

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2014060491

DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on August 19, 2014, in Culver City, California.

Lisa Basiri, Fair Hearing Coordinator, represented the Westside Regional Center (WRC or Service Agency). Claimant¹ was represented by his mother (Mother).

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on August 19, 2014.

ISSUE

Must the Service Agency provide Claimant with an hour of speech and language therapy services per week?

FINDINGS OF FACT

1. Claimant is a three-year, eight month old boy, and a consumer of the Service Agency. Specifically, Claimant has been diagnosed with Autism Spectrum Disorder, and is eligible for services pursuant to the Lanterman Developmental Disabilities Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.² Claimant currently resides with Mother within the Service Agency's catchment area.

¹ Party title is used in lieu of Claimant's name in order to protect Claimant's privacy.

² All statutory references are to the Welfare and Institutions Code.

2. On March 28, 2014, the Service Agency issued a letter to Claimant stating that it was denying Claimant's request for one hour per week of speech and language therapy, pursuant to Welfare & Institutions Code section 4659, requiring that insurance and all generic sources, including education services, be exhausted prior to the Service Agency's funding of services. On June 9, 2014, Claimant filed a Fair Hearing Request. All jurisdictional requirements have been met.

3. In early 2013, after the Service Agency's psychological evaluation of Claimant showed that Claimant suffered from Autism Spectrum Disorder, the Service Agency determined that Claimant was eligible for regional center services. Consequently, in July 2013, Claimant began participating in the Early Intervention Program, approximately five months prior his third birthday. As such, Claimant received services to address his needs, including those concerning related to his impaired expressive and receptive language skills. Specifically, the Service Agency provided Claimant with 50 minutes per week of speech and language therapy, as well as occupational therapy and social skills training.

4. On November 8, 2013, Dr. Joshua Mandelberg, who specialized in developmental and behavioral pediatrics, conducted an independent assessment of Claimant, at the behest of Mother. Dr. Mandelberg, who concurred that Claimant suffered from Autism Spectrum Disorder, advised Mother that Claimant required an hour of speech therapy per week in addition to the 50 minutes the Service Agency had been providing Claimant. His written recommendation stated that Claimant should receive speech therapy two times per week. Dr. Mandelberg also recommended that Claimant be reassessed in six months.

5. Thereafter, in November 2013, Mother requested that her insurance company fund the additional hour of speech therapy recommended by Dr. Mandelberg. However, the insurance company denied Mother's request, because her insurance plan was an employer self-funded plan governed by federal laws, and was therefore exempted from state mandates requiring the funding such services. Mother advised the Service Agency of the insurance company's denial. In addition, Mother inquired into whether Medi-cal would provide speech therapy services, but learned it would not.

6. On Claimant's third birthday, December 3, 2013, Claimant aged out of the Early Intervention Program, and, as a result, Claimant's speech therapy services ended. Consequently, Mother participated in an Individualized Education Program (IEP) meeting with the Wiseburn Unified School District (District) to determine, among other things, the services Claimant would receive from District when school commenced the following week. Because the District had completed a comprehensive assessment of Claimant prior to the meeting, Mother did not advise the IEP team of Dr. Mandelberg's recommendation. The District offered Claimant 20 minutes of individual speech therapy per week, and two 20-minute sessions of group therapy per week, for a total of 60 minutes of speech therapy per week.

7. The IEP included three speech and language goals: (1) to increase social reciprocity skills by responding to social greetings, and by gesturing and verbalizing 70

percent of the time; (2) to use two to three word utterances in the classroom and speech room settings, in four out of five consecutive opportunities; and (3) to follow one-step directions to identify nouns, verbs, and prepositions 80 percent of the time.

8. The IEP also included three classroom goals: (1) to participate in teacher led activities, such as talking, singing along, imitating, and making eye contact; (2) to comply with teacher-directed assignments of non-preferred activities; and (3) to demonstrate joint attention during adult-facilitated cooperative play.

9. Mother consented to the IEP. School-based speech therapy began for Claimant on December 8, 2013.

10. On February 25, 2014, the District provided Mother a progress report showing that Claimant had met his objectives in the area of speech and language, though it is unclear whether the District meant that Claimant met short term objectives, or whether he met the goals completely. No one from the District testified at hearing.

11. On March 20, 2014, the District provided a progress report showing that Claimant had met his short-term objectives on his first two classroom goals, and partially met his short-term objective on his third goal.

12. Because Mother did not observe the kind of progress she had hoped Claimant would have made, particularly in the area of speech, Mother requested the Service Agency to provide Claimant with the additional hour of speech therapy, pursuant to Dr. Mandelberg's recommendation. Mother also provided the Service Agency with Claimant's IEP, as well as his progress reports from the District.

13. On March 28, 2014, the Service Agency wrote a letter stating, among other things, that its speech therapy consultant reviewed Claimant's IEP and progress reports, and noted that Claimant was making progress toward his goals. However, the letter further stated that the consultant believed Claimant would benefit from additional speech services, and recommended that Claimant receive clinic-based speech therapy through the District.

14. Pursuant to Dr. Mandelberg's recommendation, Claimant returned to Dr. Mandelberg for a follow-up visit on May 1, 2014. Mother shared with Dr. Mandelberg that, among other things, she was concerned that Claimant's poor receptive language skills posed safety problems, because he demonstrated difficulty in heeding danger warnings, such as commands not to run into the parking lot, or to touch a hot stove. Dr. Mandelberg conducted a comprehensive evaluation on that day, continued the evaluation on May 20, 2014, and then prepared a written report.

15. Dr. Mandelberg administered the Mullen Scales of Early Learning, Autism Observation Schedule – Module 2 – Second Edition (ADOS-2), and reviewed information obtained from Claimant's teacher, his behavior therapy team, his speech therapist, and his occupational therapist.

16. The results of the testing showed Claimant's receptive and expressive language skills to be equal to those of a child of 31 and 29 months, respectively. In addition, Dr. Mandelberg found that Claimant had social communication challenges, particularly with eye contact and reciprocal engagement, as well as language processing challenges. Dr. Mandelberg indicated that while Claimant had progressed in these areas since his November 2013 evaluation, speech therapy was necessary to help Claimant further develop pragmatic language, as well as advance his speech and language processing skills. As such, Dr. Mandelberg recommended that Claimant receive an additional hour of individual speech therapy through his school, or through supplemental services outside of school. Dr. Mandelberg explained to Mother that strengthening Claimant's language skills would help him overall, particularly in heeding dangerous warnings.

17. In May 2014, after Dr. Mandelberg's evaluation, Mother requested an IEP meeting so that she could request an additional hour of speech therapy, and to modify Claimant's goals to make them more challenging. On June 18, 2014, the IEP team convened. Mother requested an additional hour of individual speech therapy for Claimant, and gave the team a copy of Dr. Mandelberg's written report. District members of the team explained that the speech therapy program was "group-centric," and they did not use a model that included the amount of individual therapy Mother was requesting. However, the team agreed to review Dr. Mandelberg's report and reconsider Mother's request. In the meantime, the District offered to increase Claimant's individual speech therapy by ten minutes, for a total of 30 minutes of individual therapy per week. Claimant's goals remained the same.

18. On August 5, 2014, the District sent Mother a letter denying her request for an additional 60 minutes of individual speech and language services for Claimant.

19. At hearing, Mother reiterated her concerns about Claimant's receptive language skills and his ability to process verbal commands, particularly those designed to keep him safe when at home or out in the community.

20. At hearing, Ms. Basiri offered testimony, and explained that Claimant's classroom and speech and language goals sufficiently addressed his receptive language, joint attention, language exchanges, social language, pragmatics, and individual speech. As such, given the Claimant's progression or mastery of these goals, Ms. Basiri concluded that Claimant's speech language needs were being met, and therefore did not require an additional hour of speech therapy. However, Ms. Basiri is neither a speech and language pathologist nor any other kind of expert in speech and language pathology. The Service Agency presented no testimony from any speech therapist from the District, or from any qualified Service Agency speech therapist, explaining the meaning behind each of the goals, how Claimant's goals transcended the classroom setting, if at all, or, in particular, how they addressed safety concerns outside of the classroom setting. In addition, no expert on the part of the Service Agency provided any testimony refuting the report of Dr. Mandelberg or his recommendations.

LEGAL CONCLUSIONS

The Service Agency is required to fund an hour of speech therapy for Claimant, as discussed in more detail below:

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. 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, Welfare and Institutions Code section 4659, subdivision (e), provides added protection for families and states: “This section shall not be construed to impose any additional liability on the parents of children with developmental disabilities, or to restrict eligibility for, or deny services to, any individual who qualifies for regional center services but is unable to pay.” Moreover, 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.

5. Here, Claimant met his burden of establishing that the Service Agency should be compelled to fund an additional hour of speech and language therapy. The evidence showed that an additional hour of speech therapy was necessary as set forth in the comprehensive report of Dr. Mandelberg, which was consistent with the conclusion reached

by the Service Agency's speech consultant two months prior. The evidence also showed that Mother exhausted available generic sources for funding of the additional hour of speech therapy, including her insurance company, the District, and Medi-cal, but was denied the requested service. As such, and because the regional center is the payor of last resort, as set forth in Legal Conclusion 4, the Service Agency must fund the unmet need, to wit, 60 minutes per week of individual speech therapy.

ORDER

Claimant's appeal is granted. The Service Agency must fund 60 minutes per week of individual speech therapy for Claimant.

Date: September 3, 2014

_____/s/_____
CARLA L. GARRETT
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.