

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

SAN ANDREAS REGIONAL CENTER,

Service Agency.

OAH No. 2016020005

Decision

Administrative Law Judge Kirk E. Miller, Office of Administrative Hearings, State of California, heard this matter on March 17, 2016, in Campbell, California.

James Elliot, L.C.S.W., represented San Andreas Regional Center (SARC), the service agency.

Claimant was represented by his mother.

The proceedings were interpreted from English to Mandarin and from Mandarin to English, by Jenny Liu, certified interpreter.

The matter was submitted for decision on March 17, 2016.

ISSUES

1. Is SARC required to pay for claimant's diapers and wipes?
2. Is SARC required to pay for a comprehensive psychological evaluation in claimant's natural environment?
3. Is SARC required to pay for an in-home occupational assessment for claimant?

4. Is SARC required to advocate on claimant's behalf to obtain in-home speech therapy from claimant's insurance carrier or from Medi-Cal?
5. Did SARC provide timely Notices of Proposed Action (NOPA)?

FACTUAL FINDINGS

Background

1. Claimant is three years and six months old and has been diagnosed with Autism Spectrum Disorder (ASD). He lives with her parents and older brother. His father speaks English and Mandarin, and his mother speaks Mandarin.

2. Claimant is nonverbal and uses simple gestures and body language to communicate. He lacks bladder and bowel control, and does not advise his parents when he needs to use the toilet or when he is soiled. Claimant does not dress himself or assist others to dress him, and he is not aware of dangers, such as a hot stove or oncoming traffic. He does not distinguish between edible and nonedible items, putting both in his mouth, and he eats using his fingers, rather than utensils. When denied something he wants, he will scratch himself until he bleeds. Claimant has interactions with his parents, but prefers to play alone and has little tolerance for play or other interaction in a group setting. Claimant receives 15 hours per week of Adaptive Behavior Assessment (ABA) therapy to address these behaviors.

3. Claimant was diagnosed with ASD, following an evaluation by the Kaiser Permanente Department of Child and Adolescent Psychiatry (Kaiser) on February 26, 2015. The evaluation involved taking a developmental history, together with direct behavioral observations using the Mullen Scales of Early Learning-Visual Reception, Adaptive Behavior Assessment System, 2nd ed. (ABAS-II), and the Autism Diagnostic Observation Schedule (ADOS). The evaluation also determined that claimant wanders due to his ASD.

4. Based on Kaiser's evaluation, SARC found claimant is substantially handicapped in receptive and expressive language, learning, self-care, and self-direction, and that his disability is expected to continue indefinitely. Accordingly, claimant meets the Lanterman Developmental Disabilities Services Act (Act)¹ criteria for regional center services, and on June 9, 2015, SARC found claimant eligible to receive such services. SARC has drafted an Individual Program Plan (IPP) to address claimant's developmental needs.

¹ The Lanterman Act is found at Welfare and Institutions Code, section 4500, et seq. All statutory references are to the Welfare and Institutions Code, unless otherwise specified.

Complaint's Evidence and Issues to be Determined

IS SARC REQUIRED TO PAY FOR CONSUMER'S DIAPERS AND WIPES

5. Claimant uses diapers and requests SARC to pay for the diapers and wipes. In support of his position, claimant cites section 4685, subdivision (c)(7), which provides:

A regional center may purchase or provide a voucher for diapers for children three years of age or older. A regional center may purchase or provide vouchers for diapers under three years of age when a family can demonstrate a financial need and when doing so will enable the child to remain in the family home.

Claimant contends that although children are typically toilet trained by age three, (and in the Asian culture they are often trained prior to age three), that his disability has impaired his ability to become toilet trained. Pursuant to section 4685, subdivision (c)(7), claimant contends SARC is required to provide diapers and wipes.

IS SARC REQUIRED TO PAY FOR OR CONDUCT A COMPREHENSIVE PSYCHOLOGICAL EVALUATION IN CLAIMANT'S NATURAL ENVIRONMENT?

6. Claimant contends that he would benefit from, and that SARC is obligated to provide, a comprehensive psychological evaluation, and to perform the evaluation in his natural environment. The natural environment is his home. Claimant believes that a regional center conducts such evaluations using different protocols than Kaiser used in its evaluation, and that the regional center should be required to follow its own protocols. Claimant argues that in order for the regional center to determine which services and supports are necessary for each consumer, the regional center must itself conduct a comprehensive psychological evaluation.²

IS SARC REQUIRED TO PAY FOR AN IN-HOME OCCUPATIONAL ASSESSMENT FOR CLAIMANT?

7. Claimant received occupational therapy sessions from Iwei "Elaine" Chou, Kaiser's Senior Pediatric Occupational Therapist, on July 14 and August 3, 2015. The goals for the sessions were for claimant to participate with the clinician for 15 minutes without a

² In support of his theory, claimant cites to sections 4512, subdivision (b), and 4642, subdivision (a)(1). The latter section provides: "any person believed to have a developmental disability, and any person believed to have a high risk of parenting a developmentally disabled infant shall be eligible for initial intake and assessment services in the regional centers."

behavioral incident, and to improve his tolerance for teeth brushing. After the first session, Chou noted: “[Claimant] required extended time and modification to participate in adult-led activities but he showed potential for improvement.”

The sessions were discontinued, however, because the clinician ultimately did not feel he was ready to participate in occupational therapy. By letter dated November 2, 2015, Chou wrote:

[Claimant] has a history of great difficulty transitioning to occupational therapy at Kaiser. He typically started crying as soon as I attempted to interact with him and prompted him to leave his stroller. At this time, [claimant] is not ready to either being re-assessed [*sic*] at Kaiser to determine if occupational services are needed or to receive direct therapy do to behavioral change.

8. Claimant believes he has a continuing need for occupational therapy and that an assessment should be conducted in his natural environment, in this case his home, rather than in the clinic, to determine his ability to benefit from the service. He requests SARC to provide this evaluation. (§ 4646.5, sub. (1).)

IS SARC REQUIRED TO ADVOCATE ON CLAIMANT’S BEHALF TO OBTAIN IN-HOME SPEECH THERAPY FROM CLAIMANT’S INSURANCE CARRIER OR FROM MEDI-CAL?

9. Claimant’s individual education plan (IEP), dated September 8, 2015, includes various communication goals. The IEP states that: by March 2016, he will be capable of: “understanding and following at least five, 1-step classroom instructions” such as sit-down, and stand up, in two out of three trials; he will be capable by March 2016, of “increasing his nonverbal gestures”; and, he will by March 2016, “use a picture communication system, combined with gestures, for the purpose of requesting, labeling and protesting during adult-facilitated activities.”

10. Kaiser authorized claimant to receive clinic based speech therapy, which was supplied by Uduak Osom, at Innovative Therapy Services. By letter dated January 19, 2016, Osom terminated his services, stating: “we feel [claimant] will benefit best in a consistent learning environment, which at this time appears to be his home environment.”

11. Claimant requested Kaiser to provide in-home speech therapy and Kaiser denied the request. Kaiser explained the basis for its denial in a letter dated January 6, 2016. While acknowledging that home health care is a covered service, Kaiser stated that to qualify for in-home services, one must demonstrate that he is “substantially confined to [the] home.” It is Kaiser’s position that in-home speech therapy is not “medically necessary” as defined in the evidence of coverage, and therefore it was not approved.

12. Claimant has appealed Kaiser's denial of in-home speech therapy to the Department of Managed Care. Claimant asserts the Act requires SARC to assist him in advocating for Kaiser to provide in-home speech therapy.

DID SARC PROVIDE TIMELY NOTICES OF PROPOSED ACTION (NOPA)?

13. Claimant has been frustrated by what he believes are unreasonable delays in SARC issuing NOPAs in a timely manner.

SARC's Evidence

IS SARC REQUIRED TO PAY FOR CONSUMER'S DIAPERS AND WIPES

14. The Act authorizes a regional center to purchase diapers for children three years of age or older, but it does not require a regional center to do so. (§ 4685, sub. (c)(7).) SARC has adopted a policy that states it will not purchase diapers for a consumer, except when a consumer or his family demonstrates financial need. SARC does not believe it has an obligation to pay for claimant's diapers and wipes, because SARC has determined claimant has not demonstrated a financial hardship as required by the policy.

15. SARC provided an undated "Diaper Voucher" policy which describes how a consumer can qualify to receive diapers.³ The policy provides that a service coordinator can authorize a voucher for the purchase of diapers for children between the ages of three and five, when the "family can demonstrate financial need." The policy also states at section 1.3: "One method that may be used in determining financial hardship is using SSI eligibility criteria, modified to add \$100 per month per child." The policy does not describe other methods of determining eligibility. The policy also provides that when a request for diapers is received, "the service coordinator must convene a planning team meeting to consider the family's request" and "assist the family by providing information on how to obtain diapers through vendors that accept Medi-Cal." Claimant is covered by Medi-Cal.

16. SARC determined, using the SSI eligibility criteria referenced in its policy, that claimant's family income did not demonstrate a financial hardship. The only method SARC used to determine eligibility was use of the SSI criteria.

17. Claimant's mother participated in IPP meetings on October 8 and November 6, 2015, but has only agreed to portions of the draft IPP; a final IPP has yet to be signed. Claimant's request for diapers and wipes was discussed as part of the IPP process. Gloria Yeh, claimant's service coordinator, does not recall if the issue of financial need was

³ The policy states that it supersedes the June 12, 2005 version of the policy, but does not indicate when the most recent policy was adopted or any changes from the prior policy.

discussed. There is no evidence that advocacy for obtaining diapers from Medi-Cal was discussed or that it has been provided.

IS SARC REQUIRED TO PAY FOR OR CONDUCT A COMPREHENSIVE PSYCHOLOGICAL EVALUATION IN CLAIMANT'S NATURAL ENVIRONMENT?

18. The purpose of a comprehensive evaluation is to determine if an individual is eligible to receive regional center services. Based on Kaiser's evaluation, SARC agreed that claimant was eligible for regional center services, because he is substantially disabled in the areas of expressive language, learning, self-care and self-direction. This determination was made using the same diagnostic testing procedures that SARC would have used if it had performed the evaluation.⁴ Once eligibility is determined, the individual service supports a regional center provides are based on the needs and goals identified in the IPP. (§ 4646.) Performing a second comprehensive evaluation on these facts would not change either claimant's eligibility for services or the specific services he receives.

IS SARC REQUIRED TO PAY FOR AN IN-HOME OCCUPATIONAL THERAPY ASSESSMENT FOR CLAIMANT?

19. SARC does not believe it has an obligation to fund or perform an in-home occupational therapy assessment because the service itself can be provided from generic resources, such as the school district or private insurance, and because consumers are expected to advocate for themselves.

20. Yeh has referred claimant to SARC's Medi-Cal Department to help him advocate for this service.

21. SARC is not certain if claimant has exhausted his appeal rights regarding Kaiser's decision not to provide occupational therapy. If Kaiser denied the service because claimant's behavioral issues interfere with receiving therapy in the clinic, SARC does not believe this relieves Kaiser of the responsibility for providing the service.

22. SARC does not know what position other generic providers, such as the school district or Medi-Cal, have taken on providing this service, because claimant has not provided SARC with a release to speak with these providers.

IS SARC REQUIRED TO ADVOCATE ON CLAIMANT'S BEHALF TO OBTAIN IN-HOME SPEECH THERAPY FROM CLAIMANT'S INSURANCE CARRIER OR FROM MEDI-CAL?

⁴ These criteria are listed in Finding 3.

23. Consumers are generally expected, with support from their service coordinator, to take the leading role in advocating for the services they need. This concept is memorialized in SARC's Consumer Rights Advocacy Policy which states:

The service coordinator is the primary advocate for consumers and families. The service coordinator assists the consumer/family in acquiring or improving self-advocacy skills. When needed, the service coordinator shall represent the consumer/family directly in accessing services from other agencies. (Emphasis added.)

SARC does not believe its service coordinators can take the place of a consumer or his parent when advocacy is required.

DID SARC PROVIDE TIMELY NOTICE OF PROPOSED ACTION (NOPA)?

24. SARC acknowledges its responsibility to respond to claimant's service requests within the time limits provided in the Act. SARC acknowledged that it was not as prompt as required in providing claimant with notice of adverse determination notices.

LEGAL CONCLUSIONS

1. The state of California accepts responsibility for persons with developmental disabilities under the Act. The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (§§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.)

2. The Act directs regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) An IPP contains 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.) In this case, SARC and claimant have a draft IPP, but have not reached agreement on its final form.

Determination of Issues

IS SARC REQUIRED TO PAY FOR CONSUMER'S DIAPERS AND WIPES?

3. The Act provides at section 4585, subdivision (c)(7):

A regional center may purchase or provide a voucher for diapers for children three years of age or older. A regional center may purchase or provide a voucher for diapers under three years of age when a family can demonstrate a financial need and when doing so will enable the child to remain in the family home.

This provision permits, but does not require, a regional center to pay for diapers for children over three years of age. SARC has created its own policy which requires a claimant to demonstrate financial need before it pays for diapers for children over age three. SARC's policy is consistent with the statute.⁵ With respect to making a determination regarding financial need, the policy states that "one method that may be used in determining financial hardship is using SSI eligibility criteria. . . ." Since the SSI criteria are referred to as just "one method" the language implies that other methods of demonstrating financial hardship are to be considered, although it does not describe what other methods might be used.

Claimant did not establish that SARC is obligated to pay for diapers and wipes. However, under the policy SARC has an obligation to meet with claimant to determine if he may qualify for a financial hardship on a basis other than SSI eligibility criteria. The evidence did not establish that SARC considered any other basis to determine if financial hardship exists. Under its policy, SARC should have taken this additional step.

If SARC ultimately determines claimant cannot demonstrate a financial hardship, SARC then has an obligation to assist claimant to apply for funding to purchase diapers and wipes from any available generic sources, such as Medi-Cal.

IS SARC REQUIRED TO PAY FOR OR CONDUCT A COMPREHENSIVE PSYCHOLOGICAL EVALUATION IN CLAIMANT'S NATURAL ENVIRONMENT?

4. A regional center conducts a comprehensive psychological evaluation in order to determine if a potential consumer qualifies for regional center services. In this case, SARC used the comprehensive evaluation performed by Kaiser, and based on that determination concluded that claimant's disabilities qualified him to receive it services. The evaluation Kaiser performed was substantially the same as any evaluation SARC would have performed.

Once eligibility has been determined, a consumer receives services based upon the needs and goals contained in the IPP. (§§ 4646, 4646.5, 4512, subd. (b).) Development of the IPP may from time to time require additional assessments to be performed. While specialized assessments may be needed to support implementation of particular aspects of the IPP, the evidence did not demonstrate that SARC is obligated to perform another comprehensive assessment in addition to the one completed by Kaiser.

⁵ Because the policy is undated, it is not possible to determine when the financial formula referred to in the policy was last revised.

IS SARC REQUIRED TO PAY FOR AN IN-HOME OCCUPATIONAL THERAPY ASSESSMENT FOR CLAIMANT?

5. The evidence established that claimant may need occupational therapy, but that such therapy could not be effectively provided in the clinic setting. (Findings 2 and 7.) Occupational therapy would also assist claimant to achieve his IPP goals. (Finding 4.)

Section 4646.5 provides as follows:

(a) The planning process for the individual program plan described in section 4646 shall include all of the following:

(1) Gathering information and conducting assessments to determine life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. For children with developmental disabilities, this process should include a review of the strengths, preferences, and needs of the child in the family unit as a whole. Assessment shall be conducted by qualified individuals and performed in natural environments whenever possible. . . . The assessment process shall reflect awareness of, and sensibility to, lifestyle and cultural background of the consumer in the family.

6. Claimant's health insurer is not presently paying for occupational therapy. SARC's Health Care Policy states: "Health care needs that are directly related to an individual's developmental disability become the responsibility of the regional center if no other generic, public or private resource is available. This may include evaluation. . ." In order for SARC to fulfill its obligation to advocate for claimant, an assessment of his occupational therapy needs must be performed in his "natural environment" in order to determine how and if claimant would benefit if the service is delivered in his home.

IS SARC REQUIRED TO ADVOCATE ON CLAIMANT'S BEHALF TO OBTAIN IN-HOME SPEECH THERAPY FROM CLAIMANT'S INSURANCE CARRIER OR FROM MEDI-CAL?

7. SARC contends that speech therapy should be paid for by a generic resource, such as private insurance, and that under the Act claimant or his parents have the primary responsibility to advocate for this service.⁶ The Act also requires, however, regional center

⁶ Regional centers must identify and pursue all possible sources of public funding for services, including funding that may be available from private insurers and Medi-Cal.

service coordinators to ensure that “needed services and supports are available to the consumer.” (§ 4640.7, sub. (b).) Here, although claimant is nonverbal, he is not receiving speech therapy from his insurance provider or from Medi-Cal.

8. SARC has provided some assistance in obtaining speech therapy by encouraging claimant to advocate for himself, and his service coordinator has referred him to SARC’s Medi-Cal unit for help. However, no evidence was presented regarding the assistance the Medi-Cal unit has offered or what the service coordinator has done to comply with SARC’s advocacy obligations, other than to make the referral. Claimant’s principal spokesperson, his mother, does not speak English. As such, merely referring claimant to another department or agency is not adequate to comply with SARC’s Health Care Policy or the Act. This is a case where to comply with SARC’s Health Care Policy, it is necessary for the service coordinator to “represent the consumer/family directly” in obtaining services. (Finding 23.)

DID SARC PROVIDE TIMELY NOTICES OF PROPOSED ACTION (NOPA)?

9. Regional centers must give timely notice to consumers when an adverse determination is made with respect to a consumer request. Section 4710, subdivision (b) states:

Adequate notice shall be sent to the recipient’s authorized representative, by certified mail, no more than five working days after the agency makes a decision without the mutual consent of the recipient or authorized representative, if any, to deny the initiation of the service or support requested for inclusion in the individual program plan.

SARC acknowledges that it has not been consistently prompt in advising claimant of adverse determinations it has made. Notice of any proposed adverse action must be delivered to claimant in accordance with section 4710, subdivision (b).

10. Any contentions raised by the parties and not discussed above have been found to be without merit and are hereby rejected.

ORDER

1. Claimant’s appeal of SARC’s denial to pay for diapers and wipes is denied. However, SARC shall review claimant’s financial ability to purchase diapers and wipes. If after review he does not demonstrate financial hardship, SARC shall advocate on claimant’s behalf to obtain these items from generic resources, in accordance with the Diaper Voucher policy.

(§ 4659, subd. (a)(1).)

2. Claimant's appeal of SARC's denial to perform a comprehensive psychological evaluation is denied. SARC is not required to perform a comprehensive psychological evaluation, in addition to the one previously performed by Kaiser.

3. Claimant's appeal of SARC's denial to perform or fund an in-home occupational therapy assessment is granted. SARC shall perform or fund an in-home occupational assessment.

4. Claimant's request for SARC to assist with advocacy for in-home speech therapy is granted. SARC shall provide advocacy for in-home speech assessment.

5. SARC shall provide claimant with timely notice of any adverse decision in accordance with Welfare and Institutions Code section 4710, subdivision (b).

Dated: April 1, 2016

KIRK E. MILLER
Administrative Law Judge
Office of Administrative Hearings

Notice

This is the final administrative decision; both parties are bound by the decision. Either party may appeal the decision to a court of competent jurisdiction within 90 days.