BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, Claimant, vs. KERN REGIONAL CENTER, Service Agency.	OAH No. 2015080426
In the Matter of: CLAIMANT, Claimant, vs. KERN REGIONAL CENTER, Service Agency.	OAH No. 2015080438

DECISION

These consolidated matters came on regularly for hearing on October 9, 2015, in Bakersfield, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

Claimant was represented by her mother and authorized representative. [1]

[1] Titles are used in lieu of the names of Claimant and members of her family in order to protect their privacy.

Kern Regional Center (Service Agency) was represented by Mark Meyer, Program Manager, Special Projects.

Oral and documentary evidence was received. The record was closed on the hearing date, and the matter was submitted for decision.

ISSUES

The issues presented at the hearing were:

1. Should the Service Agency fund hippotherapy[2] for Claimant?
2. Should the Service Agency fund neurofeedback for Claimant?

EVIDENCE RELIED ON

1. Claimant's Exhibits 1 and 2.
2. Service Agency's Exhibits A through J.
3. Testimony of Claimant's mother.
4. Testimony of Adel Huerta, M.D.
5. DSM-5[3] (Official notice taken).

FACTUAL FINDINGS

1. Claimant is an 11-year-old female consumer of the Service Agency by a diagnosis of "Fifth Category."[4] She carries a co-morbidity diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). Claimant also suffers from mild dystonia.

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[2] Hippotherapy is also known as equine therapy.

[3] The Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association, is a highly respected and generally accepted tool for diagnosing mental and developmental disorders. It is now in its fifth edition (DSM-5).

[4] "Fifth category" is one of the five disabling conditions for determining eligibility for regional center supports and services. It is defined as "closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability . . ." (Welf. & Inst. Code, § 4512, subd. (a).) The other four categories are intellectual disability (formerly mental retardation), cerebral palsy, epilepsy, and autism. (*Ibid.*)

Hippotherapy

2. When Claimant was in the third grade, she was granted a scholarship to Mastering Abilities Riding Equines (M.A.R.E.), a facility specializing in hippotherapy. She presented as clumsy and uncoordinated with low muscle tone and generalized weakness. She had undergone successful surgery for "knock-knees." However, gross motor skills tested below the first percentile, and fine motor skills tested on the fourth percentile on the Bruininks-Oseretsky Test of Motor Proficiency (BOTMP). (Exhibit 1.)

3. Claimant thrived in M.A.R.E. where her leg strength increased and her balance improved. Claimant's mother attributes Claimant's perfect school attendance that year to her activities at M.A.R.E. (Mother's testimony.)

4. On July 9, 2015, the Service Agency denied Claimant's request that it fund hippotherapy. The Service Agency based its decision on its finding that hippotherapy was an experimental therapeutic service when offered for improving intellectual functioning. The Service Agency did not recognize hippotherapy as an evidence-based treatment for Intellectual Disability, but rather viewed it as a social recreational program which it was prohibited from funding. (Exhibit A-3.) At the administrative hearing, Dr. Huerta credibly testified that hippotherapy is considered experimental for the treatment of Intellectual Disability, and that the Service Agency is prohibited by state law from funding for experimental treatments.

5. Claimant's mother testified that she had found documentation showing children with Intellectual Disability show signs of gross and fine motor skill delays. As her only example of that documentation she offered an untitled, undated article from Medscape Reference. (Exhibit 2.) According to that article, gross motor developmental delays "infrequently" accompany the other delays associated with Intellectual Disability. The article references the diagnostic criteria for Intellectual Disability set forth in DSM-5, but there is no reference in that section, or in the DSM-5 itself, to gross or fine motor skill delays being associated with the disorder.

6. Claimant's mother argued that, although she realizes that hippotherapy is a recreational type of therapy, children learn through recreation. Because Claimant's intellectual functioning is affected by her ADHD, she must be able to direct her attention in order to learn. By caring for a horse, Claimant learns the importance of caring for herself.

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7. As of April 7, 2015, Aetna Insurance Company considered hippotherapy "experimental and investigational for the treatment of [autism, behavioral and psychiatric disorders, cerebral palsy and other motor dysfunctions, and rehabilitation of cancer survivors] because there is insufficient scientific data in the peer reviewed medical literature to support the effectiveness of hippotherapy for the treatment of individuals with these indications."[5] (Exhibit H.)

Neurofeedback

8. Claimant's mother based her request for neurofeedback on 10 books she read. Neither those books, nor any excerpts from them, were offered into evidence at the hearing, and there was no expert witness testimony offered to establish that neurofeedback would be an established and potentially efficacious treatment for Claimant.

9. On July 9, 2015, the Service Agency denied Claimant's request that it fund neurofeedback on grounds that (1) the treatment was experimental for Claimant's fifth category diagnosis, and (2) the treatment was aimed at alleviating symptoms associated with ADHD, which is not a regional center-eligible condition, but which could be offered in special education services fundable through Claimant's health insurance or the school district. (Exhibit I-3.)

10. Claimant's school district declined to fund neurofeedback because it considered the treatment medical therapy. Recently, Claimant's health insurance carrier funded an appointment with a neurologist who will be administering a sleeping electro-encephalogram (EEG) and a magnetic resonance imaging (MRI) study of her brain.

LEGAL CONCLUSIONS

1. The Service Agency should not be required to fund hippotherapy for Claimant.

2. The Service Agency should not be required to fund neurofeedback for Claimant.

3. Claimant bore the burden of proof in this case. The standard of proof is a preponderance of the evidence. Claimant failed to sustain her burden of proof.

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[5] The Service Agency offered two other documents reflecting similar policies, one from Blue Cross/Blue Shield of North Carolina, and the other from the Wisconsin Department of Health Services. The Service Agency did not offer any evidence to establish the relevance of those documents in California. Accordingly, they are given no weight.

4. Welfare and Institutions Code section 4648, subdivision (a)(16) states:

> Notwithstanding any other law or regulation, effective July 1, 2009, regional centers shall not purchase experimental treatments, therapeutic services, or devices that have not been clinically determined or scientifically proven to be effective or safe or for which risks and complications are unknown. Experimental treatments or therapeutic services include experimental medical or nutritional therapy when the use of the product for that purpose is not a general physician practice. For regional center consumers receiving these services as part of their individual program plan (IPP) or individualized family service plan (IFSP) on July 1, 2009, this prohibition shall apply on August 1, 2009.

5. Welfare and Institutions Code section 4648.5, subdivision (a) states in relevant part:

> Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional center's 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: [¶] . . . [¶]
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> (2) Social recreation activities, except for those activities vendored as community-based day programs. [¶] . . . [¶]
>
> (4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

6. At the hearing, Claimant's mother made a compelling argument for the efficacy of hippotherapy and neurofeedback in Claimant's individual case. However, those arguments, coupled with her anecdotal evidence, do not establish those therapies as "clinically determined or scientifically proven to be effective or safe" as required by Welfare and Institutions Code section 4648, subdivision (a)(16). More clinical evidence is required before the Service Agency will be required to fund for hippotherapy and neurofeedback in connection with Intellectual Disability or fifth category diagnoses.

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ORDER

1. Claimant's appeal of the Service Agency's denial of her request that it fund hippotherapy and neurofeedback is denied.

2. The Service Agency shall not fund hippotherapy for Claimant.

3. The Service Agency shall not fund neurofeedback for Claimant.

Dated: October 12, 2015

H. STUART WAXMAN
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.