

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of :

CLAIMANT,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2015080705

CORRECTED DECISION

Matthew Goldsby, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on February 9, 2016, at Alhambra, California.

Rhoda Tong, Community Residential Services Supervisor, appeared and represented the Eastern Los Angeles Regional Center (the Service Agency).

Joseph Hyunsung Lee, attorney at law, appeared and represented claimant,¹ who was not present at the hearing.

At the commencement of the hearing, claimant's counsel orally withdrew claimant's request for attorney fees, but requested compensation for damages caused by the delay in authorizing services. The Service Agency objected on the grounds that claimant did not raise the issue of compensatory damages in the Fair Hearing Request. The Service Agency did not respond to the administrative law judge's inquiry whether more time was necessary to address the issue, requesting instead the denial of compensatory damages based on lack of jurisdiction. There is a policy of great liberality in permitting amendments to the pleadings at any stage of a proceeding. (Gov. Code, §§ 11507, 11516; Cal Code Regs., tit. 1, § 1014, subd. (a); *Fogel v. Farmers Grp., Inc.* (2008) 160 Cal.App.4th 1403.) The Fair Hearing Request is deemed amended to include the issue of compensatory damages.

The parties submitted the matter for decision at the conclusion of the hearing.

¹ Claimant and his family are not identified by name in order to protect their privacy.

STATEMENT OF ISSUES

The issues in this matter are whether the Service Agency should fund independent assessments for behavior intervention services and pay compensatory damages caused by delays in authorizing those services.

EVIDENCE CONSIDERED

Documents: Service Agency's Exhibits A-X; claimant's Exhibits 1-35.

Witness testimony: Lily Ting, Service Coordinator; Randi Elisa Bienstock, Psy.D; Mitchell Taubman, Ph.D.; Betty Jo Freeman, Ph.D.; claimant's mother; and Joseph Hyunsung Lee, attorney at law.

FACTUAL FINDINGS

1. Claimant is a 23-year-old Service Agency consumer, diagnosed with severe spasticity, quadraparesis, cerebral palsy, seizure disorder, intellectual disability, and other disabling conditions. He was born prematurely and suffered severe brain damage at birth. He is visually impaired and non-ambulatory without assistance or braces. He is able to eat and chew foods cut into small pieces and receives supplemental nutrition by gastro-intestinal tube. He has limited verbal skills, speaking in one or two-word phrases.

2. Claimant is an only child and lives with his mother, a single parent. When he was younger, claimant was prone to tantrums and other maladaptive behaviors. As claimant grew, his mother became unable to manage his behavior, which is now aggressive, dangerous, and anti-social. Claimant touches strangers inappropriately, reaching for the breasts and buttocks of women, and spitting on others. When he gets angry or frustrated, he pushes and swipes at objects within his arm span. He does not know his own strength. He openly masturbates. He sucks his thumb and inserts his forefinger into his eye, causing infection and risking further injury to his vision. He has no sense of hygiene, and puts his fingers in his eyes, nose, and mouth after touching contaminated or unsanitary objects. He is not toilet-trained.

3. On May 16, 2009, Howard J. Chudler and Associates, Inc. (Chudler) assessed claimant and recommended 12 hours per month of behavioral intervention. After attending three sessions, claimant and his mother did not continue the recommended treatment plan with Chudler due to claimant's scheduling conflicts.

4. On April 26, 2010, the Service Agency referred claimant to Roberto De Candia, a clinical psychologist, for a psychological evaluation to assess claimant's intellectual and adaptive functioning. The psychologist recommended claimant's continued participation in special education programs and a physical therapy evaluation. De Candia

also noted “The family will benefit from Behavioral Intervention Services . . . I did inform [claimant’s mother] that new procedures have been instituted by [the Service Agency] and she may be required to attend a parent group training prior to provision of behavior service.” (Ex. 18.) There is no evidence to show claimant received behavioral intervention services.

5. Claimant has received various services from the Service Agency, including physical therapy, music therapy, mobility training, facilitated communications training, and adaptive skills training. He receives full-time nursing care from a licensed vocational nurse. He benefits from Supplemental Security Income, Medi-Cal, and Medi-care, and receives 283 hours per month of assistance from the Los Angeles County In-Home Supportive Services.

6. On August 22, 2014, claimant’s mother sent the Service Agency a request for behavior intervention services using Applied Behavior Analysis (ABA). She specifically requested services be provided by Reach Integrated Services (Reach) because she was particularly satisfied with other services provided by Reach.

7. On August 26, 2014, the Service Agency directed Randi Elisa Bienstock, a licensed psychologist, to perform a review of claimant’s case history and consider the request for behavioral services. Dr. Bienstock concluded “claimant and his family may benefit from behavior interventions,” and approved “an 8-hour behavior evaluation for non-intensive behavior interventions.” (Ex. H.) She further noted that “while there are certainly advantages to working with the same agency currently providing other services including familiarity with staff, there can also be disadvantages . . . we want to be sure that parent is offered several options with regard to vendors.”

8. On August 29, 2014, the Service Agency’s service coordinator sent claimant’s mother an email, incorrectly reporting that the psychologist approved “non-intensive ABA service at rate of 8 hours per month to address [claimant’s] behavioral issues.” (Ex. 3.) She further stated “I hope you will consider SEEK as vendor.”

9. Claimant’s mother interpreted the email to mean what it stated, and she did not consider eight hours per month sufficient to address claimant’s behavioral issues. Also, she believed she had the right under the Lanterman Act to designate the service provider. On September 4, 2014, she replied to the service coordinator, requesting an ABA assessment be provided by Reach. On September 30, 2014, the service coordinator replied to clarify “Reach could not provide [the requested] services because they were not vendored with [the Service Agency] to provide non-intensive ABA service.” (Ex. 5.)

10. On October 6, 2014, the Service Agency issued a Notice of Proposed Action denying funding for an ABA assessment with Reach. Claimant’s mother retained an attorney and contested the proposed denial of services. After negotiation, the parties executed a Notification of Resolution on February 9, 2015, whereby Reach would perform the requested assessment for behavioral services.

11. On April 2, 2015, Reach evaluated claimant by interviewing claimant and his mother, reviewing unidentified records, and administering the Vineland-II Adaptive

Behavior Scales and the Adaptive Behavior Scale Social Skills Rating System. Reach submitted a report entitled “Functional Behavior Assessment.” (Ex. E.) Dr. Bienstock reviewed the report and determined that the assessment failed to meet the criteria of a Functional Behavior Assessment under ABA. She considered the treatment interventions too vague and general, and concluded that she was “not able to provide clinical approval.” (Ex. H.)

12. On June 1, 2015, Reach submitted a second report with more details about the evaluation procedures and described a more specific treatment plan. Reach recommended in-home Discrete Trial Training (DTT) services, a behavioral intervention methodology under the ABA. The plan specified 12.5 hours per week of direct ABA service, plus other supplemental services in various small increments.

13. On June 19 2015, Dr. Bienstock reviewed the second report submitted by Reach. She noted that the report failed to comply with the approved eight-hour evaluation for in-home behavior interventions because most observations took place outside the home. She otherwise determined “a specific treatment or intervention plan was not provided regarding how to target these maladaptive behaviors . . . [and] the operational definition of the behaviors provided [in the report] is not consistent with ABA methodology and theory. . . . Given the concerns related to operational definitions and limited treatment plan provided, 12.5 hours a week requested by REACH is not believed to be clinically substantiated.” (Ex. H.)

14. On July 14, 2015, the Service Agency issued a Notice of Proposed Action denying funding for intensive ABA services with Reach. Claimant filed a Fair Hearing Request, appealing the denial of funding on the grounds that claimant “needs ABA services, specifically, [DTT] in order to replace maladaptive [*sic*] behavior by learning skills that will result in his using adaptive behavior when [confronted] with non preferred tasks and behaviors.” (Ex. 9.) Claimant requested funding for an assessment from an independent behavior service provider and attorney fees.

15. On August 18, 2015, the Service Agency met informally with claimant’s mother and her counsel. During the meeting, the Service Agency discovered that Reach had not received notice of the deficiencies in its second report. The Service Agency agreed to communicate with Reach and allow it “one last effort” to provide “a Functional Behavioral Assessment as defined in ABA literature, methodology, and theory.” (Ex. K.)

16. On September 2, 2015, without the Service Agency’s knowledge or consent, claimant’s mother retained Mitchell Taubman, Ph.D., to perform an independent assessment. Dr. Taubman observed claimant during a one-hour home visit, and reviewed medical records. He reviewed the reports submitted by Reach and testified that the first report was “not a great assessment” because it was not specific and made broad recommendations. The second report “was not a great report” and was adequate only in that it didn’t undermine anything previously known. He recommended claimant “receive the kind of [ABA] services that are necessary to ameliorate [his] difficulties. Those services would need to be

comprised of highly structured, consistent, systematic programming and instruction tailored to his abilities and challenges and provided directly by a trained interventionist; that is [DTT].” (Ex. 27.) Dr. Taubman testified that a sufficient amount of information existed to determine claimant’s need for behavioral services.

17. On September 3, 2015, without the Service Agency’s knowledge or consent, claimant’s mother retained Betty Jo Freeman, Ph.D., to perform an independent assessment. She interviewed claimant and his mother, reviewed records, and administered the Vineland-II Adaptive Behavior Scales to assess claimant’s adaptive functioning. She concluded that claimant’s ability to function independently has not improved because the services he was receiving lack a behavior intervention plan. She recommended an intensive behavioral program under ABA and DTT. (Ex. 25.) Dr. Freeman testified that claimant’s need for behavioral services was evident and that services should have started before a complete assessment was available.

18. Claimant’s mother borrowed money from family members to pay for the assessments rendered by Dr. Taubman and Dr. Freeman. The total cost was \$5,800.

19. On September 4, 2015, claimant’s mother met with the Service Agency to develop claimant’s Individual Program Plan (IPP). During the IPP conference, claimant’s mother did not disclose that she had incurred costs to take claimant for independent assessments. The parties discussed claimant’s “many behavioral issues that threaten his health and life.” The Service Agency agreed to “explore behavior intervention options . . . to address these behavior issues.” (Ex. M.)

20. On October 2, 2015, Reach submitted its third report. The recommended behavior intervention plan included non-conditional reinforcement for good behaviors, priming to give claimant prompts to prepare him for expected behaviors, and opportunities to make choices of his activities. The report also recommended specific teaching strategies, consequence strategies, and interventions.

21. On October 19, 2015, the Service Agency sent claimant’s attorney a proposed resolution itemizing nine conditions, including reporting requirements expected of Reach. Claimant’s mother objected on the grounds that she cannot control Reach or direct the manner by which they prepare and file reports.

22. On November 13, 2015, the Service Agency notified claimant by email that the Service Agency was in agreement to fund ABA behavioral services provided by Reach. The Service Agency imposed none of the previously proposed conditions. The Service Agency approved 15 hours per week of ABA/DTT behavioral intervention services, which began November 16, 2015. Claimant and his mother are satisfied with the level of behavioral service now provided by Reach.

23. The period of time between August 22, 2014, the date of the request for ABA services, and November 16, 2015, the date ABA services began, is 15 months, 25 days. Dr. Bienstock testified that she had never observed a case of behavioral intervention that took as long to implement as it took in this case.

LEGAL CONCLUSIONS

1. The Frank D. Lanterman Developmental Disabilities Act (Lanterman Act) sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. (Welf. & Inst. Code, § 4500 et seq.) To comply with the Lanterman Act, a regional center must provide services and supports that "enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (Welf. & Inst. Code, § 4501.)

2. The determination of which services and supports the regional center shall provide is made "on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option." (Welf. & Inst. Code, § 4512, subd. (b).)

3. Regional centers have wide discretion in determining how to implement an IPP. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390.)

4. Claimant bears the burden of proof as the party seeking government funding and reimbursement. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156.) The standard of proof is preponderance of the evidence. (Evid. Code, § 115.)

5. In this case, there is no dispute that claimant required the requested ABA behavioral intervention services and that those services were implemented after significant delay. However, the Service Agency was not the sole cause of the delay. The Service Agency took into account the mother's preference that Reach provide the requested service, even though the Service Agency raised concerns about the vendor's suitability for the service. The first two reports rendered by claimant's chosen vendor were inadequate to establish an effective plan to meet claimant's IPP goals. In 2009, the Service Agency approved behavioral services with Chudler, but claimant did not avail himself of those services at the time for reasons beyond the Service Agency's control. Although Dr. De Candia noted the benefit of behavioral intervention services, his assessment was for other purposes, including the continuation of special education services and physical therapy, and the evidence does not indicate that claimant's mother satisfied the prerequisites advised by Dr. De Candia to initiate behavioral services.

6. The Service Agency centered the provision of behavioral intervention services on claimant and his family and its determinations reflected the preferences and choices of

claimant and his mother. (Welf. & Inst. Code, § 4646, subd. (a).) Claimant has presented no authority for the recovery of compensatory damages or the imposition of costs for two independent assessments that the mother sought without prior approval of the Service Agency. Other than the \$5,800 claimant's mother paid for the assessments with privately engaged psychologists, claimant presented no evidence of damages. The weight of the evidence does not show any abuse of the Service Agency's discretion in determining how to implement claimant's IPP after consulting claimant's family. Dr. Bienstock credibly testified that she declined to approve services based on Reach's failure to propose a specific treatment plan and the weight of the evidence shows that she acted in a manner that was not arbitrary or capricious. The expert testimony of Dr. Taubman and Dr. Freeman underscore claimant's need for behavioral services, but until it obtained a clinically sound treatment plan to approve, the Service Agency did not act unreasonably in refusing to implement ABA services.

7. The preponderance of the evidence does not prove an entitlement to relief. Accordingly, the appeal is denied.

ORDER

Claimant's appeal is denied. The Service Agency is not required to fund independent assessments for behavior intervention services or pay compensatory damages to claimant.

DATED:February 23, 2016

/s/
MATTHEW GOLDSBY
Administrative Law Judge
Office of Administrative Hearings

NOTICE

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