

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2011030625

DILLON H.,

Claimant,

vs.

SOUTH CENTRAL LOS ANGELES
REGIONAL CENTER,

Service Agency.

DECISION

Administrative Law Judge Mark Harman of the Office of Administrative Hearings heard this matter on July 22, and August 19, 2011, in Los Angeles, California.

Dillon H. (Claimant) was represented by his mother (Mother). Johanna Arias-Bhatia, Fair Hearing/Government Affairs Manager, represented South Central Los Angeles Regional Center (Service Agency).

Oral and documentary evidence was received, and the matter was submitted for decision on August 19, 2011.

ISSUE

Should the Service Agency be required to continue funding one-to-one lessons provided by the Los Angeles School for Gymnastics (LASG), at the rate of eight hours per month, in light of Welfare and Institutions Code¹ section 4648.5?

¹ All citations are to the Welfare and Institutions Code unless otherwise indicated.

FACTUAL FINDINGS

1. Claimant is twelve years old and resides with his parents and three siblings. Claimant was born with heart problems, and he has been diagnosed with, among other things, mild mental retardation, pervasive developmental disorder, not otherwise specified, and cerebral palsy. He is a client of the Service Agency. He attends Salvin Elementary School Center within the Los Angeles Unified School District (District), where he receives group speech and language therapy twice per week, occupational therapy twice per week, and adaptive physical education. Claimant also participates as a member of the California Condors, the only ice hockey team in California especially for children with disabilities. The only service that the Service Agency is currently funding, except for the service at issue in this proceeding, is 24 hours per month of in-home respite.

2. Since approximately 2008, Claimant has received two private sessions per week at LASG, funded by the Service Agency. LASG is a non-profit "Olympic quality Training Center" that provides classes for persons of all ages and every ambition, including gymnastics instruction. LASG does not specialize in services for persons with developmental disabilities, but Darryl J. Thompson, LASG's director of special education programs, has found ways for Claimant to engage in physical activities, which are helping Claimant to learn new motor skills and to improve his overall strength. LASG recognizes that these services are not occupational or physical therapies, but it has created an environment in which Claimant is motivated and perseveres to achieve his goals. His coach introduces a new and exciting challenge at every session.

3. Claimant has achieved growth in his behaviors and strength. His coach gives him exercises to help calm him down and to provide the physical stimulation he needs. His current goals are to develop posture and muscle function within the limits of his condition. Claimant, who has severe language and communication delays, interacts with greater ease with his instructor. He can follow directions. His attention span has increased substantially.

4. On February 24, 2011, the Service Agency issued a Notice of Proposed Action (NOPA), stating that it no longer would fund the LASG services because the Service Agency's authority to fund social recreation activities and non-medical therapies had been suspended."² It recommended that Claimant's family explore generic resources available to Claimant in the community. (Exhibit 1.) Claimant's mother appealed this decision.

² Section 4648.5 provides, in pertinent part, that:

“(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers' authority to purchase the following services shall be suspended pending implementation of the Individual Choice Budget and certification by the Director of Developmental Services that the Individual Choice Budget has been implemented and will result in state budget savings sufficient to offset the costs of providing the following services:

5. In Claimant's April 2011 Individual Program Plan (IPP), it states Mother requested the LASG service "in order to enhance social skills." Mother, however, disagrees with this statement. For her, this service is meeting Claimant's physical and cognitive developmental needs, and is not a social recreation activity. The Service Agency provided Mother with a list of free or low-cost services offered by local municipalities. Most of these programs, however, are only for adults or have a "social recreation emphasis."

6. After requesting a fair hearing, Mother obtained a written prescription from Claimant's treating pediatric neurologist, Nancy A. Niparko, M.D., who wrote that Claimant has hypotonia (defined as brief reflexes and spasticity), abnormal gait, and "developmental incoordination." Dr. Niparko prescribed gymnastics with a coach for core-strengthening, three times per week, for six months, due to Claimant's lack of primary control of the trunk of his body. At hearing, the Service Agency offered the opinion of Ehsan Safaie, M.D., its medical consultant. Dr. Safaie believes that Claimant can make progress in his strength-building and coordination through any type of regular exercise, not only gymnastics.

7. Dr. Niparko has been practicing for 24 years, and is board-certified. She has a background as a pediatric physical therapist before becoming a licensed physician. She has been treating Claimant since he was 10 months old. In her testimony, she discussed Claimant's many challenges, including his inability to process information and function like typically developing peers. In addition to being on the autism spectrum, he has low muscle tone, which results in problems with strength and balance. He can hop on one foot only with great effort, which a typically developing child his age would be able to do without much effort. His hypotonia results in a stretchiness of the muscles, because the necessary circuits are not keeping the elasticity in its proper form. This affects posture. He tends to rest on his ligaments, and does not position himself effectively; therefore, balance is a major issue.

8. In Dr. Niparko's opinion, Respondent's deficits are not of the kind one normally would treat through physical therapy. The simplest skills may be difficult for him

[¶] . . . [¶]

“(2) Social recreation activities, except for those activities vendored as community-based day programs.

[¶] . . . [¶]

“(4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

[¶] . . . [¶]

“(b) For regional center consumers receiving services described in subdivision (a) as part of their individual program plan (IPP) or individualized family service plan (IFSP), the prohibition in subdivision (a) shall take effect on August 1, 2009.

and require extra effort. This makes it difficult for him to relate or keep up with his peers. “When you have low muscle tone, you need to work on forcing awareness. It is not something you can try to do. You learn from doing the exercises. . . . If gymnastics is stopped, [Claimant] will increasingly hibernate behind electronic screens, [retreat into his own world physically, and] likely become obese, [along with] reduced critical thinking [and increased] autistic patterns of thinking.” Dr. Niparko was impressed with LASG’s approach and what Claimant has accomplished in this program. Dr. Niparko believes that the program is critical to Claimant’s be able to make progress with his physical development deficits.

9. Dr. Safaie is board certified in internal medicine and has practiced for nearly nine years. He agreed that Claimant has made significant improvements over the last four years, but believes Claimant would have made gains even if he had not been attending LASG. He believes that any regular exercise would have allowed Claimant to increase his balance, strength, and coordination. He testified that there were no studies demonstrating that gymnastics is a superior activity for achieving significant gains. Physical therapy is a medical approach based on the individual’s needs. One-to-one gymnastics coaching is not a medical therapy. He would never specify a particular type of exercise for his patients, whereas a physical therapist might recommend a particular activity based on an evaluation. Dr. Safaie’s opinion is respected and certainly carries weight, but Dr. Niparko’s opinion is given greater weight because she has a better knowledge of Claimant’s condition and his needs. She has observed the changes that the program has made for him. Her valuable experience as a physical therapist working with children also informs her opinion.

10. The Service Agency pointed out that, if the LASG service is medical in nature, Claimant and the Service Agency are obligated to explore alternative funding sources, such as Medi-Cal, California Children Services, or private health insurance. Claimant’s current program cannot be funded indefinitely, and therefore, his progress should be reevaluated in six months.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (§ 4500 et seq.) The Lanterman Act is a comprehensive statutory scheme providing an array of services and supports to meet the needs and choices of each person with developmental disabilities. (§ 4501.)

2. Regional centers are responsible for implementing large portions of the Lanterman Act. (§ 4620, subd. (a).) The Lanterman Act directs regional centers to develop and implement an IPP for each regional center consumer. (§ 4646.) The IPP states the consumer’s goals and objectives and delineates the services and supports that the consumer needs in order to achieve the goals set forth in the Lanterman Act. (§§ 4646, 4646.5, & 4648.)

3. The IPPs should address the needs and preferences of consumers and their families, in order to provide consumers with opportunities to live independent and productive lives. (§§ 4646, 4646.5.) Services and supports must be “flexible and individually tailored to the consumer and, where appropriate, his or her family.” (§ 4648, subd. (a) (2).) While regional centers must provide a wide array of services to implement the goals and objectives of the IPP, the services must be cost-effective. (§§ 4512, subd. (b), 4640.7, subd. (b), & 4646.) “[T]he provision of services to consumers and their families [must] be effective in meeting the goals stated in the individual program plan.” (§ 4646, subd. (a).)

4. When new legislation repeals or modifies statutory rights, the rights normally end or are modified unless vested pursuant to contract or common law. (*Green v. Workers’ Compensation Appeals Board* (2005) 127 Cal.App.4th 1426, 1436.) The entitlement to services and supports directed toward the alleviation of a developmental disability, including those involving alternative, nontraditional, or nonmedical therapies, exists pursuant to the Lanterman Act, and the Legislature may repeal or modify such statutory entitlement. Section 4648.5 clearly and specifically applies to social recreation activities and nonmedical therapies, such as gymnastics coaching. A regional center’s ability to purchase such services is suspended, “notwithstanding any other provision of law,” unless an exemption is granted.³

5. Private gymnastics coaching has alleviated some of the physical, cognitive, and psychosocial effects of Claimant’s disability. He has persevered in this program and has made gains that he achieved in no other setting. This success proves the many benefits that he has received from this service. The only service that the Service Agency is currently funding, except for the LASG services, is 24 hours per month of in-home respite. Respite is intended to relieve Claimant’s parents of some of the stress of providing his care. It is not a service directly provided to him.

6. Claimant’s academic program meets many, but not all, of Claimant’s primary needs. In particular, Claimant must be kept active to meet his goals. Dr. Niparko has described the extraordinary but real consequences, were Claimant to become disengaged in physical activity. Claimant is not simply going to grow out of the circumstances that limit his abilities or impede his physical progress. He needs a structured program to engage in physical activities. This program is deemed critical to alleviating the effects of his disability.

7. Dr. Niparko’s opinion is persuasive. A gymnastics program, which is tailored specifically to Claimant’s needs, will continue helping Claimant to learn motor skills and develop postural control that might otherwise be too difficult for him, or certainly, that he would not be able to pick up merely by engaging in team sports such as ice hockey. The

³ Section 4648.5, subdivision (c), provides that: “An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer’s developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer’s needs.”

Service Agency has failed to demonstrate that another service is available that can meet Claimant's primary and critical needs for increasing his motor skills, strength, and coordination, as well as ameliorate the effects of his disabilities. The Service Agency has not demonstrated that another service would be more cost-effective. An exemption under the law is applicable, and the Service Agency is authorized to continue funding this service.

ORDER

Claimant's appeal is granted. The Service Agency shall fund one-to-one gymnastics coaching at the Los Angeles School of Gymnastics, at the rate of eight hours per months, for a nine-month period following the date of this Decision. The quality of Claimant's progress in his gymnastics program shall be reevaluated after a period of six months.

DATED: January ____, 2012

MARK HARMAN
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.