

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

KERN REGIONAL CENTER,

Service Agency.

OAH Case No. 2013070430

DECISION

This matter came on regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on April 2, 2014, in Tehachapi, California.

Claimant's mother¹ represented Claimant.

Cherylle Mallinson, Director of Community Services, represented Kern Regional Center (Regional Center or Service Agency).

Oral and documentary evidence was received at the hearing. The record was left open for Service Agency to submit rebuttal evidence to Claimant's Exhibit 33 and for Claimant's mother to respond, and for the filing of written closing argument.

On April 3, 2014, Service Agency submitted a Clinical ID Note dated April 3, 2014, prepared by Fidel Huerta, M.D. (Huerta), Regional Center Medical Director, which has been marked for identification as Exhibit P.

On April 14, 2014, the parties submitted closing argument, which documents have been marked for identification only as Exhibits 35 (Claimant) and Q (Service Agency), and the matter was submitted for decision. On April 16, 2014, the Administrative Law Judge learned that Claimant's mother had not received a copy of Exhibit P prior to filing her closing argument and had not had the opportunity to object to its admissibility. The submission was vacated and Claimant's mother was given until April 23, 2014 to submit any objections to the admissibility of Exhibit P.

¹ Names are not being used for Claimant or her mother to protect Claimants' privacy.

On April 22, 2014, Claimant's mother submitted argument regarding Exhibit P, but did not specifically object to the admissibility of Exhibit P. The document, which was marked for identification only as Exhibit 36, has been considered as supplemental closing argument. Exhibit P is received in evidence.

The matter was submitted for decision on April 22, 2014.

ISSUES

1. Should Regional Center fund speech therapy services for Claimant?
2. Should Regional Center fund occupational therapy services for Claimant?
3. Should Regional Center fund a mentor program for Claimant?²

FACTUAL FINDINGS

1. Claimant is 12 years old. She was born in Hawaii and moved to Regional Center's catchment area in August 2010. She was in the second grade in Hawaii and received special education services, including paraprofessional support, speech and language services, physical therapy, occupational therapy, and behavioral support services.

2. a. On August 17, 2010, Nick Garcia, Ph.D. (Garcia), evaluated Claimant for the purpose of determining eligibility for Regional Center services. Dr. Garcia noted that Claimant demonstrated difficulties with regards to ambulation. She appeared to walk with her legs rather stiff and demonstrated excessive psychomotor agitation. She had difficulty staying seated, and most of the evaluation was conducted while both were on the floor. Claimant had difficulty remaining on any one task for more than 15 seconds. She appeared somewhat agitated during the evaluation, and when given a request typically put her hands over her head and appeared to hold her breath while leaning forward.

² Claimant raised two additional issues in the Fair Hearing Request, the funding of educational advocacy and the funding of swimming classes. On September 7, 2013, Claimant's mother submitted a Notice of Resolution, withdrawing the issue of advocacy services from the Fair Hearing Request because the parties had reached an agreement regarding the issue. At the hearing, Claimant's mother withdrew her request for consideration of the second issue, funding of swimming classes, because she does not wish to pursue this matter at present, as it is not the season for swimming in Tehachapi. Service Agency did not object to the withdrawals.

b. Claimant did not utter any words during the evaluation. She made guttural noises, although she did not appear to use the noises to communicate. Claimant demonstrated significant receptive and expressive language deficits.

c. Claimant did not make any eye contact. Occasionally, she looked out of the corner of her eye and smiled when she enjoyed the task at hand. Her affect was constricted. She was noted to smile on two occasions during the evaluation. When asked questions such as age, name, and school, Claimant did not acknowledge Dr. Garcia's questions.

d. Dr. Garcia attempted to administer the Wechsler Intelligence Scale for Children, Fourth Edition, but Claimant was not willing to participate and Dr. Garcia was unable to obtain a valid or reliable result.

e. Dr. Garcia administered the Autism Diagnostic Observation Schedule, Module 1, the Childhood Autism Rating Scale, and the Vineland Adaptive Behavior Scales, Survey Interview Edition. Dr. Garcia diagnosed Claimant with Autistic Disorder and Moderate Mental Retardation. Despite not being able to obtain a valid measure of cognitive ability, Dr. Garcia derived his mental retardation diagnosis on the basis of Claimant's poor academic performance, her difficulties in paying attention and following prompts, her self-care abilities, and her significant deficits in expressive and receptive language.

3. On October 5, 2010, an interdisciplinary Regional Center Diagnostic Team for Eligibility found Claimant eligible for services by reason of Autism and Moderate Mental Retardation.³ The team recommended the following services and supports: an educational program, speech follow-up, behavioral intervention, and a social skills program.

4. a. Claimant is under the care of Jason Lerner, M.D. (Lerner), a neurologist. He is following Claimant due to seizure activity and is prescribing carbamazepine, an anticonvulsant medication sold under the brand name of Tegretol. In a note dated January 21, 2014, Dr. Lerner states that Claimant is diagnosed with cerebral palsy, spasticity, behavioral disorder and autism spectrum disorder.

b. A March 20, 2014 Pediatric Diagnostic Evaluation to Rule Out Cerebral Palsy was received in evidence. The note was signed by a physician, but his name does not appear on the note and the signature is not legible. On physical examination, the doctor

³ Claimant's mother asserts that Claimant is also eligible for services under diagnoses of cerebral palsy and epilepsy. As noted below, there is evidence of seizures and she is being followed by a neurologist. Claimant's mother points to reports of Claimant's low muscle tone and spasticity as evidence that supports a diagnosis of cerebral palsy. Claimant's mother has submitted information to Service Agency, which has not yet made a determination about eligibility or about the need for further assessment based on these conditions.

described Claimant's muscle tone in her lower extremities as hypotonic and hypertonic. He diagnosed mild cerebral palsy and recommended referral to California Children's Services (CCS), a program administered by county health departments and the California Department of Health Care Services, and Service Agency for treatment.

c. In his Medical ID Note, Dr. Huerta reviewed the medical records available to him, including those set forth in factual finding numbers 4.a., 4.b., 9.a. and 10.a., and concluded that present documentation does not indicate that Claimant has any physical handicaps or mobility limitations. He suggested that Claimant's parents submit additional documentation that indicates Claimant has physical impairments or, if unable to do so, to present Claimant for his medical assessment.

5. Claimant attends a local special education school. Among the services she receives are 30 minutes per week of speech and language therapy, 10 minutes per week of speech and language consultation, and 45 minutes per month of occupational therapy.

6. During the period of August 2012 to February 2013, Service Agency funded the services provided by Motivational Application and Positive Support Services (MAPSS). As noted in a report dated January 7, 2013, MAPSS used several Applied Behavioral Analysis strategies to help decrease challenging behaviors and promote appropriate ones, and provided social skills training, functional communication training, tolerance training, and self-help skills training. The program involved one-on-one work with Claimant as well as parental training and consultation. It was not established at the hearing if Claimant continues to receive any of these services, whether funded by Service Agency or by anyone else.

7. a. The parties have been at odds since early 2013 regarding the content of Claimant's Individual Program Plan (IPP). The latest plan on which there was some agreement, and thus currently in effect, was derived following a meeting on February 11, 2013. The IPP written by Service Agency contains objectives for Claimant to continue to live with her family, to maintain an optimal level of health, to receive an appropriate education, to become more independent and self-sufficient, and to participate in community outings. Claimant's mother disagreed with significant portions of the language Service Agency personnel wrote in the IPP, and suggested extensive additions, including additional outcomes. She signed the IPP on October 25, 2015, subject to inclusion of her "Addendum," which contained the suggested additions. As it pertains to the issues on which fair hearing was requested, the outcomes suggested by Claimant's mother are more specific articulations of the broad outcomes contained in the IPP authored by Service Agency, such as a desire for Claimant to improve her language skills, to improve her fine and gross motor skills, to learn self-help skills, and to learn safety skills. Moreover, there does not appear to be disagreement regarding the services Service Agency is actually providing. Accordingly, further references are to the IPP drafted by Service Agency, with references to the language proposed by Claimant's mother if necessary. The parties are now working on a new IPP.

b. The first outcome discussed in the IPP is for Claimant to continue to live with her family, and Service Agency agreed to provide respite services to support this goal.

c. With respect to the health outcome, the IPP states that Claimant is prescribed Carbotrol for the control of seizures. The document states that Medi-Cal will be the primary source of funding, and that Service Agency will seek funding for mileage reimbursement and certain insurance copayments.

d. In the education objective, the IPP sets forth the education services Claimant received at the time, speech and language services, and Regional Center's commitment to attend Individual Education Plan meetings if requested.

e. In the area of independence and self-sufficiency, the IPP lists Claimant's challenges, and provides the following list of services and supports: Claimant's mother will develop and implement a systematic strategy for addressing Claimant's problem behavior, with assistance, if needed, from the Regional Center service coordinator in linking Claimant's mother with appropriate resources; if needed and appropriate, the service coordinator will seek Service Agency funding for the services of a behavior modification consultant; Claimant's mother will maintain a record of incidents of inappropriate behavior; and Service Agency will monitor Claimant's progress through semi-annual meetings with her mother. As noted above, Claimant's mother wants specific outcomes related to language skills, fine and gross motor skills, self-help skills, and safety skills.

f. With respect to the community outings outcome, Service Agency agreed to provide information about the Special Olympics and to monitor Claimant semi-annually. Claimant's mother agreed to provide Claimant with opportunities in the community.

8. Claimant's mother requested speech therapy, occupational therapy and the help of a mentor to provide services and supports while Claimant is not in school. Service Agency denied funding for these services and set forth its reasons in a letter dated June 21, 2013. Citing Welfare and Institutions Code⁴ sections 4646.4, subdivision (a), and 4648.5, subdivision (a), Service Agency concluded that the services could be funded more cost-effectively through generic resources, including the local school district, CCS, and private insurance. Service Agency also asserted that the Boys and Girls Club can provide access to a mentor. Claimant's mother filed a Fair Hearing Request requesting funding for the services.

9. a. In support of her request for speech therapy, Claimant's mother submitted a speech and language assessment dated January 2, 2014 from Jessica Gonzalez, M.A. (Gonzalez), a Speech Language Pathologist with Community Therapies. Gonzalez concluded that Claimant's receptive and expressive language skills are profoundly delayed.

⁴ All further references are to the Welfare and Institutions Code.

Claimant communicates primarily through pointing, and can use a few pictures and some sign language. She uttered a few words. Gonzalez recommended individual speech therapy services four times per week for 60-minute sessions.

b. An earlier evaluation had similarly concluded that Claimant needs speech and language services. In April 2012, Lynley Cochran, M.A. (Cochran), with the Academy for the Advancement of Autistic Children (AACA), concluded that Claimant had severe expressive and receptive language deficits. Claimant was unable to use speech to produce a variety of words and demonstrated poor imitative behavior to practice sounds and sound combinations. Cochran recommended twice weekly speech therapy services for 20 to 30 minutes.

10. a. Jessica Prange, OTR/L (Prange), a Registered and Licensed Occupational Therapist with Community Therapies, conducted an occupational therapy evaluation on January 2, 2014. Claimant was not able to complete any fine motor tasks, leading Prange to conclude that Claimant had severely delayed fine motor skills. Claimant was able to participate in activities described as messy play, swinging, and ball pit, quickly switching between sensory activities, which indicated significant sensory-seeking behavior. Prange observed that Claimant was unable to button or zip her clothes, or tie her shoes, activities Claimant should have been able to perform given her age. Prange recommended occupational therapy for one hour per week for six months.

b. An earlier evaluation conducted by Kiegan Blake (Blake), Registered Occupational Therapist with the Maui Center for Child Development, on July 24, 2009, when Claimant was seven years old, documented deficits in gross and fine motor skills. Claimant had hypotonia, or low muscle tone, and her movements were jerky and uncoordinated. She had poor postural control and did not utilize rotation when moving around. Visual challenges also impacted mobility and gross motor activities. Blake recommended school and after school occupational therapy sessions twice per week.

c. A December 17, 2012 physical therapy evaluation conducted by Jacobo Physical Therapy contains consistent findings regarding Claimant's motor skills. The evaluator observed spastic tone in both legs, more in the left leg. Physical therapy sessions of 45 minutes twice per week for two weeks were recommended.

11. Claimant's mother submitted a letter dated October 23, 2013, from CCS denying funding for occupational and speech therapy. In addition to providing instructions for appeal, the agency directed Claimant's mother to seek funding from Medi-Cal and Service Agency.

12. Claimant's mother did not present any evidence regarding the monitoring program she seeks for Claimant, except to state that it would be like a one-on-one aide. She did not present any evidence from a clinician articulating the need for the aide. Nor did Claimant's mother present evidence regarding how the aide or mentor would help Claimant or, more

importantly, how such an aide would provide services that are more cost effective than those more targeted to Claimant's special needs, such as social skills training, functional communication training, or self-help skills training like those provided by MAPSS.

LEGAL CONCLUSIONS

1. In enacting the Lanterman Developmental Disabilities Services Act (Lanterman Act), section 4500 et seq., the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals, and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (§ 4501.)

2. The Lanterman Act gives regional centers, such as Service Agency, a critical role in the coordination and delivery of services and supports for persons with disabilities. (§ 4620 et seq.) Thus, regional centers are responsible for developing and implementing IPPs, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (§§ 4646, 4646.5, 4647, and 4648.)

3. Section 4512, subdivision (b), defines the services and supports that may be funded, and sets forth the process through which they are identified, namely, the IPP process, a collaborative process involving consumers and service agency representatives. The statute defines services and supports for persons with developmental disabilities as "specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives." Services and supports can include speech and language therapy and other assistance that can encompass mentoring. (*Id.*)

4. The evidence clearly establishes that Claimant has speech and language deficits and that she requires services and supports to address the deficits. The two most recent assessments recommend therapy twice per week for 20 to 30 minutes each time (Cochran) and four times per week for 60 minutes at a time (Gonzalez). Claimant currently receives 30 minutes per week from the school district. No expert testimony or documentary evidence was presented discussing the various recommendations or expressing an opinion regarding the necessary or optimum number of therapy hours. Because Gonzalez's assessment is the most recent, it is most likely to address Claimant's current needs. However, because Gonzalez's recommendation is for a level that is much higher than Cochran's recommendations or past levels of therapy services, it will not be followed as the starting level of services absent additional evidence. Rather, two weekly sessions of one hour each will be deemed appropriate at this time. This level was derived by doubling the recommendation made in the evaluation that preceded Gonzalez's, Cochran's, to roughly take into account any regression since 2012

due to diminished services. Taking into account school-based services, there is an unmet need of 90 minutes per week. Claimant has exhausted available generic services and as payor of last resort, Service Agency must fund the unmet, after-school need.

5. The deficits that warrant occupational services were also established at the hearing, as set forth in factual finding numbers 2.a. and 10. Claimant receives 45 minutes of occupational therapy per month from her school district. Prange's recommendation is for one hour per week for six months. Blake made an earlier recommendation of therapy twice per week in school and at home, but did not specify the number of hours. Prange's recommendation is accepted as it takes into account Claimant's current strengths and weaknesses. Claimant's unmet, after-school need, is therefore 195 minutes in a four-week month, and Service Agency, as the payor of last resort for its consumers, shall fund the services for six months. Further assessment at the end of the period may be undertaken in accordance with the requirements of the Lanterman Act.

6. The evidence does not establish that a mentor program or a one-on-one aide is presently a cost-effective service or support necessary to meet Claimant's needs. It is unclear what specific service Claimant's mother seeks or how the service would address Claimant's needs. Moreover, there was no evidence from a clinician supporting the need for the service. It is also unclear how an aide or mentor would provide services that are more cost effective than those more targeted to Claimant's special needs, such as social skills training, functional communication training, or self-help skills training like those provided by MAPSS. Accordingly, Service Agency need not fund these services at this time.

7. Relying on sections 4646.4, subdivision (a), and section 4648.5, subdivision (a), Service Agency argues that the services at issue are generic services that others are obligated to fund. Section 4646.4, subdivision (a), requires Service Agency to establish an internal process to systematically review the services and supports consumers receive to ensure that generic services and supports are used whenever appropriate. Section 4648.5 subjects certain services, such as recreational or educational services, to greater scrutiny before a regional center can fund the services.

Service Agency has apparently established the systematic review required by section 4646.4, subdivision (a), and the services at issue have been subjected to scrutiny under section 4648.5. However, these statutes do not bar funding the speech and language services or the occupational services at issue. Claimant's family has sought generic services as appropriate and is receiving some of the services from the school district, but has been denied other necessary services. As noted in legal conclusion numbers 4 and 5, the services Claimant will receive from Service Agency are those not being funded by generic agencies. Moreover, the services are not "educational services" within the meaning of section 4648.5 in that she will not be using them to learn academic subjects in school; rather, she needs the services to address the challenges she faces outside of school as she attempts to live an independent and productive life.

8. Accordingly, Service Agency shall fund speech and language services and occupational therapy in accordance with the foregoing, by reason of factual finding numbers 1 through 11 and legal conclusion numbers 1 through 7

ORDER

1. Service Agency shall fund 90 minutes per week of speech and language services provided by Community Therapies or another provider selected in accordance with the requirements of the Lanterman Act.

2. Service Agency shall fund 195 minutes per month of occupational therapy services provided by Community Therapies or another provider selected in accordance with the requirements of the Lanterman Act.

3. Service Agency need not fund the services of a mentor program.

Dated: _____

Samuel D. Reyes
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.