

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

and

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2013040160

DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Torrance, California on June 10, 2013. GiGi Thompson, Manager Rights Assurance, represented Harbor Regional Center (HRC or service agency). Mother represented Claimant, who was present at the hearing.

The matter was submitted for decision on June 10, 2013. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUE

The sole issue presented is whether HRC should fund 12 hours per week of direct Applied Behavioral Analysis (ABA) services through Support and Treatment for Autism and Related Disorders to meet Claimant's current needs.

FACTUAL FINDINGS

1. Claimant, who presents with Asperger's Syndrome, is a 20 year-old, non-conserved consumer of HRC. Claimant is a high school graduate. Claimant resides with his mother and father and sibling.

2. During the 2011/2012 academic year, Claimant participated in Generation NeXt, a residential transitional program providing a college experience for students with intellectual and developmental disabilities. Claimant disrupted classes when other students with whom he disagreed expressed their views. Claimant's rigid expectations that all lights should go off at exactly eight minutes after nine o'clock at night did not endear him to his

roommates. Physical altercations occurred. Claimant was suspended on several occasions before completing the program.

3. In August 2012, Claimant was enrolled in Options Transition to Independence (Options), which according to its literature is “a comprehensive transitional program that guides young adult students with learning disabilities into independent adulthood and helps them recognize and optimize their full potential.” (Claimant Ex. 8.) On a date not established by the evidence, Claimant was seated at a table eating with another student who would not stop drumming on the table after Claimant’s repeated requests for him to do so. Claimant gesticulated to the student with his eating utensil—a knife—in his hand and verbally threatened the student. On October 5, 2012, Claimant was terminated from Options because of his “inability to manage anger and aggression.” (Claimant Ex. 8.)

4. On May 8, 2013, Claimant was agitated about an incident involving his younger sibling who is matriculated at Claimant’s former high school. Claimant visited the school’s campus wearing a hooded sweatshirt and dark glasses to, according to his hearing testimony, “symbolize how dark I’ve turned.” Claimant’s behavior at the school caused campus security to escort Claimant from the school. A May 9, 2013 letter addressed to Claimant and citing Penal Code section 626.4 (authorizing educational institutions to withdraw consent to remain on campus) states the following:

Your actions . . . have made it clear that your presence on campus causes a danger to persons. While being escorted from the campus you stated to campus security, “I will not rest until [a specifically named faculty member] . . . and all the board members are bleeding out of their ass.” Your actions and statements were completely inappropriate and unacceptable. The teachers/coaches have expressed concern and do not feel comfortable with you present on campus. The [police] . . . is investigating the threat level to staff[.]

(HRC Ex. 7.)

5. The incidences set forth above in Factual Findings 2, 3, and 4, have raised concerns for the safety of Claimant and others with whom he interacts. In particular, Claimant has interviewed for enrollment in Career to College, another transition program, which has advised him that it does not accept applicants with behavioral issues. Claimant’s successful participation in such a program is expected to enhance his likelihood of matriculating at a college where he can pursue his interests in ornithology. In order to address Claimant’s behavioral challenges and deficits and the appropriate intervention therefor, his parents requested, and were granted, a HRC-funded Functional Behavior Assessment (FBA) for him.

6. Faye Carter, Ph.D., BCBA, and Julie A. Walker, M.S. MFTI, assessed Claimant, and they prepared a January 23, 2013 FBA report recommending 12 hours of direct ABA services for Claimant, which HRC has declined to fund. Instead, the HRC has

proposed funding only four hours of direct ABA services for Claimant. Claimant appealed the denial and this proceeding ensued.

7. The January 23, 2013 FBA report identifies “verbalizations,” “manifestations of anxiety,” and “egocentricity” as target behaviors for which Claimant requires remediation.

Verbalizations—[Claimant] . . . will raise his voice and speak in a scripted manner about various acts of aggression towards others (i.e. I would hit them and)

Manifestations of anxiety—[Claimant] . . . will report feeling anxious (i.e. I am feeling anxious, I don’t like this, etc.) as a way to escape a non-preferred activity or task or engages in pacing.

Egocentricity—When asked to provide opinions or offer assistance to another person, [Claimant] . . . is unable and unwilling and instead responds that they should do what they want. Also, [Claimant] . . . requires prompting to engage in reciprocal conversation.

(Claimant Ex. 8 at p. 2.)

8. In the area of conceptual skills, the January 23, 2013 FBA report indicates that Claimant “does not yet start conversation on less preferred topics or ask about other’s interests. [Claimant] . . . often perseverates on highly preferred topics during conversations with others. Also[,] if the topic of conversation triggers a memory of a negative past event, [Claimant] . . . emotions will independently escalate as he raises his voice and engages in verbally aggressive soliloquy that appears to be scripted. While [Claimant] . . . is able to provide greetings to familiar people, he requires prompting to greet new individuals. Also[,] during conversation, [Claimant’s] . . . eye contact is fleeting, especially during non-preferred topics.” (Claimant Ex. 8 at p. 8.)

9. In the area of socialization skills, the January 23, 2013 FBA report indicates that Claimant “struggles with being able to identify the interests of others and is unaware of what his friend’s [*sic*] do for work. [Claimant] is also unaware of the impact of his actions on others (emotions). [Claimant] . . . unknowingly [has] said hurtful things about other students with them present, and refused to stand with another classmate in a wheelchair who was also waiting to be picked up. . . . [Claimant’s mother] . . . reports [Claimant] spending hours alone on his computer, rarely seeking out social engagements with others.” (Claimant Ex. 8 at pp 8-9.)

10. The January 23, 2013 FBA report indicates that the recommended 12 hours of direct support each week “to focus on coping skills, social skills, emotion regulation and tolerating . . . frustrations, anxiety and anger, vocational training/work support and mobility training.” (Claimant Ex. 8 at p. 11.) The report additionally recommends Positive Behavior Support Strategies, Cognitive Behavior Therapy, Dialectical Behavior Therapy, and the

generalization of strategies to Claimant's parents as additional appropriate methodologies for addressing Claimant's target behaviors set forth above in Factual Finding 7.

11. Dr. Carter testified during the hearing, and her hearing testimony was consistent with the information included in the January 23, 2013 report. Dr. Carter elaborated that Claimant's interaction with strangers is a source of anxiety for Claimant, who will use aggressive or inappropriate language, a raised voice, or harsh tone to escape such interactions. According to Dr. Carter, Claimant is "not behavior free at this time" and "any sort of behavior escalation puts people on edge given what is going on and what just happened [in a shooting on the campus of a local college]." Dr. Carter opined that Claimant is at risk for removal from educational or vocational programs or for confrontation with law enforcement because of his black and white thinking and rigidity can result in an escalation with individuals without specific knowledge of his behavioral issues. According to Dr. Carter's testimony, Claimant has to learn tolerance and how to deal with his anger—that he cannot have everything his way and that he has to compromise. Dr. Carter explained that during ABA, role playing techniques are useful to contrive situations Claimant is likely to encounter in the community and to offer him opportunities to practice techniques and skills for self-regulating his emotions and behaviors. Dr. Carter opined that this period of time when Claimant is unemployed and not enrolled in school is optimal for Claimant to work intensively on his behavior before getting involved in too many things. Dr. Carter explained that the recommendation for 12 hours each week of direct ABA includes "a comprehensive therapeutic package" notwithstanding that HRC funding would not extend to all aspects of the "package."

12. Bonnie Ivers, Psy.D., whose responsibilities include overseeing HRC's psychological services, raised concerns about wording and terminology in an initial draft of the January 23, 2013 report. In general, Dr. Ivers was in agreement with the report's "description" of Claimant's behaviors, but believed the report was rife with "terminology [that] was psychoanalytic" and "not ABA terms." Dr. Ivers testified that ABA breaks down behavior skills into elementary component parts and looks at how reinforcement or the lack thereof influences behavior. By contrast, Cognitive Behavior Therapy (CBT), a psychoanalytic modality used with individuals experiencing anxiety and depression, and anger management issues, focuses on the thoughts and feelings underlying behavior. Dr. Ivers opined that the report's identification of Claimant's goals is more in line with CBT, in that the stated goals seek to identify Claimant's thoughts and feelings interfering with his self-control. According to Dr. Ivers, a 12-hour ABA program would not assist Claimant. Dr. Ivers testified variously that "ABA would be focusing too much on the behavior and would cause an increase in [maladaptive] behavior" and that "there is no research to support that ABA is the best therapeutic response" to Claimant's impulsivity and anger management.

13. Dr. Ivers was additionally critical of the January 23, 2013 report on grounds that it contained no measurement of the frequency and duration of Claimant's maladaptive behaviors and that the raw scores on a chart purportedly reporting "ABAS-II Results" did not match the age equivalents. According to Dr. Ivers, after she employed a standard protocol

sheet to re-score Claimant's ABAS results, which fell within average range, she "didn't understand where there were deficits."

14. Dr. Ivers acknowledged that, unlike Dr. Carter, her opinions were formed without the benefit of her participation in any assessment or examination of Claimant. Although Dr. Ivers objected to 12 hours of direct ABA services for Claimant, Dr. Ivers' testimony did not establish why four hours, rather than 12 hours, of direct ABA services each week constitute the appropriate amount of behavioral intervention for claimant. Dr. Ivers' testimony regarding the recommended frequency of direct ABA services for Claimant is accorded slight weight.

15. Janet Allen, M.A., is a licensed educational psychologist who began treating Claimant when he was enrolled in middle school, and she continues to treat him on a weekly basis in her private practice. Ms. Allen testified that, in treatment, Claimant is "working on anxiety management and is not working on the behavioral component." She is concerned that the knife incident set forth above in Factual Finding 3 occurred because of claimant's rigid thinking and fixation. According to Ms. Allen's testimony, Claimant's "feelings guide his reaction to a situation," and his "egocentricity and perseveration affect his social skills in social situations." Ms. Allen opined that Claimant is "at risk without behavioral intervention."

16. The preponderance of the evidence establishes that Claimant manifests aggression that interferes with his social interactions, and consequently inhibits his integration into his community.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.), which mandates that an "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream of life in the community." (Welf. & Inst. Code, § 4501.)

2. Services and supports for persons with developmental disabilities are defined as "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." Services and supports can include those providing behavior training and behavior modification programs. (Welf. & Inst. Code, § 4512, subd. (b).)

3. Welfare and Institutions Code section 4686.2, which regulates the provision of ABA services, states the following:

(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 or intensive behavioral intervention services that reflect evidence-based practices, promote positive social behaviors, and ameliorate behaviors that interfere 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, day care, 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 ABA or intensive behavioral intervention no less than every six months, consistent with evidence-based practices. If necessary, the

intervention plan's treatment goals and objectives shall be updated and revised.

(6) Not reimburse a parent for participating in a behavioral services treatment program.

(c) For consumers receiving ABA or behavioral intervention services on July 1, 2009, as part of their IPP or IFSP, subdivision (b) shall apply on August 1, 2009.

(d) For purposes of this section the following definitions shall apply;

(1) "Applied behavioral analysis" means 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.

(2) "Intensive behavioral intervention" means any form of applied behavioral analysis that is comprehensive, designed to address all domains of functioning, and provided in multiple settings for no more than 40 hours per week, across all settings, depending on the individual's needs and progress. Interventions can be delivered in a one-to-one ratio or small group format, as appropriate.

(3) "Evidence-based practice" means a decision making process that integrates the best available scientifically rigorous research, clinical expertise, and individual's characteristics. Evidence-based practice is an approach to treatment rather than a specific treatment. Evidence-based practice promotes the collection, interpretation, integration, and continuous evaluation of valid, important, and applicable individual- or family-reported, clinically-observed, and research-supported evidence. The best available evidence, matched to consumer circumstances and preferences, is applied to ensure the quality of clinical judgments and facilitates the most cost-effective care.

(4) "Parent participation" shall include, but shall not be limited to, the following meanings:

(A) Completion of group instruction on the basics of behavior intervention.

(B) Implementation of intervention strategies, according to the intervention plan.

(C) If needed collection of data on behavioral strategies and submission of that data to the provider for incorporation into progress reports.

(D) Participation in any needed clinical meetings.

(E) Purchase of suggested behavior modification materials or community involvement if a reward system is used.

4. As the party asserting a claim for services and supports under the Lanterman Act, Claimant bears the burden of proving by a preponderance of evidence his entitlement to the services and supports. (Evid. Code, §§ 115 and 500.) Claimant has met his burden.

5. Claimant manifests aggression that interferes with his social interactions, and consequently inhibits his integration into his community. To promote positive social behaviors and to ameliorate behaviors interfering with Claimant's social interactions, the preponderance of the evidence set forth in Factual Findings 2 through 16, inclusive, establishes that Claimant requires 12 hours per week of direct ABA services.

6. Cause exists pursuant to Legal Conclusions 1 through 5, inclusive, for HRC to fund 12 hours per week of direct ABA services for Claimant.

ORDER

1. Claimant's appeal is granted.
2. Harbor Regional Center shall fund 12 hours per week of direct ABA services for Claimant.

Dated: June 26, 2013



JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is a final administrative decision. This decision binds both parties. Either party may appeal this decision to a court of competent jurisdiction within 90 days.