

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

HANNAH S.,

Claimant,

and

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH Case No. 2011100436

DECISION

David Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter at the Westside Regional Center, in Culver City, on December 13, 2011.

Claimant Hannah S. was represented by her mother, Parastoo S.¹ The Westside Regional Center (WRC or the Service Agency) was represented by Lisa Basiri, Fair Hearing Coordinator. Oral and documentary evidence was received and argument made. The record was closed and the case was submitted for decision on December 13, 2011.

ISSUES

The parties agreed that the issues to be decided by the ALJ are:

1. May the Service Agency terminate funding for occupational therapy for Claimant? This issue was resolved during the hearing and a Notification of Resolution was signed.
2. May the Service Agency terminate funding for physical therapy for Claimant?

¹ Claimant is referred to by her initials to protect her confidentiality.

FACTUAL FINDINGS

1. Claimant is a seven year-old girl. She began receiving regional center services before age three under the Early Start program. Claimant has been diagnosed with unspecified cognitive difficulties, seizure disorder and a chromosome abnormality.

2. In a letter and Notice of Proposed Action (NOPA) dated September 29, 2011 (Exhibit 2), WRC notified Claimant that the funding for Claimant's physical therapy services would cease as of November 30, 2011, because such therapy "is routinely not a funded service once a client reaches the age of 3. Funding should be requested through available generic resources, i.e., private insurance, school district." A separate notice addressed termination of funding for Claimant's occupational therapy services.

3. Claimant filed a Fair Hearing Request dated October 6, 2011 (Exhibit 2). The issue relating to occupational therapy was resolved at the hearing and a Notification of Resolution was signed, which is received in evidence as Exhibit 22.

4. Ms. Basiri testified in support of the Service Agency's position that physical therapy is routinely not a funded service once a client reaches the age of three. The Service Agency contends that, based on Welfare and Institutions Code section 4659,² generic resources should be pursued to fund physical therapy after age three and that the Service Agency would provide funding only as a payor of last resort if generic sources were unavailable. Further, and as set forth in more detail below, the Service Agency has been funding Claimant's physical therapy beyond age three as an exception to this policy based on progress reports that the therapy was necessary for development of critically emerging skills.

5. Claimant receives physical therapy services from her school district. The level had been two hours per week; however, the school district wanted to terminate physical therapy services. Claimant's parents and the school district agreed to reduce physical therapy services to one hour per week for six months, which ended in December 2011, and then to 30 minutes per week (probably through the end of the current school year, although there was no specific evidence of this). (See the school district Individual Education Plan, Exhibit 21.)

6. Claimant's Individual Program Plan (IPP), dated April 28, 2009 (Exhibit 20), indicates that she was receiving ambulation training through intensive physical therapy, and that physical therapy was received at home and at school. The Service Agency had discontinued physical therapy services with Every Child Achieves as of May 31, 2009, and services were then to begin with Sharon P. Silver at the level of five hours per month. The

² All statutory references are to the Welfare and Institutions Code.

first progress report from Sharon Silver in evidence is dated January 5, 2009 (Exhibit 16).³ The January 2009 one-page report noted that Claimant had made consistent progress “in the years that I have been seeing her”; and that Claimant’s accomplishments “in the last few months are monumental.” She was making progress in ambulation and Ms. Silver suggested that, with consistent therapy, Claimant “could very likely learn to walk independently. It would be a disservice to Hannah to discontinue physical therapy at this time since she is on the verge of the single most important milestone in her physical development. She desperately needs the intensive therapy she is now receiving in order to obtain the life altering goal.”

7. In her one-page progress report dated September 4, 2009 (Exhibit 16), Ms. Silver noted the family’s participation in stretching and practicing with Claimant, again noted Claimant’s amazing progress, and repeated the same opinion that, with continued therapy, Claimant was likely to learn to walk independently and that she was on the verge of this milestone.

8. A progress report dated March 24, 2010 (Exhibit 15) is more extensive (three pages) and includes sections on history, range of motion, muscle tone, motor control and gross motor skills. In the summary and recommendations, Ms. Silver reported that Claimant was clearly showing major improvements and had met some of the goals from the September 2009 report, and was at a crucial point in her ambulation training.

9. In her progress report dated December 22, 2010 (Exhibit 14), much of the section on gross motor skills was repeated, however there were some minor improvements noted by Claimant. The recommendations were largely the same, although it was noted that Claimant could navigate from one object to another placed farther apart than previously. This progress report was reviewed by the Service Agency’s physical therapist, Gail Smith, who made a chart note (Exhibit 14) to the effect that the goals of physical therapy had not changed, and that Claimant could ambulate with use of a walker and a walking stick. Ms. Smith noted that Claimant was receiving two hours per week of physical therapy from her school district and that those skills could be utilized at home as well with caregiver and family support.

10. In a one-page progress report dated March 2, 2011 (Exhibit 13), Ms. Silver noted that Claimant recently reached the milestone of taking one to two steps without any assistance. Ms. Silver noted recent setbacks when medical issues resulted in hospitalizations and surgery, with many missed days of school as well as missed school-based physical therapy. Home-based therapy allowed the family to observe and participate, unlike school-based therapy. Again, Ms. Silver recommended that therapy continue at one hour per week.

³ Although there was no specific evidence to explain why there was a report from Ms. Silver in January 2009 when her services were mentioned in the IPP as beginning in June 2009, other reports from Ms. Silver indicate she has provided physical therapy to Claimant for over five years. Perhaps she was employed by Every Child Achieves.

11. Ms. Smith testified that, as of this March 2011 report, she had been seeing roughly the same report every six months. She did not view the level of one hour per week as “intensive therapy,” as it was characterized by Ms. Silver. Ms. Smith also testified that the best practices would be for physical therapy to be time-limited and, if provided once or twice per week, to last for a few months only, to be followed by a consultation basis of anywhere from two to 24 visits per year, depending on the circumstances. Ms. Smith believes that Claimant’s parents can be taught what to do by Ms. Silver, with the consultation service to review progress and update the parent’s skills as needed.

12. Ms. Silver prepared progress reports dated May 6, 2011 (Exhibit 12, three pages) and September 11, 2011 (Exhibit 11, three pages). The May 2011 report repeated much of the same history and information, but included some new information as well. For example, the range of motion section added a sentence about intensive stretching; the section on gross motor skills added a new paragraph about recently attained or improved skills and that the family had purchased a treadmill but needed some help in adapting it to Claimant’s use; and the section on recommendations added that she had achieved the milestone of taking three independent steps. Added to her goals were that Claimant would walk on the treadmill with minimal assistance and take three to five independent steps.

13. The September 2011 progress report included new information in the history relating to reduction in services from the school district. Also added was that it took two people to assist Claimant on the home treadmill which was now more difficult because her mother was pregnant, and the family was attempting a schedule for the treadmill use. Independent standing balance had increased from a count of seven to a count of ten. More information was included about her stability, about a new forward-facing walker, that Claimant could walk considerable distances using the wall for support and could maintain balance longer.

14. The Service Agency’s occupational therapist, Chris Azantian, was covering for Ms. Smith in reviewing the September 2011 progress report. Ms. Smith testified it is very common for them to work together on files. Ms. Azantian reviewed the September 2011 progress report and made a chart note (Exhibit 12) summarizing some aspects of the report, and added: “These are the same goals that have been worked on for the last four years, with little progress. Hannah needs continuous practice to improve these skills, not on-going active PT.” After noting that Claimant gets physical therapy at school and the goals are transferable and can be practiced at home, Ms. Azantian concluded: “Request for continued PT, at 5 hours per month is not supported at this time.” Ms. Smith agreed with this summary and recommendation.

15. In response to the recommendation to terminate physical therapy, Ms. Silver prepared a letter dated November 23, 2011 (Exhibit A). Among other things, she notes that the school district would be reducing and then eliminating weekly physical therapy and turning to a consultation model. Ms. Silver believed that Claimant is walking as a result of the continuing weekly therapy she has been receiving, and gave several examples of therapy, such as core exercises, range of motion, and facilitating use of trunk muscles while stretching

lower extremities, that require a skilled therapist and should not be done by someone who is not professionally trained. In Ms. Silver's opinion, Claimant "would most likely lose the ability to do most of what we have worked on these past five years to accomplish if she did not receive actual treatment by a physical therapist." "[W]ithout physical therapy provided by a trained physical therapist Hannah will regress and no longer maintain the muscle control and range of motion needed to meet the goal of independence."

16. Ms. Smith did not agree with Ms. Silver's position, and testified that the family has been working diligently with Claimant and a good physical therapist should be able to teach parents what to do when the therapist is not there. Ms. Smith also testified that she did not think that physical therapy at the level of one hour per week made the type of difference noted by Ms. Silver, that Claimant probably would have matured into many of the same skills she now has, and that Ms. Silver should have transitioned into a consultation model long ago.

17. Claimant's mother testified that, although Ms. Silver's reports may appear to have information that is repeated, there have been many instances where Claimant has regressed due to illness, hospitalizations and surgery. Therefore, Ms. Silver often has to work with Claimant to regain past accomplishments. Similar regressions occurred when there was a change and increase in Claimant's pattern of seizures and when medications have changed and have had side effects for Claimant.

18. Claimant's IPP dated May 27, 2010 (Exhibit 19) contains virtually the same information about her ambulation and physical therapy as was contained in the 2009 IPP (see Exhibit 20), except for the change in provider name and a note of an informal appeal not otherwise described in the evidence. Claimant's IPP dated May 16, 2011 (Exhibit 18) contains relevant new information, including that Claimant had taken six steps independently and was working at home on a treadmill. Both include a paragraph titled "Current Status" that includes the following description of Claimant's mother's involvement. "Hannah's mother is her primary caregiver, and her life is consumed by Hannah's day to day care. She is often sleep deprived as she monitors Hannah throughout the night for seizures. Additionally, due to Hannah's inability to function independently at any level, her mother is physically taxed by the demands of her care, including carrying, feeding, toileting, dressing and motoring her from one location to another. Mother is a strong advocate on Hannah's behalf, and takes an active role in all of Hannah's therapies. Due to the effects of various seizure medications, Hannah is sometimes sleepy or napping during therapy sessions or when at school. This impedes her progress and sometimes results in regression of what she has learned both at home and in her school settings."

19. A letter was submitted from Claimant's neurologist, Dr. Van Hirtum-Das (Exhibit B, dated October 20, 2011). Dr. Van Hirtum-Das writes that she has treated Claimant for several years and that Claimant has a combination of medical and genetic issues. She is familiar with Claimant's participation in, and gains from, physical therapy. "Typical of these types of genetic abnormalities, when therapies are lessened or

discontinued, neurological and overall function is expected to significantly decrease [and] quality of life would deteriorate as Hannah would likely stop ambulating”

20. In two letters (Exhibit C, dated October 25, 2011, and Exhibit D, dated December 4, 2011), Claimant’s pediatrician, Dr. Nagel, noted that as Claimant becomes taller and heavier it is harder for her mother to manage her physically, but that Claimant’s increased balance and stability has made it easier for her mother to do activities such as bathing and moving her around the home. In his opinion, terminating the home physical therapy “will result in a significant arrest in her physical developmental milestones” and continued physical therapy will aid Claimant’s independence and activities of daily life and minimize safety concerns.

21. Exhibit 4 contains three letters of prior resolutions of disputes concerning physical therapy and other services. The February 4, 2010 letter notes that an appeal of a WRC notice of termination of occupational and physical therapy is resolved by continuing the therapies through April 2010 and will be reassessed at that time. The reasons cited include that Claimant is on new medication, has a new school therapist and a new occupational therapy provider. In the June 22, 2010 letter, WRC indicated it was withdrawing the decision to terminate the therapies, which were re-authorized through January 2011. This letter acknowledges that Claimant’s mother told WRC she had exhausted her insurance benefits and that she was challenging the school’s decision to reduce or eliminate services. The March 8, 2011, letter relates to another appeal of WRC’s later decisions to terminate both therapies, and authorized the therapies to continue through August 2011 based on the severity of Claimant’s challenges, her recent progress, recommendations from therapists and physicians, the difference in goals between school services and WRC services, denial of funding from generic resources and exhaustion of private insurance benefits.

22. There was an informal meeting to try to resolve the present dispute on November 10, 2011, summarized by a letter by Mary Rollins of WRC (Exhibit 3). Ms. Rollins offered to continue both therapies through February 2012, when occupational therapy would end and physical therapy would reduce to two hours for one month and then one hour four times per year for consultation and assessment. The reasons cited are that Claimant has gained the skills sought by therapy, and it is now a matter of strengthening and practice “which do not require the skills of a trained therapist.” Also, Claimant receives therapy at school, with the notation that she “misses a great deal of therapy because of absences and tardiness.”

23. In her testimony, Claimant’s mother confirmed that there have been episodes when Claimant has had increases in seizures or reactions to medications that have resulted in surgery, hospitalization, missed school days and times when Claimant is not able to take full advantage of the therapies and services offered to her. Some of these events have caused regressions in her skills, strengths and gains from prior therapy, and much work was needed to get some of these skills back. Ms. Silver has helped consistently with this process. Originally, doctors did not think that Claimant would sit, walk or even breathe on her own.

Claimant's orthopedic surgeon, neurologist and pediatrician have all told her they now believe that Claimant will walk in the future. Claimant's mother has tried to obtain help from California Children's Services but was told Claimant is not eligible. She has been able to get some benefits from her private insurance, such as a special walker/stroller. Although the insurance will pay for 24 visits of occupational therapy or physical therapy, Claimant's mother has not been able to find an approved provider that specializes in children with neurological deficiencies, and was told that two hospitals only provide physical therapy as after care for surgery, but not on an ongoing basis for children with developmental delays.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (§ 4500 et seq.) A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant properly and timely requested a fair hearing and therefore jurisdiction for this case was established. (Factual Findings 1-3.)

2. Where the Service Agency seeks to reduce and ultimately discontinue a service it has previously funded, it has the burden to demonstrate that its decision is correct. In this case, the Service Agency had the burden to show that funding for the existing physical therapy should be terminated, as set forth in the NOPA.

3. Section 4501 requires the state, through the regional centers, to provide an array of services and supports which is sufficiently complete to meet the needs and choices of each person with developmental disabilities. These are services and supports that will allow such persons, "regardless of age or degree of disability, and at each stage of life" 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." Persons with developmental disabilities have the right to treatment and habilitation services and supports which foster the individual's developmental potential and are "directed toward the achievement of the most independent, productive and normal lives possible." The regional centers will work with consumers and their families to secure "those services and supports that maximize opportunities and choices for living, working, learning and recreating in the community." (§ 4502.)

4. Section 4646.5 defines the content of the planning process for the IPP. It must include a statement of goals based on the consumer's needs and time limited objectives for implementing the goals. The goals and objectives should maximize opportunities for the consumer to develop relationships, be part of community life and to develop competencies to help accomplish the goals. The IPP process must also include a schedule of the type and amount of services and supports to be purchased by the regional center or obtained from generic agencies or other resources in order to achieve the IPP goals and the identification of the providers of services.

5. Section 4646, subdivision (a), states, in pertinent part:

“It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual. . . . It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.”

6. The procedures that the Service Agency must follow when terminating the services that a vendor is providing to a consumer are set forth in California Code of Regulations, title 17, section 56718, subdivision (a), which provides that funding for a service “shall be terminated when one or more of the following occur”: (1) continued participation jeopardized the consumer’s health and safety; (2) the consumer requests termination or cannot attend due to change in residence; (3) “The ID Team⁴ has determined through a consumer evaluation that the vendor’s program no longer meets the consumer’s needs”; (4) the vendor determines that its program may no longer meet the consumer’s needs; or (5) the consumer consents to “an alternate placement identified by the ID Team as being able to meet the consumer’s needs and as being more cost effective.” In this case, the closest applicable alternative is (a)(3).

7. There was no evidence that WRC followed the procedure set forth in the regulation. The option in the regulation above, relating to termination of services, that comes closest to the present situation is (a)(3), which requires action by an Interdisciplinary Team, which did not take place here. The closest thing to a consumer evaluation, required by the regulation, was Ms. Azantian’s chart note, which was not convincing, for the reasons set forth below. However, the regulation does not cover all situations wherein services may be terminated; it sets forth situations where funding must be terminated.

8. Further, WRC did not offer sufficient evidence or argument in support of the reasons it did cite as a basis to terminate physical therapy. The first reason cited was that, based on section 4659, generic resources should be pursued to fund physical therapy after age three and the regional center would provide funding only as a payor of last resort if generic sources were unavailable. An examination of section 4659, and other sections related to generic resources, reveals no mention of a cut-off of services at age three. It is presumed that WRC was referring to the laws that create an obligation of a regional center to provide certain services for consumers up to age three (referred to as the Early Start program) and that, as the child reaches age three, primary responsibility for provision of some services shifts to the local school district. However, the school district takes primary

⁴ This refers to the Interdisciplinary Team. Under California Code of Regulations, title 17, section 54302, subdivision (a)(39), and Code section 4646, this team includes a representative of the regional center, the consumer, and a parent or authorized representative.

responsibility for those services necessary for the consumer to have access to a free appropriate public education, and a regional center may be responsible for other services that conform with the Lanterman Act. Physical therapy is included in the list of available services and supports. (§4512, subd. (b).)

9. With respect to generic sources, by law, the Service Agency is required to determine if the needed services can be obtained from other sources, usually denoted as “generic” sources or agencies. This legal obligation is found in several places. For example, Code section 4646.5, subdivision (a)(4), provides that the IPP should include:

“A schedule of the type and amount of services and supports to be purchased by the regional center or obtained from generic agencies or other resources in order to achieve the individual program plan goals and objectives, and identification of the provider or providers of service responsible for attaining each objective, including, but not limited to, vendors, contracted providers, generic service agencies, and natural supports.”

A limitation exists to the effect that the Service Agency should not provide a service if it is available from a generic source. Section 4648, subdivision (a)(8) states:

“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.”

Section 4659, cited by WRC, establishes the Service Agency’s obligation to pursue all possible sources of funding for services, including school districts and private insurance companies.

10. The evidence establishes that Claimant has pursued available generic resources, some of which were not available (California Children’s Services) and others that have provided some services or medical goods (private insurance and the school district). However, no generic resource has been identified to provide the type of physical therapy provided by Ms. Silver. Therefore, the code sections relating to generic resources do not support a termination of physical therapy for Claimant.

11. Although it is WRC’s contention that it has provided physical therapy to Claimant beyond age three as an “exception” to this policy, as noted above, it was not established that there is a basis for the policy under the facts of this case. Further, some of the very reasons that existed for the so-called exceptions in the past still exist, with no convincing reasons why they should not still apply.

12. WRC’s contention that Claimant has met her goals for physical therapy is not supported by the evidence. The opinions of Ms. Smith and Ms. Azantian to the effect that Claimant’s mother can supply the necessary support for Claimant, with physical therapy consultation of as little as four times a year or as much as two times per month, is not supported by the evidence. As noted in Factual Finding 18, the last two IPPs indicate that

Claimant's mother is already overwhelmed by providing care for Claimant, and added to that, she was pregnant at the time of the hearing, which will likely result in her being responsible for a newborn as well. The conclusion that Ms. Silver's reports were nearly identical, and did not support further services at five hours per month, are also not supported by the evidence. To the contrary, Ms. Silver's reports noted changes in condition, accomplishments and goals. There was no reply by the Service Agency to the opinions of Claimant's neurologist or pediatrician regarding the potential for regression as well as the actual evidence that Claimant has regressed when she has been unable to engage in her therapy as scheduled. This evidence was more convincing than Ms. Smith's opinion that best practices applied to Claimant would be to convert to a consultation model (which was not a part of the Service Agency's position; rather, it decided to terminate the service). Services from the school are being reduced, presumably because Claimant has attained sufficient access to her education. The Service Agency did not offer evidence or argument of how this reduction somehow supports reduction of its physical therapy obligation. It is more likely that it reduces the possibility of Claimant's mother using the school's physical therapy as a source of learning and reinforcement. Simply stated, generic resources have been identified and, to the extent available, have been used. Under these circumstances, and as conceded by the Service Agency, it is the payor of last resort. There is insufficient support in either the law or the facts to support a termination of physical therapy services as decided by the Service Agency.

ORDER

Claimant Hannah S.'s appeal of Westside Regional Center's decision to terminate funding for physical therapy is granted. The funding may not be terminated at this time.

IT IS SO ORDERED.

DATED: January 20, 2011.

DAVID ROSENMAN
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.