

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

Claimant,

vs.

CENTRAL VALLEY REGIONAL CENTER,

Service Agency.

OAH No. 2016010362

DECISION

Stephen J. Smith, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter at the Central Valley Regional Center (CVRC) in Fresno, California, on February 26, 2016.

Shelley Celaya, Fair Hearing Representative, represented CVRC.

Claimant's father appeared and represented his son, who did not appear.

Evidence was received, the matter was argued and submitted for Decision on February 26, 2016.

JURISDICTIONAL AND PROCEDURAL FINDINGS

Notice Of Proposed Action And Appeal

1. CVRC issued a Notice of Proposed Action (NOPA) to claimant via his father and mother on December 22, 2015. CVRC's NOPA advised claimant and his family that CVRC proposed to discontinue funding for Applied Behavioral Analysis intensive behavioral intervention services (ABA) provided to claimant by Learning ARTS, an ABA¹ services vendor and funded by CVRC on a consultation-only basis. CVRC notified claimant and his parents that the effective date of the action was to be January 31, 2016. CVRC advised claimant and his parents that the "Reason for Action" was, "Behavior intervention services have been provided for 14 quarters. Service provider's intervention plan recommends end of services."

¹ Applied Behavioral Analysis/Intensive Behavioral Intervention.

CVRC quoted verbatim the provisions of Welfare and Institutions Code section 4686.2, subdivisions (a) (1) through (a) (3) in the portion of the NOPA entitled “Authority for the Action (law, regulation, and/or policy in support of the action).”

2. Claimant’s father timely filed a Request for Fair Hearing (Appeal), signed and received by CVRC on January 7, 2016. Claimant’s father stated in the section of the Appeal “Reason(s) for requesting a Fair Hearing,” “I asked to begin a conversion to Medi-Cal. Two weeks later I was dropped. No current assessments in place, the report is bogus, and no transition plan, assessments, transition to another level of services.”

3. Claimant’s father requested an informal meeting and mediation. Mediation and an informal meeting took place, without resolution of the matter. This Fair Hearing before the Administrative Law Judge (ALJ) followed.

4. The CVRC action proposed in the NOPA was suspended by the filing of the appeal. Services continue pending the resolution of this appeal (Aid Paid Pending).

ISSUES

Is the CVRC action to discontinue ABA services provided by Learning ARTS to claimant, effective January 31, 2016, factually and legally warranted?

Does the Learning ARTS December 10, 2015, Quarterly Vendor Evaluation Report (the Quarterly Report), recommending discontinuation of ABA services to claimant, effective December 31, 2015, extended to January 31, 2016, contain a factually reliable, and thus a legally supportable basis for discontinuance of ABA services to claimant, within the meaning of Welfare and Institutions Code section 4686.2, subdivision (b)(4) and (5)?

Does CVRC have an obligation to ameliorate the discontinuance of ABA services to claimant by creating a transition plan, to take effect upon discontinuance, with successor supports and services to take up where discontinuance of the ABA services leaves claimant, before discontinuance is legally and factually appropriate?

Is it appropriate and consistent with the standards set by Welfare and Institutions Code section 4686.2 to discontinue claimant’s ABA services in the absence of a reasonably current evaluation and assessment of claimant’s needs by a Board Certified Behavioral Analyst (BCBA) or other qualified behaviorist?

Did CVRC provide claimant and his family reasonable and timely notices of the actions and the bases for those actions?

Burden Of Proof

A service agency seeking to change a service contained in a consumer's IPP has the burden of demonstrating that its proposed action to limit or discontinue a service presently being received by a consumer pursuant to that consumer's IPP is correct.² "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that the party is asserting."³

It is CVRC's burden to prove by a preponderance of the evidence that the discontinuance of the ABA services being provided to claimant by Learning ARTS is warranted, as determined by conformity with the discontinuance requirements of Welfare and Institutions Code section 4686.2, subdivision (b)(4) and (5). CVRC must also prove its proposed action does not violate the general protective provisions of Welfare and Institutions Code sections 4501 and 4648.

CVRC is specifically required to prove that claimant's ABA services can be discontinued because claimant's "goals and objectives [have been] reviewed and updated as required in [Welfare and Institutions Code section 4686.2, subdivision (b)] Paragraph (5)," and that, "those updated treatment goals and objectives do not require ABA or intensive behavioral intervention services." CVRC must also prove as part of proving that claimant's "goals and objectives have been reviewed and updated," that it has reviewed and that there is a factually sound basis for agreeing with the vendor's [Learning ARTS] conclusion that claimant's "treatment goals and objectives ... are achieved." Welfare and Institutions Code section 4686.2, subdivision (b)(4) and (5) requires CVRC to prove that claimant's current treatment goals and objectives do not require the continuation of the ABA or intensive behavioral intervention services he has been receiving, and that CVRC agreement with Learning ARTS' recommendation for discontinuance of services is evidence-based and factually supported.

Summary Of Resolution Of Issues

CVRC failed to meet its burden to prove its action to discontinue claimant's ABA services provided by Learning ARTS is factually and legally warranted, and in accord with the requirements of the discontinuance of services provisions of Welfare and Institutions Code section 4686.2, subdivision (b)(4) and (5).

CVRC failed to prove by a preponderance of the evidence that the Learning ARTS December 10, 2015, Quarterly Vendor Evaluation Report (the Quarterly Report), recommending discontinuation of ABA services to claimant effective December 31, 2015,

² Welfare and Institutions Code section 4643.5, subdivision (b).

³ Evidence Code section 500, *Harmon. v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 696, *Parker v. City of Fountain Valley* (1981) 127 Cal. App. 3d 99, 113.

extended to January 31, 2016, contains a factually reliable and legally sustainable basis for discontinuance of ABA services to claimant,

CVRC failed to ameliorate the impact of the discontinuance of consultation-only ABA services to claimant by meeting and conferring with claimant's parents and/or claimant's IPP Planning Team to craft a transition to other successor supports and services for claimant upon the discontinuance of ABA services, avoid a gap in services and supports, to make certain claimant's gains are not lost and his, and his parents,' needs for support and services to assist in managing his problematic behaviors identified in his IPP are addressed, as the ABA services are eventually discontinued.

CVRC failed to meet its burden to prove that, under the circumstances proved, discontinuance of the services as proposed in the NOPA is factually and legally warranted, or that the action is consistent with the requirements of Welfare and Institutions Code section 4686.2, subdivision (b)(4) and (5). CVRC failed to prove that reliance upon the hearsay opinions and conclusions of the Learning ARTS December 10, 2015 Quarterly Report was factually warranted and would conform to the requirements of Welfare and Institutions Code section 4686.2, particularly subdivision (b)(4) and (5). Claimant's father made a number of persuasive and credible challenges to several of the factual assumptions forming the basis of the opinion that services should be discontinued none of which were successfully challenged. CVRC failed to prove that discontinuance of the services as proposed in the NOPA is warranted in the absence of a reasonably current evaluation and assessment of claimant's needs by a CVRC and/or a Learning ARTS Board Certified Behavioral Analyst (BCBA) or equivalent qualified behaviorist.

CVRC's notices to claimant's father of receipt of the Quarterly Report recommending discontinuance of services were less than adequate, even though lawfully sufficient, making it difficult for claimant's father to timely, adequately and sufficiently respond to the action.

FACTUAL FINDINGS

1. Claimant is a 9-year-old boy who is eligible for CVRC services based on a diagnosis of autism. He lives with his parents and two sisters in the family home in Madera, California. Claimant has been served by CVRC since age two. Claimant is currently "medically deemed" due to his diagnosis, and thus will not be transitioned to Medi-Cal.

2. Claimant is a Special Education (SE) student based on his autism diagnosis, and attends an elementary school in the Madera Unified School District (District). He is in the fourth grade and attends an autism class for 95 percent of his school day, and is mainstreamed for the other five percent. He has an Individual Education Plan (IEP) from the District, based on a triannual assessment of his educational needs last performed in 2011. He has a one-on-one aide to assist him in his school-based program.

3. Claimant began receiving early intensive intervention ABA services at age two or three from Behavior Intervention Associates (BIA), a CVRC vendor for those services. Claimant continued to receive intensive behavioral intervention services from BIA until approximately age six, in June 2012, at which time his services provider was changed to Learning ARTS. Claimant's level of intervention was recently reduced to its current level, a tutor-provided, consultation-only ABA services program provided at a level of 25 hours per month. Learning ARTS has been the CVRC vendor of tutor-provided, consultation-only ABA services to claimant for 15 consecutive quarters, starting in June 2012, and continuing to date.

4. CVRC acknowledged that the underlying purposes of provision of ABA services provided by Learning ARTS to claimant and his family have been well met, enormously beneficial, and it would not be an understatement, and did not disagree with the opinion of claimant's father that the services have been essential to claimant's reasonably successful adjustment. Claimant's father testified that Julia Lopez, the Learning ARTS tutor who provides claimant his consultation services, "loves my son" and "does a wonderful job helping him." CVRC also acknowledged that claimant's parents have been very cooperative, and are enthusiastic learners of behavior intervention and modification strategies and tools taught them by BIA and Learning ARTS. CVRC also acknowledged that claimant's parents have worked very hard to implement the strategies and interventions they have been taught and have very successfully taken over a large part of the interventions that were formerly provided by BIA and Learning ARTS at previous higher levels of intensive behavioral intervention services. CVRC representatives who have worked with claimant and his family acknowledged at the hearing that claimant's parents have become quite effective in taking on an increasing role in intervening, modifying and redirecting claimant when he engages in undesirable behaviors, as the Learning ARTS ABA program envisions, and as Welfare and Institutions Code section 4686.2 requires.

Current IPP Supports And Services

5. Claimant's current IPP, dated May 20, 2015, provided for him to continue to receive 25 hours per month ABA consultation-only services provided by Learning ARTS. The portion of claimant's IPP entitled "Behavioral Health" notes that claimant has been diagnosed with autism and has several behavioral challenges that interfere with learning and social interactions. The IPP Behavioral Health section notes claimant becomes frustrated when he is not understood or does not get his way or he may cry when he becomes overwhelmed or upset. The Behavioral Health note also identifies and targets what, according to claimant's father, is a relatively new inappropriate behavior of rubbing his iPad against his genitals and the need for redirection in order to stop the behavior. The section also notes claimant continues to have a fear of birds and dogs, and will run off when he "sees a bird in particular." The IPP, Behavioral Health section, also identifies other deficits including:

Fine motor delays which impact claimant's ability to self-feed using utensils, to complete personal care including brushing teeth and/or bathing as well as dressing (putting on or taking off shirts, pants, socks (sic) or shoes and buttoning or zipping clothing) and handwriting;

Safety awareness;

Social interactions, including the ability to initiate or maintain a social exchange.

Claimant's IPP, Behavioral Health section, continues by stating claimant also displays excessive behavior that impedes claimant's level of functioning and ability to learn from a typical learning environment. These excessive behaviors include:

Disruptive social behavior such as physical stereotypy;

Aggressive behavior such as grabbing, scratching, pinching or hitting;

Running or wandering away when he sees a bird or dog;

Emotional outbursts including tantrums; and

Self-injurious behavior which may or may not require medical attention.

Claimant's IPP, Behavioral Health section, continues by identifying "Desired Outcome: [Claimant] will work with Learning ARTS on a consult for one final quarter to increase his self-care skills, fine motor and social skills. He will also work on decreasing his fear of birds and his other behaviors. The final quarter of approval will be from 7/1/15-9/30/15 and will be consultation hours only.

Claimant's IPP, Behavioral Health section, in the portion entitled "Plans" notes that Learning ARTS hours will be extended for one more quarter. "CVRC's behaviorist has reviewed the latest quarterly report from Learning ARTS and agreed to the extra quarter of 25 hours of consultation from 7/1/15-9/30/15, *as his last quarter of consultation changes to previously established goals require CVRC and parent agreement as part of an IPP meeting.*⁴ Amount of services intended to decrease, is time-limited, and is based on reasonable progress toward IPP goals. CVRC will fund behavior intervention services. Private insurance will be pursued by family if/when available. Parents will participate in the intervention plan, implement intervention strategies, collect data, and participate in clinical meetings as required by learning arts. Parents will verify receipt of behavioral services provided to their child.⁵

⁴ Italics added.

⁵ The "Plan" appears incomplete, in that it makes no mention of what happens when the ABA services are discontinued, what should replace those services, what successor services and supports are available or contemplated, and the Plan makes no recommendation for transition.

Claimant's IPP, Behavioral Health section, concludes with "Target Date:" Learning ARTS services will be completed as of 9/30/15.

The Quarterly Report Upon Which The Discontinuance Is Based

6. The key Learning ARTS Quarterly Report of December 10, 2015, was the fourteenth such report to CVRC, each one reporting goals for claimant and progress meeting those goals. This key Learning ARTS Quarterly report contained the Learning ARTS recommendation that the tutor-provided, consultation-only services be concluded and discontinued, effective December 31, 2015. The Quarterly Report made no recommendations for transition, or suggestions for continued support or successor services that might be of assistance in sustaining claimant and his parents, to help claimant hold his considerable gains and/or adjust to the next phase without the support of ABA services Learning ARTS had been providing. All parties agreed the ABA services sequence provided to claimant and his parents, by Julia Lopez have supported gains for claimant in self-control and managing undesirable behaviors for claimant, and for his parents, valuable training and learning many new tools and resources enabling them to be able to step in and assist claimant manage an increasing number of behavioral and other situations on their own.

7. The Quarterly Report was the precipitating factor leading to the NOPA, the appeal and this hearing. Julia Lopez, MS, appears to have been the primary author of the Quarterly Report. Ms. Lopez is not a BCBA or a qualified behaviorist. The Quarterly Report recites at its end that it was reviewed and approved by Learning ARTS employee Hannah Wolde, MA, BCBA, the Learning ARTS staff behaviorist. The Quarterly Report was also reviewed by CVRC staff before issuing the NOPA, including a review by Emily Branscum, Ph.D., BCBA, who testified in support of the action.

8. Claimant's father acknowledged that there is a point in time when the ABA services will sunset. He expressed concern about the necessity of transition to other supports and services in order to hold gains made and continue to assist claimant to progress with controlling his undesirable behaviors will take place. Claimant's father anticipates and expects the transition, but does not agree that the time is now for those services to end. He contends that ending the current services is premature, when there has been no assessment by a fully qualified BCBA of claimant's needs for more than 18 months, a period of time in which claimant has experienced tremendous growth and change. He pointed out that without an agreed upon plan in place for a smooth transition to a new environment with successor services and supports available seriously prejudices claimant, and risks loss of his gains, for no good reason.

9. CVRC did not dispute claimant's father's claims that Dr. Branscum's last evaluation of claimant was in April 2014, and Ms. Wolde's last contact with and evaluation of claimant was earlier than Dr. Branscum's. CVRC did not dispute claimant's father's claim that Ms. Wolde did not evaluate claimant as part of making the recommendations for discontinuance in the Quarterly Report, nor was claimant's father's claim that Madera Unified's last assessment of claimant was in 2011 disputed. CVRC also did not dispute claimant's father's claim that there has been no meeting or discussion to date of any substance regarding a transition plan or

suggestions for successor services and supports or alternatives for claimant to help him hold his gains and continue to make progress upon discontinuation of the ABA current services.

10. CVRC representatives testified that since claimant and his parents have proved so receptive and effective in cooperating with the goals and objectives of the services, that there would be “no problem” with restarting any needed services for claimant after discontinuance of the ABA services currently being provided, upon the parents communicating to CVRC such need. Claimant’s father expressed that the offer gave him cold comfort and that he had little confidence assurances that the reinstatement of essential services would be timely. He claimed that any restart of necessary services for claimant after discontinuation would take considerable time from request to the time the service could be actually available. In the meantime, claimant would be subject to a gap in services, and would likely regress. CVRC did not disagree with that assertion.

Key Portions Of The Quarterly Report

11. The Quarterly report, in its provision entitled “Program Description” states:

Early intensive intervention targets comprehensive verbal behavior and self-help skills across multiple domains. ... The ultimate goal of this program is for the consumer to obtain as close to typical functioning as is possible for the specific individual in cognitive, motor, language, social and self-help skills.

In the portion entitled “Summary of Quarter” the following appears:

There is an increased frequency of behaviors occurring during curriculum-based classroom activities such as math, reading and writing. [claimant’s] one-on-one aide knows him very well and can see early signs of behavior onset. This helps her implement preventative measures, which can help redirect him. Other instances of triggers or antecedents situations being recorded at school included seating and cafeteria arranged differently, school holidays, possible irritability caused by illness, and his one-one aide going to lunch in some instances. Many observable changes have been put into place based on direct observation across Spring 2015 school observation and the school observation made this November 2015.

Based on the verbal data received by parents during the months of October, November and early December, behaviors at home or at a minimum and far between. Parents were asked to record frequency and duration data on targeted behavior excesses to help develop a plan on how to manage [claimant’s] behaviors. Parents

submitted one instance of aberrant behavior that was documented. When asked what were observable estimates in the home, parents reported less than once a week. Daily school data was also saved and given to the behavioral specialist to analyze. Parents are using the behavior skills discussed and provided with to help [claimant] cope throughout his day. ***If behaviors do occur, they are low in intensity and duration. He can also be easily redirected during a tantrum.*** If the tantrum has turned into a meltdown, he is put in a quite (sic) to cool down, as he could get aggressive is observed in the past.

In regards to haircutting, which is aversive for [claimant], dad was asked if they could work on systematic desensitization by doing daily haircutting in the form of 10 swipes with the clipper. [Dad] reported a decrease in unwanted behaviors as far as frequency, but it is still something that needs to be worked on daily. Parents were asked to record duration data on tantrum behavior during haircutting but none was provided to the behavior specialist. ... Parents were also briefed on the issues and concerns of sensory overload, which may explain why [claimant] has such a difficult time getting his hair cut. Through observation and parent report, [claimant] has a hard time when it comes to cutting along his ears and back of head, and this may be due to the oversensitivity. Another skill mentioned, was to establish motivation with [claimant] prior to the events of that he is motivated to get the haircut. ...

Also mentioned by parents, as reason for concern to continue consult services was [claimant's] accessing and touching of his private area outside of his clothing. Behavior specialist and parents consulted on developmental growth for [claimant], as he is a growing young boy, and the situations they may encounter in the future.⁶

In the portion of the Quarterly Report entitled “The Big Picture/Transition Summary/Progress to Date,” states:

Overall, [claimant] continues to make progress in his showing his daily potential. Parents are noticing that with age, [claimant] is starting to understand how day-to-day life works and all its dos. He knows his days of the week and understands the expectation

⁶ The report makes no mention of any recommendation for what strategies, interventions or tools the parents might use to deal with this new problem that is anticipated to stretch forward into the future.

set in place each day. He is made major improvements with transitioning at home and during unannounced visits or events in his schedule. Although there will be skills that need continued work, ***Learning ARTS feels confident that parents have learned the necessary approach to help [claimant] in areas he needs help with.*** Parents would like to continue something similar to that of parent-initiated consult services and are interested in pursuing further services through other funding sources (i.e., private insurance or Medi-Cal). ***They are interested in having [claimant] reassessed to determine current levels of functioning and seek services based on those results. I have also stated their desire to explore other possible services provided by Medi-Cal. They said that they would like to seek services they believe Medi-Cal offers including respite, physical, occupational, and speech therapy, and family counseling. Parent has mentioned to the behavior specialist that he is not looking for one-on-one daily intervention, but for someone to come when needing behavioral help,*** and for someone to possibly have set play dates with James. This is [claimant's] 14th quarter under the Early Intervention Services. For the last three quarters, Learning ARTS has been providing consultation-only services. ***It was recommended and stated in the previous report that this would be James's last quarter for consultation services and that service outcome has been achieved.*** Therefore, this report serves as an exit report of concluding consultation-only services. (Emphasis added)

Analysis Of The Quarterly Report

12. The Quarterly Report is self-contradictory in many respects. The Quarterly Report recites achievement of goals and success as a basis for discontinuation, and yet reports instances of continuing difficulty with problematic behaviors at school and at home, including the development of an entirely new problem with self-touching due to claimant being a "growing boy." The report then dismisses the reports of at home behaviors being problematic (including presumably the self-touching), based upon its recitation that parent reports of problem behavior are infrequent. The report is conclusory without foundation in its recommendation, as it states, with limited and conclusory factual analysis, that claimant's father successfully challenged (below), that "service outcome has been achieved." The Quarterly Report's recommendations and conclusions are not based upon a current behavioral assessment by a qualified professional of claimant's status, needs and progress by a fully qualified BCBA. The Quarterly Report acknowledges and then ignores, by making no specific proposal or recommendations, claimant's father's repeated requests, acknowledged in the report, for continued support, assessment and transition in the process of discontinuance of the services.

13. Claimant's father testified that he contacted Learning Arts, advised them of the Fair Hearing, advised Ms. Wolde and Ms. Lopez that he intended to "trash" their Quarterly

Report, and invited each to appear and defend their statements, opinions and conclusions contained in the report. Claimant's father's offer was declined. The Quarterly Report's contents, its statements, opinions, conclusions and recommendations, are entirely hearsay. There was no means available without the presence of the authors to determine whether material facts were omitted, downplayed or were not accurately stated because they were not supportive of the report's objective.

Claimant's Case

Lack Of Qualifications To Evaluate Of Primary Author

14. Claimant's father's challenged the lack of evaluative qualifications and expertise of the presumptive author of the Quarterly Report. Claimant's father pointed out that the presumptive author of the report, Ms. Lopez, is the tutor-counselor provider of the services, and lacks the background, training and expertise to perform a behavioral evaluation of claimant's current needs and the appropriateness of any given level of services based upon that evaluation. Claimant's father contends that only a BCBA, such as Ms. Wolde or Dr. Branscum, or someone with similar behavioral expertise and training, is qualified to make such an evaluation. Claimant's father claimed, without dispute, that there is no evidence that Ms. Wolde or Dr. Branscum has evaluated claimant in at least the last 18 months. His claim that any opinions or conclusions regarding the propriety of any given level of services to claimant made in the Quarterly Report, and any conclusions that the present is an appropriate time to discontinue those services, are inherently suspect and lack the necessary foundational behavioral expertise and qualifications, has merit.

Lack Of Accuracy Of Findings Upon Which Conclusions Are Based

15. Claimant's father also pointed out substantial flaws in several of the factual statements in the quarterly report upon which the conclusions recommending termination of services are based. Claimant's father's challenges to the factual accuracy of the statements he identified was not disputed or rebutted.

16. Claimant's father identified several incorrect and conclusory statements in the factual portion of the Quarterly Report. He pointed out that the claims in the report that claimant has "mastered" goals such as going outdoors "100 percent of the time without behaviors," and not being afraid of birds other than seagulls, "100% of the time without behaviors," are simply wrong, as claimant refused to go outdoors as recently as the day before the hearing due to the presence of birds (not seagulls). Claimant's father also pointed out that the report sets a goal of standing in line with 80 percent independence, finds that claimant stands in line with 60 percent independence, yet concludes "Goal Ended," which he interpreted as the report concluding that the goal had been satisfactorily achieved. Similarly, claimant's father pointed out that the report concludes another goal is "Ended" that seeks to have claimant engage in asking one question to another peer spontaneously, and yet notes that claimant only ask questions to people 35 percent of the time. Claimant's father also pointed out that other goals and current levels are either found "Mastered," or "Ended," even though those

conclusions conflict with the findings that claimant has not achieved or mastered the goal levels identified in the report. Claimant's father testified that "I wish" that the statements in the report about claimant's mastery of his goals were true. Claimant's father's successful challenges to the factual accuracy of the statements he identified erodes confidence in the foundation underpinning the opinions and conclusions made in the Quarterly Report, and thereby undermines the validity and reliability of the recommendation that the services should be discontinued effective January 31, 2016.

Continuing Benefits And Timing Of Discontinuance

17. Claimant's father pointed out that claimant, and he and his wife, still greatly benefit from the tutor-provided, consultation services Julia provides. He testified that claimant continues to need the benefit of the services to work on these and new problems that are the product of claimant's growth and maturity and his adjustment to school, such as touching himself inappropriately, adjusting in the school classroom, haircuts, waiting in line, transitioning between tasks, and aggressive behavior toward adults and peers, all of which are either unresolved previous problems or are developing due to his growth. Claimant's father tearfully expressed gratitude and emphasized that claimant has made tremendous progress and that he and his wife have learned a great deal, benefiting in a way that is difficult to quantitate but he greatly appreciates in terms of progress for his son. But he emphasized that the discontinuance of the services that they are currently receiving without an assessment and without a transition plan to other supports and services risks significant loss to claimant and the family. Claimant's father pointed out that one problem in particular is claimant's rapid growth and aggressiveness, that he is now a 95-pound fourth-grader, as tall as his mother, who two weeks ago head butted the school principal, and a week ago pulled a girl student's hair in class seriously enough to warrant immediate aggressive intervention. Claimant's father is very concerned that discontinuance of services without a transition to new supports and services that can assist with dealing with these behaviors leaves him without the ability to maintain his gains and continue to progress.

18. Claimant's father does not contend that the ABA tutor-provided consultation-only services now being perceived should not be discontinued sometime in the near future. But he contends quite persuasively that now is not the time to terminate services that are providing a significant benefit to his son without an assessment and a thought-out smooth transition plan into a reasonable set of successor services and supports that can sustain claimant and help him to build upon his gains. He pointed out that he is very concerned about school. He described claimant's first two years at school as very difficult, and although claimant's first semester this year was good due to the fact that he has an excellent teacher, and his second semester is off to a good start, he is very concerned about fall semester 2016, when claimant has to transition to another teacher, all of the time when he is experiencing significant physical growth and new growth-related inappropriate behaviors. Claimant's father is also concerned that the school district is not providing reasonable supplemental/alternative supports, that claimant's IEP is grossly out of date, and the district has not performed its mandatory triannual assessment of claimant since 2011, almost two years overdue, all at a time when claimant has grown and changed a great deal. Claimant's father pointed out that without the triannual assessment and an

update to claimant's IEP at school, the services currently provided by the school district do not smoothly dovetail with what he is receiving at home, and he is being disadvantaged as a result.

19. Claimant's father noted that due to the problems with the school district, claimant is falling behind in their goal of having a seamless provision of services at school and at home at the same level. Claimant's father realizes that his remedy with respect to the triannual evaluation and the update of the IEP is with the school district, but he raised the point in order to demonstrate the necessity of the continuity, at least for a short additional time, of the Learning ARTS services, until such time as the school districts assessments, IEP, and services are updated and coordinated with what is being provided by CVRC. Claimant's father contends persuasively that due to the unusual constellation of adverse circumstances that are present for this brief period of time, termination of the Learning ARTS services now, at a time of significant change in claimant's life and when services being provided to claimant at school have not been reasonably updated doubly disadvantage claimant, removing the only source of effective intensive behavior programming and modification services he is receiving. Claimant's father emphatically made the point that although he appreciates the vote of confidence from Learning ARTS and from Dr. Branscum, neither he nor his wife are yet prepared and equipped to fully undertake all of the services previously provided by Julia through Learning ARTS by themselves, especially when no reasonable alternative has yet been proposed.

Lack Of Current Assessment And Transition Plan

20. Claimant has not been evaluated by either Dr. Branscum, the CVRC BCCA, or Ms. Wolde, the Learning ARTS BCCA, or any other qualified behaviorist, since claimant was in the second grade, and he is now a second semester fourth-grader. Claimant's father pointed out that during the period of time since claimant's most recent evaluation by a fully qualified professional, claimant has experienced a period of significant physical, personal, psychological and adjustment change. Claimant's father persuasively pointed out that such a qualified behavioral specialist assessment and evaluation of his son's current needs, skills, and capabilities is long overdue, and should be a condition precedent to any determination that consultation-only services are ready to be terminated. Claimant's father also points out that under ordinary circumstances, an evaluation from the school district might be able to backstop the lack of the current evaluation from CVRC or Learning ARTS, but as noted above, the school district's most recent evaluation is even more out of date than what appears to be the most recent evaluation, that performed by Dr. Branscum in May 2014.

21. Claimant's father also pointed out that there is no plan in place for transitioning claimant into other forms of services that meet similar needs as were met by the consultation-only services, once those services are terminated. Claimant's father persuasively pointed out that there is a significant risk that claimant may lose his gains to a significant extent if the services are discontinued and a transition plan has not been crafted and made a part of his IPP. He testified that although he and his wife have learned a great deal, and manage better than they did before ABA services taught them strategies for helping their son, nevertheless they are not yet fully capable and qualified to make certain that claimant does not regress, without some on-call outside support and services available and in place to assist them.

22. Claimant's father successfully demonstrated that without a current assessment made by a fully qualified BCBA, and a carefully thought-out transition plan, discontinuance of services at this time leaves claimant with a potentially significant gap in services that could cause claimant and his family harm by loss of some of the gains he has made to date. All parties acknowledge those gains have been considerable, and a reflection of the value and benefit that such services can provide to a motivated family. He testified, "We need and use the services, the services really work, and my son's age is immaterial. We need to get a sense that we have gone around the corner, and we still like and need these services because we have really benefited, and with the upcoming new year with a new teacher in the fall this is a very big deal for us." He also asked, "Why are we fading out services that we make good use of and enjoy and from which my son is benefiting. Only one out of the last five quarters in which he did well is not good enough. At least not yet."

CVRC's Evidence

23. CVRC had no well-founded or persuasive answers for claimant's father's contentions. CVRC failed to offer any adequate or persuasive response to claimant's father's claims that the opinions and conclusions of the Quarterly Report were not reliable due to the lack of expertise of the author and factual inaccuracies. CVRC was greatly disadvantaged in attempting to defend the hearsay opinions and conclusions contained in the Quarterly Report it did not author, in the absence of the participation of any of the persons who made the findings, opinions and conclusions contained in the report. CVRC's response that section 4686.2 requires the vendor to make the recommendation, and CVRC's role is merely to review the Quarterly Reports recommendation, approve it and take the action recommended, was an insufficient and unpersuasive response in light of the well supported challenges made by claimant's father to the factual foundations, opinions and conclusions of the Quarterly Report, none of which challenges were successfully refuted. CVRC's burden to adequately respond claimant's father's testimony that the factual statements regarding his son's achievement of set goals was greatly magnified by the lack of a current evaluation by Dr. Branscum or another qualified behaviorist. CVRC's contention that the data sources reflected in the Quarterly Report are that of parent reports, relies upon hearsay upon hearsay. CVRC discovered throughout the course of the hearing that the accuracy or inaccuracy of that information cannot be adequately or accurately assessed based upon the Quarterly Report alone. CVRC failed to point out any manner or means by which the accuracy of the author's factual statements regarding mastery of goals and achievements may be validated in the face of credible and persuasive direct factual challenges made by claimant's father. CVRC was unable to adequately reply to claimant's father's challenges that some facts in the Quarterly Report were omitted, some facts were misstated, some facts were misrepresented, and some facts were simply wrong. Dr. Branscum's testimony that there is no guarantee all goals be met in any ABA services plan was not disputed by claimant's father, but was entirely beside the points claimant's father made when challenging the factual reliability of the Quarterly Report. That testimony failed to address claimant's comment that, "Why say something is 100-percent mastered when it is not?"

24. CVRC did not reply to claimant's father's contention that before the services are discontinued, claimant should be fully assessed by a BCBA to fully inform all parties regarding

claimant's current progress and needs, and then have a meeting in which the proposed fading of services and discontinuation could be discussed with the vendor and with the BCBA, as well as the IPP planning team, to work out a sensible transition plan that would support claimant through the discontinuation and not leave him facing a gap in services.

LEGAL CONCLUSIONS

1. Welfare and Institutions Code section 4686.2 provides, in pertinent part:

(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 services or intensive behavioral intervention services that reflect evidence-based practices, promote positive social behaviors, and ameliorate behaviors that interface 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, daycare, 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 each ABA or intensive behavioral intervention no less than every six months, consistent with evidence-based practices. If necessary, the intervention plans treatment goals and objectives shall be updated and revised.⁷

2. Welfare and Institutions Code section 4686.2, subdivision (b) (4) forbids CVRC from discontinuing the purchase of ABA consultation-only services that have been provided to claimant unless "the consumer's treatment goals and objectives," as described under subdivision (a), are achieved. Section 4686.2, subdivision (a) requires, among other things, that "a behavioral assessment of each consumer to whom the vendor provides these services" be performed, that the consumer's progress shall be evaluated and reported, and that a copy of the intervention plan be provided to the Regional Center for review and consideration by the planning team members. These steps were initially taken, but more than a year and a half later, the behavioral assessment assumptions upon which claimant's program are based proved to be dated, and the conclusions in the Quarterly Report incomplete and/or inaccurate. Section 4686.2, subdivision (b)(4) also forbids discontinuation of the ABA consultation-only services being provided to claimant, "until the goals and objectives are reviewed and updated as required in Paragraph (5) ... and only if those updated treatment goals and objectives do not require ABA or intensive behavioral intervention services." CVRC failed to carry its burden to prove the discontinuance requirements of section 4686.2 were met.

3. Section 4686.2, subdivision (b)(4) assumes that when the vendor provides a behavioral assessment and evaluation of the consumer's progress, reports that to a regional center such as CVRC, and recommends discontinuation based on achievement of the goals and objectives, the assessment, evaluation and recommendation will be evidence-based, accurate, reliable, and provide a substantial factual basis in support of the proposed action. The assumption proved to be inaccurate in this instance. Claimant's father's testimony demonstrated the inaccuracy of the assumption for the Quarterly Report upon which the

⁷ Emphasis added.

discontinuance action is based, by the presentation of evidence that erodes confidence in the accuracy of the evaluations, assessments, or recommendations, all as set forth in the Factual Findings.

4. Claimant's father's evidence, as set forth in the Factual Findings, successfully demonstrated that discontinuation of the services at this time, without a current assessment by a BCBA, and without a plan for seamless transition from the discontinued services to a new set of supports and services plan is unwarranted and would violate the discontinuation prohibition set forth in section 4686.2, subdivision (b)(4). Claimant's father presented considerable evidence, as set forth in the Factual Findings, that many of the assumptions and conclusions upon which the Quarterly Report's evaluation and recommendation to discontinue services are based are inaccurate, flawed and unreliable. Claimant's father's evidence identified numerous flaws in the factual assumptions upon which the evaluation was based, eroding the accuracy and persuasiveness of its conclusion to discontinue the ABA services at the present time. Claimant's father presented considerable evidence that the recommendation that the services be discontinued effective January 31, 2016 is premature, and that there are a number of missing pieces that should be present in order to make an accurate determination as to when is the appropriate time to discontinue the services.

5. CVRC failed to meet its burden to prove that the opinions, conclusions and recommendations made by Learning ARTS in its December 10, 2015 Quarterly Report recommending termination of consultation-only services constituted a reliable basis for discontinuation of services effective January 31, 2016, as set forth in the Factual Findings and commensurate with the requirements of section 4686.2, subdivision (b)(4) and (5).

6. Claimant's father recognizes that the services will be discontinued and concluded at some point in time in the near future. But his point was well made and proved that discontinuation should only take place in an environment where a current assessment has been made by a qualified BCBA professional, based upon a factual basis where the parties agree that a reasonable amount of the goals and objectives of the services have been satisfied, and that there is a well thought out transition plan in place to seamlessly transition claimant into supports and services that build upon the consultation-only services gains that claimant and his family have achieved to date.

7. For all the above reasons, the appeal must be sustained, and the NOPA must be set aside and withdrawn. The ABA consultation-only, tutor provided services shall continue until such time as discontinuance fully conforms to the discontinuance requirements of Welfare and Institutions Code section 4686.2, and is, among other things, factually supported on reliable, evidence-based factual conclusions and a reasonably current assessment by a BCBA, with a plan for seamless transition to successor services and supports put in place.

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ORDER

The appeal of Claimant is GRANTED. The Notice of Proposed Action, discontinuing consultation-only, tutor-provided ABA services to claimant, is SET ASIDE AND DISMISSED.

DATED: March 7, 2016

DocuSigned by:

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STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welfare and Institutions Code section 4712.5, subdivision (a)).