

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

ALIJAH G.

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH Case No. 2009070819

DECISION

This case was heard by Amy C. Lahr, Administrative Law Judge, Office of Administrative Hearings, State of California, at the Harbor Regional Center in Torrance, California, on September 18, 2009.

Carmen Carley, Special Education Advocate, represented Alijah "Niko" G. (Claimant). Claimant's parents, Margarita G. and Armand G., attended the hearing.

Gigi Thompson, Manager of Rights Assurance, represented the Harbor Regional Center (HRC).

Oral and documentary evidence was received at the hearing. The matter was submitted for decision on September 18, 2009.

ISSUES

1. Should HRC fund 20 hours per week of applied behavior analysis therapy (ABA) for Claimant, through the Lovaas Institute ("Lovaas"), during breaks not covered throughout the 2009-2010 school year?

2. Should HRC reimburse Claimant's parents for personally funding ABA services from August 1, 2009 through August 31, 2009?

FACTUAL FINDINGS

1. Claimant is a six-year-old male who qualifies for HRC services pursuant to an autism diagnosis.

2. On June 22, 2009, Claimant's mother requested that HRC fund 20 hours per week of direct intensive in-home behavioral intervention services during his school break in the summer of 2009.

3. By letter dated June 30, 2009, HRC denied Claimant's request. HRC based its denial on an assessment of Claimant's needs, and his generically funded programming, which consisted of LAUSD funding for a 40-hour-per-week program during the last week and a half of June, the month of July, and one week in August; and speech and language services when not in school. HRC suggested that Claimant attend a social skills program or summer camp to address his social needs. Claimant appealed the denial and requested a hearing.

4. On February 27, 2009, Claimant, his parents, Erin Ellis and Vang Yang of the Lovaas Institute, and HRC counselor Cecelia Valdivia, held an Individual/Family Service Plan (IFSP) meeting. The IFSP was revised on August 4, 2009, to include HRC's funding of social skills camp for Claimant.

5. Claimant's IFSP "desired outcome" stated that he "will have the opportunity to interact with his peers in a highly structured setting allowing for the opportunity to generalize social skills that are being addressed in his current [Behavioral Intervention Implementation] Program."

6. Previously, in the matter of Claimant v. HRC, Case Number L2007010045 (April 2007), the final administrative decision, pursuant to Welfare and Institutions Code 4712.5, granted Claimant's request for funding by HRC for 80 hours of ABA provided by Lovaas, consisting of 40 hours per week for two weeks, during the summer of 2007, finding that "it was established that Claimant can benefit, and is benefiting, from the ABA provided by Lovaas."

7. Similarly, in a separate matter, Case Number 2008120749 (March 4, 2009), the final administrative decision held that "HRC shall fund Claimant's 40 hour per week ABA program through Lovaas" during his 2009 spring break, due to Claimant's needs. The ALJ takes official notice of these two decisions.

8. Claimant has been receiving ABA since June 2006. Although Claimant's behaviors have improved since he began ABA with the Lovaas Institute, Claimant presented evidence that his current needs include continuing an intense program of 40 hours per week, for at least 50 weeks per year, with no more than a one week break. Dr. Scott Cross, of the Lovaas Institute, testified that Claimant has severe to profound needs. He stated that the severity of Claimant's behaviors require an additional level of service. He also stated that a more intensive treatment program has a more favorable outcome. Dr. Cross testified that

current recommendations are for a program of 36 to 40 hours per week, year round; and that taking a break of more than one week is contraindicated.

9. Claimant also presented evidence from Dr. Robin Morris, which supported his need to continue to receive 40 hours of one-to-one programming per week, taking place in home and school, year-round, with no break exceeding one week in length.

10. HRC acknowledged the severity of Claimant's behaviors. It contended that Claimant would not regress if they stopped his ABA during his summer break. The evidence did not support HRC's theory. HRC monitored Claimant's behavior during his spring break, with inconclusive results. Specifically, HRC's Behaviorist, Rebecca Asdel, concluded that she "was unable to determine whether or not [Claimant] evidenced behavioral regression during school breaks when in-home behavioral services are not in place."

11. On the other hand, Claimant's mother testified that she observed Claimant's regression during school breaks. She stated that he has increased toileting incidents and self-stimulatory behaviors. For example, he more often eats lotion, crayons and play dough during breaks. In addition, Claimant tries to escape from home more frequently.

12. HRC also argued that it is prohibited from providing school services, and contended that Claimant's ABA was primarily educational in nature. HRC's argument is without merit. HRC's witnesses, as well as Claimant's witnesses, testified that behavioral therapy is applicable to many scenarios, and that the ABA may not be parsed into distinct categories of "school" or "home." Erin Ellis, of the Lovaas Institute, testified that Claimant's behaviors must be addressed in both the home and school setting. She also stated that Claimant's needs are more intense than other children. Lindsey Hoffman Roberts, of the HRC Behavioral Service Team, testified that the strategies applicable to address Claimant's behaviors could be applied in various settings, including at home.

13. Finally, HRC argued that new legislation¹ requires it to consider group training for parents in lieu of some or all of the in-home parent training component of the behavioral intervention services, and thus it should not fund Claimant's ABA during school breaks. HRC's argument fails. Claimant's parents are currently receiving minimal, in-home training; and thus, the requested 20 hours of ABA is not a duplication of service. While Claimant's parents may benefit from in-home training, the evidence did not show that it will effectively substitute for a portion of Claimant's ABA therapy at this time.

14. Claimant began summer camp during August 2009, however, because of behavior problems, the camp required him to attend with a one-to-one aide. HRC denied funding for this aide. By letter dated August 6, 2009, the regional center explained:

¹ As of July 1, 2009, Welfare and Institutions Code section 4685 requires the regional center to consider "the use of group training for parents on behavioral intervention techniques in lieu of some or all of the in-home parent training component of the behavioral intervention services."

During our conversation with you yesterday we discussed that by adding a one to one aid [*sic*] to a specialized camp we would be moving away from [Claimant]'s assessed need that led to this service. The need for a one to one aid [*sic*] in a specialized setting indicates that [Claimant] currently does not have the pre requisite [*sic*] skills required to be successful in such a setting. [HRC] would look to an IBI program to continue to address his social skills deficits. At this time it was shared with you that HRC is not in agreement with providing a one to on[e] support in a specialized camp.

15. Claimant's parents decided not to privately fund the aide and Claimant withdrew from the camp. Claimant's parents ultimately chose to privately fund ABA therapy for Claimant through the Lovaas Institute, at a cost of \$2,970, for the month of August 2009.

LEGAL CONCLUSIONS

1. Cause exists to grant Claimant's appeal and reverse HRC's denial of funding for applied behavior analysis therapy (ABA) for Claimant, through the Lovaas Institute, during breaks not covered throughout the 2009-2010 school year, and for reimbursement of funding during August 2009, as set forth in Factual Findings 1 through 15, and Legal Conclusions 2 through 6.

2. The Lanterman Act, incorporated under Welfare and Institutions Code section 4500, et seq., acknowledges the state's responsibility to provide services and support for developmentally disabled individuals. (Welf. & Inst. Code, § 4501.)

3. Welfare and Institutions Code section 4659, subdivision (a), provides that when a regional center makes decisions regarding purchase of service requests for consumers, it is mandated to "identify and pursue all possible sources of funding for consumers receiving regional center services." The regional center must consider all possible generic sources for funding the claimant's needed services. (Welf. & Inst. Code, § 4648, subd. (a)(8).) The regional center may not purchase either ABA or intensive behavioral intervention services for purposes of providing respite, day care, or school services. (Welf. & Inst. Code, § 4686.2, subd. (b)(3).) However, if a needed service is not provided by the generic agency, then the regional center must fill the gap and fund the service in order to adequately meet the goals set forth in the claimant's IFSP. (Welf. & Inst. Code, § 4648, subd. (a)(1); *Association for Retarded Citizens v. Department of Developmental Services*, (1985) 38 Cal. 3d 384, 390.)

4. Applying those provisions here, Claimant's appeal must be granted. Claimant's IFSP states that he needs a "highly structured setting allowing for the opportunity to generalize social skills." The evidence showed that Claimant's behaviors improved from the intense program provided by the Lovaas Institute. While LAUSD funds Claimant's program for most of the school year, there exists a gap during the school breaks. Claimant

has established that he needs the program year-round. Claimant has also shown that HRC's purchase of ABA therapy would not be a substitute for, or for the purpose of providing school services. Given these circumstances, Claimant is entitled to funding for ABA therapy by the Lovaas Institute during 2009-2010 school breaks.

5. With regard to reimbursement, the Lanterman Act does not specifically authorize retroactive reimbursement of service costs to families in the fair hearing context. Nevertheless, general equity principles may require reimbursement in particular cases in order to fulfill the purposes and intent of the Lanterman Act. (See *Association for Retarded Citizens v. Department of Developmental Services*, (1985) 38 Cal. 3d 384.)

6. In this case, equitable considerations require that HRC reimburse Claimant's parents the \$2,970 that they expended to privately fund ABA therapy during August 2009. HRC initially suggested that Claimant attend social skills camp during August 2009, but when the camp personnel required a one-to-one aide, HRC refused to fund the aide. HRC's rationale was inconsistent and confusing, and left few options for Claimant's parents, who acted in Claimant's best interest by funding the Lovaas Institute. Claimant has repeatedly demonstrated the need to fund ABA therapy by the Lovaas Institute during school breaks. HRC had the opportunity to directly fund Claimant's attendance at the Lovaas Institute for the month of August 2009. Having failed to do so, equitable considerations require that it must now reimburse Claimant's parents.

ORDER

Harbor Regional Center's decision denying Claimant's request of 20 hours per week of applied behavior analysis therapy (ABA) for Claimant, through the Lovaas Institute, during breaks not covered throughout the 2009-2010 school year, and for reimbursement during August 2009, in the amount of \$2,970, is reversed.

The appeal by Claimant Niko G. is granted.

DATED: October 5, 2009

AMY C. LAHR
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.