

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

SAN ANDREAS REGIONAL CENTER,

Service Agency.

OAH No. 2015060657

DECISION

Administrative Law Judge Kirk E. Miller, State of California, Office of Administrative Hearings, heard this matter on June 29, 2015, in Campbell, California.

James Elliott, Director's hearing representative, represented San Andreas Regional Center (SARC).

Claimant was present and was represented by his father.

The matter was submitted for decision on June 29, 2015.

ISSUE

Did SARC err when it denied claimant's request to attend a communication skills conference called "My Voice, My Future...Supporting Communication."

FACTUAL FINDINGS

Background

1. Claimant is a 33-year-old man who qualifies for regional center services by reason of intellectual disability, autism and seizure disorder. Claimant lives separately from his parents and receives 24-hour supported living services to assist him in all aspects of daily living. Claimant can only eat pureed food and uses a rudimentary grasp on a spoon when eating. He is able to walk, but has an uneven gait and has difficulty with balance.

2. Claimant only speaks a few words, but augments his speech with large targets to indicate “yes and no” to questions, and he uses a communication board to type messages.

3. Claimant is requesting SARC to pay for him and one of his caregivers to attend a conference on July 23 – 25, 2015, in Whittier California, entitled “My Voice, My Future –Supporting Communication.”¹ The conference brochure describes the meeting in part as follows:

The conference speakers and trainers will include professionals, family members, and communicators. The Skill Building Strands will include strategies that are based on Facilitated Communication and/or Rapid Prompt Method. Your breakout sessions will be on a variety of topics that relate to school, building teams, advocacy, and other therapies that relate to communication, best practice, and more.

¶ ¶

Our invited presenters will be speaking on topics such as research in the areas of supporting communication using AAC, theory in practice, movement and rhythm, providing appropriate support to the classroom setting, sensory integration, advocacy, and so much more. . . .²

¹ The Fair Hearing Request states: “Provide funding for this conference to allow [claimant] to build his communication skills and work toward independent communication. Allow him access to the same services that are funded for another consumer at the same regional center.” The Fair Hearing Request does not state what expenses, or the amount of payment, that is requested.

² Augmentative and Alternative Communication (AAC), is communication in forms other than speech, such as non-aided body gestures, facial expression, and sign language, and may also involve the use of a tool or device, which may take the form of a pencil and paper, pointing to letters or pictures, or the use of a keyboard.

4. At least a portion of the conference is focused on facilitated communication. Facilitated communication is a technique by which a “facilitator” provides physical and other supports in an attempt to assist a person with a significant communication disability to point to pictures, objects, printed letters and words, or to a keyboard. Supporters of the technique believe this permits individuals with autism and other disabilities to demonstrate previously undetected literacy and communication skills.³

5. On June 11, 2015, SARC provided claimant with a Notice of Proposed Action (NOPA), denying his request for the conference. The NOPA states the denial was based on Welfare and Institutions Code sections 4501, 4686.2, subdivision (d)(3), and 4620, subdivision (b):

The Legislature finds that the mere existence of the delivery of services and supports is, in itself, insufficient evidence of program effectiveness. It is the intent of the Legislature that agencies serving persons with developmental disabilities shall produce evidence that their services have resulted in consumer or family empowerment and in more independent, productive, and normal lives for the person served. (Welf. & Inst. Code, § 4501)

“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. Evidence – based practice promotes the collection, interpretation, integration, and continuous evaluation of valid, important, and applicable individual or family – reported, clinically – observed, and research – supported evidence. The best available evidence, matched to consumer circumstances and preferences, is applied to ensure the quality of clinical judgments and facilitates the most cost – effective care. (Welf. & Inst. Code, § 4686.2, subd. (d)(3))

“. . . private nonprofit community agencies shall be utilized by the state for the purpose of operating regional centers.” (Welf. & Inst. Code, § 4620, subd. (b))

Claimant appealed the decision and this hearing followed.

³ See Position Statement on Facilitated Communication, American Speech – Language Hearing Association

Claimant's Evidence

6. Claimant communicated using only body language until 2010, when he began using (AAC). Claimant worked with a trainer to develop his skills using AAC. In 2011, claimant, together with his mother and father, attended a conference at the Massachusetts Institute of Technology (MIT) that was similar to the requested conference. As a result of the MIT based conference, claimant was able to build on what he had previously learned, and with practice his "own voice" became clearer, and less influenced by others. Claimant's mother feels that his communication skills were enhanced by the facilitated communication techniques which were presented at the MIT conference. Claimant seeks to attend the Whittier conference to build on these skills and to meet others who are communicating with them.

7. Facilitated communication involves a personal interaction between the person attempting to communicate, and a second person, who may touch his elbow or hand, and assist in pointing to a keyboard or other device, to complete the communication. Claimant's mother testified that he conveys needs and ideas about himself that only he could know, and that the thoughts and desires he types are independently confirmed using the large target. Claimant has difficulty controlling his arm and hand movements, and for this reason he uses a wooden keyboard. Claimant now initiates conversations where he did not do so before. These enhanced communication skills have made them happier, and as a result he no longer needs to take anxiety medication.

8. Claimant's mother contrasts his current communication skills with those prior to 2010, when he would simply point to picture icons to express his needs. He lost interest in working with these, and has since conveyed the message that he was bored with them. His verbal comprehension is greater than his speaking ability. He learned to spell by sitting with his younger sister while his mother helped her to learn to read and they both watched Sesame Street.

9. Claimant's limited verbal capacity did not permit him to testify at the hearing. However, he submitted the following letter regarding his request:

Attending the symposium will give me ideas about how to better my future. I found my voice just four years ago and with help from Janna, my family staff like Masai my life is now in my hands. I have never really had an opportunity to learn new skills. I believe that this will help me be the college student that I know I can be. I am asking for your help because this is such a great opportunity.

10. Claimant's Individual Program Plan (IPP) is dated December 1, 2014 and in Part II, section D, "Personal Growth," the IPP states:

[Claimant] is able to communicate in a variety of methods. He communicates with limited verbalization or body language. He mainly communicates with augmented communication [*sic*] though. He uses a large target letter board, a large target yes/no card, a large target selection board, a yes/no screen on a phone, and an iPad. All of [claimant's] SLS staff are working towards open-ended communication with [claimant]. Five of his current staff are already at this level. [Claimant's] typing has been reported to be much improved lately. Claimant is involved in a number of activities. He initiates conversation with others. He has many friends in Loud Talking Fingers. He is out in the community often, and many people seem to know him.

11. Part III, Outcome 4, of the IPP states:

[Claimant] will continue to express his thoughts and feelings through his use of communication through 12/31/17.

To do: [Claimant] will continue to be encouraged and assisted in using his communication system. [Claimant] will be praised when using his communication system to express his thoughts and feelings.

SARC's Evidence

12. Carrie Molho, Ph.D, has been a licensed clinical psychologist in California 2000. She has developed significant expertise in the area of autism spectrum disorder, and she provides guidance to the service agency in the development of policies and procedures relating to autism, as well as supervising other staff psychologists.

13. Facilitated communication is a form of communication that comes under the umbrella of AAC generally, and involves a facilitator to assist the person to make choices in whatever system is used. Dr. Molho testified that facilitated communication is not an "evidence-based" system. That is, it has not been proven effective in peer reviewed studies, and in some instances it has been found to be dangerous. In particular, studies have shown it cannot be reliably used in cases involving abuse, and in other instances, it appears that the communication reflects the intention of the facilitator rather than the "speaker." Dr. Mohlo cited several academic articles supporting her position, which summarize the literature where facilitated communication is evaluated.

14. Dr. Melho believes hundreds and perhaps thousands of service agency clients use AAC, and that the service agency provides funding for AAC when it is evidence-based. Dr. Melho opined the service agency cannot provide funding for facilitated communication, because it is not evidence-based. She agreed claimant's IPP includes the use of AAC, but

she did not believe the IPP expressly describes or makes reference to facilitated communication.

15. Michael Kelly is a licensed Marriage and Family Therapist, who has a master's degree in clinical psychology, and he has been employed by SARC for 19 years. He is currently the director of consumer services, and in this capacity reviews consumer requests to attend conferences. Among the criteria that SARC uses in considering payment for conferences is whether it will be beneficial to the consumer or his family, and if it addresses needs identified in the IPP. He testified SARC will pay a "certain amount" for conference attendance, but did not know what that amount is, although he did not believe that SARC paid for travel expenses. He thought conferences must be sponsored by a vendored provider. He stated the approval process considers "individual situations." SARC is developing, but has not adopted, a written conference policy, and it did not use the draft policy in its evaluation of this request.

16. Kelly was responsible for reviewing claimant's request to attend the conference at issue, and denied the request because he concluded, based on the conference brochure and input from Dr. Melho, the techniques being taught at the conference were not evidence-based.⁴

17. Kelly testified he was aware of only five SARC clients who are receiving funding for AAC, but also acknowledged he may not be aware of all of them. He stated that teaching someone to type does not constitute facilitated communication from his perspective, but that placing a facilitator's hand over the hand of the typist might be appropriate. He did not believe that one would be able to learn to type through facilitated communication.

Analysis

18. SARC cannot rely on either Welfare and Institutions Code section 4501, section 4686.2 subdivision (d)(3), or section 4670, subdivision (b), to deny claimant's request to attend this conference.⁵ Section 4501 requires service agencies to demonstrate that "their services have resulted in consumer or family empowerment"; it does not speak to services provided by others. Section 4686.2, subdivision (d)(3), is part of the statutory provision that deals specifically with applied-behavioral analysis (ABA) services. To the extent the statute defines "evidence – based," it is referring solely to ABA services. This definition cannot be plucked from one statutory provision and applied generally to all other services that might be funded by a service agency. Section 4670, subdivision (b) merely states that regional centers are not to be operated by the state. That concept is not in issue either. In short, for the reasons explained, none of these provisions are relevant to claimant's request, and accordingly do not form a legal basis to support the denial.

⁴ Dr. Melho advised him that the presenters at the conference were "affiliated with Facilitated Communication."

⁵ All statutory references are to the Welfare and Institutions Code.

19. The IPP underscores claimant's need for continued communication skill improvement to enhance his independence, and the evidence was that claimant has substantially improved his ability to communicate over the past four years. (Findings 8 and 9.) Certainly AAC has been a life-changing difference for claimant, and he and his mother believe that facilitated communication has been an integral part of the gains he is experienced. (Findings 6-9.) Under these circumstances, claimant established that attendance at the conference will further the goals and objectives of the IPP.

20 SARC does not have a clearly defined policy about when it pays for conferences or what it pays for. The testimony was that determinations are made on an "individual basis," and that conference fees, but not travel expenses, are reimbursed. (Finding 16.) In the Fair Hearing Request, claimant requested "funding for this conference," and SARC will be ordered to pay the conference fee for claimant and a caregiver.

LEGAL CONCLUSIONS

1. The standard of proof is a preponderance of evidence.
2. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Act). (§ 4500 et seq.) In addition to persons with developmental disabilities, the Act also makes individuals with cerebral palsy eligible for services. (§ 4512, sub. (a).) Claimant is eligible for services under the Act by virtue of his intellectual disability, autism, and seizure disorder.
3. The Act directs regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP states the consumer's goals and objectives and delineates the services and supports needed by the consumer to implement his goals and objectives. (§§ 4646, 4646.5, 4512, subd. (b).) Each consumer is assigned a service coordinator, who is charged with the task of implementing and monitoring each IPP. (§4647.)
4. Claimant's 2014 IPP identifies the need for claimant to continue the development of communication skills using AAC, and claimant established that the requested seminar will support this IPP goal. (Findings 6 - 9.) The authorities cited by SARC as a basis to deny claimant's request do not relate to any issue raised by the request. (Finding 18.) To the extent SARC has a policy regarding the payment for conferences, it is limited to payment of the conference fees. (Finding 16.). Accordingly, SARC is obligated to pay the conference fee for claimant and for one of his caregivers to attend the requested July conference in Whittier.

ORDER

Claimant's appeal is granted. SARC shall pay the conference fees in the amount of \$700 for claimant and one caregiver to attend "My Voice, My Future..." on July 23-25, 2015.

DATED: July 3, 2015

_____/s/_____
KIRK E. MILLER
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.