

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of :

CLAIMANT,

v.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2015120529

DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 19, 2016, in Alhambra, California. Mother and Father represented Claimant,¹ who was present at the hearing. Jacob Romero, Fair Hearing/HIPAA Coordinator, represented Eastern Los Angeles Regional Center (service agency or ELARC).

Testimonial and documentary evidence was received, the case was argued, and the matter was submitted for decision on April 19, 2016. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUE

The sole issue for determination is whether the service agency should continue to fund music therapy for Claimant.

FACTUAL FINDINGS

1. Claimant is a 17-year-old consumer of ELARC due to her qualifying diagnoses of profound Intellectual Disability and Cerebral Palsy. Claimant presents with

¹ Claimant and Claimant's parents are not identified by their names to preserve confidentiality.

significant impairment in motor, linguistic, social, and cognitive abilities. These impairments are present with a history of pulmonary problems, gastro-intestinal issues, and prominent hypotonia. Claimant is non-verbal and non-ambulatory. Claimant expresses her needs by smiling, whining, crying, and vocalizing. Claimant resides with her parents, on whom she is dependent for care. Claimant is enrolled in a special education program in her school district.

2. Claimant's most recent Individual Program Plan (IPP), dated June 5, 2015, provides for, among other things,² six months of ELARC-funded music therapy, commencing July 1 2015 through December 31, 2015, to allow for parent training as Claimant exits from this service because, in light of the nature of her global developmental delays, she is unlikely to achieve age-level skills—a criterion for termination of music therapy services. The IPP provides that ELARC is expected to discontinue funding Claimant's music therapy services after December 31, 2015.

3. Claimant was a two-year old, when Pasadena Child Development Associates (PCDA)³ conducted a Music Therapy Initial Assessment of Claimant to determine “whether music therapy service is able to provide a significant benefit toward the attainment of [Claimant's] individual goals.” (Ex. II.) Claimant's individual goals enumerated in the initial assessment report include increasing the quality and span of Claimant's interest in play and interaction, improving eye contact and demonstrated attention and focus, increasing purposeful vocalizations and indications to initiate and terminate play (signifying the beginning and end of an activity), improving skills of ideation and demonstrating choice, enhancing Claimant's motivation to exercise motor abilities, including trunk support and grasping items, and enhancing Claimant's enjoyment of interaction and quality of life. (*Id.*)

According to the initial assessment summary, Claimant “demonstrated motivation to participate in activities as well as prolonged attention and interest in interaction. It was made evident that music stimuli significantly enhances responses by [Claimant], that the use of music, toward training response and initiation functions for [Claimant], may prove to be very successful. [Claimant's] baseline, as demonstrated in music therapy assessment sessions, may successfully be expanded on through a period of individual music therapy treatment including parent consultation and collaboration.” (*Id.*)

² The IPP provides for the following additional ELARC-funded services and supports: development behavioral consultation services, commencing May 2015 through May 2016, at a frequency of seven and a half hours per month and in-home respite care services, commencing May 2015 through May 2016, at a rate of 24 hours per month.

³ The documentary evidence suggests that during the relevant time period that Claimant received music therapy Pasadena Child Development Associates was renamed Professional Child Development Associates. The acronym PCDA references both nomenclature.

4. On March 19, 2002, ELARC commenced funding music therapy through PCDA for Claimant at a rate of one hour per week. Beginning April 16, 2002, and continuing through at least November 15, 2015, PCDA routinely reported on Claimant's progress. During the initial periods of music therapy sessions, PCDA reported that Claimant demonstrated increased levels of responsiveness to time-structured, predictable and rhythmic music stimuli. (See e.g. Exs. 5, 6, and 7.) As Claimant's music therapy sessions continued, PCDA reported "demonstrated gains" including Claimant's increased awareness of cause and effect as evidenced by eye movements, Claimant's increased vocalizations and variety of vocalizations, Claimant's recognition of familiar songs, and Claimant's increased attention span. (Ex. 8.)

PCDA reported in later treatment sessions that Claimant's music therapy goal statements were rewritten to reflect Claimant's progress and areas of developmental challenges, but that the objectives of each goal and the focus of intervention services remained unchanged. (See Ex. GG.) Rewritten goal statements provided for increasing Claimant's communication with her family and others, enhancing Claimant's skills of anticipation and imitation to increase her social interactions with family and others, and increasing Claimant's purposeful vocalizations. (See e.g. Exs. BB, CC, DD, EE, FF, and GG.)

In a September 24, 2009 Music Therapy Progress Report, PCDA reports that Claimant "continues to increase two-way social communication by interacting with familiar adults or peers, through back-and-forth interactions, such as reaching with her arm to play an instrument or sustaining eye contact However, this is not yet consistent." (Ex. Y.) In addition, Claimant "was observed to display differentiated emotions, such as excitement, through requesting 'more' by touching her mother's hand or laughing or vocalizing to show frustration, at least four times per session. . . . [Claimant] was observed to laugh more frequently in interactions with her mother. Changes in routines, and new songs and activities often made [Claimant] laugh. Specifically, [Claimant] laughed while engaged in interactions with her mother, when her mother made funny sounds or faces. [Claimant's] responses became more consistent during this term, as well as, her requesting 'more' through reaching for others, or reaching for her mother's hand." (*Id.*)

5. On January 5, 2010, physicians at the General Child Outpatient Clinic (GCOC) at the Semel Institute of the University of California Los Angeles evaluated Claimant "regarding her behavior and development and to secure recommendations for intervention." (Ex. D.) A February 16, 2010 letter memorializing the evaluation states in pertinent part that "The continued provision of music therapy intervention is strongly recommended as parent and therapy reporting (Pasadena Child Development Associates Music Therapy Progress Report dated 09/24/09) indicates that [Claimant] is responding uniquely to this intervention modality to support her social, emotional, and communicative development. Successful intervention with children with significant developmental disorders rests on identifying those modalities to which they are most sensitive and responsive; music appears to be that special modality for [Claimant]. To decrease or remove this service is tantamount to silencing her development progress. The aforementioned report's

recommendation of a minimum of 5 hours of music therapy per month appears appropriate.”
(*Id.*)

6. After the GCOC evaluation, Claimant continued to receive music therapy through PCDA. In an April 17, 2012 Music Therapy Progress Report, PCDA indicated that Claimant met the goal of expressing her wants and needs through two-way social communications by interacting with familiar adults or peer and the goal of differentiated emotions. PCDA identified Claimant’s continuing and revised therapeutic goals and objectives as follows:

Goal 1: [Claimant] will increase her ability to sustain reciprocal musical interactions with a familiar adult.

Objective (Milestone 3): [Claimant] will explore and use musical instruments with purpose and intentionality with increasing complexity while interacting with familiar adults and family for a flow of 7-10 circles, 3 times per session.

Goal 2: [Claimant] will increase her ability to initiate through predictable music support.

Objective (Milestone 3): When provided with a pause within a musical song or activity, [Claimant] will express her wants and choices by initiating a new idea (through touching the ‘stop’ button on her communication builder to indicate she is ‘all done’ and then choosing a new activity when given a binary choice) or continuing the current idea (through gestures, vocalizations, or through hitting the ‘go’ button on her communication builder) 3 times per activity.

(Ex. S.)

7. A May 15, 2014 Music Therapy Progress Report notes that Claimant is “Progressing” on her two goals. (Ex. 15.) Claimant’s exploration and use of musical instruments with purpose and intentionality was “not consistent each week as there are limitations with her capacity to be spontaneous, and is also vulnerable to stress (fatigue, illness).” (*Id.*) Claimant’s expression of her wants and choices through continuing eye contact or by reaching out and touching a desired object “was not yet consistent each week.” (*Id.*)

8. In June 2014, an ELARC consultant reviewed progress reports regarding Claimant’s music therapy service and determined to fade out the service. A June 11, 2014 note states so:

[Claimant] has been receiving music therapy for a number of years and while progress has been made, it is also felt that the exit criteria for termination of services is for her to achieve age-level skills and this is not a likely outcome for [Claimant] secondary to her diagnosis of Global Developmental Delays. I would like [Claimant] to continue to receive music therapy however, specific

goals for home-program and family training needs to be an integral part of her sessions and a plan to fade services would also be appropriate given the other services she has in place that could also include a music medium to enhance her social, reciprocal and co-regulated interactions.

(Ex. 14.)

9. A November 14, 2014 Music Therapy Transition Report sets forth three goals for a training and home program and enumerates specific roles for Claimant's parents to promote the generalization of Claimant's skill development and maintenance. (See Ex. 15.) A subsequent May 26, 2015 Music Therapy Termination Report identifies Claimant's parents' concerns transitioning from therapy sessions to a home program as follows: assisting Claimant to stay calm and focused and to avoid self-absorption and preservation; engaging Claimant in back and forth reciprocal interactions with a clear purpose; engaging Claimant in problem solving; and assisting Claimant to sustain interactions with others when feeling frustrated, sad, or excited. (Ex. 16.)

10. On October 29, 2015, the service agency notified Claimant's parents of its proposed action to terminate its funding of Claimant's music therapy. In support of its proposed action the service agency cited to the language contained in Welfare and Institutions Code section 4648.5 as set forth in Legal Conclusion 2. Claimant's parents filed a Fair Hearing Request dated November 6, 2015. On December 9, 2015, ELARC personnel conducted an informal meeting with Mother in which Mother was advised that, after 11 years of therapeutic sessions, music therapy was no longer appropriate for Claimant. ELARC personnel noted that Claimant has achieved progress interacting with music commensurate with Claimant's growth and development in light of Claimant's significant global delays. ELARC personnel maintained that Claimant's parents are required, with training, to implement the modalities in Claimant's home and community in order for Claimant to transfer and generalize the musical and nonmusical skills she has acquired in therapeutic sessions.

11. Melissa St. John is a board-certified music therapist holding a Bachelor Degree in music therapy and a Master of Music with a focus in Neurologic Music Therapy. Ms. St. John is the founder of Meli Music, an entity providing individual and group music therapy since 2013. Ms. St. John has known Claimant since 2008. She has never provided music therapy to Claimant. On April 5, 2016, Ms. St. John, at Claimant's parents' request, conducted an assessment of Claimant and prepared Meli Music Music Therapy Assessment Report, which, in part, states the following:

Communication and Cognitive Skills

Throughout the music therapy assessment, [Claimant] was provided multiple opportunities to respond in a purposeful manner. This was successfully structured with pauses during rhythmic breaks in both familiar and non[-familiar songs. [Claimant] successfully responded by soundings her instrument, and/or vocalizing to initiate the continuation of the activity. Her response rate was 70% of opportunities. It was discovered during the

assessment, [Claimant] sustained the longest period of shared attention when the song did not contain lyrics, and the focus was strictly on rhythm, melody and harmony within the music. Additionally, the incorporation of steady rhythm is critical to the success with [Claimant's] organization to respond successfully. Once the pattern of interaction is established, [Claimant] responded with a higher degree of success, increased confidence and improved posture (sitting straight, open eyes, increased eye contact, etc.). Throughout the music therapy assessment, [Claimant] demonstrated the ability to use her vision and eye contact to respond. She was observed to acknowledge a pause in the music, look at assessor, look down at instrument, look back at assessor, and then respond by striking or sounding her instrument with 75% accuracy. [Claimant] has a diagnosis of cortical visual impairment which makes her hand eye coordination difficult. When she reaches for objects, she does it more like a blind person by using her tactile sense. It was evidenced in this session that music therapy enabled [Claimant] to look at the object. Mother mentioned that she had not seen this before.

[¶]

Social/emotional development

During the music therapy assessment, [Claimant] has been observed to demonstrate pleasure and enjoyment through smiling. She was observed to also demonstrate frustration when she was ready to transition to another activity. This was mainly through the lack of response, as well as pushing away her instrument.

[¶]

Sensorimotor

During the music therapy assessment, [Claimant] was observed to respond to movement prompts 2 times per session, within an average of 20-30 seconds. These movement prompts were successful when paired with steady and predictable rhythmic cues. Such cues include drumbeats, and rhythmic guitar. When paired with steady rhythm, with predictable pacing of prompts, [Claimant] was successful. She demonstrated to have challenges when the pacing of prompts is too fast or unpredictable.

[¶]

Music Making

During the music therapy assessment, [Claimant] demonstrated the ability to remain engaged with assessor and parent as long as music was present. This was through the incorporation of various instruments, such as a small xylophone, paddle drums, tambourine and cabasa/afuche. During the assessment, [Claimant] responded to music making activities with increased

enthusiasm, energy and eye contact. [Claimant] was observed to entrain rhythmically to match the assessor's pacing and timing of activities.

Recommendation

Based on this assessment, music therapy is a critical means of ameliorating [Claimant's] developmental disability or global developmental delay. It is the recommendation that [Claimant] receive music therapy for 60 minutes once per week.

(See Ex. A.)

12. Ms. St. John testified at the hearing and her testimony was consistent with her assessment report. At the hearing she opined that Claimant "still had room to grow" and that "there are still a lot of areas where music therapy can help [Claimant] to develop." According to Ms. St. John, discontinuation of music therapy before Claimant's skills are "fully integrated" would cause those skills to "disappear or regress." She noted that Mother understands and is motivated to implement the therapeutic modalities, but that Mother does not play an instrument and the home environment is different from a controlled, clinical environment. In light of Ms. St. John's limited role in Claimant's one and one-half decade history with music therapy, slight weight is accorded Ms. St. John's opinion.

13. Also at Mother's request, on February 3, 8, and 26, 2016, an assistant clinic director at the Music Therapy Wellness Clinic at California State University Northridge conducted an assessment "to independently assess [Claimant's] response to music, and to identify the use of specific musical elements to support her current [Individualized Education Plan]⁴ goals." (Ex. G.) The assistant clinic director prepared a March 2016 Music Therapy

⁴ The referenced Individualized Education Plan (IEP) was not produced at the hearing. A February 5, 2016 letter from Claimant's school district (Ex. H), which is addressed to Mother, mentions a January 20, 2016 IEP in the following context:

I am writing in response to your request made during the Individual Education Plan (IEP) dated January 20, 2016, that the District provides a Music Therapy Assessment that uses DIR approach.

Under the provisions of the Individuals with Disabilities Education Improvement Act of 2004 . . . the IEP team is not required to state a specific methodology on a student's IEP. The special education teacher or provider determines the methods to be used, and they are described in the goal statements and benchmarks in a generic manner so any qualified professional may implement the student's IEP. . . . [¶]

Further, [Claimant] is receiving musical exposure in the Recreation Domain. Based on special education classroom schedule, [Claimant] is exposed to music instruction which involves but is not limited to playing instruments such as the tambourine, rattle, chimes, bells, electronic guitar.

Assessment Report (2016 Assessment Report) containing the following excerpted conclusion:

In conclusion, the assessment highlighted the importance of music in many areas of [Claimant's] development, and supported indications from other professionals that she responds and learns through auditory mode. She maintained positive levels of awareness and displayed spontaneous body movements with differentiated facial expressions in response to musical stimuli. During this brief assessment the use of music was identified as a strong motivator, which can be used clinically to support [Claimant's] IEP goals. Within an interdisciplinary team, the individual application of music therapy is most appropriate for [Claimant] as it supplements and reinforces other interventions, while also implementing its own program. . . . The assessment has supported the parent's knowledge of the importance of this medium in [Claimant's] life. Music offers a non[-]verbal means of making contact and stimulating awareness. Gains are possible through the development of a sense of self that unfolds through relating to musical stimuli and through participating in a musical relationship.

(Ex. G.)

14. The 2016 Assessment Report recommends weekly 45-minute music therapy sessions to support Claimant's IEP goals. The assistant clinic director who assessed Claimant and prepared the 2016 Assessment Report did not testify at the hearing. The substance of the 2016 Assessment Report supports the conclusion that alternatives to ELARC-funded music therapy services are available to meet Claimant's needs. (See Legal Conclusion 5.)

15. Jean Voss is not a licensed therapist. She has known Claimant since Claimant's birth, and she has witnessed Claimant's parents' frustration when they did not know what to do with Claimant. In a March 31, 2016 letter, Ms. Voss recounts the following experiences she has observed with Claimant:

I was with [Claimant] during some music therapy sessions given in their home a few years ago. [Claimant] would be sitting and waiting, staring into space with no emotional or facial expressions. As soon as a person sang, or played any music either taped or on an instrument, [Claimant] would become immediately engaged with eye contact, focusing on the person, and even responding to commands to perhaps shake a rattle, pound on a drum, pull a toy that made different noises.

Just recently, while shopping with [Claimant and her parents] at IKEA store for a new dresser for her bedroom, I sat by [Claimant] while they examined items. When her parents moved farther away around a dresser and out of her sight, [Claimant] became upset, made loud noises and even flayed her arms and legs and was looking all over with her eyes. I thought I would try the only

thing I knew how—I began to sing familiar songs to her, she looked at me, and calmed down and seemed to me to be awaiting a signal to participate as she had with the music therapist.

Just this past year, [Claimant] and I sat on her front porch together on Halloween. She sensed something special was going to happen because she had been dressed up and complimented. [Mother] played music on a speaker from inside the house. These songs were not that familiar to [Claimant]. [Claimant] had one of her toys on her wheel chair tray which has levers to pull—each making a different sound. I was singing and when children came up the sidewalk, [Claimant] would pull the levers in her excitement and participated this way. It truly showed me that music is a communication tool that [Claimant] not only responds to, but uses to express herself.

One of my favorite things to experience with [Claimant] on a regular basis is something which may not be considered music therapy, but actually is a sound recognition. When her father is not home, and she hears the garage door opening, she immediately begins to laugh. She KNOWS that sound is associated with her father coming home.

Just this past week, I sat with [Claimant] for an hour while her parents went shopping. I had hoped to watch a TV download special of seasons I had missed. They had put on the television a series of musical items with cartoon characters which act out the song in dance. When I tried to change the program, [Claimant] was very upset and voiced herself loudly. ONLY when the music program had run its complete course of song and dance sessions could I change the program to something else. . . .

(Ex. F.)

16. Ms. Voss testified at the hearing and her testimony was consistent with her March 31, 2016 letter.

17. Catalina Hernandez has been Claimant's caregiver for the past eight years. Ms. Hernandez wrote an April 11, 2016 letter⁵ in which she asserts, "I have seen that music is critical to help improve [Claimant's] disability." The letter elaborates as follows:

[Claimant] has a gait trainer to help her move her feet to take steps. When I put [Claimant] in this device, [Claimant] puts her body floppy and does not move. But when I put at the same time a tv show with music like musically animated shows, or like Barney, [Claimant] becomes alert and moves her feet and moves the gait trainer backwards.

⁵ The letter was translated from Spanish to English.

I have observed that when [Claimant] sits in her wheelchair with tray and I don't play with her with music, she looks like a sick, weak girl. When I give her tambourines, bells, piano, guitar, or sing to her she becomes alert, laughs, and her face looks brilliant. When I give her a little piano to play she plays (touches it with her hands), and then plays/touches it again and again.

When I put her in her standing device (supine stander) she leans to one side and is floppy, weak. Then I give her a piano and [Claimant] straightens her body up, becomes alert, and plays the piano.

I have seen that when [Claimant] sits on the floor she wants to fall to side on lie down. But when I give her a little piano to play with she will stay sitting up and play the piano. She is very motivated to play the piano.

Sometimes [Claimant] appears frustrated by moving her arms on all sides, or using her voice loudly, or on rare occasion whining, then we sing, play music for her, or give her a musical instrument [Claimant] will calm down and relax. Her character looks different and better with music.

I think that music is a very important way to improve [Claimant's] disability. When we use music, [Claimant] is alert, brilliant, and looks intelligent. You can see that her mind is working and thinking. Music gives [Claimant] a lot of motivation to do the things that are difficult for her due to her disability. Without music, [Claimant] looks weak and sick.

(Ex. E.)

18. Ms. Hernandez testified at the hearing⁶ and her testimony was consistent with her April 11, 2016 letter.

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Services Act (Lanterman Act),⁷ developmentally disabled persons in California have a statutory right to treatment and habilitation services and supports at state expense. (Welf. & Inst. Code, §§ 4502, 4620, 4646-4648; *Association for Retarded Citizens of California v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389.)

2. To address a budgetary imbalance, the California legislature has made significant changes to the provision of services and supports under the Lanterman Act. Section 4648.5 sets forth the following limitations:

⁶ Ms. Hernandez received Spanish language interpretation services at the hearing.

⁷ Welf. & Inst. Code, § 4500 et seq.

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers' [sic] 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 cost 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 of 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.

3. As the party seeking to terminate an existing service provided to Claimant—music therapy, ELARC bears the burden of proving by a preponderance of evidence that the termination of such service is warranted. (Evid. Code, § 500.)⁸

4. Claimant bears the burden of establishing her extraordinary circumstances that would warrant an exemption from the state's budget spending reductions. (Evid. Code, § 500.)

⁸ Evidence Code section 500 provides that "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

5. For almost one and one-half decades, ELARC has funded musical therapy services for Claimant to promote her social skills, self-expression, and emotional regulation. The evidence establishes that Claimant has not only benefitted from ELARC-funded music therapy services, but that such services have been critical for ameliorating the physical, cognitive, and psychosocial effects of her developmental disabilities—Intellectual Disability and Cerebral Palsy. Multiple progress reports and independent assessments document Claimant’s success and response to music therapy intervention. (Factual Findings 4, 6, 7, 11 and 13.) Notwithstanding the critical role of ELARC-funded music therapy services in the treatment and habilitation of Claimant, the preponderance of evidence establishes the availability of similar or alternative interventions to meet Claimant’s continuing needs. (Factual Finding 14.) For example, Claimant’s IEP provides for music in her special education curriculum offered in her school district. (Factual Finding 13.) Claimant’s IPP provides for parent training and a home program to promote generalization of Claimant’s acquired skills and to maintain the progress Claimant has achieved after years of music therapy. (Factual Finding 2.) The evidence strongly suggests that generalization commensurate with Claimant’s global developmental delays is already occurring outside the confines of the clinical setting and within Claimant’s home environment. (Factual Findings 15 and 17.) Nothing in the evidence offered at the hearing indicates that without ELARC-funded music therapy services Claimant is unable to remain in her home.

6. Cause exists pursuant to Welfare and Institutions Code section 4648.5 for ELARC to discontinue funding music therapy services for Claimant by reason of Factual Findings 1 through 18 and Legal Conclusions 1 through 5.

ORDER

1. Claimant’s appeal is denied.
2. The Eastern Los Angeles Regional Center may discontinue funding music therapy services for Claimant through PCDA after the successful implementation of a six-month transition program providing for parent and home training.

Dated: May 5, 2016

JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.