

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

NGIMA S.,

Claimant,

OAH No. 2013010622

vs.

ALTA CALIFORNIA REGIONAL
CENTER,

Service Agency.

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Sacramento, California, on March 4, 2013.

The Service Agency, Alta California Regional Center (ACRC), was represented by Robin Black, Legal Services Manager.

Claimant was represented by his guardian, Catherine Gaehwiler.

Oral and documentary evidence was received. At the conclusion of the hearing, the record was closed and the matter was submitted for decision.

ISSUES

Is ACRC required to fund Auditory Integration Therapy (AIT) for claimant?

FACTUAL FINDINGS

1. Claimant is an 11-year-old boy, with uncontrolled seizures, who is eligible for ACRC services based on a diagnosis of epilepsy. Claimant came to the United States from Nepal in 2008 and resides with his guardian, who was previously married to claimant's uncle.

Claimant's biological mother currently resides in California and his biological father remains in Nepal with claimant's siblings. Claimant speaks Nepali and is learning English.

In 2008, while residing in Nepal, claimant was hospitalized after his body temperature became extremely high. He was in a coma for one week, in the hospital for a month and developed a seizure disorder. The cause has not been determined, and after failing to respond to medical treatment claimant had a Vagus Nerve Stimulator implanted in 2012.

2. As indicated in his current Individual Program Plan (IPP), dated June 4, 2012, claimant's long range goals are "to receive an appropriate education, be healthy and for his guardian to receive a break from [claimant's] care."

Pursuant to these goals, claimant's IPP includes that he will receive special education services as specified in his Individualized Education Program (IEP), provided by the Lake Tahoe Unified School District (LTUSD). He will also receive regular medical and dental care and ACRC will request funding for respite care.

3. Claimant's guardian became aware of AIT and thought it might be beneficial for claimant. In October 2012, at claimant's IEP meeting, she requested that LTUSD fund that therapy. The district denied the request stating that it did not fund such services and was not familiar with that type of service. A subsequent IEP, dated November 29, 2012, noted "[claimant] is undergoing auditory integration training, which the parent noted is not-research supported. Catherine chose to try it due to anecdotal data regarding success. Catherine has noted improvement, especially Nepali. [Special education teacher] noted that, at school, [claimant's] communication is difficult to understand. [Claimant] has both expressive and receptive delays per [claimant's] speech therapist at the hospital (Suzanne Bull)."

4. On December 6, 2012, claimant's guardian made a formal request that ACRC fund the AIT.

5. On December 10, 2012, ACRC issued a Notice of Proposed Action (NOPA) to claimant, advising that claimant's "request for the Alta California Regional Center to fund Auditory Integration Therapy for [claimant] has been denied."

6. The NOPA advised claimant that the reason for this decision was as follows:

ACRC is prohibited from funding experimental treatments and therapeutic services which have not been clinically proven to be safe, such as Auditory Integration Therapy. ACRC is further prohibited from funding non medical therapies. ACRC has determined that [claimant] does not qualify for an exemption to that prohibition, as Auditory Integration Therapy has not been found to be primary or critical for ameliorating the physical, cognitive, or psychosocial effects of [claimant's] developmental disability, nor has that therapy been found necessary to allow

[claimant] to remain in his home and that no alternative services are available to meet his needs.

7. Claimant filed a Fair Hearing Request, dated January 14, 2012 [sic-2013], appealing that decision stating:

[Claimant] has a severe communication disorder associated w/ his seizure disorder. A.I.T. helped and reimbursement is in order. 1hr/day X 10 days before Thanksgiving; dates 11-12-12 thru 11-22-12.

Claimant sought reimburse in the amount of \$2200.

8. A Fair Hearing- Informal Meeting was held on January 29, 2013. In attendance at that meeting were claimant's guardian; Khymberleigh Herwill-Levin, Certified AIT Trainer; Wendi McCray, ACRC Service Coordinator; Sharon Wiggins, ACRC Supervising Counselor; and Robin Black, ACRC Legal Services Manager and Designee of ACRC Executive Director.

After that meeting, ACRC informed the parent of the decision to "uphold the service agency's determination that it cannot fund, or reimburse the parent for, Auditory Integration Therapy for [claimant]."

9. Wendi McCray is an ACRC Supervising Counselor. She testified that claimant's guardian sought funding for AIT to help with claimant's "auditory processing disorder". She was in attendance at claimant's IEP meeting when LTUSD stated that it would not be able to fund that service. To her knowledge, claimant's guardian has not appealed that decision.

Ms. McCray stated that when claimant's guardian requested that ACRC fund AIT she forwarded the request to the agency's clinical team. Ms. McCray spoke with Terrance Wardinsky M.D., ACRC's Physician, who informed her that AIT was an experimental therapy and referred her to Debra Harms MA CCC-SLP, ACRC's Speech Pathologist, for further clarification. Ms. Harms agreed that AIT was an experimental therapy that ACRC was prohibited from funding. The team determined that claimant did not qualify for an exemption because there was no evidence that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or that 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.

Ms. McCray also testified that other services may be utilized to address claimant's needs. She specifically noted that assistance may be available through the school district or other generic resources or that service clubs will sometimes provide funding. She also noted that claimant's primary disability noted in his IEP is OHI (Other Health Impaired), not speech and language, and there is no secondary disability noted. She opined that more information would be helpful in determining if, and to what extent, claimant has an auditory processing

disorder. She remains available to attend claimant's IEP meetings if requested to do so by his guardian.

10. Debra Harms, ACRC's Speech-Language Pathologist, testified that AIT has not been proven to be effective and is still experimental in nature. She also noted that there was no evidence that claimant has been formally diagnosed with an auditory processing disorder.

Ms. Harms presented evidence that the American Academy of Pediatrics, the American Academy of Audiology, and the American Speech-Language-Hearing Association have all determined that AIT is an experimental treatment. The American Speech-Language-Hearing Association concluded that AIT has not met scientific standards for safety. The Association has warned its practitioners that they may be found in violation of its Code of Ethics if they provide AIT services.

She testified that early AIT studies showed methodological flaws such as lack of blinding and lack of use of control groups. Later and better controlled studies failed to show effectiveness. Based on this information, Ms. Harms determined that ACRC cannot fund AIT as it is not scientifically proven or clinically determined to be safe and effective.

11. Ms. Harms explained that there are evidence-based interventions for auditory processing disorder, as recommended in the American Academy of Audiology's Clinical Practice Guidelines on Treatment/Management of Central Auditory Processing Disorder. The Academy's recommended interventions are designed to meet a person's individual needs based on audiological testing. There was no evidence of audiological testing and Khymberleigh Herwill-Levin, who provided the AIT service through The Brain Fitness Learning Center, is not an audiologist and is not independently qualified to assess claimant's auditory processing disorder nor to independently design or implement interventions to address his auditory processing disorder.

Ms. Harms opined that a multidisciplinary team including audiologists, speech-language pathologists, psychologists, teachers, parents and Ms. Herwill-Levin, should work to identify and implement appropriate evidence-based interventions to meet claimant's needs. She stated that because his auditory processing disorder appears to be impacting his ability to benefit from his education, a formal request of claimant's school district to provide this related service in his special education program would be appropriate. Should the district deny the request, claimant should appeal the denial. ACRC cannot fund educational services for children ages 3-17, and cannot fund services or supports which are available from generic agencies, such as school districts. Generic resources must be exhausted before ACRC can consider funding such services.

12. Catherine Gaehwiler, claimant's guardian, is devoted to doing all she can to find ways to assist claimant with his difficulties. She contends that he has an expressive-receptive language disorder caused by his seizure disorder which causes communication difficulties. She testified that his use of his native language and his use of English were both diminishing. She chose to pursue AIT in the hope of improving claimant's communication.

13. In November, 2012, claimant participated in a ten day course of therapy provided by Kimberleigh Herwill-Levin, MA Sp.Ed./AIT and Neurocognitive Practitioner, with The Brain Fitness Center. The Center description of AIT states that “AIT is an education intervention and not a medical tool.” In a report dated January 28, 2013, Ms. Herwill-Levin noted that “concerns about [claimant]” include:

All academics are behind-this could be due to English as a second language, medical issues and not being able to focus in his classroom setting.

Difficulty reading at grade level, although given simple books, he is able to master them.

Poor retention of information unless taught by rote.

Difficulty processing certain English sounds.

Difficulty following spoken instructions.

Needs instructions to be repeated before following through.

Other listening skill problems appear on attached “Auditory Problems” compiled by Fischer and Katz.

Ms. Herwill-Levin’s testing concluded that claimant has an auditory processing disorder. He has no difficulty hearing but is unable to process auditory information in a timely manner.

14. Ms. Gaehwiler testified that the ten days/sessions of ½ hour AIT treatments were effective in improving claimant’s communication. She also explained that his seizures disappeared during the treatment period and for some time thereafter. She presented letters from a caregiver and a neighbor noting their impressions of claimant’s improved communication skills after the AIT.

15 While claimant’s guardian acknowledged that AIT has not been researched supported, she suggested that the therapy would not have survived for 25 years if it was not effective. She opined that people should not have to wait for all the evidence to be compiled to receive effective therapies and that there is a lag time between the time a treatment is considered experimental and the time it is considered an accepted treatment. She stated that “off label experimental treatments are not necessarily a detriment.”

16. Claimant’s guardian also contends that the service is medically necessary because claimant has a prescription from Rachael E. Gardner, APN, dated February 28, 2013, which states: [claimant] would benefit from Auditory Integration for his communication difficulties. This argument was not persuasive, especially because the prescription was dated after the therapy was completed and four days prior to the start of the hearing.

17. Ms Gaehwiler seeks reimburse of the fee she paid for the first ten AIT sessions, in the amount of \$2200.00 and also seeks funding for an additional ten future sessions.

LEGAL CONCLUSIONS

1. Regional centers are governed by the provisions of Welfare and Institutions Code section 4500 et seq. (Lanterman Act).¹ Section 4646, subdivision (a), provides:

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 with developmental disabilities and takes into account the needs and preferences of the individual and family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. 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 plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.”

2. Section 4646.4, subdivisions (a)(1) and (2), provide:

Effective September 1, 2008, regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer’s individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

(1) Conformance with the regional center’s purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.

(2) Utilization of generic services and supports when appropriate.

¹ All subsequent statutory references are to the Welfare and Institutions Code, unless otherwise specified.

3. Section 4648.5 provides:

(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 ending 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:

(1) Camping services and associated travel expenses.

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

(3) Educational services for children three to 17, inclusive, years of age.

(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.

(c) 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.

4. Section 4648, subdivisions (a)(8) and(15), specifies:

In order to achieve the stated objectives of the consumer's individual program plan, the regional center shall conduct activities including, but not limited to, all of the following:

(a) Securing needed services and supports.

(8) 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.

¶ . . . ¶

(15) Notwithstanding any other provision of law or regulation to the contrary, effective July 1, 2009, regional centers shall not purchase experimental treatments, therapeutic services, or devices that have not been clinically determined or scientifically proven to be effective or safe or for which risks and complications are unknown. Experimental treatments or therapeutic services include experimental medical or nutritional therapy when the use of the product for that purpose is not a general physician practice. For regional center consumers receiving these services as part of their individual program plan (IPP) or individualized family service program (IFSP) on July 29, this prohibition shall apply on August 1, 2009.

5. In response to the mandates of sections 4648.5 and 4648, ACRC correctly determined that the agency was prohibited from funding AIT. The Brain Fitness Learning Center specifically describes AIT as an education intervention and not a medical tool. (Finding 13). As an educational service/non medical therapy, an exemption would be required pursuant to section 4648.5, subdivision (a)(4)(c) to allow regional center funding. There was no evidence to show that failure to provide AIT would alter claimant's ability to remain in his home, or that it is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of his developmental disability, epilepsy.

There was credible evidence presented to demonstrate that AIT has not been clinically determined or scientifically proven to be effective or safe. Therefore, ACRC is prohibited from funding AIT as an experimental treatment.

6. The evidence was convincing that claimant's language and academic difficulties are of concern. It is recommended that the IPP team explore available options for assistance. One such option may be pursuing assistance through claimant's educational program, and his Service Coordinator remains available to assist in that regard.

7. The above matters having been considered, ACRC is not required to fund Auditory Integration Therapy (AIT) for claimant.

ORDER

The appeal of claimant Ngima S. is denied. ACRC is not required to fund Auditory Integration Therapy.

DATED: March 15, 2013

SUSAN H. HOLLINGSHEAD
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 this decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)