

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

CLAIMANT,

and

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2014050301

DECISION

This matter came on regularly for hearing on June 18, 2014, at Alhambra, California before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California. Claimant was represented by her mother (Mother). (Titles are used to protect confidentiality.) Eastern Los Angeles Regional Center (ELARC) was represented by Carmen Luna, Supervisor, ELARC.

Oral and documentary evidence was presented and the matter was submitted for decision on June 18, 2014.

ISSUE

The parties agreed to the following statement of the issue: Claimant received 1:1 floor time services from Intercare Therapy, Inc. (Intercare), an ELARC vendor, which services terminated on March 31, 2014. Intercare recommended that the 1:1 services be terminated. Should ELARC grant the request of Claimant's parents to provide Claimant with an evaluation from a different vendor to determine whether Claimant should receive further 1:1 floor time services?

FACTUAL FINDINGS

The Administrative Law Judge finds the following facts:

1. Claimant is a 16-year-old girl eligible for services from ELARC based on her diagnosis of autism. Claimant began receiving services at about 2.5 years of age. As discussed in more detail below, the only service provided by ELARC was floor time through Intercare, and recent adaptive skills training. Further services for socialization are under consideration.

2. On April 15, 2014, ELARC sent a Notice of Proposed Action to Claimant's parents indicating it denied the request "to switch from [Intercare] to a different DIR/Floor time agency." (Ex. 1.) The reason stated for the denial was that Claimant had received Intercare floor time since January 2011, had made steady progress, and in the progress report of March 2014 Intercare recommended terminating the service. Intercare also recommended that Claimant transition to either community integration or social skills training. Claimant's mother submitted a Fair Hearing Request dated April 23, 2014, limited to a request for an evaluation by a different vendor of whether floor time should be continued. (Ex. 2.)

3. Claimant's last Individual Program Plan (IPP) followed meetings on February 14 and April 10, 2014. (Ex. 4.) It indicates that ELARC provided floor time from Intercare; adaptive skills training and a social skills program were to be determined; ELARC would fund for her parents to attend relevant conferences; and that her school district was providing speech therapy and adaptive physical education. Among the issues concerning Claimant that are documented in the IPP are: she needs assistance with organizing and pacing herself; needs to learn patience; needs assistance with self care tasks; food needs to be chopped as she eats too quickly and overfills her mouth; she has some difficulty with fine motor tasks; she does not have friends outside of school, her friends there are superficial, and she tends to isolate herself; and her interests are more geared towards the activities that younger children enjoy.

4. In evidence are progress reports from Intercare, dated: June 1, 2011; November 1, 2012; May 1 and November 1, 2013; and February 26 and March 25, 2014. (Ex. 6.) Claimant received five hours of services per week, including supervision, provided in her home. The progress reports have substantial information on services provided, goals, Claimant's progress towards goals and modification of goals, parent training and participation, and recommendations. Salient information is noted below. (In this Decision, the earlier reports are discussed in a more summary fashion. Greater detail is discussed from the later reports to better depict Claimant's progress and developments in the more relevant recent time period.)

5. The June 1, 2011 report (Ex. 6, pp. 78-85) noted progress in areas of attachment/engagement, communication, elaborating ideas and emotional thinking. There was no progress in complex problem solving, and a regression in self-regulation/attention. Mother was involved in each session, and both parents were urged to observe the sessions and gather relevant data between sessions. Intercare recommended that services continue at 20 hours per month.

6. The November 1, 2012 report (Ex. 6, pp. 66-77) referred to the prior six months of services and reported specific information in the general areas of communication, social, and caregiver information. Claimant's progress in specific areas of communication and social were often erratic, showing improvements and regressions, however her performance improved over time. In communication, two goals and nine objectives are discussed; Claimant did not meet either goal, and met two objectives. In social, Claimant met two of seven goals and none of the 17 objectives. Claimant's parents were present during sessions and were given goals.

7. Progress for the next six months was reported on May 1, 2013. (Ex. 6, pp. 56-65.) The progress report notes that Claimant will be entering high school in the fall; that her parents had paid for after school programs that will not be available at the high school; and that there may be fewer opportunities to develop relationships with peers. In communication, two goals are discussed, and Claimant did not meet either goal; she met four of 15 objectives. In social, Claimant did not meet any of the four goals and met one of the 12 objectives. Claimant's parents were present during sessions and were given goals.

8. Progress for the next six months was reported on November 1, 2013. (Ex. 6, pp. 44-55.) Again, few of the goals and objectives listed were met. Some goals and objectives were placed on hold while others were receiving more emphasis. It is clear from these four reports that Claimant's services were being adjusted to accommodate areas in which she was making progress as well as areas in which progress was slow. With respect to caregiver education, Claimant's parents had been consistent in providing data to the team and were trained in utilizing tools developed by the team during naturally occurring opportunities during the day. New parent goals were to facilitate at least one community outing or peer interaction per month, and to focus on the socialization goal of problem solving during Claimant's regular day. Parents were to implement strategies in settings such as the home and in the community. There would be collaboration with Intercare to ensure consistency between the settings. After the specialists demonstrated strategies, they would assist the parents in implementation, observe the implementation by the parents, and give them feedback for successful implementation until the parents could operate independently. The recommendation for continuing services was for 20 hours of services for each month of January and February 2014, reduced to 10 hours in March, with the goal of transitioning the responsibility for Claimant's skill development to her parents.

9A. The report dated February 16, 2014 (Ex. 6, pp. 33-43), states it is not a progress report; rather, it is to update the clinical team "of current progression of goals." The subject of communication has four subparts, as follows. (1) Functional communication: Claimant met the goal of requesting to escape from or end a task (goal = 80% of opportunities in three consecutive days). Specific objectives met were increasing Claimant's response of "I don't know" instead of making up answers, and combining that with asking appropriate questions of the other person (objective = 80% of opportunities in three consecutive days). (2) Describing: to communicate complex ideas, Claimant was to recall the order of several events. With the help of picture cards, she could describe up to three events, but struggled with four. Without cards, Claimant could describe two actions in order,

100% of the time, but only 40% with three actions. (3) Event recall: without prompting, Claimant will recall chronological events only relating to food or television. For the task of identifying components in a paragraph of a story and summarizing them, Claimant could identify 50% of the significant information and struggled to construct a coherent statement of the information. (4) Express complex ideas: Claimant was to take her time performing tasks and converse using full sentences. She was able to do so 70% of the time; however, her mastery during December was followed by a drop after Christmas, indicating the skill was not generalized and was not maintained in the natural environment.

9B. In the February 16, 2014 report, the subject of social has five subparts, as follows. (1) Conversation: an objective of answering “why” questions was modified to reflect only concrete concepts, which was better for Claimant. Claimant had progress in changing conversation topics until a decrease for several days in January when her family took over the goal, indicating a failure to master the skill to generalize it to other skills. An objective to increase eye contact was not addressed so that other objectives could receive focus. Claimant was not providing sufficient context when recalling events, which was addressed by reference to other goals and objectives. (2) Asking others to perform actions: some mastery in May was illusory as Claimant did not generalize this skill to other people. Progress was better, however with a high degree of variability. The team deferred work on the objective of having Claimant tolerate when her requests for others to perform an action is denied. (3) Nonverbal cues: Claimant is consistent in responding appropriately when people appear interested, however she exhibits variability in responding appropriately when others are confused or bored. (4) Social awareness: because Claimant had difficulty remaining attentive, the team placed on hold her goal of recalling statements of others and following multiple step instructions. She could comply with three-step instructions, but the team was working on her recall of previous actions, and the objective relating to complex tasks had not yet been targeted by the team. (5) Problem solving: Claimant had appropriate solutions to a school-based scenario, but struggled to follow group activities in the community without explicit instructions. No additional observations in the community were possible for reasons stated below.

9C. In the section of caregiver education, it was reported that a protocol was developed “to systematically transition instructional control to caregivers and ensure maintenance and generalization,” starting in December 2013. (Ex. 6, p. 42.) The transition was on track through January 21, however Mother opted out on January 28 citing an increase in Claimant’s self-injurious behavior of eye rubbing causing persistent redness. The parents were consistent in relaying relevant data, and their data collection was increasing before they “opted out of treatment.” There was no opportunity for the goal of the objective of family facilitation of a community outing or implementing the social goal related to it.

10A. The last progress report is dated March 25, 2014. (Ex. 6, pp. 21-32.) It closely followed the February 26 report and added the following information of significance. Many areas and subjects included a treatment plan to the effect that Claimant’s parents continue to maintain mastered skills, encourage increased performance, facilitate opportunities in her natural environment and ensure generalization of skills. Several of the

treatment plans for Claimant's parents include working on objectives and goals that were the subject of the clinical team's interactions with Claimant, often in areas in which Claimant had not yet met a goal or objective. The treatment plan specific to caregiver education included that they "continue to maintain protocols associated with [Claimant's] social and communication skills, particularly those pertaining to the rules 'Staying on track,' 'Taking your time,' and 'Being a good friend.'" (Ex. 6, p. 31.) Further, the parents were to generalize skills to Claimant's natural environment by giving her "an opportunity to exercise these skills independently and thereby come into contact with naturally occurring contingencies of reinforcement." (Ex. 6, p. 32.)

10B. In a section of the March 25, 2014 progress report on the rationale for terminating services, Intercare stated the opinion that further services using a 1:1 model "will only be effective if the emphasis is on community integration through parent training and implementation." As Mother "disagreed with this recommendation . . . therefore services are no longer appropriate under the current model." Claimant demonstrated progress in conversational exchanges, responding to non-verbal cues, sequencing, and paraphrasing utilizing visual cues. She demonstrated proficiency relating to self-regulation protocols. She demonstrated deficits in recalling events. Intercare recommended she be assessed for a structured social skills program to facilitate generalization in naturally occurring settings, "in conjunction with a parent training protocol to ensure maintenance of established skills." (Ex. 6, p. 32.)

11. In preparation for an informal meeting with Judy Perez (Perez), ELARC's Fair Hearing Coordinator, Mother prepared a letter listing her concerns (dated May 8, 2014; Ex. A). After the meeting, Perez wrote a letter (dated May 14, 2014; Ex. 3), including Mother's concerns and other information. In the meeting and in her testimony at the hearing, Mother stated her concerns that she was not ready to take over the tasks of the clinical team, nor did she think the plan was realistic. Many of the goals and objectives in the Intercare reports were not met, or were modified, were in progress or were put on hold. Although Mother is aware of the last services and therapies provided by Intercare, she feels unprepared to assist Claimant in progressing past the last accomplishments with Intercare. Mother had seen a lapse of skills over breaks in school or services, as well as when services decreased in February and March. It is difficult for Mother to function as a guide to Claimant when Claimant is in a natural peer setting, such as a church youth group or choir or an after school activity. Mother would have to be next to Claimant to provide the feedback and the prompting used in the Intercare therapy. However, Mother was doubtful that other teenagers would interact naturally with Claimant, or interact with her at all, if Mother was present. Mother stated they tried it but it did not work. Mother was also concerned that a structured social skills program with peers with special needs would not be the best setting for Claimant to practice her skills. She believed that interaction with typical peers would be better, and a trained therapist could mimic such interaction to help prepare Claimant.

12. In her testimony, Mother added that she and Claimant's father are very active with Claimant, and work with her every day. The picture depicted in the Intercare progress reports is not accurate in that regard. Further, as Mother became more active in Intercare's

transition to Mother and reduction of service hours, Claimant began the new self-injurious behavior of rubbing her eyes so hard that there was blood. Claimant had not exhibited self-injurious behaviors in the past. Mother was concerned not only about this new behavior but also that it indicated an increased level of anxiety for Claimant. After trying the transition for about five sessions, Mother believed that Claimant did not like it, so Mother stopped. Mother also believes that Claimant views her as her mother and not as a therapist. Mother agrees; she is already teaching, correcting and training Claimant in her role as Claimant's parent.

13. Mother also stated some concerns about the new services offered by ELARC. The social skills agencies were not convenient, and the one she spoke with had activities that did not seem to foster much interaction and would take time from Claimant's schedule that is otherwise devoted to doing homework. The adaptive skills program offered by ELARC at the March 10, 2014 IPP was delayed and did not actually start until the day of hearing, June 18, 2014.

14. Mother believes that Intercare did not offer a neutral evaluation of Claimant's need for continued 1:1 floor time. She would like a neutral assessment, and is willing to accept the outcome, whether it includes more floor time or not.

LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judges makes the following legal conclusions:

1. Proper jurisdiction was established by virtue of ELARC's denial of the request for a new assessment and the Fair Hearing Request on behalf of Claimant. (Factual Findings 1 and 2.)

2. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act¹) requires otherwise. (Evid. Code, § 115.) The burden of proof is on the person whose request for government benefits or services has been denied. (*See, e.g., Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) Claimant has the burden of proof in this matter.

3. Portions of the Lanterman Act are referenced below relating to the family's role in designing and implementing the IPP, the parents' role in participating in the provision of services, and measuring the progress and effectiveness of services.

4. Section 4646 provides, in part:

¹ All statutory references are to the Welfare & Institution Code, except where otherwise noted. Section 4700 et seq. is known as the Lanterman Developmental Disabilities Services Act (Lanterman Act).

“(a) 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 the 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.”

5. In preparing a consumer’s plan for services, under section 4646.5, regional centers should determine and assess the life goals, capabilities, preferences and concerns of the consumer and family. “Assessments shall be conducted by qualified individuals and performed in natural environments whenever possible.”

6. Section 4647, subdivision (a), provides:

“Pursuant to Section 4640.7, service coordination shall include those activities necessary to implement an individual program plan, including, but not limited to, participation in the individual program plan process; assurance that the planning team considers all appropriate options for meeting each individual program plan objective; . . . and monitoring implementation of the plan to ascertain that objectives have been fulfilled and to assist in revising the plan as necessary.”

7. Services and supports provided by a regional center shall be flexible and individually tailored to the consumer and family. The regional centers must consider whether the consumer and his family are satisfied with the services being offered, and whether reasonable progress is being made. (§4648, subs. (a)(2) and (a)(7).)

8. It is the intent of the Legislature that regional centers provide family support services that: respect and support the decision-making authority of the family; are flexible and creative in meeting the unique and individual needs of families as they evolve over time; and are designed to meet the cultural preferences, values, and lifestyles of families. (§4685, subd. (b).)

9. Section 4501 states, in part, that the complexities of providing these services requires coordination of many state and community agencies, and that a consumer and family “shall have a leadership role in service design” and should be “empowered to make choices in all life areas.” Further, the Legislature specifically found that the mere existence and delivery of services was not enough—those agencies must “produce evidence that their services have resulted in consumer or family empowerment.”

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10. The floor time services provided to Claimant are considered applied behavioral analysis, as defined and discussed in section 4686.2. Among other things, subdivision (b) of section 4686.2 requires regional centers to purchase services that “promote positive social behaviors, and ameliorate behaviors that interfere with learning and social interactions,” and that include parent participation, as it is “critical.” Further, services should be discontinued only “when the consumer’s treatment goals and objectives . . . are achieved.” The services “shall not be discontinued until the goals and objectives are reviewed and updated . . . and shall be discontinued only if those updated treatment goals and objectives do not require ABA or intensive behavioral intervention services.” Parent participation is discussed in subdivision (d), and may include, among other things, implementing intervention strategies according to the intervention plan, collection of data on behavioral strategies and submission of that data to the provider for incorporation into progress reports, and participation in clinical meetings.

11. The fade out of Claimant’s services was quick: a reduction from 20 hours per month, to one month at 10 hours, and then termination. The transition to more parent-centered implementation appeared to have immediate negative consequences. Where Claimant previously had not displayed any self-injurious behaviors, she was now rubbing her eyes to the extent that blood was present. There is little mention of any action planned or implemented by Intercare to deal with this new, negative behavior. Rather, Intercare termed this development as Mother “opting out” of the plan for transition of services.

12. At the time that services were quickly reduced and terminated, Claimant’s skills were still in the process of being established. The transition plan was not given time to be properly implemented. Although it included plans for her parents to take Claimant into the community, there was insufficient time for this to happen. There was little of the planned collaboration between Intercare and the parents. Intercare’s recommendation to terminate services was premature, and then the plan to transition to the parents was not given sufficient time or collaboration as to be implemented with any hope of real success. The key component of transition never occurred; i.e., the specialists demonstrating strategies, assisting the parents in implementation, observing the implementation by the parents, and giving them feedback for successful implementation until the parents could operate independently (see the November 1, 2013 report). Nevertheless, Intercare recommended termination and ELARC agreed. As of February 2014, Claimant was not meeting many, even most of her goals and objectives with the full clinical team from Intercare providing services, including program monitoring and modification. Many goals and objectives were deferred or modified downward.

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13. Under the circumstances, it was unreasonable to expect Claimant's parents to manage new settings, and maintain and build on Claimant's skills, without more professional support. The recommended social skills and adaptive skills services are not substitutes, and in a practical way were either not a good fit for Claimant or were delayed in implementation. Claimant should be re-evaluated for possible further floor time services, as requested by Claimant's parents, by a vendor other than Intercare.

ORDER

ELARC's decision to deny an evaluation from another vendor is overruled. ELARC shall provide for an evaluation by a vendor other than Intercare to determine whether Claimant should receive further 1:1 floor time services.

DATED: June 30, 2014.

DAVID B. 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.