

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

BEVERLEY M.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH Case No. 2013030947

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on October 4 and November 27, 2013, in Tehachapi. Thereafter, the parties submitted closing briefs, which were marked as exhibits 43 (Claimant) and 14 (Service Agency), respectively. The record was closed and the matter was submitted for decision upon receipt of the closing briefs on December 10, 2013.

Beverley M. (Claimant), who was not present, was represented by her mother.¹

Kern Regional Center (KRC or the Service Agency) was represented by Cherylle Mallinson, M.S., Interim Director of Community Services.

ISSUE

Shall the Service Agency provide funding for Claimant to receive Floortime services, either through her family being deemed a family-vendored provider of such services, or through another provider?

EVIDENCE RELIED ON

Documents: Regional Center exhibits 1-10 & 12-13; Claimant's exhibits 1-42. The closing briefs are not considered to be evidence.

¹ Initials and family titles are used to protect the privacy of Claimant and her family.

Testimony: Claimant's mother; Service Coordinator Stacey Fogle; Lisel Storck, MA, NCSP, LEP; Brendon Kirkbride; and Nick Garcia, Ph.D.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is an 11-year-old female eligible to receive services from the Service Agency due to her diagnoses of autistic disorder and moderate mental retardation.²

2. By no later than February 2010, Claimant's mother first approached KRC to fund Floortime services for Claimant. In February and March 2013, the parties were in frequent communication regarding behavior intervention services for Claimant, including Floortime. By no later than March 12, 2013, Claimant's mother requested the Service Agency to provide funding for Floortime, either through a vendor or by Claimant's family.

3. By a Notice of Proposed Action dated March 14, 2013, Claimant's mother was advised that the Service Agency had denied the service request, because Claimant's mother was not vendored to provide Floortime services; the family had not submitted a vendor application to the Service Agency; and staff was not convinced that Floortime is an evidence-based practice or scientifically proven to be effective.

4. On March 22, 2013, an appeal of the service denial (the Fair Hearing Request) on Claimant's behalf was submitted to the Service Agency.

5. On April 26, 2013, the parties participated in an Informal Conference to discuss the Service Agency's service denial. No resolution was reached.

6. The hearing of this matter was initially scheduled for June 6, 2013. The hearing was twice continued at the request of Claimant's mother. In connection with the first continuance, Claimant's mother executed a written waiver of the time limit prescribed by law for holding the hearing and for the ALJ to issue a decision.

7. The hearing of this matter commenced on October 4, 2013. Each party moved to exclude portions of the other's evidence. Instead of granting those motions and excluding material parts of each party's case, the ALJ granted Claimant's mother's request for a continuance, so the parties could prepare for and present a meaningful case on the merits.

² Claimant has also been diagnosed with seizure disorder, but it is not clear if she has been deemed eligible for regional center services on that basis.

Claimant's Background Information

8. Claimant and her family moved to California from Hawaii in 2010. Claimant currently lives with her mother and grandfather, though she also sees her father regularly.

9. Claimant was initially enrolled in a specialized school for autistic children. The family moved to a more remote area in early 2013, and Claimant was unable to enroll in that same school. Claimant's family has appealed that decision, and Claimant is currently enrolled in a basic education program funded by the Kern County Superintendent of Schools. The type of special education services received by Claimant was not established.

10. Claimant is significantly delayed in all domains. Relative to this case, Claimant's mother is concerned about her daughter's delays in social-emotional, communication, and behavior. For example, Claimant demonstrates some awareness of others, but she does not initiate interaction. She has few communication skills, namely use of a few words, pointing and gesturing. She also engages in a variety of inappropriate behaviors, such as self-injury and frequent tantrums.

The Request for Floortime Services

11. Claimant previously received traditional applied behavior analysis (ABA) services when she resided in Hawaii. Claimant's mother was unsatisfied with her daughter's progress in that program.

12. When Claimant was evaluated for occupational therapy in Hawaii in 2009, her mother expressed concerns regarding Claimant's motor development and sensory processing, including poor attention span and a lack of intentionality and initiation. The occupational therapist who conducted the evaluation ultimately recommended a package of services for Claimant, including "Floortime strategies."

13. Floortime is a type of behavior intervention, under the umbrella including ABA. Floortime was developed in response to critiques that ABA can be too robotic or rote. The key difference with Floortime is that a parent or caretaker gets on the floor with the child and interacts with them, allowing the child to take the lead in things or activities of interest. The emotion and interest of the child are the focus of the activity. Floortime uses only positive encouragement for good behaviors, such as praise and affection. Floortime does not try to ignore or deflect unwanted behaviors.

14. Claimant's mother testified that Floortime was more beneficial to her daughter than ABA. She found that after regularly engaging in Floortime, Claimant was more communicative with her, had a longer attention span and initiated more interaction.

15. After moving to California, Claimant's mother was interested in continuing with Floortime. Partly because KRC staff is skeptical of Floortime conceptually, and partly because there are more ABA providers in its catchment area, KRC offered to fund ABA

services for Claimant on numerous occasions. Claimant's mother has refused the offers of ABA, because she believes Floortime is better for her daughter.

16. Claimant's mother has researched the particular ABA vendors offered by KRC to provide those services. During the hearing, she articulated a good faith reason for being concerned with those involved.

17. Claimant's mother arranged for her daughter to be evaluated for Floortime services by Lisel Storck, MA, NCSP, and licensed educational psychologist. The primary reasons for the referral were concerns over Claimant's self-injurious behaviors, as well as her deficits in attention, communication and interaction with others. Ms. Storck conducted an evaluation of Claimant in May 2012, and did a telephonic update of the situation in April 2013. Ms. Storck issued an amended report dated April 4, 2013, in which she recommended that Claimant receive 10 hours per week of Floortime, at home and in the community, to address the areas of concern. Ms. Storck clarified in her testimony that Floortime is not the only means of addressing Claimant's deficits, but that it should be provided in conjunction with other services, perhaps including ABA.

18. Claimant's mother has had difficulty finding a Floortime provider willing to serve her daughter in their remote location. However, Corey Fox, who provides Floortime through his company Developmental Dynamo in Northridge, is also employed to do the same by Real Connection Child Development Institute (Real Connection), which is headquartered in Monrovia. As established by the testimony of Real Connection's business manager, Brendon Kirkbride, Real Connection is willing to assign Mr. Fox to provide Floortime services to Claimant in her home and community.

19. Real Connection is not vendored with KRC. However, it is vendored with the North Los Angeles County Regional Center, Eastern Los Angeles Regional Center, the Frank D. Lanterman Regional Center, the Westside Regional Center, and the San Gabriel/Pomona Regional Center. Real Connection provides Floortime services to customers of those regional centers at the standard regional center rate of \$52.50 per hour. However, Real Connection uses different service codes for each regional center, including 106 and 048. According to information submitted by KRC, Service Code 048 is for behavior intervention services, including the use of behavior intervention programs. Mr. Kirkbride testified that Real Connection formerly used Service Code 106, but discontinued using that code at the request of regional centers because that code covers specialized recreational therapy services. Funding for that type of service has been suspended pursuant to a recent change in the law.

The Service Agency's Concerns about the Requested Funding

20. As an alternative, Claimant's mother proposed being vendored by KRC to provide Floortime, or receiving vouchers so she could procure Floortime services from others. Claimant's mother was requested to, but never did, complete and submit an application to become a vendor. Moreover, while she did obtain a "Documentation of Mastery" concerning the "DIR/Floortime Model" in June 2010, Claimant's mother failed to

establish that she is qualified to be a vendor to provide Floortime. Finally, KRC contended that vouchers are limited to a narrow range of services, excluding Floortime.

21. KRC also contended that Floortime is not an evidence-based practice or scientifically proven to be effective, which by law would preclude it from being funded. On this point, KRC presented the expert opinion testimony of Nick Garcia, a clinical and forensic psychologist. Dr. Garcia testified that Floortime is not on the same footing as ABA, in terms of being evidence-based or scientifically proven, because it relies so much on the emotional connection between parent and child, and that it is hard to measure or quantify emotional connection or growth. However, Dr. Garcia did not specifically testify that Floortime is not evidence-based or is not scientifically proven to be effective. When confronted with a paper concerning Floortime (ex. 40), Dr. Garcia conceded that there are some areas of Floortime, such as attention span, which can be measured. Dr. Garcia also testified that Claimant would benefit from ABA, but he did not elaborate.

22. On the other hand, Claimant presented a paper she obtained during an autism conference which cites numerous published articles and research regarding Floortime, and which concludes that Floortime has a “solid foundation of research and clinical experience support, and can be considered both “evidence-based and also a prominent therapeutic option for children with disorders of relating and communicating.” (Claimant’s ex. 40.) That article, in combination with the fact that Real Connection is vendored with so many regional centers to provide Floortime, is more persuasive evidence than that presented by KRC, meaning that it was not established by a preponderance of the evidence in this case that Floortime is not an evidence-based practice or scientifically proven to be effective.

23. KRC contended but failed to establish that it would not be cost-effective to fund for Floortime services, because there are alternative local resources available to Claimant, namely the ABA providers previously mentioned. First, the family’s preference is for Floortime, not ABA. Second, although KRC offered a few ABA providers to Claimant, KRC failed to establish that those providers can meet Claimant’s needs, and Claimant’s mother provided plausible reasons why they could not. Third, KRC failed to present any evidence of the cost of the alternative providers, i.e., whether they charged a rate lower than \$52.50 per hour.

DISCUSSION

Jurisdiction and Burden of Proof

The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.³) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a

³ All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established. (Factual Findings 1-7.)

The standard of proof in this case is the preponderance of the evidence. (Evid. Code, § 115.)

When one seeks government benefits or services not before provided, the burden of proof is on her. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).)

In this case, the Service Agency has not before provided the funding requested by Claimant's family. Claimant therefore bears the burden of proving by a preponderance of the evidence that she is entitled to that funding.

The Lanterman Act Generally

The Lanterman Act requires regional centers to respect and support the decision-making authority of the family; be flexible and creative in meeting the unique and individual needs of families as they evolve over time; and meet the cultural preferences, values, and lifestyles of families. (§ 4685, subd. (b).) The Lanterman Act also requires flexibility to meet unusual or unique circumstances. For example, regional centers are encouraged to employ innovative programs and techniques (§ 4630, subd. (b)); to find innovative and economical ways to achieve goals (§ 4651); to implement procedures that encourage innovative approaches to sharing resources with other agencies (§ 4669.2, subd. (a)(7)); and to utilize innovative service-delivery mechanisms (§ 4685, subd. (c)(3)). Similarly, section 4648, subdivision (a)(2), states that services and supports "shall be flexible and individually tailored to the consumer and, where appropriate, his or her family."

In order to meet the above mandates, the parties are required to develop goals, as well as identify the services and supports necessary to achieve those goals, in the process of creating an individual program plan (IPP). A consumer's IPP "shall be reviewed and modified by the planning team . . . as necessary, in response to the person's achievement or changing needs." (§ 4646.5, subd. (b).) The planning process relative to an IPP shall include, among other things, "[g]athering information and conducting assessments to determine the . . . concerns or problems of the person with developmental disabilities." (§ 4646.5, subd. (a).) However, the Lanterman Act directs service agencies to accomplish agreed-upon IPP goals in a cost-effective manner. (§§ 4646, subd. (a), and 4648, subd. (a)(11).)

Funding for Floortime Services

Services should be designed toward "alleviation of a developmental disability," and among the services and supports that can be funded under section 4512, subdivision (b), are "behavior training and behavior modification programs."

Due to the state's funding crisis, as of July 1, 2009, section 4648.5 suspended a regional center's authority to purchase "social recreation activities." (§ 4648.5, subd. (a)(2).)

Additionally, a regional center may only purchase therapies that “reflect evidence-based practices.” (§ 4686.2, subds. (b)(1), (2) & (6).) “Evidence-based practice” means “a decision making process that integrates the best available scientifically rigorous research, clinical expertise, and individual’s characteristics. Evidence-based practice is an approach to treatment rather than a specific treatment.” (§ 4686.2, subds. (d)(1) & (3).)

In this case, Claimant met her burden of establishing by a preponderance of the evidence that she is entitled to funding for Floortime. Floortime is a behavior training and modification program. Section 4512 expressly provides for funding of such a service. Claimant’s mother has tried both ABA and Floortime in the past, and has found Floortime beneficial to her daughter. No evidence was presented indicating that the decision-making of the family should be questioned in this regard. Nor was evidence presented indicating that ABA would be more beneficial to Claimant than Floortime. In any event, Claimant has presented credible written reports from an occupational therapist and a licensed educational psychologist recommending Floortime to address Claimant’s needs. The Service Agency’s expert witness, Dr. Garcia, did not necessarily opine that ABA would be more beneficial for Claimant than Floortime.

The Service Agency failed to establish that funding Floortime will be cost-ineffective. In fact, the Service Agency offered no evidence indicating how much the alternative to Floortime would cost. The proposed provider of Claimant’s service, Real Connection, charges \$52.50 per hour, an amount which, on its face, does not appear unreasonable, especially when compared with ABA.

The Service Agency contended that Floortime is not an evidence-based practice or scientifically proven to be effective, which would legally bar the Service Agency from funding it. However, Claimant’s evidence to the contrary was more persuasive.

Finally, regardless of the Service Code that Real Connection may have used for this service in this past, it was not established in this case that Floortime is a social recreation activity within the meaning of section 4648.5, which would result in suspension of said funding. In fact, Real Connection apparently now uses a Service Code for Floortime which is decidedly different from a social recreational activity.

There seems to be no factual disagreement that Claimant needs 10 hours per week of behavioral intervention, whether it be Floortime or ABA. Under these circumstances, the Service Agency should provide funding for no more than 10 hours per week of Floortime to be provided at Claimant’s home and in her community.

Who Can Provide Floortime Services?

A regional center may purchase services and supports “pursuant to vendorization or a contract” (§ 4648, subd. (a)(3).) “Vendorization or contracting” is defined as “the

process for identification, selection, and utilization of service vendors or contractors, based on the qualifications and other requirements necessary in order to provide the service.” (§ 4648, subd. (a)(3)(A).)

Another way of funding a service is for a regional center to offer vouchers to family members or an adult consumer to allow families or consumers to procure their own services. (Cal. Code Regs., tit. 16, § 54355, subd. (a).) However, the use of vouchers is limited to procuring diapers, nutritional supplements, day care, nursing, respite and transportation. (*Id.*) In any event, the Lanterman Act prohibits regional centers from reimbursing a parent for participating in a behavioral services treatment program. (§ 4686.2, subd. (b)(6).)

In this case, Claimant failed to establish that the law would condone her family being vendored or funded directly to provide Floortime. The regulations do not expressly provide that a family or consumer can receive vouchers to procure behavioral intervention services, and section 4686.2 appears to prohibit such funding. Claimant’s mother never submitted an application to become a vendor, which is critical to the process, nor has she proven in this case that she is qualified to be vendored to provide such a service.

The alternative is for the Service Agency to fund a vendor to provide Floortime to Claimant. As the Service Agency has failed to identify such a vendor, the vendor identified by Claimant’s mother appears to be the only viable option. Real Connection is vendored with several regional centers, meaning it has already demonstrated its qualifications and ability to provide Floortime services to consumers. The ALJ is familiar with the concept of “courtesy vendorization,” in which a regional center can provide funds to an entity for a service that the entity has been vendored to provide with another regional center. Real Connection is in such a position. Real Connection is willing and able to provide Floortime to Claimant in her home and community, and has specified an hourly rate that it charges other regional centers for such services. The Lanterman Act requires innovation and flexibility in delivering services to consumers. Requiring the Service Agency to fund Real Connection in this case to address the fact that Claimant is located in a remote area would fulfill that mandate.

LEGAL CONCLUSION

Pursuant to sections 4512, 4646, 4648, and 4686.2, Claimant established cause to order the Service Agency to provide funding for Floortime in the amount of 10 hours per week, to be provided by Real Connection Child Development Institute, at the rate of \$52.50 per hour. (Factual Findings 1-23, Discussion.)

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ORDER

Claimant Beverley M.'s appeal is granted. The Kern Regional Center shall provide funding for Floortime in the amount of 10 hours per week, to be provided by Real Connection Child Development Institute, at the rate of \$52.50 per hour.

DATED: December 16, 2013



ERIC SAWYER,
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.