

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

In the Matter of:

NATHAN F.

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH Case No. L 2007060551

**DECISION GRANTING, IN PART,
CLAIMANT'S APPEAL**

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on September 5, and November 7-8, 2007, at the Harbor Regional Center in Torrance, California.

Carmen Carley, Advocate, represented Claimant.¹ Barbara Guzman, Program Manager, and Steven Roberts, Manager of Rights Assurance, represented the Harbor Regional Center (HRC or Service Agency).

During the hearing, the testimonial and documentary evidence described below was presented and closing arguments were made. The record was closed and the matter was submitted for decision at the conclusion of the hearing on November 8, 2007.

ISSUE

Shall the Service Agency provide funding for Claimant to receive 30 hours per week of one-to-one applied behavioral analysis (ABA) and 16 hours per month of ABA supervision provided by Autism Behavior Consultants, until an appropriate educational program is secured with Claimant's local school district?

EVIDENCE RELIED UPON

Documentary: Service Agency exhibits A-T, V, Y, Z, and official notice was taken of the statutes contained in exhibit X; Claimant exhibits A-S, except that official notice was taken of the prior administrative decisions contained in exhibit Q.

¹ The first initial of Claimant's last name and family titles are used to protect the privacy of Claimant and his family.

Testimonial: Jacquelyne Leigh, Psychologist, Whittier Area Cooperative Special Education Program (WACSEP); Elaine Sun, Psychologist, WACSEP; John Cone, Ph.D., HRC Consulting Psychologist; Colleen Mock, HRC Director of Community Services; Dolores Burlison, HRC Director of Children's Services; Agustin Zaragoza, Jr., HRC Counselor; Robin Morris, Psy.D., M.F.T.; Carol Bellamy, HRC Psychologist; Sylvia Young, HRC Psychologist; Claimant's mother; and Wendy Cheng, Autism Behavior Consultants.

FACTUAL FINDINGS

Jurisdiction

1. Claimant is a five-year-old boy who has been a consumer of HRC since 2006 due to his diagnosis of autism. He lives at home with his parents and his younger sister.

2. In early January 2007, during the process of formulating Claimant's initial Individual/Family Service Plan (IFSP), Claimant's mother requested that HRC provide funding for Claimant to receive in home ABA services from Autism Behavior Consultants (ABC). (As discussed in more detail below, Claimant's parents by this time had been privately funding 10 hours per week of this service.) After much discussion between the parties, HRC agreed to fund 10 hours per week. In light of the fact that Claimant's parents were involved in a dispute with their son's school district over special education services for Claimant (including an ABA program), Claimant's parents ultimately requested HRC to provide funding for the entire ABA program recommended by ABC until the dispute with the school district was resolved. Therefore, by no later than May 8, 2007, Claimant's parents requested HRC to fund 30 hours per week of direct ABA services in home by ABC and 18 hours per month of supervision.²

3. By a letter dated June 4, 2007, HRC denied Claimant's service request, stating the 10 hours of ABA that HRC was already funding addressed his support needs at home, and that his other needs addressed by an ABA program would be most appropriately provided by his school district.

4. On May 29, 2007, a Fair Hearing Request was submitted on Claimant's behalf, requesting "20 additional hours per week of ABA and 8 additional hours per month of supervision both provided by ABC until an appropriate educational program is secured with the [school district]." Because HRC was already providing some ABA funding, the Fair Hearing Request was deemed to request the funding described above in the Issue section.³

² The 18 hours of "supervision" would be comprised of 16 hours per month of chart review and supervision by an ABC clinical director overseeing Claimant's case and 2 hours per month of clinical meetings and interaction between ABC staff and Claimant's parents.

³ During the hearing, Claimant requested to amend the Fair Hearing Request to increase funding to 40 hours per week of direct ABA, 16 hours per month of supervision, and

Relevant Facts Related to the Service Request

5. In June 2006, Claimant's parents began to suspect he had a developmental disability after a consultation with Claimant's pediatrician. Claimant was ultimately referred to the Service Agency for an eligibility evaluation in September 2006.

6. Claimant became seriously ill relatively soon after attending a preschool in June 2006, and was thereafter hospitalized more than once with infection and fever over the course of the next several weeks. As a result, Claimant's parents decided to keep him out of a school environment.

7. On September 18, 2006, Claimant's parents also had their son examined by Dr. Robin L. Morris, at their expense. Dr. Morris primarily found Claimant to have significant weaknesses in his language and social skills, and concluded that Claimant was autistic. Among other recommendations, Dr. Morris urged Claimant to immediately begin an intensive program to address his substantial deficits, which would "lay the foundation for him to learn and be safe." She therefore recommended Claimant receive 30 hours per week of one-to-one (1:1) direct ABA in home, by qualified ABA therapists, and 2-3 hours per week of program supervision by a qualified ABA consultant. Dr. Morris indicated that the program could be increased to 40 hours per week of direct ABA when Claimant stopped taking naps and showed a tolerance for the initial amount of 30 hours per week of ABA.⁴

8. Based on Dr. Morris' recommendations, Claimant's parents, on October 12, 2006, began privately funding 10 hours per week of ABA in home for Claimant, provided by Autism Behavior Consultants (ABC).

9. On October 31, 2006, during the Service Agency's eligibility evaluation process, the diagnosis of autism for Claimant was confirmed by Sylvia Young, Ph.D. On December 4, 2006, the Service Agency found Claimant eligible for services.

10. On November 14, December 8 and December 15, 2006, meetings to devise Claimant's Individualized Education Program (IEP) were convened by his local school district, the Little Lake City School District (LLCSD). The LLCSD's offer of a free, appropriate, public education (FAPE) to Claimant in its proposed IEP included 20 hours per week in an autism special day class, six hours per week of extended day autism preschool, two hours per week of speech/language services at home, 50 minutes per week of occupational therapy, one hour per week of behavior specialist services, and 32.50 hours per week of a 1:1 aide. The LLCSD also concluded that there was no "clear indication of requirement for home teaching consistent with the education code."

2 hours per month of clinical time. HRC opposed the request. The request was denied, for the reasons specified on the record.

⁴ Dr. Morris testified at the hearing that she now believes Claimant can tolerate 35 hours per week of ABA.

11. After review of developmental assessments, Claimant's IEP service offer and reports by ABC, HRC's ABA Committee decided to fund 10 hours per week of ABA in home provided by ABC beginning February 1, 2007, and continuing through January 31, 2008. The rationale for this funding decision was that 10 hours per week was sufficient to support Claimant's needs at home, and that the LLCSD should fund his remaining needs.

12. Claimant's parents chose not to sign the IEP and to instead pursue a Due Process complaint against the LLCSD, because they had several fundamental disagreements over the proposed special education services. For example, Claimant's parents believed their son's fragile medical condition required him to receive an in home program. They also believed the eclectic program offered by the LLCSD, which did not include 1:1 ABA services, was not appropriate. Claimant's parents were also concerned that the staff assigned to Claimant's proposed special day class were not sufficiently trained in ABA techniques.

13. On March 1, 2007, an attorney retained by Claimant's parents submitted a Due Process Hearing Complaint, which contested the LLCSD's offer of FAPE for various reasons, including those described above. On April 10, 2007, a mediation in the Due Process matter was conducted, but did not result in a resolution. A due process hearing was scheduled for August 14-17, 2007, but did not go forward at the request of the LLCSD's counsel due to medical reasons involving a family member. The hearing was rescheduled for October 23-26, 2007. The parties thereafter decided to return to mediation and agreed that school district staff could observe Claimant in his home ABA program to facilitate the mediation process. The hearing of the Due Process matter was therefore rescheduled for January 22-25, 2008, with the mediation to convene after the requested observation.

14. Because Claimant's parents were involved in a dispute with the LLCSD over Claimant's special education needs, they requested HRC to fund the entire ABA program they envisioned for their son until an appropriate educational program could be secured through the school district. So they requested HRC to fund 30 hours per week of in home ABA provided by ABC and 18 hours per month of supervision, as described above.

15. Claimant's parents have incurred over \$17,000 of ABA service charges from ABC for the time period of October 2006 through June 2007.

16. Claimant was recently enrolled in a private school by his parents. He attends kindergarten classes with typical children, for three hours a day, four days a week. He is accompanied in class by a therapist from ABC. The private school classes run from September to June, with an optional summer program offered from June through August.

Relevant Facts Regarding Claimant's Applied Behavioral Analysis Program

17. Claimant's parents have reported that one of their son's strengths is academics. He knows his ABC's and how to count. He also has a very good memory. Claimant's parents also report that Claimant has weaknesses in his communication skills, i.e. he has a difficult time communicating his needs and wants. They are also concerned about his

problematic behaviors, especially his tendency to tantrum. Claimant also has weakness in paying attention and focusing on tasks. He has been described by various sources as being hyperactive. Because he is also apt to elope, he must be constantly supervised to insure for his safety.

18. The Service Agency has concluded that the LLCSD made an appropriate offer of FAPE, and that with the additional 10 hours per week of ABA HRC currently funds, Claimant would receive adequate services designed to meet his needs. This was the decision of HRC's ABA Committee in response to Claimant's service request. Such is also the opinion of Dr. John Cone, HRC consulting psychologist, who has reviewed Claimant's file. Dr. Cone focused on Claimant's achievement in the five major life areas relevant to children Claimant's age: learning, receptive/expressive language, mobility, self-care, and self-direction. Dr. Cone found Claimant to have a substantial disability in only one of the five areas, receptive/expressive language. Dr. Cone believes the goals outlined in the LLCSD's proposed IEP are consistent with Claimant's weaknesses, i.e. 59 percent of them (16 of 27) address language and learning. Dr. Cone therefore believes the combination of the services contained in the proposed IEP and the HRC's current funding of ABA would meet the general recommendation that young children with autism receive a minimum of 25 hours per week of engaged time in direct instructional activities (National Research Council, Educating Children with Autism, 2001).

19. It was established by a preponderance of the evidence that Claimant has a current need for an in home ABA program of at least 30 hours per week of 1:1 therapy to address his behavior, communication, social skills and safety problems described above. This finding is supported by the credible opinions expressed by Dr. Morris and Wendy Cheng, the ABC Case Director overseeing Claimant's case. This amount of 1:1 direct ABA therapy is also consistent with the generally accepted research presented by the parties.⁵ Moreover, HRC Psychologist Sylvia Young testified that Claimant currently needs an intensive instruction program like ABA, and Dr. Cone testified that 30 hours per week of in home ABA is a standard recommendation for children like Claimant. Finally, Claimant has made encouraging progress from the 20 hours per week of ABA he has so far received.

20. It was established by a preponderance of the evidence that the in home ABA program provided to Claimant by ABC supports developing skills Claimant can use at school, in his home, and in the community in general.

21. For a program providing 30 hours per week of in home ABA therapy to Claimant, ABC would need 14 hours per month of supervision and four hours per month of clinical time.

⁵ The National Research Council's recommendation cited by Dr. Cone and various other witnesses contemplates a *minimum* of 25 hours per week of intensive services, but does not rule out programs with more hours per week of service. The other research presented by the parties, particularly relating to the research of U.C.L.A. Professor O. Ivar Lovass, shows that greater gains can be achieved by 30-40 hours per week of direct ABA services.

22. ABC is an approved vendor of the HRC. Pursuant to a service agreement ABC entered into with HRC for services rendered to HRC consumers, ABC receives a flat hourly rate for the direct ABA therapy it provides, inclusive of supervision and clinical time spent on a case. Pursuant to this service agreement, ABC bills HRC only for the hours of direct ABA therapy it provides. ABC provides the required supervision and clinical time, but does not bill HRC for that time because it is included in its hourly flat rate.

DISCUSSION

The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)⁶ 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. (Factual Findings 1-4.)

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.)

Although the Service Agency funds some amount of ABA for Claimant, it has not previously agreed to fund the amount currently requested by Claimant. Therefore Claimant has the burden of establishing entitlement to that relief by a preponderance of the evidence. (Factual Findings 1-4.)

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."

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." Therefore, in this case, HRC has the responsibility to explore the LLCSD as a provider of services for Claimant.

⁶ All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

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." In this case, the LLCSD undoubtedly has a legal responsibility to provide special education services to Claimant. (See, e.g., Cal. Code Regs., tit. 5, § 56426.9.)

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."

In this case, Claimant established that he has a need for 30 hours per week of in home ABA services provided by ABC. It was also established that such a program is not solely educational in nature, but rather addresses various needs Claimant has at school, at home, and in the community in general. The service is specifically provided for by the Lanterman Act and is therefore a service and support the Service Agency should typically fund. The 10 hours per week that the Service Agency currently funds is not adequate, nor is the additional 10 hours that Claimant's parents privately fund. Thus, the service request for the Service Agency to increase its ABA funding from 10 to 30 hours per week is appropriate.

The Service Agency does not seriously contest the propriety or efficacy of a 30-hour-per-week in home ABA program in addressing Claimant's needs. Instead, the bulk of the Service Agency's evidence related to the sufficiency of the special education program offered by the LLCSD. As discussed above, the Service Agency has the responsibility to explore the LLCSD as a provider of generic services and it cannot supplant the school district's budget for providing services. Since the ABC program as currently operated addresses some skills that are educational in nature, the Service Agency can reasonably expect the LLCSD to provide funding for those services in the future. Due to the current dispute between Claimant's parents and the LLCSD, however, Claimant is not receiving any of the services that the school district would be expected to provide as a generic resource. It is anticipated this problem will be addressed in the pending Due Process matter.

The Service Agency's position as the payer of last resort requires it to provide the requested funding for ABA services in the meantime, to prevent a gap in the provision of services to Claimant.

The Service Agency's primary contention is that the LLCSD's proposed IEP, combined with the Service Agency's current level of ABA funding, would adequately address Claimant's current needs. However, that argument is contingent upon a finding that the LLCSD's proposed IEP is an offer of FAPE which Claimant's parents should have accepted. This tribunal does not have jurisdiction to decide such an issue. To do so would impermissibly invade the province of the pending Due Process matter between Claimant's parents and the LLCSD. Due Process complaints have different legal standards than matters brought under the Lanterman Act, many of which were not addressed by the parties in this case. (See, e.g., *Hendrick Hudson Dist. Bd. of Ed. v. Rowley* (1982) 458 U.S. 176, 203, the standard for determining whether a district has offered a FAPE is whether the state provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.") Since it cannot be concluded that the LLCSD's proposed IEP is sufficient, the Service Agency's argument fails.

Requiring the Service Agency to provide funding for the requested service in the meantime would not violate the above-described provisions of the Lanterman Act requiring regional centers to seek generic sources of funding and to avoid supplanting the budgets of other agencies. In this case, Claimant's parents have sought out the school district as a generic resource, but the school district has so far not provided any services to Claimant due to a legal dispute that is the subject of a pending Due Process complaint. Claimant's parents are diligently prosecuting that matter, but a conclusion has not yet been reached because the parties have been trying to resolve the matter by mediation. The issues Claimant's parents have raised in the Due Process matter are fundamental to Claimant's education and significant in nature. Claimant's parents are now privately funding part of their son's current ABA program at great expense. These facts demonstrate that Claimant's parents have so far acted in good faith relative to their dispute with the school district. A hearing in the Due Process matter is scheduled for early 2008. There is nothing more that can be reasonably done. Thus, Claimant's parents have so far exhausted available generic resources, to no avail. Since the school district is not currently providing services to Claimant, nor is it required to do so while the Due Process matter is pending, it cannot be concluded that the Service Agency is supplanting the school district's budget relative to Claimant. The Lanterman Act requires the Service Agency to cover the current gap in services.

However, the Service Agency cannot be reasonably expected to indefinitely provide the requested funding. Such a requirement would run afoul of its requirement to secure generic funding and to not supplant the budget of other agencies. As discussed above, a resolution of the dispute between Claimant and his school district over his special education program can be expected to resolve by the end of the current school year. A resolution of that dispute will result in the provision of services by the school district that, in part, should address Claimant's needs demonstrated in this case. At that point, the Service Agency would only need to fund the remaining necessary ABA services, preventing it from supplanting the school district's budget. Under these circumstances, the Service Agency should provide the requested funding through June 2008, which would approximate the end of Claimant's current school year.

At that time, the Service Agency would be entitled to revisit this situation and determine if circumstances warrant a change. The parties could then convene an Individual/Family Service Plan meeting regarding this issue if a dispute exists. Claimant's parents could pursue another Fair Hearing request if such a dispute was not thereafter resolved. In any event, Claimant's parents should immediately notify the Service Agency of any resolution of the pending Due Process matter. If the Service Agency has reasonable cause to conclude that such a resolution has altered its funding responsibilities, it may issue an appropriate Notice of Proposed Action.

Finally, an order regarding funding for supervision and clinical time is not necessary. Pursuant to the Service Agency's service contract with ABC, the service provider will provide to Claimant the hours of supervision and clinical time that it deems necessary to support a 30-hour-per-week ABA program. Under that agreement, ABC is not entitled to additional compensation for supervision and clinical time, since such is included in the flat hourly rate it bills the Service Agency for ABA services provided to Claimant. Including such an order would only create confusion and could lead to ABC obtaining a double recovery. The Lanterman Act appears to embrace such an application. For example, regional centers are encouraged to find innovative and economical ways to achieve goals (§ 4651); to implement procedures that encourage innovative approaches to sharing resources with other agencies (§ 4669.2, subd. (a)(7)); and to utilize innovative service-delivery mechanisms (§§ 4685, subd. (c)(3), and 4791.) The Service Agency has apparently found a cost-effective way of funding ABA services provided by ABC. Since Claimant has specifically chosen ABC as his service provider, he should also be subject to whatever contractual commitments ABC has made to the Service Agency.

LEGAL CONCLUSION

1. Claimant established by a preponderance of the evidence that he is entitled to funding for 30 hours per week of one-to-one applied behavioral analysis provided by Autism Behavior Consultants, until June 30, 2008. (Factual Findings 5-22.)

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ORDER

Claimant Nathan F.'s appeal is granted, in part. The Harbor Regional Center shall forthwith provide funding for Claimant to receive 30 hours per week of one-to-one applied behavioral analysis provided by Autism Behavior Consultants, until June 30, 2008.

Claimant's parents shall immediately notify the Harbor Regional Center of any resolution of the pending Due Process matter they have against the Little Lake City School District.

DATED: November 29, 2007

ERIC SAWYER,
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)