

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

REGIONAL CENTER OF THE EAST
BAY,

Service Agency.

OAH No. 2016030166

DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on April 12, 2016, in Concord, California.

Claimant was not present; he was represented by his mother.

Mary Dugan, Fair Hearing and Mediation Specialist, represented Regional Center of the East Bay.

The matter was submitted for decision on April 12, 2016.¹

ISSUES

1. Is Regional Center of the East Bay obligated to fund a social skills program for claimant?²
2. Is Regional Center of the East Bay obligated to fund an iPad for claimant?

¹ The parties submitted additional evidence after the hearing was concluded and the record was closed. This evidence was not admitted or considered.

² A third issue identified in the fair hearing request form, regarding the number of hours of Applied Behavior Analysis, was resolved by the parties before the hearing.

FACTUAL FINDINGS

Introduction

1. Claimant is a four-year-old boy who has been diagnosed with autism spectrum disorder (ASD). Claimant received early intervention services³ and was made eligible for Lanterman Act⁴ services on his third birthday.

2. Claimant, who has no siblings, lives with his mother. Claimant's mother is not working at this time. Claimant's father lives in England and sees him only occasionally, but they visit regularly online through Skype technology. Claimant's maternal grandmother lives nearby and provides some support in caring for claimant.

3. Claimant attends special day preschool class at a public elementary school in Walnut Creek on Monday through Wednesday. Claimant also attends a private church-run preschool on Thursday and Friday, where he is provided with a one-on-one aide.

4. Claimant's current strengths include independent play skills and listening. Claimant's current weaknesses include manding (using scripted phrases or gestures to have needs met), language skills (his speech is delayed), social skills (difficulty navigating social situations with peers), motor imitation, adaptive skills (including full toilet training) and maladaptive behaviors (tantrums and noncompliant behavior).

Claimant's Individual Program Plan and ABA Services

5. Claimant's Individual Program Plan (IPP) was signed by claimant's mother and an RCEB representative on August 27, 2014. The IPP goals were identified as: 1) claimant will continue to reside at home; 2) claimant's social skills will increase; 3) claimant's communication skills will increase; 4) claimant will maintain optimal health; and, 5) claimant's challenging behaviors will be addressed and eliminated.

In order to reach these goals, claimant's mother and RCEB agreed that RCEB would fund 66 hours of respite, claimant's mother would address claimant's social skill building and monitor claimant's challenging behaviors, claimant's school would provide speech therapy, and RCEB would monitor claimant's progress.

³ Early intervention services are provided by regional centers to children up to three years in age pursuant to the Early Intervention Services Act, Government Code section 95000 et seq.

⁴ The Lanterman Developmental Disabilities Services Act (Lanterman Act) sets forth the services and supports available to developmentally disabled consumers of regional centers and is found at Welfare and Institutions Code, section 4500 et seq. Further statutory references are to the Welfare and Institutions Code unless otherwise noted.

6. Claimant's mother and his RCEB case manager met in January and February 2015 to discuss claimant's progress. Claimant's mother requested in-home Applied Behavior Analysis (ABA) services to address claimant's tantrums, transitions, functional communication, toilet training, delays in completing daily living tasks, interactions with peers and safety awareness.⁵ On February 13, 2015, claimant's mother and his RCEB case manager signed an addendum to the IPP, in which RCEB agreed to fund an assessment for ABA services through East Bay ABA. Claimant's health insurance was through Medi-Cal, which covers ABA services; claimant's mother was referred to Medi-Cal to begin the process of accessing ABA services through Medi-Cal.

Claimant's mother and his RCEB case manager agreed on the following objectives: 1) claimant will initiate play with at least one child per day by August 2015; 2) claimant will no longer engage in tantrum behavior by August 2015; and, 3) claimant will reduce his repetitive behavior.

7. On May 15, 2015, following receipt of East Bay ABA's assessment, claimant's mother and his RCEB case manager agreed on an IPP addendum. The addendum provided that RCEB assessed the need for in-home ABA services to be provided by East Bay ABA effective June 1, 2015 through November 30, 2015, at 10 hours per week of direct tutoring, three hours per week of services by the program manager and two hours per week of services by the clinical director. As of May 15, 2015, claimant's long range goals included increasing his social skills and addressing his challenging behaviors. The objectives included claimant initiating play with at least one child each day and eliminating tantrums during transitions by August 2015. The plan for achieving the objectives was to authorize in-home ABA services.

8. RCEB completed an annual review of claimant's IPP on August 14, 2015. At that time, claimant was reported to have emerging social skills when interacting with peers, including his ability interact and engage in peer interaction. He was reported to be learning social boundaries but to struggle with sharing. Claimant was not yet engaging in peer conversations. Claimant was continuing to engage in tantrum behavior and to struggle with transitions. These issues were to be addressed through ABA services. Claimant's mother reported that she provides him with an iPad when she cooks. She also reported that claimant engages in bolting behaviors when in the community.

9. Claimant's August 28, 2015 IPP addendum stated that increasing social skills and addressing challenging behaviors remained goals. RCEB assessed the need for in-home ABA services provided through East Bay ABA effective September 15, 2015 through March 31, 2016, at 10 hours per week of direct tutoring, five hours per week of services by the

⁵ ABA services are among the services funded by regional centers. ABA is defined in the Lanterman Act 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." (§ 4686.2, subd. (d)(1).)

program manager and four hours per week of services by the clinical director. The objectives included claimant initiating play with at least one child daily, and to cease engaging in tantrums during transitions. The plan for achieving the objectives was to authorize in-home ABA services.

10. On November 16, 2015, East Bay ABA provided a progress report to RCEB. As of the date of the report, East Bay ABA Clinical Director Edwin Cruz, M.A., B.C.B.A.,⁶ reported that claimant had mastered 10 goals in the areas of tact, listener responding, visual perceptual skills, social play and motor limitation. Nine new goals were set and one goal was continued. The new goals included social play and social behaviors.

Cruz recommended that claimant receive a total of 23 hours per week of ABA therapy in the home and community, including 12 hours of direct services by tutors. Cruz noted that claimant's mother had placed a strong emphasis on social skills during claimant's attendance at his church preschool. Four of the 10 hours with a tutor had been in the preschool setting to facilitate social interaction with peers. At the same time, claimant's mother had reported an increase in behaviors occurring at home. Cruz was concerned with the amount of tutor time being spent at the preschool instead of in the home. Cruz determined that claimant required further assistance to facilitate and teach appropriate social skills in natural environments. He requested additional tutoring hours to be targeted in the community, such as in parks, the library, at the East Bay ABA Center and at community events. Claimant's mother agreed to these recommendations on November 11, 2015.

11. On January 31, 2016, East Bay ABA Clinical Director Rachel Scott-Rosenbluth, M.S., B.C.B.A., authored a transition report. The transition was occurring for a number of reasons. Primarily, East Bay ABA had limited staff members available who were a good fit for claimant and his family. Scott-Rosenbluth stated that the staff members assigned to perform claimant's ABA services were competent and performed the duties to the best of their ability; however, claimant's mother asked to replace many of the available direct support and supervisory staff. Because many of claimant's mother's concerns involved peer socialization, a lack of available peers within East Bay ABA and claimant's mother's reluctance to find peers in community settings, the objective could not be programmatically targeted. Services with East Bay ABA were suspended as of December 15, 2015.

12. On January 21, 2016, RCEB approved an assessment of in-home ABA services through Positive Pathways, effective February 1, 2016. On March 21, 2016, an addendum to claimant's IPP stated that RCEB assessed the need for in-home ABA services to be provided by Positive Pathways, effective April 1, 2016, through September 30, 2016. RCEB currently funds ABA services with Positive Pathways of up to 15 hours per week of direct tutoring, 12 hours per month of supervision at the manager level and six hours per month at the director level.

⁶ B.C.B.A. stands for Board Certified Behavior Analyst.

13. Claimant's ABA services will be funded and approved by Medi-Cal as of May 1, 2016, instead of by RCEB.

Claimant's Request for RCEB to Fund a Social Skills Group

14. Claimant's mother is requesting that RCEB fund claimant's participation in a formal social skills group in addition to funding ABA services. She notes that RCEB contracts with vendors that provide social skills groups. Her experience at public parks and playgrounds is that other parents do not want their children to play with a child who has a developmental delay. Claimant's mother is concerned that it is a critical time for improving claimant's social skills and she believes he needs a formal group with regular members who are focused on the same goals. Claimant attended a gym class with other children and enjoyed it, but claimant's mother states that she cannot afford to pay for these kinds of classes. Claimant's mother has not tried low cost or free community classes for children of claimant's age offered by the city, county or through the Care Parent Network.

15. On March 17, 2016, Dawn Fleminger, M.A., B.C.B.A., Regional Director of Positive Pathways, submitted an assessment and treatment plan. Fleminger observed claimant at home, at his public preschool and at his private church preschool. Fleminger reported that claimant enjoyed the attention and affection from his family and staff. She observed him engage in parallel play for short periods, but to struggle with sharing. Fleminger observed claimant initiate with a peer on only one occasion. She found that he was able to identify emotions and regularly make eye contact when he wanted to draw attention to something. Fleminger concluded that claimant's abilities in social skills fell in the 18-to-30 month range. Fleminger recommended that treatment occur in claimant's home and in community settings, such as a local park, stores, restaurants, community activities, and social skills groups. Fleminger recommended that claimant participate in a social skills group that includes neurotypical peers to help address his social skills deficits.

Fleminger later advised RCEB that as an only child, claimant did not have access to peers on a consistent basis outside of school; as a result, she recommended that claimant attend a social skills group funded by RCEB.

16. Fleminger testified at hearing. In her experience, developing social skills in a public playground can be challenging. When there are no siblings or regular access to peers, improving social skills is difficult to achieve; she believes a social skills group would be helpful to claimant. Fleminger does not consider social skills groups to be duplicative of ABA services because group interaction is different from individualized programming. Positive Pathways does not offer a social skills groups.

17. A classroom assistant from claimant's church-run preschool, David Vargas Contreras, confirms that claimant has difficulty with social skills. He believes claimant would benefit from social skills training.

18. Maria Villacis, M.S., C.C.C.-S.L.P., claimant's speech-language pathologist, wrote a letter regarding claimant's condition dated March 31, 2016. Villacis is addressing claimant's language goals. She recommends that claimant practice his skills with a language or social skills group, as well as through natural interactions with typically developing peers.

19. Stephanie Chang, Children's Minister at Contra Costa Gospel Church, wrote a letter dated December 14, 2015. Chang has observed claimant in his preschool classes and reports that he functions appropriately with no signs of aggression, but needs occasional support. Chang believes that claimant's involvement in a social skills group would further enhance his involvement in the church community.

20. RCEB denied claimant's request for funding participation in a social skills group. RCEB clinical psychologist Cari Yardley, Psy.D., testified at hearing. Dr. Yardley explained that the social skills groups with whom RCEB contracts, are meant for children with greater foundational skills. Typically, the children in those groups are age seven and older, and they have mastered foundational skills such as learning to share toys or taking turns. In Dr. Yardley's opinion, claimant would not fit in with the children in formal social skills groups because he is not ready to interact with the children in those groups; instead, he would benefit from interaction in a play group. In addition, when RCEB funds participation in social skills groups, they begin to fade ABA services. ABA services are most appropriate for a child of claimant's age. RCEB does not fund ABA services to work on social skills and a social skills group at the same time because that would constitute a duplication of services.

Dr. Yardley recommends that claimant work on his social skills with his ABA tutor facilitating the interaction in natural environments, similar to the way neurotypical peers would. To the extent that claimant does not have siblings or friends with whom to practice his social skills, she recommends interacting with neurotypical children at a local playground with the ABA tutor to facilitate the interaction. Or, claimant can join a Parks and Recreation class for children his age, or attend "Gymboree" classes, church group activities, Care Parent Network groups, or playdates with preschool friends. Parents of developmentally disabled children are expected to help arrange opportunities for social interaction, in the same way that parents of neurotypical children arrange those opportunities.

According to Dr. Yardley, she, the RCEB service coordinator, and the prior ABA tutors have consistently encouraged claimant's mother to access community groups and natural environments with the ABA tutors facilitating the interaction. In Dr. Yardley's professional opinion, claimant would benefit from community group involvement with neurotypical peers, while being provided with ABA support. Claimant would not, in her opinion, benefit meaningfully from the social skills groups funded by RCEB at this time because he is too young and has not developed the necessary foundational skills.

21. Maria Garcia-Puig, graduated with a master's degree in clinical psychology from John F. Kennedy University. She has worked at RCEB for 23 years and currently supervises the young children's team. Garcia-Puig testified at hearing. In her opinion, claimant's social skills are best addressed through ABA services at this time. She agrees

with Dr. Yardley's opinions regarding whether claimant is ready to move from ABA services to a social skills group.

Garcia-Puig also explained that regional centers are obligated to use cost-effective means to provide services. It would not be cost-effective or appropriate to provide both ABA services and a social skills group to address claimant's deficits in social skills. Claimant is currently benefiting from his ABA services and it is important not to set too high of a target from claimant; if he were to attend the social skills group instead of ABA services, he would likely become frustrated.

Claimant's Request for RCEB to Fund an iPad

22. Claimant's mother is requesting that RCEB fund an iPad for claimant. Claimant's iPad screen is cracked. Claimant's mother uses the tablet to help claimant self-regulate when they are out in the community, when they are traveling, and to assist with transitioning. Claimant and his mother traveled to Japan last year to attend a wedding and they travel to Los Angeles on a regular basis to visit claimant's grandfather. Claimant also uses the iPad when "skyping" with his father, and claimant's mother uses the device to motivate claimant, to distract him while he is eating, or to occupy him while they are out in the community.

23. Claimant's mother provided a letter from claimant's physician, S.M. Chang, M.D., dated February 29, 2016. Dr. Chang states:

Per mom, child needs tablet replaced to help aid in daily learning and living. Mom feels this will help.

This letter is of limited value on the issue of claimant's need for an iPad because it states that the request is based on claimant's mother's statements rather than a medical opinion.

24. RCEB has denied claimant's request for funding of an iPad. RCEB notes that it has funded ABA services through East Bay ABA and Positive Pathways, and that claimant is attending a public preschool. The ABA program and public preschool program provide opportunities to address claimant's self-regulation skills and the ability to transition to different environments without reliance on a device. RCEB offered to discuss how Positive Pathways tutors could assist in teaching claimant to use self-regulation skills without using an iPad. RCEB denied the request because it is duplicative of the services being provided by Positive Pathways and the local school district.

25. Dr. Yardley opined that the use of an iPad is not the best choice for teaching self-regulation; she recommends implementing the strategies taught by his ABA tutors. Garcia-Puig agreed; in her opinion, claimant should be working on mastering his foundational skills rather than relying on a device like an iPad to self-regulate.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. (§ 4500 et seq.) Individuals with developmental disabilities have the right to services and supports directed toward the achievement of the most independent and normal lives possible. (§ 4502, subd. (b).) The Lanterman Act authorizes the Department of Developmental Services to contract with regional centers to provide developmentally disabled individuals with access to the services and supports best suited to them throughout their lifetimes. (§ 4620.)

2. Neither the Lanterman Act appeal process (§ 4700 et seq.) nor its implementing regulations (Cal. Code Regs., tit. 17, § 50900 et seq.) assigns burdens of proof. Here, claimant is requesting an additional support and therefore bears the burden of proof. And, as there is no statute that provides otherwise, the standard of proof to be applied in this proceeding is the preponderance of the evidence. (Evid. Code, § 115.)

3. The consumer's needs are determined through the IPP process. (§ 4646.) The process "is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments." (§ 4646, subd. (a).) Section 4685, subdivision (c)(1), similarly provides that in order to provide opportunities for children to live with their families, regional centers shall give a very high priority to services and supports designed to assist families care for their children, including "behavior modification programs" and "special adaptive equipment such as wheelchairs, hospital beds, communication devices, and other necessary appliances and supplies"

4. The IPP is developed by an interdisciplinary team and must include participation by the consumer and his or her representative. The IPP must set forth goals and objectives for the consumer, contain provisions for the acquisition of services (which must be provided based upon the consumer's developmental needs), and reflect the consumer's particular desires and preferences. (§§ 4646, 4646.5, subds. (a)(1), (a)(2) and (a)(4), 4512, subd. (b), and 4648, subd. (a)(6)(E).)

5. Although an IPP must reflect the needs and preferences of the consumer, a regional center is not mandated to provide all the services a consumer may request. A regional center's provision of services to consumers and their families must "reflect the cost-effective use of public resources." (§ 4646, subd. (a).) A regional center also has discretion in determining which services it should purchase to best accomplish all or any part of a consumer's IPP. (§ 4648.) This entails a review of a consumer's needs, progress and circumstances, as well as consideration of a regional center's service policies, resources and professional judgment as to how the IPP can best be implemented. (§§ 4646, 4648, 4624, 4630, subd. (b), and 4651; *Williams v. Macomber* (1990) 226 Cal.App.3d 225, 233.)

Request for Funding of a Social Skills Group

6. The goals of claimant's IPP include improving his social skills and learning self-regulation skills. Dr. Yardley and Garcia-Puig gave persuasive testimony regarding whether the social skills groups that RCEB funds would be appropriate for claimant at his age and skill level. They explained that claimant is not ready to benefit from these groups, and he might become frustrated if he attended because he is not at the same developmental level. Moreover, claimant has the opportunity to practice his social skills in a play group arranged by his mother, by attending a free or low cost play group available in the community, or accompanying his ABA tutor to a park or library, where interaction with neurotypical peers can occur naturally. These opportunities would serve claimant's need for practicing social skills. Finally, in order to avoid duplicating services, RCEB fades ABA services when children join social skills groups. Claimant is benefiting from ABA services and they should continue at this time. Claimant did not meet his burden of establishing that RCEB erred in denying funding for a social skills group.

Request for Funding of an iPad

7. Claimant did not meet his burden of establishing that RCEB is obligated to purchase an iPad device for his use. The testimony of RCEB employees established that an iPad is not the best way to teach claimant self-regulation. His ABA tutors should teach claimant and his mother methods to enable claimant to change his behavior without reliance on a device. Because RCEB is funding ABA services, funding a device is neither necessary nor cost-effective.

ORDER

Claimant's appeal is denied.

DATED: April 15, 2016

JILL SCHLICHTMANN
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.