

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of :

CLAIMANT,

and

EASTERN LOS ANGELES
REGIONAL CENTER,

Service Agency.

OAH No. 2014060948

DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Alhambra, California on September 29, 2014.

Mother represented Claimant.¹

Lee Strollo, II, Supervisor, Family Services Unit, 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 September 29, 2014. 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 fund private music therapy for claimant at a rate of two hours per week through Integrated Music Therapy Services (IMTS).

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

FACTUAL FINDINGS

1. Claimant is an 18-year-old consumer of ELARC due to his qualifying diagnosis of Autism.
2. Mother has requested ELARC to fund two hours per week of private music therapy for Claimant through IMTS.² ELARC has denied the request, and Mother has appealed filing a fair hearing request. Thereafter, these proceedings ensued.
3. Claimant's March 13, 2014 Individualized Educational Plan (IEP) indicates that, among other things, Claimant has "difficulty maintaining appropriate personal space with peers, staff, and other individuals that visit our classroom. [Claimant] consistently attempts to touch or grab anyone who he passes by or who passes by him." (Ex.3.) Additionally, Claimant's most recent Individualized Program Plan (IPP), dated July 30, 2014, indicates, among other things, that Claimant presents with Obsessive Compulsive Disorder (OCD), which Claimant manifests "using hands to touch objects such as computer, floors and also displaying inappropriate touching of female[s]." (Ex. D at Pages 4 and 10.) Claimant's IPP further describes his maladaptive behaviors as follows:

[Claimant] will display temper tantrum when he is not feeling well or not able to access his thought He is resistive and sensitive to changes to his daily routine. Mother [is] concern[ed] with [Claimant's] behaviors at school and home. [Claimant is reported hitting his classmates, hugging female students and touching female students' hair at school. At home, he hits his mother when he cannot get what he wants. He wants to control his mother but mother would not allow him to do so. [Claimant] continues to display repetitive self-stimulating behaviors such as constantly moving his body from side to side and flipping magazines. [Claimant] is hyperactive except when given individual attention. He is easily frustrated when behavior is hindered. He needs constant prompts to complete tasks. Mother reported that [Claimant] urines [in] different spots in the house except in the bathroom. [Claimant] continues to receive behavioral modification services to address the above concerns.

(Ex. D at Page 6.)

4. Since at least 2012, ELARC has been funding 16 hours per month of behavioral intervention services for Claimant through Howard J. Chudler and Associates, Inc. A June 6, 2014 Progress Report indicates, among other things, that Claimant's outings "to the park or library have been placed on hold. Mother described that whenever she takes [Claimant] into the community she 'cannot control him' due to heightened impulsive/compulsive desire to tough things and/or elope." (Ex. G.) Mother elaborated at the fair hearing that while transporting Claimant to events in his community, Claimant has

² ITMS is an ELARC vendor.

opened the doors of her car while the vehicle is in motion and when the vehicle stops at stoplights. Mother indicated that while out in the community, Claimant has eloped into other people's offices and homes. Claimant frequently ventures behind counters to touch cash registers and computers and into the women's restrooms. Claimant constantly touches other people's bodies.

5. Between May 2011 and April 2014, Claimant was enrolled in at least three socialization programs from which he was expelled because of his maladaptive behaviors generally, and his inappropriate touching in particular. According to Mother, on occasions Claimant's maladaptive behaviors caused his neighbors to report him to the police. As a consequence, Mother has resorted to locking Claimant, notwithstanding his protest, in their home. Mother credibly testified that she believed she was "in crisis." "I am afraid that they will take [Claimant] away from me. I am afraid that they will say that I'm not a good mother." Claimant is over six feet tall, and Mother is unable to physically restrain or subdue him when he behaves inappropriately in public. Mother testified, "I don't want to put [Claimant] away, but I will have to if I'm unable to handle him." Mother's exasperation was evident at the fair hearing. A friend recommended that Mother enroll Claimant in music therapy to help address his maladaptive behaviors, and Mother did so at her own expense commencing February 2, 2013.

6. Claimant's music therapist is Andy Tubman, who graduated from Temple University with a Bachelor of Arts degree in music therapy. Tubman has 10-years' experience working in a variety of institutional settings including day programs, rehabilitation centers, and hospitals and with a varied population of children, adult, and geriatric clients. Tubman's written analysis of, and credible testimony narrating, a video presentation of several of his therapeutic sessions with Claimant³ establishes that music therapy is a critical means of ameliorating the physical, cognitive, or psychosocial effects of Claimant's autism.

7. During the narration of his videoed sessions with Claimant, Tubman explained that he uses music to provide a structure in which Claimant can identify specific coping strategies to self-regulate emotions and impulsivity. According to Tubman's narration, Claimant does not just learn a song during his music therapy sessions; Claimant's participation requires "engagement and a deep level of focus" as well as "a lot of compliance." The following examples, set forth in Tubman's accompanying written analysis, are illustrative.

The song writing process for [Claimant] is a complex and structured task that addresses multiple issues simultaneously. One, it provides a structure for [Claimant] to authentically and honestly express himself and have those expressions be evaluated. Two, by [Claimant] creating the content of the song

³ Exhibit 18.

writing meaning the lyrics, it keeps him engaged and on task and interested in subject matter which increases focus and attention span.

By tuning a guitar to open D, it means that [Claimant] can use the guitar basically as a percussion instrument while keeping all of the tones of the guitar in harmony with the song. In other words, [Claimant] can't make a mistake on the guitar. It encourages him to focus rhythmically on the guitar playing. Over time this rhythmic pattern going in tempo, on guitar, drums, piano, will help [Claimant] feel internally structured and will calm him down and will eventually serve as a coping strategy when outside of the music therapy milieu.

[The structured song learning] process entails [Claimant] repetitively reading the lyrics until he is very familiar with them and singing the melody. After he is able to sing the song he then starts to improvise on piano and eventually learn cords. This process requires deep concentration and focus. It allows [Claimant] to engage in his preferred music in a deep and intimate way. This process will transfer into [Claimant's] daily life by him using this as a regular experience of what it is to increase focus, attention to detail, and positive social interaction.

(Ex. 18.)

8. Tubman reported that Claimant has demonstrated "significant improvement in coping" and that Claimant's "OCD with his hands have significantly changed." Tubman was reluctant to opine on Claimant's other services stating that it was difficult for him to judge the effectiveness of any other services. Tubman indicated that he "would hope that they all work together."

9. Mother believes that Claimant's music therapy sessions have been "effective" handling his mood at home and in the community. Since Claimant has been receiving music therapy, he shouts less and he is more relaxed. Mother attributed improvements in Claimant's behavior at school, which are noted in Claimant's Fall 2013,⁴ Spring 2014,⁵ and Summer 2014⁶ report cards and March 13, 2014 IEP,⁷ to his music therapy sessions.

⁴ Exhibit 10.

⁵ Exhibit 11.

⁶ Exhibit 14.

⁷ Exhibit 3.

10. A music curriculum is not available for Claimant at his school where he is enrolled in a transition program focused on vocational training.

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Services Act (Lanterman Act),⁸ claimant has a right to treatment and habilitation services that are a primary or critical means of ameliorating the physical, cognitive, or psychosocial effects of his developmental disability. Section 4648.5 so provides:

(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.

2. Claimant receives ELARC-funded behavioral intervention services to address his maladaptive behaviors. The severity of Claimant's maladaptive behaviors nonetheless

⁸ Welf. & Inst. Code, § 4500 et seq.

required Mother to seek additional support in the form of music therapy. The evidence establishes that with the addition of music therapy to Claimant's treatment regimen Claimant's maladaptive behaviors are better managed. Other supports, such as socialization services, did not result in similar success. With these improvements in Claimant's behavior, Mother is unlikely to remove Claimant from his home.

3. Claimant bears the burden of establishing his extraordinary circumstances that would warrant an exemption from the state's budget spending reductions authorized in section 4648.5. (Evid. Code, § 500).⁹ Claimant has met that burden.

4. Cause exists pursuant to section 4648.5, subdivision (c), for ELARC to fund two hours per week of private music therapy for Claimant through Integrated Music Therapy Services by reason of Factual Findings 3 through 10, inclusive, and Legal Conclusions 1 through 3, inclusive.

ORDER

1. Claimant's appeal is granted.

2. The East Los Angeles Regional Center shall fund two hours per week of private music therapy for Claimant through Integrated Music Therapy Services until such time as it can establish that provision of such service no longer meets the exception criteria of Welfare and Institutions Code section 4648.5, subdivision (c).

Dated: October 9, 2014

_____/s/_____
JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings

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.

⁹ 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."