

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH Case No. 2016010845

DECISION

John E. DeCure, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on March 3, 2016, in Culver City, California.

Claimant's mother (Mother) was present and represented Claimant, who was not present.¹

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (WRC or Service Agency).

The parties presented documentary and testimonial evidence and gave closing arguments. The record remained open for Mother to submit further documents by March 10, 2016. WRC was given until March 17, 2016, to make any objections. Mother provided copies of cancelled checks, invoices, and timesheets reflecting the floor-time therapy services provided to Claimant by Janne Peters. WRC did not object to these documents, which were marked and received in evidence as Exhibit F. WRC submitted an Interdisciplinary Council on Development and Learning (ICDL) description of floor-time approach and course information, which was marked as Exhibit 10. WRC also submitted a document entitled "Referral, Intake and Assessment Process," describing the process its vendor, the Verdugo Hills Autism Project (Verdugo Hills), follows in order to ensure a program is clinically sound and meets all applicable criteria. This document was marked as Exhibit 11. Complainant acknowledged

¹ Claimant and his parents are not identified by name to protect their privacy.

receipt of Exhibits 10 and 11 and lodged no objections, so Exhibits 10 and 11 were received in evidence. The record was closed and the matter submitted for decision on March 17, 2016.

ISSUES

Should WRC be required to reimburse Claimant for self-funding floor-time therapy provided by Janne Peters from June 15, 2015 to the date of this Decision?

EVIDENCE RELIED UPON

Documentary: WRC's Exhibits 1 through 11. Claimant's Exhibits A through F.

Testimonial (Service Agency): Lisa Basiri, WRC Fair Hearing Coordinator;
(Claimant): Mother.

FACTUAL FINDINGS

Claimant's Background

1. Claimant is a nine-year-old male child who was born on August 31, 2006. He was diagnosed with autism in 2009. Claimant is eligible for regional center services under the Lanterman Act, and for special education services from his local school district, Los Angeles Unified School District (District). The parents are currently in mediation with the District, which does not provide any services. Claimant's parents currently enroll him privately in the UCLA LAB School, where he is in his second-grade year and progressing well with a behavioral aide for the entire school day. He receives one to two hours of occupational therapy per week, two to three hours of speech therapy per week, weekly swimming lessons, and two hours of psychological counseling services per week.

2. Claimant lives at home with his father and mother, his older sister, and his younger brother. English is spoken in the home. Claimant's father works outside of the home, full-time. Claimant's mother works part-time and is Claimant's primary caregiver. The family also has a nanny. Claimant's mother is actively involved in her son's applied behavior analysis (ABA) therapy,² has attended ABA trainings, and has implemented ABA

² Applied Behavior Analysis (ABA) is the analysis of human behavior. B.F. Skinner developed the basic science that behavior of any sort responds to and is controlled by identifiable events that happen before, during, and after the behavior. Behavior analysis emphasizes observable events, and that altering those events can lead to the alteration of the behavior. The application of behavior analysis is what is commonly referred to as ABA. Through research studies and techniques developed by Dr. O. Ivar Lovaas, ABA is considered a proven method to address the severe behavioral challenges of autistic children.

techniques with her son. Claimant has benefited greatly from ABA therapy but has not received behavior services since February 2014, as his parents have a history of concerns with service delivery available through WRC vendors.

3. Claimant is described as an energetic young boy who is loved by his parents and family. He has expressive language delays and limited functional language, but he has an engaging personality and makes friends easily. He is athletic, loves to play and can walk and run without difficulty. He is very involved with family life and participates in school events, attends carnivals, travels with his family, and does many things typically developing children do. Claimant has close friends and gets along well with his siblings, often helping to feed his two-year-old brother. Claimant engages in dangerous and self-injurious behaviors, eloping daily. Mother has had to retrofit the family home to deter Claimant from escaping or injuring himself, yet he continues to make escape attempts. His outdoor safety skills are limited, as he does not know to stop at crosswalks, how to heed traffic lights or signs, or to look both ways before entering lanes of traffic. Caregivers must be aware that Claimant can dart away when in public, so they must keep him physically close to them. On a recent family trip to the Washington D.C. area, Claimant leapt from a chest of drawers onto a set of curtains, sustained a scalp laceration and hematoma, and had to receive emergency medical care. (Exhibit D.) Mother expressed concerns about Claimant's safety as a "top priority."

4. WRC has authorized "adaptive skills training" services for Claimant since May 29, 2014. The Service Agency's Individual Program Plan (IPP), dated September 8, 2015, describes how Claimant's parents have been unhappy with the business-like culture of many ABA providers, and have been frustrated by the slow response of providers in providing necessary assessments of Claimant and finding appropriate staffing for his therapy. The IPP does not discuss floor-time therapy by name, but reports that Claimant's parents "have been paying for some ABA privately with their own provider," and that "[t]hey "would ideally like to hire their own qualified therapists due to their negative experiences" with many ABA companies. (Exhibit 3.) Gerard Dupree is Claimant's assigned WRC Service Coordinator, was present at the Individualized Family Service Plan (IFSP) meeting, and authored the September 8, 2015 IPP. He was not present at the fair hearing.

5. Claimant's parents have selected floor-time therapy as Claimant's primary ABA therapy. Floor-time therapy derives from the Developmental Individual-difference Relationship-based model (DIR) created by child psychiatrists Stanley Greenspan, M.D. and Serena Wieder, PhD. Its premise is that adults can help children expand their circles of communication by meeting them at their developmental level and building on their strengths. The technique challenges children with autism to push themselves to their full potential. Floor-time encourages parents to engage children literally at their level, by getting on the floor to play. Families can combine it with other behavioral therapies or use it as an alternative approach. In floor-time, therapists and parents engage children through the activities each child enjoys. Therapists teach parents how to direct their children into

increasingly complex interactions. This process, called “opening and closing circles of communication,” remains central to the floor-time approach. Floor-time does not target speech, motor or cognitive skills in isolation. Rather, it addresses these areas through its focus on emotional development. Formal treatment sessions range from two to five hours a day. They include training for parents and caregivers as well as interaction with the child. Therapists encourage families to use floor-time principals in their daily lives.

6. Claimant's parents have engaged the services of Janne Peters to provide Claimant with one-hour sessions of floor-time therapy, approximately three to four times per week, since June 15, 2015, at a rate of \$70 per hour. Claimant provided timesheets and invoices from Janne Peters verifying that the services were provided to Claimant on 85 dates from June 15, 2015, through February 29, 2016. Claimant further provided copies of cancelled checks Claimant's parents paid for these services in the amount of \$6,142.00. Floor-time therapy has helped Claimant immeasurably, particularly in regard to helping Claimant become safer in his behavior. Claimant believes WRC should reimburse Claimant for these expenses. WRC does not contest the efficacy of floor-time therapy for Claimant, but disputes the issue of reimbursement. The September 8, 2015 IPP makes no reference to floor-time therapy or the parents' private contracting with Janne Peters for her services. No evidence was presented regarding whether these topics were explored or discussed on that date.

7. WRC is concerned that Claimant has not sought these services through a WRC-approved vendor, and that therefore, a vendor cannot implement the services by ensuring the program offered is clinically sound and meets established criteria for floor-time therapy. WRC also contends the \$70 per hour rate Janne Peters has charged is significantly above the \$52.55 rate WRC is authorized to reimburse its vendors for such services. WRC also believes Janne Peters lacks the requisite minimum educational background to provide such services. Lastly, WRC also argues that no legal basis exists under the Lanterman Act to justify reimbursement. These contentions will be dealt with individually below.

Services Provided Outside of Vendor Process

8. WRC has provided Claimant with three potential vendors for floor-time therapy: Verdugo Hills, Smart Start, and Building Bridges. Because Mother has been engaging Janne Peters since June of 2015 and Janne Peters has already built a good rapport with Claimant over a period of months, Mother wants to work through Verdugo Hills. Janne Peters is an employee of Verdugo Hills, but she has been independently contracting with Claimant's parents to provide Claimant's floor-time therapy.

9. To fund these services, WRC requires that a chosen vendor provide an assessment. Verdugo Hills has been slow to do so, and by the time of hearing, they were still in the process of arranging an assessment, despite Mother's contact with them as far back as in October 2015.

Rate of Pay for Services

10. Of the \$52.55 rate WRC is authorized to pay, its vendors typically pay the service provider roughly \$20 per hour and retain the rest to cover the cost of supervising the case, including direct intervention, parent training, supervision, clinical team meetings, and social facilitation. Vendors are expected to maintain session notes, sign-in sheets, and service logs. They must also maintain professional liability insurance. By working independent of Verdugo Hills, Janne Peters is receiving a far higher hourly wage, at \$70 per hour, while working outside the supervision of an approved vendor. In essence, she is circumventing the vendor/WRC process. The Lanterman Act requires WRC to follow an internal process ensuring adherence with federal and state law and regulation when purchasing services and supports. (See Welf. and Inst. Code § 4646.4, subdivision (a).) WRC cannot pay for services that do not conform to its purchase of service policies.

Service Provider Qualifications

11. WRC also challenged Janne Peter's qualifications. California Code of Regulations, title 17, section 54342, subdivision (a)(3), provides that an adaptive skills trainer shall meet the following requirements:

(A) **Possess a Master's Degree** in one of the following: education, psychology, counseling, nursing, social work, applied behavior analysis, behavioral medicine, speech and language, or rehabilitation; and

(B) have at least one year of experience in the design and implementation of adaptive skills training plans.

(Emphasis added.) Janne Peters's curriculum vitae describes her educational experience as including a Bachelor of Science degree which she earned in 1971 in speech pathology and special education from Mankato University. Her curriculum vitae further describes "graduate study" she undertook in other deaf education at Gallaudet College in 1975, and lists a "graduate fellowship" in theater from the University of Maryland in 1978. (Exhibit 9.) It is plain from her curriculum vitae that Janne Peters does not hold a Master's Degree.

Request for Reimbursement

12. Claimant's parents seek reimbursement for ABA services they purchased from Janne Peters at a rate of \$70 per hour. For June 2015, Claimant's parents seek reimbursement of \$350. For July 2015, they seek reimbursement of \$875. For August 2015, the reimbursement sought is \$840. For September 2015, the reimbursement sought is \$770. For October 2015, the reimbursement sought is \$875. For November 2015, the reimbursement sought is \$752.50. For December 2015, the reimbursement sought is \$560. For January 2016, the reimbursement sought is \$420. For February 2016, the reimbursement sought is \$840.

13. Claimant's parents provided invoices reflecting the monthly expenses set forth above. Claimant submitted cancelled checks made out to Janne Peters for her services provided, totaling \$6,142. Thus, the total reimbursement sought by Claimant's parents in this matter is \$6,142.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. and Inst. Code, §§ 4500 et seq.)³ An administrative "fair hearing" to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal the Service Agency's denial of his service request and jurisdiction for this case was thus established.

2. When one seeks government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) The standard of proof in such cases requires proof by a preponderance of the evidence, because no other law or statute, including the Lanterman Act, requires otherwise. (Evid. Code, § 115.)

3. Although WRC funds some amount of ABA for Claimant, it has not previously agreed to reimburse Claimant's parents for the ABA services they are self-funding, at the rate Claimant's parents are paying for the services. Therefore, Claimant has the burden of establishing entitlement to that relief by a preponderance of the evidence.

4. When deciding what services to provide a consumer, a regional center has a duty to provide services that meet the consumer's needs and preferences and that are also a cost-effective use of public resources. (§§ 4640.7, subd. (b), 4646, subd. (a).) The service agency must also follow the intent of the Legislature as stated in Welfare and Institutions Code section 4646, subdivision (a), to provide services that take into account the needs and preferences of the consumer. The service agency is required to secure needed services and supports that will be effective in meeting the goals stated in the consumer's individual program plan. (§§ 4646, subd. (a) and 4648, subd. (a)(1).) The regional center is required to "find innovative and economical methods of achieving the objectives" of the client's IPP. (§ 4651, subd. (a)(1)).

5. The Lanterman Act specifically contemplates ABA services. For example, section 4512, subdivision (b), specifically defines "services and supports for persons with developmental disabilities" to include, in part, "behavior training and behavior modification training," and section 4685, subdivision (c)(1), requires service agencies to give high priority to services intended to allow a child consumer to remain at home, such as "behavior modification programs."

³ All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

6. Pursuant to section 4659, regional centers are required to "identify and pursue all possible sources of funding for consumers receiving services." Subdivision (a)(1) of section 4659 identifies such sources to include "[g]overnmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the states supplementary program."

7. Furthermore, section 4648, subdivision (a)(8), provides that "Regional Center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services."

8. However, when a generic agency fails or refuses to provide services and supports that a consumer needs to maximize his or her potential for a normal life, the Lanterman Act requires the service agency to make up the service shortfall. For example, section 4501 states that "[t]he complexities of providing services and supports . . . requires the coordination of services of many state departments and community agencies to ensure that no gaps occur in communication or provision of services and supports." Similarly, section 4647, subdivision (a), directs regional centers to secure services "through purchasing or by obtaining from generic agencies or other resources, service and supports specified in the person's individual program plan" Based on provisions such as these, and others, it is said that the regional center is the "payer of last resort."

9. It was established by a preponderance of the evidence that Claimant's current ABA services involving floor-time therapy are necessary and effective to address his needs in areas that are within the responsibility of WRC under the Lanterman Act. (Factual Findings 1-6.) WRC did not contest the benefits of floor-time therapy for Claimant. Therefore, WRC shall continue to assist Claimant's parents in locating ABA services for floor-time therapy through an approved vendor.

Request for Reimbursement

10. The primary goal identified in the Lanterman Act is to enable clients with developmental disabilities to approximate the pattern of everyday living enjoyed by non-disabled people of the same age and to lead more independent and productive lives in the community. (*Association for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.)

11. In arriving at services aimed at meeting the aforementioned goals, a client's IPP "shall be reviewed and modified by the planning team . . . as necessary, in response to the person's achievement or changing needs, . . ." (§ 4646.5, subd. (b).) The planning process relative to an IPP shall include, among other things, "[g]athering information and conducting assessments to determine the . . . concerns or problems of the person with developmental disabilities." (§ 4646.5, subd. (a).)

12. The creation of an IPP is a collaborative process. (§ 4646.) The IPP is created after a conference consisting of the consumer or his representatives, service agency representatives and other appropriate participants. (§§ 4646, 4648.) A service agency is then required to secure the services and supports necessary to satisfy the consumer's needs determined in the IPP. (§ 4648.) The purpose of an IPP is "a statement of goals, based on the needs, preferences, and life choices of the individual with developmental disabilities, and a statement of specific, time limited objectives for implementing the person's goals and addressing his or her needs." (§ 4646.5, subs. (a)(1) and (2).)

13. If the parties cannot agree on the provision of a service after the IPP process, a hearing officer shall make the decision after a hearing. For example, section 4646, subdivision (g), specifies that the service agency drafts the IPP, and that if a consumer does not agree with all of the provisions of the IPP, he or she "shall be sent written notice of the fair hearing rights, as required by Section 4701." Section 4710, subdivision (a), similarly requires a service agency to give written notice to a consumer of an action the service agency proposes without the consent of the consumer. Section 4710.5, subdivision (a), provides that upon receipt of any such written notice of a proposed action, a dissatisfied client can request a fair hearing.

14. Based on the above statutes, a service agency is required and legally obligated to participate in the decision-making process before a service is implemented or expenses for it incurred. Where the parties disagree, the hearing process will resolve the dispute.

15. The Lanterman Act does not specifically authorize retroactive reimbursement. The above-described statutes detailing the IPP process suggest that reimbursement is generally not available, particularly where the development of the IPP is supposed to be a collaborative process between the parties. As discussed above, the process necessarily requires prior consideration and approval of any support or service provided to an individual client and thus suggests reimbursement is not typically available.

16. In addition, California Code of Regulations, title 17, section 50612, subdivision (b), specifically limits retroactive authorization of services as follows:

The authorization shall be in advance of the provision of service, except as follows:

(1) A retroactive authorization shall be allowed for emergency services if services are rendered by a vendored service provider:

(A) At a time when authorized personnel of the regional center cannot be reached by the service provider either by telephone or in person (e.g., during the night or on weekends or holidays);

(B) Where the service provider, consumer, or the consumer's parent, guardian or conservator, notifies the regional center within five working days following the provision of service; and

(C) Where the regional center determines that the service was necessary and appropriate.

17. In this case, the Lanterman Act and its accompanying regulations support the Service Agency's denial of Claimant's request for retroactive reimbursement. Despite Claimant's proclivity for elopement and his recent injury on a family trip, no evidence was presented establishing the kind of "emergency" situation contemplated by this regulation. Although Verdugo Hills has been slow to provide an assessment, the provision of services by one of its employees without its involvement or supervision was not an "emergency" situation either. Instead, it was a result of the family's appropriate desire to see Claimant benefit from floor-time services once Claimant's parents determined that Claimant would benefit from them. Janne Peters's lack of the qualifications mandated for adaptive skills training providers is also indisputable. Notwithstanding these issues, the September 2015 IPP makes no direct reference to the controversy over Janne Peters providing floor-time services for which Claimant's parents now seek reimbursement. The entire situation is indicative of the problems which occur when a regional center and a client's commendably motivated parents cannot resolve the client's need for services in a timely fashion.

18. Yet, the lack of specific statutory or regulatory authorization is not necessarily dispositive of the issue. If the Lanterman Act is to be applied as the legislature intended, reimbursement may be available in particular cases where equity requires it. For example, section 4706, subdivision (a), includes broad language empowering the hearing officer to resolve "all issues concerning the rights of persons with developmental disabilities to receive services under [the Act]. . . ." In addition, based on the above-described general principles articulated in the *Association for Retarded Citizens* case, an order of reimbursement may be appropriate when the principles of equity apply, or when, if not granted, the purposes of the Lanterman Act would be thwarted.

19. In this case, equitable considerations do not require WRC to reimburse Claimant's parents for floor-time therapy through Janne Peters. When Claimant's parents attended the September 8, 2015, IFSP planning meeting, they expressed displeasure with the service-providing experiences they had endured to date, but they did not indicate they would be self-funding such a program and seeking reimbursement if WRC denied the request. At the fair hearing, the evidence established that Janne Peters does not meet the minimum qualifications as a service provider, that she is working outside of the supervision of her vendor, Verdugo Hills, and that she is enjoying a rate of pay perhaps more than triple the rate she would be paid if she were working through her vendor. WRC's concern that reimbursement is outside their legal purview is warranted. WRC should not, after the fact, be expected to bear the expenses of a services initiated outside of the IPP process. Claimant's parents acted unilaterally and deprived WRC of the opportunity to consider their request for reimbursement through the IPP process.

ORDER

1. Claimant's request for reimbursement for self-funded ABA services provided by Janne Peters from June 15, 2015, to the date of this Decision is denied.
2. The Service Agency shall continue to assist Claimant's parents in locating ABA services for floor-time therapy through an approved vendor.

DATED: April 1, 2016

JOHN E. DeCURE
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5, subdivision (a). Both parties are bound by this decision. This decision may be appealed to a court of competent jurisdiction within 90 days of receipt of notice of this decision.