUE

Must the Service Agency continue to fund intensive one-on-one Applied Behavior Analysis (ABA) Intervention services in the home in order to meet Claimant's needs?

FINDINGS OF FACT

1. Claimant is a 10-year-old girl, and a consumer of the Service Agency. Specifically, Claimant has autism, and is eligible for services pursuant to the Lanterman Developmental Disabilities Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.¹

¹ All statutory references are to the Welfare and Institutions Code.

2. The Service Agency issued a Notice of Action on December 26, 2013, advising that it intended to terminate funding for Claimant's 21 hours per week of one-on-one intensive ABA intervention in the home, delivered by the Center for Autism and Related Disorders (CARD). The Notice of Action indicated that the Service Agency based its reason for terminating claimant's services on the clinical opinion rendered by one of its consulting clinical specialists. Specifically, the consulting clinical specialist, Dr. Jean Johnson, concluded that because Claimant had been receiving such services for a period of six years, one-on-one teaching in the home was no longer clinically indicated. In addition, Dr. Johnson noted that there were no recent objective assessments that established a continuing need for one-on-one ABA services, and that progress reports for such services indicated that the intervention had accomplished the intended outcome of an early intensive ABA program. On January 30, 2014, Father filed a Fair Hearing Request on behalf of Claimant.² All jurisdictional requirements have been met.

3. Claimant lives with her parents within the Service Agency's catchment area. In or about February 2007, when Claimant was three and one-half years-old, the Service Agency began funding intensive one-on-one ABA services in the home for Claimant. Claimant initially received those services from Stepping Stones, but in April 2008, CARD began providing one-on-one ABA services to Claimant, and currently provides 21 hours of week of services. CARD provided the Service Agency with multiple reports every year of Claimant's progress.

4. On October 25, 2011, when Claimant was eight-years-old, Claimant's parents (Parents) and the Service Agency developed Claimant's Individual Program Plan (IPP). The IPP included a section entitled, "What it's currently like for me," which set forth Father's report of Claimant's daily living skills. Specifically, Father stated Claimant required moderate assistance to complete her activities of daily living, including brushing her teeth, dressing, buttoning and zipping, tying shoe laces, showering, toileting, and grooming. In addition, Father reported that Claimant continued to require continuous prompts to follow directions. Claimant would attempt to complete some tasks on her own, but failed to do so thoroughly. Father also reported that Claimant no longer engaged in self-injurious behaviors.

5. On February 11, 2013, when Claimant was nine and one-half years old, Father and the Service Agency conducted an annual review of Claimant's IPP. Father reported that Claimant required moderate assistance to complete her activities of daily living. In addition, Father reported that although Claimant knew her morning routine, she required constant attention and prompts to complete her needed tasks. Father also reported that Claimant attempted to complete some tasks on her own, but did not do so thoroughly.

Report of Dr. Jean Johnson

² The Service Agency had sent the Notice of Action to Father on December 26, 2013 via certified mail. However, on January 22, 2014, the post office returned the Notice of Action unclaimed. Consequently, the Service Agency emailed the Notice of Action to Father on January 22, 2014, as well as sent it via regular U.S. mail. Father then filed a Fair Hearing Request on January 30, 2014.

6. On June 7, 2013, Dr. Johnson conducted a comprehensive review of Claimant's ABA services by reviewing all progress reports prepared by CARD, progress reports prepared by Stepping Stones in 2007, reports from floor-time services she received in 2006, Individualized Education Program (IEP) documents and special education assessments, a psychological assessment report from 2005, a research study on intensive behavioral treatment for children with autism, and guidelines for ABA as it relates to regional center consumers. Dr. Johnson, who testified at hearing, received her bachelor's degree in physiological psychology in 1978 from the University of California at Santa Barbara (UCSB), and her doctorate in speech and hearing sciences in 1991 from UCSB, with an emphasis in the specialty areas of autism, ABA, and language development. In 2008, Dr. Johnson earned an ABA certificate, and in 2013, became a board certified behavior analyst. She has been a consulting clinical specialist for FDLRC since 2004, and has participated on the autism team at FDLRC since 2007. She has also served as an independent contractor determining regional center eligibility since 2000. Prior, Dr. Johnson served as a director of education over autism programs at a non-public school, as a regional manager of early intervention services at FDLRC, and as an area specialist of early intervention services at North Los Angeles County Regional Center. Dr. Johnson has also published seven research articles concerning autistic individuals.

7. After her review of Claimant's reports and other relevant documents, Dr. Johnson prepared a written report for the purpose of providing an analysis of Claimant's results over the course of the intervention, and to make recommendations concerning Claimant and her care assistance needs. Dr. Johnson balanced her review with evidence-based research on intensive early intervention one-on-one ABA programs for young children diagnosed with autism. Dr. Johnson explained that such programs, when initiated between ages two and five years, produced dramatic gains in most children who received them. For some, intensive interventions within this time frame produced IQs within the normal range, and entry into kindergarten or first grade without special education supports. Dr. Johnson testified that, based on the research, early intensive behavior interventions, such as one-on-one therapy in the home setting for 30 to 40 hours a week, for a period of two to four years, generally produced major gains within the first two years of treatment, with diminishing gains thereafter. Dr. Johnson further explained that after early intervention services, the need for one-on-one behavioral services generally decreased because, once a child began elementary school, there was more emphasis on that child generalizing acquired skills in the community, as well as increasing social skills. In other words, in the early stages, it was important to minimize outside distractions, but as the child got older and began to require more socialization, it was important for that child to be exposed to the outside environment. Dr. Johnson further advised that research has shown that extensive use of one-on-one therapies could have deleterious effects, such as prompt dependence, lack of initiation of desired behaviors, behavior contrast effects, and a failure to demonstrate learned responses in relevant natural settings.

8. No current measures of Claimant's intellectual functioning were available, and the only available form of objective data measuring Claimant's adaptive skills functioning were set forth in Claimant's psychological assessment and in an educational assessment in

October 2005 and May 2009, respectively. During the 43 months between 2005 and 2009, during which Claimant received one-on-one ABA services, Dr. Johnson noted that Claimant achieved gains in the domains of receptive communication, expressive communication, daily living skills, and socialization at the 17, 19, 16, and three month levels. Dr. Johnson considered Claimant's progress as minimal, and not an expected result of intensive ABA program services on adaptive skills development. Dr. Johnson believed that current (and prior) ABA interventions failed to consider the effect of significant functional deficits, including intellectual disability, on present and future potentials for ameliorating adaptive skills deficits via behavior modification principles. Overall, the minimal progress which Claimant gained during the 43 months, according to Dr. Johnson, "must be jointly attributed to natural maturation and appropriate educational program services, in addition to intensive in-home program services, and cannot be directly attributable to in-home services alone."

9. Dr. Johnson's review of Claimant's educational records showed, among other things, that in each area of performance, Claimant, who received continuous one-on-one behavioral support in her general education classroom, "relie[d] on constant adult prompts to act appropriately and interact with her peers," and that she was "extremely dependent on prompts to attend a task." However, Claimant's independent functioning in the classroom had improved, and she "no longer relie[d] on a structured token economy for the entire classroom day." In addition, Claimant independently approached a group of peers, and initiated communication using non-verbal means, but would not initiate conversation with adults or peers. Moreover, Claimant's IEP noted that Claimant continued to make slow progress on her modified curriculum with continuous ABA support, and exhibited prompt dependence in all areas. The IEP also stated that although Claimant demonstrated interest in social interaction, she was unable to initiate or sustain play activities with age peers.

10. After reviewing Claimant's educational records, as well as Claimant's IPPs where Father reported that Claimant required continuous prompting to complete tasks, Dr. Johnson concluded that Claimant was prompt dependent. Dr. Johnson explained that Claimant's prompt dependence would continue without a plan to develop independence.

11. Dr. Johnson's review of Claimant's ABA progress reports from February 2007 to March 2013 showed that Claimant's maladaptive behaviors occurred at low frequencies, and that Parents had learned and demonstrated maladaptive behavior reduction strategies. Dr. Johnson noted that CARD provided no objective data to document improvement or lack of improvement in targeted behaviors during naturally occurring family activities with family members over time. Consequently, there was no real sense of the effects of maladaptive behaviors on Claimant's functioning under natural circumstances. However, Dr. Johnson noted that the maladaptive behaviors appeared to remain at acceptable or tolerable levels for the family. Consequently, Dr. Johnson concluded that continued intensities of one-on-one services at 21 hours a week were not clinically justified based on the levels of maladaptive behaviors in natural settings, and on the intensity and duration of prior long-term services, Claimant's slow progress, and lack of significant integration into natural community and family activities. In addition, Dr. Johnson concluded that Claimant's prompt dependence would hinder her independence, and that continued isolated intensive one-one-one behavioral

services would hinder opportunities for participation in naturally occurring community and family activities.

12. Dr. Johnson never observed Claimant in her home, school, or in any other setting. In addition, Dr. Johnson never interviewed Parents, teachers, or service providers as part of her review.

13. Based on her review, Dr. Johnson recommended an updated psychological assessment to establish adaptive skills and intellectual functioning over time. In addition, Dr. Johnson concluded that the need to continue one-on-one ABA based behavior intervention services was not established, and opined that continued services were unlikely to produce significantly increased results. She recommended a new assessment for focused ABA intervention to address specific adaptive skills development via parent consultation services. In addition, Dr. Johnson recommended that Claimant be assessed to determine her need for supervision to maintain her safety. Finally, Dr. Johnson recommended that Claimant receive an appropriate assessment in social, recreational, group, or community activities with peers, including programmed inclusion services and one-on-one aide support as needed to promote participation in appropriate community based activities and programs.

14. At hearing, Dr. Johnson, in response to questions concerning the cessation of intensive one-on-one ABA services, explained that she would not recommend a sudden termination of services, because Claimant would not know how to operate without an adult prompting her. In addition, an abrupt change in Claimant's routine could result in the increase of maladaptive behaviors. Instead, she would recommend a fading plan which would systematically reduce the hours of one-on-one ABA intervention services, and would implement self-management skills, such as using checklists and other strategies to promote Claimant's independence while completing tasks. In addition, the fading plan would include a simultaneous reduction in the use of prompts. Dr. Johnson suggested that Claimant begin receiving 18 hours of one-on-one ABA services per week, and then next month begin receiving 16 hours per week. Each month, Claimant's weekly ABA services should be reduced by two hours, until the one-on-one therapist is faded out completely. Dr. Johnson further explained that ABA services will always be appropriate for Claimant, but not on a continuous one-on-one basis.

15. Claimant's service coordinator, Celene Heman, reviewed Dr. Johnson's report with Father. While Ms. Heman, who testified at hearing, claimed to have offered, on behalf of the Service Agency, to fund an independent ABA assessment in August 2013, pursuant to Dr. Johnson's recommendation, Father denies that the two of them discussed performing an ABA assessment, but rather only a psychological assessment. Father agreed to a psychological assessment, but Ms. Heman had not provided a date in which the Service Agency wished to have a psychological assessment completed, and Father heard nothing from the Service Agency about the psychological assessment until its Notice of Action in December 2013. Previously, in 2012, when Father received notice from the Service Agency that it would fund an independent psychological assessment, the Service Agency later withdrew the offer, despite Father's initiation of the assessment process with the evaluator slated to conduct the assessment.

Testimony of Marina Bulkin

16. Claimant's service provider, Marina Bulkin, MA, BCBA, of CARD, who has worked with Claimant since June 2008, testified at hearing. Ms. Bulkin received her bachelor's degree in psychology in 2002 from the University of California at Los Angeles, her master's degree in psychology in 2005 from Pepperdine University, and her board certified behavior analyst certificate in 2006. She has been a regional manager at CARD since January 2014. Prior, she worked at CARD as a managing supervisor from 2007 to 2014, a case supervisor from 2005 to 2007, a senior therapist from 2003 to 2005, and a junior therapist from 2001 to 2003.

17. Ms. Bulkin explained that throughout CARD's provision of one-on-one ABA services, Claimant has made continuous and steady progress toward her goals, specifically in the areas of functional communication, maladaptive behavior, social skills, adaptive skills, and safety skills, as a result of receiving 21 hours per week of services. Claimant has not demonstrated a loss of treatment effectiveness, and over the last six years, when Claimant accomplished a goal, more goals were introduced for Claimant to master. When Claimant learned a skill, she and other CARD therapist would work with Claimant to maintain and generalize those skills, and would ensure Parents and Claimant's school team were aware of the mastery of skills. Because CARD works with Claimant at home and at school, Claimant's skill acquisition has the potentiality of occurring more successfully. Claimant has not demonstrated any slow-down of her abilities.

18. Ms. Bulkin believes that Claimant continues to require at least 21 hours per week of one-on-one ABA services in order to become independent in her home and school settings. Specifically, Claimant requires mastery of certain adaptive skills, such as completing her toileting routine after a bowel movement, brushing her teeth, thoroughly washing her hands, getting her own snacks, pinning her hair out of her face, regulating her own body temperature by putting on a coat when she's cold, and other adaptive skills. Claimant also needs one-on-one ABA services to address her social skills, as well as her leisure skills (i.e., figuring out what to do when she has stretches of down time).

19. While she concedes that consistent ABA support could lead to prompt dependency, CARD therapists are very conscious of this possibility, according to Ms. Bulkin. As a result, she and the other CARD therapists build into their programs a strategy of using the least intrusive prompt initially, and only increase the intensity of the prompt if the child demonstrates noncompliance. On the whole, contrary to Dr. Johnson's conclusion, Ms. Bulkin does not consider Claimant as prompt dependent, and the Service Agency had not communicated to her that it believed Claimant was prompt dependent.

20. Ms. Bulkin explained that abruptly terminating Claimant's services at home could cause problems. Specifically, Claimant would be required to cope with a change from having a lot of structure in her life to experiencing a sudden elimination of structure, which is highly difficult for autistic children. Ideally, before terminating services, the parents and other caretakers would need to know how to adequately meet and address Claimant's needs,

and CARD would need to implement a fading plan. However, because Claimant still has areas of weakness that must be addressed in the areas of functional communication (e.g., saying when she's too hot, too cold, in pain, is sad, etc.), social skills (e.g., generalization with peers, basic conversational and reciprocal statements made to peers in a social setting, etc.), adaptive skills (e.g., tying her shoes, wiping herself, bathing herself, brushing her teeth, etc.), and safety skills (e.g., safely crossing the street, knowing what to do if approached by a strangers, etc.), Ms. Bulkin would not recommend a reduction or a fading of Claimant's hours at this time. In addition, Ms. Bulkin explained that it is not abnormal or unusual for children 10 and older, like Claimant, to continue receiving one-on-one ABA services as long as they are making progress.

LEGAL CONCLUSIONS

1. Services are to be provided to regional center clients in conformity with section 4646, subdivision (d), and section 4512, subdivision (b). Consumer choice is to play a part in the construction of the IPP. Where the parties cannot agree on the terms and conditions of the IPP, a Fair Hearing may, in essence, establish such terms. (See §§ 4646, subd. (g); 4710.5, subd. (a).)

2. The services to be provided to any consumer of regional center services must be individually suited to meet the unique needs of the individual consumer in question, and within the bounds of the law each consumer's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subd. (a)(1) and (a)(2).) Otherwise, no IPP would have to be undertaken; the regional centers could simply provide the same services for all consumers. The Lanterman Act assigns a priority to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).)

3. Section 4512, subdivision (b), of the Lanterman Act states in part:

“Services and supports for persons with developmental disabilities” means 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. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of . . . the consumer's family, and shall include consideration of . . . the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, . . . special living

arrangements, physical, occupational, and speech therapy, . . . education, . . . recreation, . . . community integration services, . . . daily living skills training . . .

4. Services provided must be cost effective (§ 4512, subd. (b), *ante*), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, *e.g.*, §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) The regional centers' obligations to other consumers are not controlling in the individual decision-making process, but a fair reading of the law is that a regional center is not required to meet a consumer's every possible need or desire, in part because it is obligated to meet the needs of many disabled persons and their families.

5. Services are to be chosen through the IPP process. (§ 4512, subd. (b).) The IPP is to be prepared jointly by the planning team, and services purchased or otherwise obtained by agreement between the regional center representative and the consumer or his or her parents or guardian. (§ 4646, subd. (d).) The planning team, which is to determine the content of the IPP and the services to be purchased is made up of the disabled individual, or his or her parents, guardian or representative, one or more regional center representatives, including the designated service coordinator, and any person, including service providers, invited by the consumer. (§ 4512, subd. (j).)

6. Pursuant to section 4646, subdivision (a), the planning process is to take into account the needs and preferences of the consumer and his or her family, "where appropriate." Further, services and supports are to assist disabled consumers in achieving the greatest amount of self-sufficiency possible; the planning team is to give the highest preference to services and supports that will enable a minor child with developmental disabilities to remain with his or her family. (§ 4648, subd. (a)(1).)

7. Section 4646.4 was also added to the Lanterman Act as a cost-containment measure in response to the state budget crisis of that time. In particular, section 4646.4, subdivision (a), requires regional centers, among other cost saving measures, to conform to their purchase of service guidelines, and utilize available generic resources. In addition, subdivision (a)(4) requires regional centers to consider the family's responsibility for providing similar services and supports for a minor child without disabilities. However, a service policy established by a regional center to govern the provision of services may not take precedence over the established individual needs of the consumer. (*Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390-393.)

8. Here, the Service Agency failed to meet its burden of establishing that a termination or reduction of intensive one-on-one ABA services was appropriate for Claimant. The Service Agency based its decision to terminate services solely on Dr. Johnson's review of a battery of documents, mostly out-dated, including 2005 and 2009 assessments, as opposed to current observations, assessments, or interviews. Consequently, it is unclear whether Claimant is indeed prompt dependent or otherwise requires a cessation of one-on-one ABA services, given the representations of Ms. Bulkin, who contends Claimant is not prompt dependent, and still requires mastery of a number of skills in order to

become independent. In addition, Dr. Johnson's testimony, though called as a witness for the Service Agency, does not support termination of services for Claimant at this time. Specifically, Dr. Johnson explained that she would not recommend the sudden termination of services, because Claimant would not know how to operate without an adult prompting her, because she is so prompt dependent. In addition, Dr. Johnson, as well as Ms. Bulkin, testified that an abrupt change in Claimant's routine could result in maladaptive behaviors. Dr. Johnson explained that, instead, she would recommend a fading plan which would systematically reduce the hours of one-on-one ABA intervention, and would implement self-management skills, such as using checklists and other strategies to promote Claimant's independence while completing tasks. However, at this point, it remains unclear whether a fading plan is appropriate, without an independent functional behavioral assessment and/or psychological assessment demonstrating that such a plan is necessary. Indeed, the Service Agency's actions in 2012 and 2013 of raising the need for, and agreeing to pay for, an independent psychological assessment, prior to the issuance of its Notice of Action, underscores the importance of obtaining current data.

9. Similarly, the Service Agency's argument based on Dr. Johnson's review that Claimant has not made sufficient progress, and, therefore, one-on-one ABA services should be terminated, is equally unpersuasive, given the absence of current independent ABA or psychological assessment reports to support the Service Agency's conclusion. Given the above factors, the Service Agency failed to meet its burden of establishing that Claimant's one-on-one ABA services should be terminated.

ORDER

Claimant's appeal is granted. The Service Agency may not deny Claimant's request for continued funding of one-on-one ABA services in the home.

Date: April 4, 2014



CARLA L. GARRETT
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.