

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SUMMER W.,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH No. 2013030468

DECISION

Michael A. Scarlett, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California on May 17, 2013.

Jeffrey Popkin, Associate Director, represented Kern Regional Center (Service Agency or Regional Center).

John W. (Father) represented Summer W. (Claimant)¹.

Oral and documentary evidence was received and the matter was submitted for decision on May 17, 2013.

ISSUE

1. Did Service Agency improperly deny Claimant's request for funding to pay for neurological evaluation by the Centre for Neuro Skills (CNS)?

FACTUAL FINDINGS

1. Claimant is a 27 year old female who is eligible for regional center services based upon a diagnosis of moderate mental retardation. She also has been diagnosed with "intermittent explosive disorder" and "other mood dysfunction." Claimant's moderate mental retardation was caused by hemorrhaging following a head injury as a result of

¹ Last name initials are used to protect the privacy of the Claimant and her parents.

“shaken baby syndrome” in 1987. Claimant had a history of seizures, but has not experienced a seizure in several years. Claimant lives with her father, and her 17 year-old brother. Father is concerned that Claimant’s aggressive behaviors have increased and he is seeking a neurological evaluation through the CNS inpatient program for rehabilitation of individuals with traumatic brain injuries. Claimant currently receives psychiatric monitoring through the Kern Regional Center Telemedicine Clinic (KRCTC). Claimant is currently being treated with the following psychotropic medications: Risperdal (4 mg), an anti-psychotic, Lamictal (150 mg), a mood stabilizer, and Celexa (40 mg), an anti-depressant. Claimant had been treated with Lithium until earlier this year, when Father decided that she should be “weaned off” of the Lithium in an attempt to reduce her maladaptive behaviors. Claimant receives funding for in-home respite services provided by Full Circle and attends the Bakersfield Association for Retarded Citizens (BARC) adult day program. Claimant also receives 283 hours per month of In-Home Supportive Services (IHSS) and Father is the IHSS provider.

2. In May or June 2010, Claimant began receiving behavioral intervention services from Holdsambeck and Associates, Inc. in Lompoc, California to address Claimant’s tantrums and self-injurious behaviors. Claimant was originally scheduled to receive 120 hours of behavioral intervention services through October 2010, but the services were later extended through January 31, 2011. According to Monique Joyner, M.A., a behavior analyst, Claimant was close to meeting her behavioral goals in September 2010, and the services were extended through January 2011 to insure that the stated goals were obtained.

3. Claimant’s June 20, 2012 Individual Program Plan (IPP) indicated that she was in good physical health. At that time, she was receiving psychiatric monitoring through the KRCTC, where she can meet with a psychiatrist on a regular basis and be treated with psychotropic medications. However, Claimant was not receiving behavioral intervention services when this IPP was conducted and Father expressed concerns that Claimant’s maladaptive behaviors were again becoming more severe. He noticed that she was becoming more defiant and her temper tantrums were occurring with more frequency. Claimant was displaying numerous behavior problems including: using profane language, resistiveness and temper tantrums. Her temper tantrums were reported to be occurring seven to eight times per week. Service Agency indicated in the IPP that, if requested, Claimant would be provided behavior modification and telemedicine services to address her challenging behaviors. The IPP further indicated that behavior analysts would meet with Claimant and Father to develop an appropriate behavioral intervention plan.

4. Claimant continued to receive psychiatric monitoring and treatment through KRCTC to control her maladaptive behaviors in 2012 and 2013. Father became concerned that the psychotropic medications were not having the desired effect which was to decrease the tantrums and aggressive behaviors. In January 2013, he sought to have Claimant’s dosages of the medications lowered, specifically requesting that Claimant be taken off of the Lithium treatments.

5. Father stated that in January 2013, Claimant's behaviors increased significantly, which he later believed were being caused by bleeding on the right side of Claimant's brain, which was discovered in a February 2013 MRI. Father stated Claimant began to lean to her left and her hand motor functions changed noticeably when she was walking. Claimant's increased behaviors included using profanity, screaming, head banging, and tantrums. Father requested that Service Agency provide funding for a neurological evaluation by CNS to address the bleeding in Claimant's brain and to provide rehabilitative services for Claimant's traumatic brain injury.

6. CNS provides a two to three week inpatient program designed to evaluate Claimant's traumatic brain injury and to "maximize the eventual level of functioning" of the patients they treat. The program includes a clinical component, in which therapy is provided at the clinic. Claimant would receive a therapeutic assessment in the areas of physical therapy, occupational therapy, educational therapy, and speech/language pathology, and would also receive psychological counseling. CNS therapists would implement the program five days per week, for six hours per day over the two to three week period. The cost of the inpatient program is \$2,500 to \$2,731 per day. CNS provides rehabilitation services for traumatic brain injuries, but any medical or ancillary services other than rehabilitative services would be referred out to medical specialists other than CNS personnel. CNS does not provide medical treatment for brain injuries and would necessarily be required to refer Claimant to other medical providers to address the bleeding in Claimant's brain.

7. On February 8, 2013, Service Agency denied funding of Claimant's request for a neurological evaluation from CNS stating that the service requested was not directly related to Claimant's developmental disability as required by Welfare and Institution Code² section 4646.4, subdivision (a)(1), which provides in pertinent part that in developing, reviewing, or modifying an Individual Program Plan (IPP), that Regional Centers shall utilize the internal process to ensure that appropriate services and supports are provided to consumers, including "conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434." On February 28, 2013, Claimant filed a Fair Hearing Request (FHR) seeking funding for the neurological evaluation through CNS. All jurisdictional requirements have been met and subsequently, this hearing ensued.

8. On March 19, 2013, following the March 18, 2013, informal meeting, Service Agency notified Claimant that the requested CNS neurological evaluation was not directly related to Claimant's "eligible condition" and that the service could potentially be provided through a generic resource. Service Agency recommended that Claimant contact Dr. Antonia C. Chalmers, M.D., a neurologist who had treated Claimant in the past, to determine whether Dr. Chalmers believed a referral to CNS would be necessary. In the alternative, Service Agency suggested that Claimant be referred to Dr. Ira T. Lott, M.D., a Pediatric Neurologist at UC Irvine Medical Center, and the Director of the Telemedicine Program UCI

² All further statutory references shall be to the Welfare and Institutions Code unless otherwise denoted.

Health Sciences, for a “one-time review.” On April 16, 2013, at Father’s request, Dr. Chalmers referred Claimant to CNS for a neurological evaluation. CNS informed Dr. Chalmers and Father that it did not accept Medicare and Medi-Cal patients and that Claimant did not have funding for the neurological evaluation.

9. On September 7, 2010, Dr. Antonia C. Chalmers, M.D., Diplomate, American Board of Neurology, American Board of Electrodiagnostic Medicine (EMG/NCV), performed a neurologic evaluation on Claimant. The evaluation was conducted due to Father’s concern that Claimant was suffering from seizures. Dr. Chalmers diagnosis indicated that Claimant had a brain injury sustained during childhood from shaken baby syndrome accompanied by mental and physical disability. Dr. Chalmers referred Claimant to KRCTC for treatment and recommended a CT scan of the brain and an electroencephalogram (EEG). On September 15, 2010, a CT scan of the brain without contrast materials was performed at Kern Radiology Medical Group, Inc. The CT images showed: (1) Marked diffuse cerebral hemispheric atrophic changes and patchy encephalomalacia with associated atrophic ventricular enlargement; and (2) No definite acute intracranial abnormality currently identified. No mass or hemorrhage was identified. These findings were consistent with claimant’s 1987 diagnosis of traumatic brain injury as a result of shaken baby syndrome. On September 15, 2010, an EEG was also performed by Kern Radiology. The results of the EEG were normal.

10. On February 13, 2013, Quest Imaging performed an MRI of Claimant’s brain without contrast. The MRI showed “subdural collections along the bilateral cerebral convexities, slightly more pronounced on the right compatible with subacute subdural hematomas” (bleeding in the brain). There were also large areas of “cystic encephalomalacia with associated central white matter volume loss” which was compatible with Claimant’s history of shaken baby syndrome. Based upon the Quest Imaging MRI, Father believed that the Claimant’s traumatic brain injury, including the newly revealed bleeding of in her brain, provided the basis for the CNS neurological evaluation, stating that CNS was the preeminent treatment center in the Bakersfield area and nationally recognized for treating traumatic brain injuries.

11. On April 3, 2013, Claimant was examined by Dr. Ira T. Lott, M.D. at KRCTC, per the agreement at the March 18, 2013 informal meeting. Dr. Lott examined Claimant, and reviewed the February 13, 2013 MRI from Quest Imaging and past EEGs. Dr. Lott concluded that Claimant’s “neurological picture” was not clear. He stated that Claimant had a history of traumatic brain injury and possible recent bleeding in the brain, referencing the February 13, 2013 MRI. Consequently, Dr. Lott concluded that in order to make a definitive diagnosis regarding Claimant’s current medical condition and course of treatment, he would need to review Claimant’s medical records from her treatment at Loma Linda Hospital, recent MRI and EEGs, and possibly order an MRI angiogram. At the time of hearing in this case, all of Claimant’s medical records from Loma Linda had not been obtained and Claimant had not gone back to Dr. Lott for a follow-up examination. An MRI angiogram also had not yet been performed.

12. Dr. Fidel Huerta, M.D., testified on behalf of Service Agency at hearing. Dr. Huerta reviewed the MRI from Quest Imaging, Dr. Chalmer's 2010 diagnosis from the CT scan and EEG from Kern Radiology Medical Group, the medical records from KRCTC, and the May 3, 2013, letter from CNS describing the inpatient neurological evaluation proposed to be performed by CNS. Dr. Huerta opined that Claimant's medical condition was not significantly different from her 1987 diagnosis for traumatic brain injury or from the diagnosis rendered by Dr. Chalmers in 2010. Although the Quest Imaging MRI showed bleeding in Claimant's brain, Dr. Huerta concluded that further testing, including the MRI angiogram recommended by Dr. Lott, was required to determine the extent of the brain bleeding, the cause of the bleeding, and what medical treatment, if any, would be required to address the new brain injury. Dr. Huerta also expressed concerns that if a new brain injury had occurred between 2010 and 2013, a determination would need to be made whether the injury was related to the condition for which Claimant was originally deemed to be eligible for regional center services, i.e., moderate mental retardation based upon a traumatic brain injury. Dr. Huerta also believed that before a neurological evaluation and rehabilitative treatment by CNS could be approved, a definitive diagnosis and course of treatment for the bleeding in Claimant's brain would have to be completed.

LEGAL CONCLUSIONS

1. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) Claimant seeks an appeal of the denial of a requested service not previously funded by the Service Agency and therefore Claimant has the burden to demonstrate that Service Agency's decision was incorrect. Claimant has the burden to show by a preponderance of the evidence that she is entitled to a neurological evaluation provided by CNS. (*See* Evid. Code, § 115.)

2. The Lanterman Act contemplates that the provision of services shall be a mutual effort by and between regional centers and the consumer and/or the consumer's family. The foundation of this mutual effort is the formulation of a consumer's IPP. A consumer's IPP "shall be reviewed and modified by the planning team . . . as necessary, in response to the person's achievement or changing needs, . . ." (§ 4646.5, subd. (b).) The creation of an IPP is a collaborative process. (§ 4646.) The IPP is created after a conference consisting of the consumer, the consumer's representatives, regional center representatives, and other appropriate participants. (§§ 4646 and 4648.) Thus, the Lanterman Act contemplates cooperation between the parties and the sharing of information in determining services and supports for a consumer and her family. The preferences of the consumer or her family are an important factor in determining services, but not the only factor, to be considered in the IPP process.

3. The planning process relative to an IPP shall include "[g]athering information and conducting assessments to determine the . . . 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 and the family unit as a whole. Assessments shall be conducted by qualified individuals and performed in natural environments whenever possible. Information shall be taken from the consumer, his or her parents and other family members, his or her friends, advocates, providers of services and supports, and other agencies. The assessment process shall reflect awareness of, and sensitivity to, the lifestyle and cultural background of the consumer and the family.” (§ 4646.5, subd. (a)(1).) However, there is no requirement in the Lanterman Act that a regional center’s assessments, as part of the IPP planning process, must be performed by vendors preferred by the consumer’s family. While consumer preference is an important factor in determining services and supports for a consumer (e.g., §§ 4512, subd. (b), and 4646, subd. (d)), a regional center is entitled to conduct assessments by its own staff and vendors of its own choosing.

4. Section 4646.4 provides that in pertinent part that:

Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer’s individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

- (1) Conformance with the regional center’s purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.
- (2) Utilization of generic services and supports when appropriate.
- (3) Utilization of other services and sources of funding as contained in Section 4659.
- (4) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting.

5. Section 4659, subdivision (a)(1), provides that:

...the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.

6. Section 4648, subdivision (a)(8), provides that “Regional Center funds shall not be used to supplant the budget of an agency which has the legal responsibility to serve all members of the general public and is receiving public funds for providing those services.”

7. Claimant has not shown by a preponderance of the evidence that she is entitled to a neurological evaluation provided by CNS as she has requested.

8. Claimant’s request for a neurological evaluation by CNS is premature. A proper diagnosis and course of medical treatment has not been established to address what appears to be a new injury, the bleeding on the right side of Claimant’s brain. Dr. Lott stated that Claimant’s neurological picture was not clear based upon his review of the Quest Imaging MRI and Claimant’s 2010 CT scan and EEG. He examined Claimant and concluded that additional examinations would need to be performed after he has received all of Claimant’s medical records, and that an MRI angiogram would possibly be needed to reach a definitive conclusion regarding the recent bleeding in Claimant’s brain. CNS does provide medical services directly to its patients. CNS primarily provides rehabilitative services through physical therapy, occupational therapy, educational therapy, speech/language pathology, and psychological counseling. CNS would necessarily have to refer Claimant out to a medical provider for a proper medical diagnosis and course of treatment for the suspected bleeding in Claimant’s brain. Medical professionals must determine what is causing, and the extent of the bleeding in Claimant’s brain, and whether the medical condition is related to the traumatic brain injury that caused Claimant’s moderate mental retardation. It also must be determined whether the bleeding is causing the increase in Claimant’s maladaptive behaviors and whether CNS’s neurological evaluation would benefit Claimant’s definitively diagnosed medical condition. Referrals for medical services are provided by the Service Agency for its consumers through the IPP process and its vendored service providers. Until Claimant’s physiological symptoms are properly diagnosed and a course of treatment is identified, CNS’s neurological evaluation for purposes of rehabilitative treatment for a traumatic brain injury is premature.

9. CNS also does not accept MediCal or Medicare, and thus, would not be a generic resource for provision of services to Claimant. Service Agency would be required to utilize its own funds for provision of the neurological evaluation sought by Claimant. The estimated cost of this evaluation has been placed at approximately \$2,600 per day, five days per week for up to three weeks, for a possible cost of \$39,000. Service Agency is required to insure that Claimant utilizes the generic resources available to her before expending regional center funding for such services. Although Father would prefer to use CNS for the neurological evaluation, Service Agency is entitled to use its vendors to obtain assessments

and evaluations to assist in determining the appropriate level of service Claimant requires. Consequently, this would include Dr. Lott and Dr. Chalmers, both vendored neurologists who have provided services for the regional center in the past. Even though Dr. Chalmers provide a referral for Claimant to CNS, his referral was premature. Given Dr. Lott's determination on April 3, 2013, that further evaluations are required to definitively diagnose Claimant's present medical condition, Service Agency must be allowed to complete the medical evaluation of Claimant's injury utilizing regional center vendors and generic resources available to Claimant.

10. Finally, the Service Agency offered behavioral intervention services to Claimant in the June 2012 IPP. Previously, Service Agency provided behavioral intervention services to address Claimant's maladaptive behaviors, including the temper tantrums and self-injurious behaviors that Father seeks to have CNS treat. Should Claimant require services beyond those which can be provided by KRCTC or other regional center vendors, Service Agency is required to refer Claimant to the appropriate service provider to meet Claimant's needs. It has not yet been determined that Claimant's current medical condition necessarily requires the services provided by CNS.

11. Service Agency shall consult with Father to complete the necessary medical evaluations and assessments to determine the extent and cause of the bleeding in Claimant's brain, including ordering an MRI Angiogram if determined to be necessary, and to determine whether the injury is associated with Claimant's developmental disability. After a definitive diagnosis and course of treatment has been determined, an IPP should be convened as soon as possible to confer with Father regarding the services and supports that will be required, and to determine whether generic resources are available to provide the services required. If Father does not agree with the Service Agency's recommendation for services and support, Father and Claimant may again appeal the Service Agency's decision by requesting a fair hearing. (§ 4710.5, subd. (a).)

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ORDER

Claimant Summer W.'s appeal of the Service Agency's decision to deny funding for a neurological evaluation provided by CNS is DENIED.

DATED: June 13, 2013



MICHAEL A. SCARLETT
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5, subdivision (a). Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.