

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

SOUTH CENTRAL LOS ANGELES
REGIONAL CENTER,

Service Agency.

OAH No. 2015080203

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on September 14, 2015, in Los Angeles, California. Claimant was represented by his mother and authorized representative.¹ South Central Los Angeles Regional Center (Service Agency or SCLARC) was represented by its Fair Hearing Coordinator, Johanna Arias.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on September 14, 2015.

ISSUE

Should SCLARC be required to fund afterschool programming for Claimant at Milestones Behavior Management Program?

EVIDENCE

Documentary: Service Agency Exhibits 1-11; Claimant's Exhibit A.

Testimonial: Pamela Romero, Service Coordinator; Arlene Jackson, Program Manager; Claimant's mother.

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¹ Names are omitted throughout this Decision to protect Claimant's privacy.

FACTUAL FINDINGS

1. Claimant is a five-year-old male client of the Service Agency who was diagnosed with Autistic Disorder in 2012. Claimant resides with his mother and his older brother, who is also a regional center consumer.

2(a). Claimant's Individualized Program Plan (IPP) was not submitted as evidence. However, two 2013 IPP addendums and a 2014 IPP review were submitted and provided the bases for Factual Findings 2(b) through 2(e). These documents did not list Claimant's behavioral goals or identify any services to address behavioral issues in the home or the community. Instead, the documents addressed only respite and Medicaid waiver issues.

2(b). In 2013, Claimant continued to suffer from deficits in toileting and safety awareness, and demonstrated behaviors such as elopement and emotional outbursts.

2(c). In November 2014, at four years old, Claimant was still not toilet trained and needed complete assistance with self-help skills. He required constant supervision to prevent injury. Claimant continued to wander away from his home if left unsupervised or if his hand was not held while walking in the community.

2(d). By 2014, Claimant had become aggressive. When upset, he would hit whoever was nearby. This occurred approximately twice per day. He also engaged in tantrums two to five times per day, lasting five to ten minutes. His tantrums included throwing items, pinching, scratching and hitting anyone near him.

2(e). In Fall of 2014, Claimant was attending a preschool special day class through his school district, with a one-on-one aid. He received one and a half hours per day of intensive behavioral intervention (IBI) services in the classroom setting. Claimant also received occupational therapy (OT) and speech therapy services through his school district. Claimant had difficulty complying with classroom tasks due to the interference of his maladaptive behaviors, but he had improved since the prior year. Claimant was also attending an afterschool program four times per week, funded by his parents. The afterschool program had 20 children and five aides.

3(a). On February 20, 2015, an Individualized Education Program (IEP) meeting was convened and attended by a school administrator designee, Claimant's mother, his IBI specialist, his Speech and Language Pathologist, his Occupational Therapist and his Early Childhood Education Teacher, Paula Dodson. The parties discussed Claimant's transition into kindergarten and the longer classroom time involved.

3(b). The IBI specialist and Ms. Dodson also discussed Claimant's goals and both indicated that he had met his past IBI and classroom goals. The past goals were not specifically listed in the IEP.

3(c). According to the IEP:

The IBI Specialist has stressed how much [Claimant] has improved overall with his school readiness skills. [Ms. Dodson] explains that [Claimant] will sit and attend without eloping. He is able to attend during whole groups, handle frustration and denial of activities or items well. He is able to transition, work for short periods of time and stay on task. He is improving in all areas. The team discussed the need for [Claimant] to begin reducing the amount of IBI time, and increase his classroom time. Beginning in March, [Claimant] will attend his classroom portion for [one] hour and [a] half of his day, he will increase this by ½ hour increments monthly until June when he will be attending full time in his classroom. He will be dismissed from IBI completely on the last day of school.

(Exhibit 8.)

3(d). The IEP noted, "Mother is extremely happy with the improvement [Claimant] has made in the area of behavior. He is no longer demonstrating tantrum behaviors like last year." (Exhibit 8.)

4. Claimant has never received funding from SCLARC for any afterschool program. After Claimant was expelled from two prior daycare centers due to his behaviors, his mother placed him in an afterschool setting with a ratio of one adult for every three to four children. That facility agreed to work with Claimant to address his behaviors until he was five years old and then extended the provision of services through the summer of 2015. That program is no longer available to Claimant.

5. Since Claimant's mother anticipated the discontinuation of Claimant's afterschool program by June of 2015, she discussed Claimant's options with his Service Coordinator, Heidi Zander. Ms. Zander told Claimant's mother that the Milestones Behavior Management Program (Milestones) would be a good fit for Claimant. Claimant's mother agreed. Claimant's older brother had been attending Milestones for several years, with much improvement.

6. After 2009, regional centers were not allowed to fund afterschool programs unless they meet certain statutory exemptions. (See Legal Conclusion 4.) Although its Purchase of Service Policy was not submitted at the fair hearing, SCLARC's Program Manager, Arlene Jackson testified credibly that an "exception" to the funding preclusion is "a behavioral afterschool program." In determining

whether to provide funding for a behavioral afterschool program, SCLARC assesses whether the consumer exhibits behaviors which would qualify him/her to attend the behavioral program.

7. Milestones is a behavioral afterschool program.

8(a). Claimant's request for funding to attend Milestones was forwarded to SCLARC's Clinical Division, Autism Community Liaison, Pamela Colvin-Lee. She reviewed Claimant's February 20, 2015 IEP to determine if he met criteria to attend Milestones. Ms. Colvin-Lee did not review any other documentation to make this determination, nor did she identify the specific criteria she used. She did not observe Claimant in the classroom or in his afterschool program.

8(b). In an Interdisciplinary Note, dated May 18, 2015, Ms. Colvin-Lee noted:

In review of [the February 20, 2015 IEP], the IBI Specialist stresses [Claimant] has improved over all with his school readiness skills. He will sit without eloping, is able to attend during whole groups, handle his frustration when faced with a denial of activities or items. He is able to transition, work for short periods of time and stay on task and that he is improving in all areas.

Additionally, his IBI services have been reduced and are schedule[d] to terminate completely on the last day of school.

In the area of speech and language he has met his goals of discriminating, traveling and exchanging a picture to communicate 3-6 requests and mother has reportedly noticed him talking and expressing himself at home. The occupational therapist reports that he has met his goal of staying on task for a 4-step obstacle. Additionally, [Claimant] shows interests in books and will attend to this activity for 10-15 minutes. Socially, he has also shown improvement. He enjoys being tickled and hugged and demonstrates parallel play among his peers. He is independent during snacks and will ask for help [if] needed. IEP states that they will continue to work on turn taking during structured play and following two step directions. Early childhood education teacher reports that mother is extremely happy with the improvement [Clamant] has made in the area of behavior and that he no longer demonstrates tantrum behavior like he did last year.

In review of the consumer[']s behavior and skills it has been determined that the consumer does not meet the criterion for funding of the Milestones Behavior Afterschool Program. It should be explained that the requested afterschool program is provided according to POS guidelines, for consumers that exhibit significant behavioral challenges. It is recommended that [Claimant] continue in his current school program and the family continue to engage him in activities in the community with family and typical children to provide peer models. It appears that this consumer[']s behavioral and social needs are being met via the school setting. . . .

(Exhibit 10.)

8(c). In parts of her note, Ms. Colvin-Lee inaccurately characterized Claimant's behaviors, which tainted the impartiality of her determination. She paraphrased Claimant's improvements in a manner which could be misconstrued as being more positive than actually stated in the IEP. For instance, she noted that "He enjoys being tickled and hugged and demonstrates parallel play among his peers." (Exhibit 10.) This would seem to suggest that he enjoys being touched by his peers. However, the exact citation in the IEP is that Claimant "enjoys tickles and hugs from adults. [Claimant] will parallel play, playing next to peers but not with them." (Exhibit 8.)

9. While waiting for a formal decision on the funding request, Claimant's mother was informed around the end of May 2015 that the request would be denied. On May 28, 2015, Claimant's mother went to a local YMCA to see if that facility could accommodate Claimant in their afterschool program. She was informed that they did not accept children who were not potty trained. Additionally, their staff ratio was 1 adult for every 10 children, and Claimant's mother was told that they did not have a one-on-one program which would facilitate Claimant's needs. The Child Care Director of that YMCA suggested that Claimant's mother enroll him at Milestones.

10(a). On June 8, 2015, SCLARC sent Claimant's mother a Notice of Proposed Action (NOPA), stating that it was denying Claimant's request for SCLARC to fund afterschool programming at Milestones Behavior Management Program. SCLARC stated that Claimant was "not eligible for the requested level of services" because, after reviewing his IEP, the Clinician determined that Claimant "does not meet the criterion for funding of the Milestones Behavior Afterschool Program." (Exhibit 1.)

10(b). In support of its denial, the NOPA cited Welfare and Institutions Code sections 4512, subdivision (b), and 4646, subdivision (a).

10(c). At the fair hearing, Program Manager Jackson cited to the 2009 “Trailer Bill” as the basis for the funding preclusion. (Welf. & Inst. Code, § 4648.5, subd. (a).) However, the NOPA did not cite to that statute.

11. On June 29, 2015, Claimant’s mother filed a Fair Hearing Request on his behalf. (Exhibit 2.)

12. Following receipt of the NOPA, Claimant’s mother obtained a letter from Claimant’s Early Childhood Teacher, Ms. Dodson. Ms. Dodson’s letter noted that she had been Claimant’s teacher for the past three years. She further stated:

[Claimant] is a sweet boy who requires constant supervision. While he has made significant progress in his education, behavior, self-help, social and communication, he continues to be a child with Autism that still has significant delays in these areas. He was recently exited from the IBI program . . . , but continues to receive his education in a very restrictive environment. He is in a classroom that is behavioral based, with a current staffing ratio of 1 adult for every 2 students. [Claimant] continues to exhibit maladaptive behaviors, such as eloping, tantrum behavior, frustration from lack of communication and social skills. While these behaviors have improved enough to no longer warrant the Intensive Behavioral Program, they still are areas of delays that continue to be worked on in the classroom setting. [Claimant] requires an environment that can give him the adult supervision and attention that he requires. This program would need to have structure and focus on social, communication, safety awareness and self-help skills ([Claimant] is not potty trained at this time) in a format that [Claimant] could benefit from. I don’t believe a typical daycare or afterschool program could provide this environment for him. He requires a more specialized setting that is aware of the needs of a child with Autism, and has the skills to provide the appropriate environment for [Claimant]. . . .

(Exhibit 11.)

13. At the fair hearing, Claimant’s mother noted -- as pointed out by Ms. Dodson, but not recognized by Ms. Colvin-Lee -- that despite improvement, Claimant still demonstrates maladaptive behaviors in the classroom. He also continues to demonstrate maladaptive behaviors at home and in the community. Claimant’s mother additionally noted that, despite removal of the one-on-one IBI services at school, he remained in a classroom setting with a ratio of one adult for every two students, which is “nowhere near” the typical afterschool program ratio of “two to three adults for 30 children.” Furthermore, Claimant is still not potty trained, which precludes him from attending a traditional afterschool program. Claimant’s mother

further noted that Milestones is “community-based, to promote safety awareness, which [Claimant] lacks.” She noted that the IEP is “educational-based,” not community-based, so “it was not a good tool for [Ms. Colvin-Lee] to use to determine if Milestones was a good fit” for Claimant. For these reasons, Claimant’s mother asserted that Claimant is an appropriate candidate to attend Milestones.

14. Claimant’s mother’s biggest concern is finding the appropriate placement for Claimant, not the funding involved. She asked the Milestones program personnel if she could directly fund his attendance at their program without going through the regional center, but she was told that they had to work through the regional center.

15. Ms. Colvin-Lee did not testify at the fair hearing and therefore did not respond to Claimant’s mother’s observation that her conclusions were based on insufficient information regarding Claimant.

16. The evidence established that Ms. Colvin-Lee’s determination was based on incomplete and insufficient information regarding Claimant’s behavioral deficits and the services needed to address them. As noted above, Ms. Colvin-Lee did not review any documentation other than the single IEP to make her determination. She did not observe Claimant in the classroom or in his afterschool program. She noted improvements Claimant made with intensive one-on-one behavioral intervention at school, but did not follow-up with an analysis of how the reduction and termination of IBI may affect his improved behaviors, particularly in an afterschool setting. She did not address the fact that, despite the reduction and removal of the IBI, Claimant would remain in a structured classroom setting with a ratio of one adult for every two children. She did not address the fact that Claimant had been in an afterschool program which addressed his behaviors and had a ratio of one adult for every three to four children. She did not address how Claimant’s behaviors could be affected by the transition from a structured classroom setting and low-ratio afterschool program to a traditional afterschool program with no behavioral component and a much larger ratio. She also did not address Claimant’s toileting issue. Furthermore, Ms. Colvin-Lee did not identify the specific criteria she used to determine if Claimant’s behaviors qualified him to attend Milestones.

17. Given the questionable and incomplete bases for Ms. Colvin-Lee’s determination, her conclusion that Claimant “does not meet the criterion for funding of the Milestones Behavior Afterschool Program,” is flawed and is given no weight.

18(a). Claimant established that, unlike traditional afterschool programs, Milestones was program through which his toilet training and his maladaptive behaviors in a community-based setting could be addressed in an environment that would meet his individual needs.

18(b). Claimant has established that the Milestones program is a critical means for ameliorating the cognitive or psychosocial effects of his developmental disability and that no alternative service is available to meet his needs.

LEGAL CONCLUSIONS

1. Cause exists to sustain Claimant's appeal of the Service Agency's denial of funding for the Milestones Behavior Management Program. (Factual Findings 1 through 18.)

2. Where a change in services is sought, the party seeking the change has the burden of proving that a change in services is necessary. (See, Evid. Code, §§ 115 and 500.) In seeking new funding of an afterschool program, Claimant bears the burden of proving by a preponderance of the evidence that the afterschool program is necessary to meet his needs. Claimant has met his burden of proof.

3(a). Welfare and Institutions Code section 4512, subdivision (b) provides, in part:

[T]he determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option.

3(b). Welfare and Institutions Code section 4512, subdivision (b), further provides that the "services and supports" which may be provided to a consumer include "training, education, . . . behavior training and behavior modification programs, . . . [and] social skills training"

3(c). Welfare and Institutions Code section 4646 provides, in part:

(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.

4. Welfare and Institutions Code section 4648.5 provides:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers' authority to purchase the following services shall be suspended pending implementation of the Individual Choice Budget and certification by the Director of Developmental Services that the Individual Choice Budget has been implemented and will result in state budget savings sufficient to offset the costs of providing the following services:

(1) Camping services and associated travel expenses.

(2) Social recreation activities, except for those activities vendored as community-based day programs.

(3) Educational services for children three to 17, inclusive, years of age.

(4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

(b) For regional center consumers receiving services described in subdivision (a) as part of their individual program plan (IPP) or individualized family service plan (IFSP), the prohibition in subdivision (a) shall take effect on August 1, 2009.

(c) An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs.

5. Welfare and Institutions Code sections 4512, subdivision (b), and 4646, subdivision (a), provide that the determination of which services are necessary include consideration of the needs and preferences of the consumer. Claimant established that, unlike traditional afterschool programs, Milestones was program through which his toilet training and his maladaptive behaviors

in a community-based setting could be addressed in an environment that would meet his individual needs. Consequently, Claimant established, by a preponderance of the evidence, that the change in services is necessary to meet his current needs.

6. SCLARC gave Claimant no notice that Welfare and Institutions Code section 4648.5 was a basis for its denial of funding. Under that statute, the Service Agency's authority to fund social recreation activities, educational services and nonmedical therapies, including specialized recreation, was suspended. SCLARC Program Manager Jackson testified that this funding preclusion includes afterschool programs unless the afterschool program is a behavioral program and the consumer meets certain statutory exemptions. Despite the lack of notice, Claimant established that the Milestones program is a critical means for ameliorating the cognitive or psychosocial effects of his developmental disability and that no alternative service is available to meet his needs.

7. Given the foregoing, the Service Agency's denial of funding of afterschool programming for Claimant at Milestones Behavior Management Program was unfounded.

ORDERS

1. South Central Los Angeles Regional Center's denial of funding for Claimant's afterschool programming at Milestones Behavior Management Program is overruled, and Claimant's appeal is sustained.

2. South Central Los Angeles Regional Center shall begin funding Claimant's afterschool programming at Milestones Behavior Management Program.

DATED: September 18, 2015

_____/s/_____
JULIE CABOS-OWEN
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.