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

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| In the Matter of:<br><br>FRANCISCO M.,<br><br>Claimant,<br><br>vs.<br><br>SAN GABRIEL/POMONA REGIONAL CENTER,<br><br>Service Agency. | OAH No. L 2006060274 |

## DECISION

The hearing in the above-captioned matter was held on July 26, 2006, at Culver City, California. Joseph D. Montoya, Administrative Law Judge (ALJ), presided. Claimant Francisco M. was represented by his mother, P.M.[1] The Service Agency was represented by G. Daniela Martinez, B.S., Fair Hearing Program Manager.

Evidence was received, argument presented, and the matter submitted for decision on the hearing date. The Administrative Law Judge hereby makes his factual findings, legal conclusions, and orders, as follows.

## ISSUES PRESENTED

Must the Service Agency provide music therapy where Claimant receives special education services, and the Service Agency contends any such therapy would be the obligation of the school district that serves the Claimant?

## FACTUAL FINDINGS

1. Claimant Francisco M. (Claimant or Francisco) is a boy of approximately five and one-half years who suffers from mental retardation and Klinefelter's

[1] The surname of Claimant and his family is omitted to protect his privacy.

Syndrome. As a result of his mental retardation, Claimant is entitled to services from San Gabriel/Pomona Regional Center (Service Agency or SGPRC), pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.[2] There is no dispute that he is generally eligible for services; rather this case concerns what sort of services should be provided to him by SGPRC.

2. Claimant commenced this proceeding by filing a request for hearing on or about May 27, 2006,[3] in response to a notice from the Service Agency that it would not fund music therapy for him. That notice, dated May 24, 2006, was provided through a letter explaining the reason for the service denial, and a form Notice of Proposed Action. (Exhibit A.)[4] There is no dispute that jurisdiction to proceed was established.

3. As set forth above, Claimant has been diagnosed with mental retardation, described as mild-moderate in documents generated by his school district. (See Ex. 1, p.1; see Ex. H, p. 1.) Klinefelter's Syndrome is a chromosomal anomaly in which the chromosome count is 47, with XXY sex chromosome constitution.[5] In Claimant's case, he was also afflicted with a cleft palate and club foot. He has had surgery to repair his cleft palate and his foot. He previously received services under the "Early Start" program[6], which services included occupational therapy and speech therapy, the former to help him with eating problems and walking. (Ex. C, p. 3.)

4. It is not completely clear from the documents at to just what services, if any, are being provided to him by the Service Agency. As of February 2004, the Service Agency agreed that occupational therapy, speech therapy, and "infant stimulation," should continue. (Ex. C, p. 4.) But, his Individual Program Plan (IPP), set forth in a separate document, does not show that the Service Agency was providing any services to Claimant, aside from a commitment to visit his school

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[2] All further statutory citations shall be to the Health and Safety Code, unless otherwise noted.

[3] The Fair Hearing Request was not included in the evidence packet prepared by the Service Agency. Notice is taken of the copy in the OAH file.

[4] The Service Agency's exhibits were identified alphabetically, and the Claimant's numerically.

[5] This information is found in Stedman's Medical Dictionary (25th ed. 1990), p. 1530.

[6] "Early Start" is the common name for the California Early Intervention Service Act, Government Code section 95000, et seq.

annually, and to attend the special education Individual Education Plan (IEP) meeting upon the parents' request; there is not even a mention of respite care. (Ex. B, p. 2.) Exhibit B carries the same date as Exhibit C; both being generated in February 2004. It appears then that at this point the only therapeutic services are coming from the schools.

5. It is clear that Claimant is receiving special education services through the Hacienda-La Puente Unified School District (District), and it is undisputed that he will start kindergarten in September 2006. In February 2006, an IEP meeting was held. It was agreed that Claimant would attend a special day class, and that he would receive occupational therapy one time per week, for 50 minutes. He is to receive language and speech for one hour per week, in two half-hour increments. One speech and language session was to be conducted in the special education classroom, and one half-hour session in the language room—a "pull-out" session. (Ex. H, p. 1.)

6. The IEP document describes a pleasant boy who likes to participate in activities, and to help the teacher. In terms of communication, his speech is limited, and he often uses signs and gestures. He appears to pull his tongue to one side. He has trouble imitating consonant sounds in isolation. His fine motor skills are limited, thus limiting his ability to trace a picture, letter, or number. (Ex. H, pp. 3-6.)

7. In January 2006, the District's speech-language pathologist, Judy Nguyen, CCC-SLP, issued a brief progress report. There she stated that his two weekly sessions of speech and language therapy were emphasizing Claimant's communication skills using "all communicative modalities (signs, gestures, vocalizations) to identify and label basic vocabulary pictures/objects." (Ex. 1, p.1.) She stated that overall, he had made "minimal improvement on his ability to produce consonant sounds other than /b/ and /m/ sound in isolation." (*Id.*)

8. According to his mother, Claimant was seen by a physician who is an ear, nose, and throat specialist. That physician, and others, conducted examinations to determine if Claimant's tendency to twist his tongue is caused by some physical abnormality. However, MRI and X-rays led the doctors to conclude that a physical problem is not the source of Claimant's speech problem.

9. One of Claimant's physicians prescribed music therapy for Claimant, on February 6, 2006. (Ex. 1, p. 2.)[7] According to Claimant's mother, that physician, Nancy Shinno, M.D., was one of the physicians who repaired Claimant's cleft palate. No amount of therapy or frequency thereof is set forth in Doctor Shinno's prescription. Claimant's mother had spoken to school staff about having the school provide music therapy, but the District informed her that it doesn't provide such

[7] This document is found on the reverse side of page 1 of the exhibit, the speech and language progress report.

therapy as it doest have a music therapist on staff. She was informed, however, that someone within the SELPA—Special Education Local Plan Area—should be available to provide that service.

10. Claimant's mother has not requested another IEP meeting to discuss the provision of music therapy by the District, nor has she made some formal demand on the District to provide that therapy. No due process complaint has been filed to compel the District to provide that service.

11. Aside from the prescription for music therapy, there is no evidence that such is necessary to improve Claimant's speech and language abilities. No assessments have been performed by music therapists or by a speech and language therapists, and the basis for the doctor's prescription is not evident from the record; indeed the prescription is just a note on a page from a prescription pad, to the effect that the child should have music therapy.

12. One reason Mrs. M. wants to obtain music therapy from the Service Agency and not the District is because the Service Agency would generally provide it after school. She fears the District or the SELPA would pull him out of class for the therapy and that this might impede his overall academic progress. Further, if the service were available after school, she could possibly observe the therapists at work, and learn from their techniques, so that she could work better with her son.

13. As it asserted in the letter denying the request for music therapy (Exhibit 1), the Service Agency contends in this proceeding that music therapy is a "generic" service that must be provided by the District as part of it's legal obligation to provide special education services. The Service Agency relies on the statutory rule that regional centers are not to duplicate services offered by other public agencies that have the obligation to provide such services to the public. The Service Agency has offered no evidence as to whether or not music therapy would assist in his development of language skills, and it did not take steps to perform any sort of evaluation of whether or not such therapy would be efficacious for Claimant.

## LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1and 2.

2. Services are to be provided in conformity with the IPP, per section 4646, subdivision (d). Consumer choice is to play a part in the construction of the IPP. Where the parties can not agree on the terms and conditions of the IPP, a Fair Hearing may, in essence, establish such terms. (See § 4710.5, subd. (a).)

3. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each client's particular needs must be met. (See, *e.g.*, §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subd. (a)(1) &. (a)(2).) Otherwise, no IPP would have to be undertaken; the regional centers could simply provide the same services for all consumers. The Lanterman Act assigns a priority to maximizing the client's participation in the community. (Code §§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).)

4. Section 4512, subdivision (b), of the Lanterman Act states in part:

> "Services and supports for person with developmental disabilities" means specialized service and supports or special adaptations of generic services and support 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. . . . The determination of which services and supports are necessary shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of . . . the consumer's family, and shall include consideration of . . . the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, . . . speech therapy, . . . recreation, education, . . . behavior training and behavior modification programs, . . . camping, community integration services, . . . respite, . . .

5. Services provided must be cost effective (§ 4512, subd. (b)), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, e.g., §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) To be sure, the regional centers' obligations to other consumers are not controlling in the individual decision-making process, but a fair reading of the law is that a regional center is not required to meet a consumer's every possible need or desire, in part because it is obligated to meet the needs of many children and families.

6. Here it has not been established that music therapy is a service that Claimant needs to meet his unique needs, to maximize his integration into the community, and to habilitate him. The only professional who has supported the claim is a medical doctor who has provided no basis for the "prescription" of the services. No music therapist, speech therapist, or other professional equipped by training and experience to evaluate the need for such services has evaluated the Claimant, and

thereafter recommended such services. To be sure, such therapy may provide an appropriate benefit for Claimant, but such services can not be ordered based on the record developed in this proceeding.

7. (A) The Service Agency asserts that it can not provide such services where the school district should do so; essentially, it asserts that the services are a generic service and that under the law the school district should provide those services. To be sure, section 4648, subdivision (a)(8), provides that: "Regional center funds shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." However, that does not end the analysis.

(B) It has not been established that any obligation to provide music therapy would be solely the obligation of the school district; not every therapy is an educational service, or necessary to allow the consumer to access his or her education. Under the Service Agency analysis, almost any service that a consumer might need between his or her third and twenty-second years could be labeled as an educational service, and then denied by a regional center as the obligation of a generic source, the schools. That does not comport with section 4512, subdivision (b), which even lists education among the services that can be provided under the Lanterman Act, nor does it take into account the differing goals of the schools and the regional centers, and their vastly different service standards.[8]

(C) Further, if a generic agency is required to provide services, but fails or refuses to do so, such services must be provided by the regional center, or it must make up any service shortfall; regional centers are known as the "payor of last resort." If the regional center believes the generic source, including a school district, has failed to meet its obligations, then it must provide the services, and it is authorized to pursue reimbursement under Code section 4659. As stated by the

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[8] In *Board of Education of the Hendricks Hudson Central School District v. Rowley*, (1982) 458 U.S. 176 (*Rowley*), the United States Supreme Court made clear that the schools are not required to provide the best possible education; instead, the requirement is to provide a student who suffers from disabilities with a "basic floor of opportunity." (*Rowley*, *supra*, 458 U.S. at 207-208.) On the other hand, as noted in Legal Conclusion 3, the regional centers are to maximize a consumer's participation in the community. Furthermore, the Lanterman Act gives consumers the right to services that foster developmental potential, directed toward achievement "of the most independent, productive, and normal lives possible." (Code § 4502, subd. (a).) The regional centers must provide services and supports that allow the consumer to integrate "into the mainstream life of the community" and to "approximate the pattern of everyday living available to people without disabilities of the same age." (Code § 4501. See also, § 4648, subd. (a)(1).) This mandates something more than a basic floor of opportunity.

Attorney General in one of his opinions, "A regional center for persons with developmental disabilities may initiate an action at law for the purpose of pursuing a source of funding for clients receiving services." (73 Ops.Cal.Aty.Gen. 156, 157 (1990).)

(D) In this case, the need for the services has not been established, and the school district has not had an opportunity to fail or refuse to provide the service, in that a proper request or demand for the services has not been made. In such circumstances, it does not appear appropriate to treat this as a case where a generic source has refused to provide services. It should be noted that the ALJ does not agree with the conclusions reached in *Naomi C. v. North Bay Regional Center*, OAH case number N2005080977, to the effect that there must be a final administrative determination whether a school district must provide a service before it can be obtained from a regional center. (Ex. D., p. 4, ¶ 4.) That analysis fails to account for the fact that it can take months, or longer, to initiate a request for a service with a school district, and to then initiate and complete the hearing process if the school will not provide the services requested..[9] In such a period a consumer could lose valuable time in the battle to alleviate serious maladies and to maximize his or her potential. It has become modern doctrine that early intensive interventions often yield the best long term results, which in fact minimize the expense of services in the long run; indeed, that is a theoretical base to the Early Start program. Notwithstanding these conclusions, in this case a proper request was not made to the IEP team for music therapy, and it can not be shown, from this record, that the services should be provided under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.) or the Lanterman Act.

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[9] OAH has been tasked with conducting due process hearings in special education disputes since July 1, 2005. The undersigned, who is entitled to evaluate evidence based on his experience and training (Govt. Code, § 11425.50, subd. (c)) has conducted six due process hearings and numerous mediations of those disputes, and thus is aware of the practical, as opposed to statutory, timelines for the initiation of service requests and the completion of due process hearings where agreement can not be reached between a student's parents and the schools.

## ORDER

Claimant's appeal, requesting that the Service Agency provide music therapy, is denied. This is without prejudice to a future requests for such services, where an appropriate showing might be made.

August 4, 2006

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Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

## NOTICE

**THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.**