

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

In the Matter of:

CHLOE W.-S.

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH Case No. L 2003110572

DECISION

This case was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, on January 29, 2004, at the Westside Regional Center in Culver City.

Claimant was represented by her mother.¹ Martha T., Fair Hearing Coordinator, represented the Westside Regional Center (WRC or Service Agency.)

Oral and documentary evidence was received and argument given.

The record was initially left open 30 days for the parties to pursue further information from Claimant's health insurance carrier to facilitate a resolution of the matter. A tele-conference between the Administrative Law Judge (ALJ) and the parties to determine the status of the matter was convened on May 5, 2004. The record thereafter remained open so the parties could continue pursuing a resolution. On November 2, 2004, OAH issued an Order notifying the parties that they had 20 days to resolve the case or else the record would be closed and a Decision rendered. The parties did not resolve the case. In light of the lengthy period since the hearing of this matter, the parties were allowed to present further written evidence before the record was closed. Claimant timely presented further evidence, which was marked as exhibit R. The Service Agency did not thereafter submit further evidence or object to exhibit R, which is hereby admitted into evidence.

The record was thereafter closed and the matter submitted for decision on December 31, 2004, the date by which the Service Agency was to present further evidence and/or respond to Claimant's further evidence.

¹ Claimant and her family are referred to by their initials or family titles to protect their privacy.

ISSUE

May the Service Agency terminate Claimant's funding for clinical physical therapy, one session per week, one hour per session?

EVIDENCE RELIED UPON

Exhibits: Service Agency exhibits 1-16 & Claimant's exhibits A-R.

The testimony of: Claimant's mother; and Martha Thompson, Service Agency Fair Hearing Coordinator.

FACTUAL FINDINGS

Parties & Jurisdiction

1. Claimant is a five (5) year-old girl (born 07/12/99), who became a consumer of WRC during infancy. She is diagnosed with expressive language disorder, a chromosome abnormality, and as mildly mentally retarded "on a rule-out basis."

2. The Service Agency has funded Claimant to receive clinical physical therapy (clinical PT), one session per week, one hour per session, for a period of time not established, but before the October 2003 Individual Program Plan (IPP) meeting, which was the last IPP conducted before the hearing of this matter.

3. The Service Agency issued a Notice of Proposed Action (NoPA) dated October 20, 2003, which proposed termination of the clinical PT funding, effective November 30, 2003. WRC contended in its NoPA that the service was educational and therapeutic in nature, and thus the responsibility of Claimant's school district. At the hearing, WRC also contended the service should be funded by other generic resources, such as the family's health insurance carrier and/or the California Children's Services (CCS).

4. On November 19, 2003, Claimant submitted a Fair Hearing Request to the Service Agency, appealing the proposed termination of funding and requesting the hearing that ensued. Claimant contends the clinical PT is necessary for her development, that the family has exhausted attempts to have generic resources fund the service, and that clinical PT would be far too expensive for the family even if funded through health insurance.

5. WRC has continued to fund the clinical PT as aid paid pending this appeal.

Facts Related to the Clinical Physical Therapy

6. Claimant is described as a sweet, loving and friendly child with a good sense of humor. She lives at home with her parents.

7. The parties agree the clinical PT service in question is necessary for Claimant to improve her fine and gross motor coordination and abilities. Claimant's mother also testified that clinical PT is helpful in preventing Claimant from tripping, falling and from running into objects. Therapy West provides the PT to Claimant in a clinical setting.

8. The Service Agency pays Therapy West, as an approved vendor, the rate of \$56.10 per hour, per session, for Claimant's clinical PT. If Claimant's parents paid Therapy West directly, the cost to them would be \$120 per hour.

9. Claimant's mother has exhausted appeals with CCS for it to fund the service without success. CCS has decided that Claimant is not eligible for clinical PT in its program.

10. Claimant receives school and special education programming by the Los Angeles Unified School District (LAUSD). Claimant's mother has exhausted appeals with LAUSD for it to fund the clinical PT without success. Claimant's mother specifically requested this service during an Individualized Education Program (IEP) meeting. LAUSD denied the request because it contended PT outside of a school setting does not respond to Claimant's educational needs and therefore is the responsibility of the Service Agency. Claimant's mother proceeded with a Due Process appeal against LAUSD, including a pre-hearing mediation session. The matter was resolved prior to a hearing for other relief as a result of a good faith belief by Claimant's mother that she would not prevail at a hearing. The Service Agency did not establish that the service in question is related to Claimant's educational needs or that Claimant's mother would have prevailed against LAUSD in a full hearing of the matter.

11. Claimant's family health insurance policy is not available as a generic resource for funding the clinical PT, even if the Service Agency agreed to pay the family's deductible for the service, for the following reasons:

A. The Service Agency would ultimately pay more under such an arrangement than it currently pays Therapy West per year as a vendor. At 52 sessions per year, the Service Agency currently pays \$2,917 per year for the service. It was not established that Therapy West would be approved by Claimant's health insurance carrier as a plan provider of the service, meaning Claimant's family would have to pay Therapy West its usual rate of \$120 per hour and then seek reimbursement from the carrier for 70 percent of the first 24 sessions per year covered by the policy. Including payment of the family's \$1,500 deductible and fully paying the last 28 sessions per year that the policy would not cover, the Service Agency would end up paying \$3,070 per year for the service, which is more than the \$2,917 per year it currently pays.

B. Claimant's family would also have to pay \$864, the sum of 30 percent of the first 24 sessions per year covered by the policy, as well as being required to initially pay for 70 percent of those first 24 sessions before being reimbursed by the carrier many months later. Claimant's family cannot afford to pay either the \$864 out-of-pocket costs or temporarily fund 70 percent of first 24 sessions before being reimbursed by the carrier.

LEGAL CONCLUSIONS

Jurisdiction & Burden of Proof

1. The Lanterman Developmental Disabilities Act (Lanterman Act) governs this case. Welfare and Institutions Code sections 4500, et seq.² A state level hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of a service agency decision. Claimant properly and timely requested a hearing and therefore jurisdiction for this case was established. Because her appeal was deemed timely filed by the Service Agency, Claimant has continued to receive funding of the service in dispute pending this appeal pursuant to Welfare and Institutions Code section 4715. Factual Findings 1-5.

2. A service agency seeking to change a service previously approved has the burden to demonstrate its proposed decision is correct. This is because according to Evidence Code section 500, "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief ... that [s]he is asserting." The burden in this case requires proof to a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute requires otherwise. The Lanterman Act does not alter the burden of proof. Section 4712, subdivision (j). In this case, since WRC proposes to terminate funding for a service it currently provides to Claimant, it bears the burden of establishing such by a preponderance of the evidence. Factual Findings 1-5.

Claimant is Entitled to Continuing Funding for Clinical Physical Therapy

3A. Service Agencies are subject to certain fiscal constraints and budgetary limits, which require them to cost-effectively use of their resources. Sections 4640.7, subdivision (b), 4646, subdivision (a), and 4648, subdivision (a)(11). Generic resources therefore must be considered, because service agencies are precluded from using funds to provide services and support if doing so would supplant the budget of any other agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services. Section 4648, subdivision (a)(8). Examples of generic resources include Medi-Cal, Medicare, school districts, other agencies and insurance. Section 4659, subdivision (a).

3B. In this case, the Service Agency failed to establish that a generic resource is available to fund the clinical PT, which the parties agree is a necessary service. Claimant has exhausted appeals to CCS and LAUSD without success. Though a family insurance policy potentially covers the service in question, using that resource would ultimately be more expensive for the Service Agency and impose unreasonable burdens on the family. The Service Agency failed to meet its burden of proof in this case. Factual Findings 6-11.

² All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

ORDER

Claimant CHLOE W.-S.'s appeal of WESTSIDE REGIONAL CENTER's proposed decision is GRANTED. The Service Agency may not terminate Claimant's current clinical physical therapy funding.

DATED: January 10, 2005

ERIC SAWYER,
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5(b)(2). Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.