

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Due Process Request of:

MATTEO L.,

Petitioner,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Respondent.

OAH No. 2013060581

California Early Intervention
Services Act (Gov. Code, § 95000
et seq.)

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on July 1, 2013, in Alhambra. During the hearing, the parties presented the testimonial and documentary evidence described below. The record was closed and the matter was submitted for decision at the end of the hearing.

Petitioner, who was present, was represented by his parents.¹

Judy Castañeda, Fair Hearing Coordinator, represented the Eastern Los Angeles Regional Center (ELARC or Respondent).

ISSUE

May ELARC stop funding Petitioner's in home physical therapy and occupational therapy due to the presence of a generic funding source?

EVIDENCE RELIED UPON

Documentary: Respondent's exhibits 1-16; Petitioner's exhibits 1-6.

¹ Full names of Petitioner and his family members are omitted to protect their privacy.

Testimonial: Nora Liu, ELARC PT Consultant; Heidi Blanco, ELARC Service Coordinator; Alireza Hoveyda, PT; Lara Rechnitzer, PT; Petitioner's maternal aunt, his mother and his father.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Petitioner is 31 months old. He was referred to ELARC's Early Start program² due to global delays caused by cerebral hypoplasia, nystagmus ataxia and truncal weakness. Petitioner has also been diagnosed with a form of cerebral palsy and his parents are having him evaluated for autism.

2. Since September and November 2011, ELARC has provided funding for Petitioner to receive in home physical therapy (PT) and occupational therapy (OT) services, respectively. The parties previously had a dispute about ELARC continuing to provide that funding, which was resolved in February 2013. By that resolution, ELARC agreed to continue the funding in light of Petitioner's parents' agreement to request the same funding from generic resources such as California Children's Services (CCS) and the family's health insurer Kaiser Permanente (Kaiser).

3. By letter dated May 30, 2013, ELARC advised Petitioner's parents that the regional center had decided to discontinue the PT and OT funding because CCS had agreed to provide clinic-based PT and OT to Petitioner. ELARC stated that it cannot provide funding for a service that can be supplied by a generic resource.

4. On June 14, 2013, Petitioner's mother submitted a Due Process Hearing Request to appeal ELARC's proposed decision to stop funding PT and OT.

Petitioner's PT and OT Service Needs

5. Petitioner is currently provided in home PT by Alireza Hoveyda, twice per week, for one hour each session; and in home OT by Shelly Read, twice per week.

6. CCS has agreed to provide both clinic-based PT and OT to Petitioner at one of its facilities. The OT and PT would each be provided twice per week, 30 minutes each session. The CCS staff members who would provide the clinic-based PT and OT are trained and licensed professionals who specialize in providing such services to those receiving Early Start services. The goals of CCS's PT and OT programs would be similar to those offered by Petitioner's current in home providers.

² "Early Start" is another name for the California Early Intervention Services Act (Gov. Code, § 95000 et seq.)

7. ELARC OT Consultant Angela Espinoza has reviewed Petitioner's chart and opined that Petitioner would highly benefit from clinic-based OT. She offers little insight explaining her conclusion. It appears her conclusion primarily relies on CCS as a generic funding source. She fails to address the underlying reason why Petitioner receives in home OT or his parents' concerns about replacing in home with clinic-based services.

8. ELARC PT Consultant Nora Liu reviewed Petitioner's chart and has opined that he would benefit from CCS's clinic-based PT program. Again, Ms. Liu heavily relies on CCS as a generic resource in support of her conclusion. She also testified that any behavioral issues experienced by Petitioner in transitioning to a new provider and from in home to clinic-based services would last two months or less; she does not expect Petitioner to suffer much regression. However, she admitted that programs in a natural environment (such as home) are preferable for children Petitioner's age; that she understands the parents' concern about replacing in home services with those provided in a clinic; and that Petitioner's current in home PT and OT services would have to be funded by ELARC in the absence of a generic resource such as CCS. By these admissions, Ms. Liu seems to accept the necessity of providing the services in home, but defer to the legal concept of a generic resource.

9. Petitioner's parents have been more than diligent in their pursuit of generic funding sources for Petitioner's in home PT and OT. Although CCS has agreed to provide those services in one of its clinics, it has refused to do so in home. Petitioner's parents have pursued internal CCS appeals without success. CCS maintains that it will only provide in home services in special cases of medical necessity where a patient is not medically able to leave the home. Petitioner is not in that situation. Kaiser has denied providing these services in home for the same reason. Petitioner's parents exhausted Kaiser's internal appeal process without success. Petitioner's parents have filed a complaint about Kaiser's denial with the California Department of Managed Health Care (DMHC). That matter is pending.

10. The PT and OT are provided in Petitioner's home because prior efforts to do so in a clinic have been disastrous. Petitioner does not like being touched or handled by others. The PT and OT require some amount of touching and handling. Clinic-based PT at a Kaiser facility was attempted in 2011 but was later stopped at parents' request because Petitioner simply cried during the sessions. A later change in therapists resulted in some improvement, but success was inconsistent and progress limited. In February 2013, Petitioner was referred to another clinic-based PT program at Achieve Beyond. The therapist who worked with Petitioner there, Lara Rechnitzer, testified that she had four sessions with Petitioner, but that he "melted down" in each session, and that she achieved no progress with him.

11. Although Petitioner has done better in a clinic-based speech and language therapy program, it appears that distinction is because in such therapy Petitioner is not touched or handled by the therapist.

12. It took PT Hoveyda almost seven months to gain Petitioner's cooperation. Progress during that time was slow. However, in the last few months, Petitioner has made rapid progress through the in home PT program. PT Hoveyda believes that a natural environment, like the family home, is best for children under three. PT Hoveyda also believes that the age range of 2.5 to 3.0 years is the most crucial for a child in terms of making progress. Petitioner is now in that age range. PT Hoveyda estimates that a change in PT environments and therapists will essentially stop Petitioner's progress, because it would take another six to seven months of transition for Petitioner to adapt. PT Hoveyda is also concerned that CCS proposes only 30 minute sessions. It currently takes PT Hoveyda about that amount of time to "warm up" Petitioner before he can spend the remaining 30 minutes on PT.

13. Petitioner's parents are satisfied with the in home PT and OT programs. Since Petitioner does not like being touched or handled, they fear a change in therapists will cause transition issues that will stop the recent progress Petitioner has made. They are not confident that Petitioner is ready for a clinic-based program, given the past results. They realize that Petitioner will have to transition to clinic-based programs at some point after he turns three, but they feel now is not that time.

LEGAL CONCLUSIONS

1. This case is governed by the Individuals with Disabilities Education Act (IDEA), which is federal law (20 U.S.C. § 1431 et seq.); and the California Early Intervention Services Act (CEISA) (Gov. Code, § 95000 et seq.), which is state law that supplements the IDEA. Each act is accompanied by pertinent regulations.

2. The burden of proof in an administrative hearing under the IDEA is properly placed upon the party seeking relief. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62; see also, 34 C.F.R. § 303.425(a).) In this case, ELARC is seeking to stop on-going funding it has provided to Petitioner for several months. As the party seeking relief in this matter, ELARC bears the burden of proof. (Factual Findings 1-4.)

3. The California Legislature has found that early intervention services represent an investment of resources, "in that these services reduce the ultimate costs to our society, by minimizing the need for special education and related services in later school years and by minimizing the likelihood of institutionalization." (Gov. Code, § 95001, subd. (a)(2).) The Legislature has recognized that "[t]he earlier intervention is started, the greater is the ultimate cost-effectiveness and the higher is the educational attainment and quality of life achieved by children with disabilities." (*Id.*) Thus, time is of the essence in Early Start funding.

4. Early intervention services are defined as those services "designed to meet the developmental needs of each eligible infant or toddler and the needs of the family related to the infant or toddler's development." (20 U.S.C. § 1432(4)(A); Cal. Code Regs., tit. 17, § 52000, subd. (b)(12).)

5. Pursuant to Government Code section 95004, subdivision (a), the provisions of the Lanterman Developmental Disabilities Services Act, located at Welfare and Institutions Code sections 4500 through 4846, also apply to Early Start. Pursuant to Welfare and Institutions Code section 4659, subdivision (c), and Government Code section 95004, subdivision (b), a regional center may not purchase any service that would otherwise be available from a consumer's health care plan, Medi-Cal, CCS, health insurance or other generic resources. Welfare and Institutions Code section 4648 similarly prohibits regional centers from providing funds that would supplant the budget of any other agency which has a legal responsibility to serve all members of the general public, i.e., a generic resource. However, California Code of Regulations, title 17, section 52109, subdivision (b), provides that the regional center is the payor of last resort for a service where all other public sources for payment have been identified but decline funding.

6. In this case, CCS cannot be considered a generic resource for purposes of justifying ELARC's discontinuation of the funding in question. It was abundantly established that Petitioner's service needs are for in home PT and OT, because clinic-based programs have not been successful. CCS will not provide in home PT or OT. Petitioner has only recently made progress in his programs due to their being provided in his natural environment. Replacing providers and changing environments will cause an immediate halt to that progress. That would have disastrous consequences, because Petitioner is now in the age range where progress is most meaningful. Making the changes proposed by ELARC would mean Petitioner would likely receive no more benefit from PT or OT during his remaining time in the Early Start program. For this reason, the CCS funding would essentially provide no meaningful service to Petitioner. As time is of the essence in Early Start funding, such a result would completely frustrate the law. CCS therefore is not a generic resource for purposes of PT and OT services for Petitioner. (Factual Findings 1-13.)

ORDER

The Eastern Los Angeles Regional Center shall not stop providing funding for Petitioner's current in home physical therapy and occupational therapy programs.

DATED: July 11, 2013



ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings