

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL CENTER,

Service Agency.

Case No. 2013051056

California Early Intervention
Services Act (Government Code
§ 95000 et seq)

DECISION

This matter was heard by Glynda B. Gomez, Administrative Law Judge with the Office of Administrative Hearings, on June 24, 2013, in Alhambra, California. Claimant was represented by his (Mother) and father (Father) (collectively Parents). The Eastern Los Angeles Regional Center (ELARC or Service Agency) was represented by Judy Castenada, Fair Hearings Coordinator.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on June 24, 2013.

ISSUE

Whether ELARC must continue to fund Claimant’s speech and language therapy.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a 30-month old boy born on November 29, 2010. Petitioner was referred to ELARC’s Early Start Program¹ based upon his global delays and lack of speech.

¹ “Early Start” is another name for the California Early Intervention Services Act (Gov. Code, § 95000 et seq.)

2. Claimant's Individualized Family Service Plan (IFSP) dated November 29, 2012 contains three outcomes as follows:

Outcome #1: [Claimant] will remain in good health.

Outcome #2: [Claimant] will say single words to tell parents what he wants to eat during meals/snacks.

Outcome #3: [Claimant] will be placed in an appropriate preschool program once his Early Start program ends at age three.

3. With reference to Family Resources, the IFSP states:

SC [Service Coordinator] discussed use of [Claimant's] health care plan for IFSP services such as speech therapy, as mandated by California's Trailer Bill Language (TBL). SC also informed parents that regional centers function as payer of last resort and that regional centers "must continue to ensure the timely provision of required early intervention services." ... Currently, [Claimant] is not receiving any therapy services through Kaiser. ELARC to initiate funding of [Claimant's] speech therapy while parents pursue it via their son's health care plan.

4. On the "Parental Consent and Procedural Safeguards" section of the IFSP, Claimant's parents checked the box which stated:

I/We understand that we are required to use our private insurance or health care service plan for medical services (i.e. occupational therapy, physical therapy, speech therapy) identified in the IFSP...

5. Based upon an assessment from an ELARC vendored speech and language pathologist and pursuant to the IFSP, ELARC agreed to provide speech therapy to Claimant for one hour twice per week with an ELARC vendor as an interim service while Claimant's parents contacted Kaiser, their medical insurer, to obtain speech therapy funded by their health insurance.

6. Claimant began receiving speech and language therapy from Talk to Me-Bilingual Speech Therapy, Inc., an ELARC vendor, on December 5, 2012. Initially, Claimant had tantrums and resisted speech therapy. Nora Delgado, the speech pathologist, described that Claimant "initially had significant difficulties with transitioning into and out of therapy sessions" in her progress report. Claimant's father described Claimant as having tantrums during the early stages of speech therapy. Claimant has received speech and language therapy twice per week for one hour duration each session for approximately seven months and by all accounts has made tremendous progress. Claimant is now comfortable with Ms. Delgado and is able to readily engage in his speech therapy. Ms. Delgado provides speech therapy to Claimant in both Spanish

and English. Claimant's parents have both been present for his sessions and have actively participated in the sessions.

7. In her April 13, 2013 progress report, Ms. Delgado recommended that Claimant continue therapy with her and opined that "it is very likely that he may regress in a new environment." At hearing, Claimant's father testified about the changes that Claimant will be experiencing in the next few months which include a new sibling expected in September, the transition to preschool, commencement of occupational therapy and changes in the work schedules of both of his parents. Father expressed concern about Claimant's ability to handle so many transitions and possible regression based upon Ms. Delgado's opinion.

8. Claimant's parents contacted Kaiser, their health care provider, and after a several months wait, Claimant was evaluated and referred to Kaiser's outside provider Easter Seals, for speech therapy once per week for one hour. The speech therapy was approved in March of 2013 and began in June of 2013. Claimant's parents have had difficulty with scheduling appointments with Easter Seals because the provider does not have evening appointments. Claimant's father testified that Parents have made special arrangements with their employers to attend the speech therapy sessions. Father also testified that the first therapy session with the new provider was "a disaster". According to Father, Claimant refused to participate in therapy and had a tantrum for most of the session. Father has asked Kaiser to provide Claimant with two sessions of speech therapy of the same duration and frequency as currently provided by the ELARC vendor, but has not yet received a response from Kaiser.

9. ELARC's speech and language pathologist consultant, Myrna Ramirez (Ramirez), reviewed Ms. Delgado's progress report and parents' request to continue with Ms. Delgado's as an ELARC funded service. Ramirez concluded that although Claimant will have difficulty with the transition just as he had difficulty with Ms. Delgado in the initial sessions, he will become accustomed to the new therapist. She recommended that ELARC discontinue funding of speech therapy based upon legal requirements that generic resources be used when possible and provisions of the ELARC purchase of service (POS) policy which require that Claimant use his own health insurance or other generic resources.

10. The POS provides that:

In all cases, purchase of this service may only be considered when all other alternative sources of funding have been exhausted, which includes private insurance, private trusts, Medi-Cal, California Children Services (CCS) or other sources of public health care available to the general public...

ELARC may purchase OT/PT/ST Services for Early Intervention consumers, ages 0-3, when the service is deemed appropriate by evaluation and planning team.

All supporting documentation from consumer's health service providers should be current within 6 months and written denials/documentation shall include that all other resources for payment have been exhausted.

10. Under the section entitled "Alternative Funding," the ELARC POS provides:

Effective July 1, 2009...regional centers shall not purchase any service that would otherwise be provided through generic resources. Regional center shall first explore these resources including but not limited to: Private trusts, private insurance, Medi-Cal, Medicare, California Children's Services, the special education school system, EPSDT, CHAMPUS, private health plans, HMO's, Veteran's Benefits, Department of Rehabilitation, ability-to-pay programs at county facilities and clinics, etc.

11. The POS policy also provides that:

An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of the service when the regional center determines that the service is a primary or critical means for amelioration of the physical, cognitive or psychosocial effects of the consumers developmental disability or the service is necessary to enable the consumer to remain in the home and no alternative service is available to meet the consumer's needs.

12. On May 6, 2013, ELARC provided Claimant with a Notice of Proposed Action (NOPA) which provided notice of ELARC's intent to cancel funding for speech therapy based upon Government Code section 95004's requirement that families use private insurance or health care service plan for medical services identified in the IFSP, to the extent available. Claimant's parents filed a fair hearing request appealing ELARC's NOPA on May 28, 2013.

LEGAL CONCLUSIONS

1. Jurisdiction for this case is governed by the Individuals with Disabilities Education Act (IDEA), which is federal law (20 U.S.C. § 1431 et seq.); and the California Early Intervention Services Act (CEISA) (Gov. Code, § 95000 et seq.), which

is state law that supplements the IDEA. Each act is accompanied by pertinent regulations.

2. The burden of persuasion to establish entitlement to services not agreed upon by a regional center is on a petitioner's family in an administrative matter under the IDEA. (See, e.g., *Schaffer v. Weast* (2005) 546 U.S. 49, 51; see also, 34 C.F.R. § 303.425(b) (1999).)

3. The California Legislature has found that early intervention services represent an investment of resources, "in that these services reduce the ultimate costs to our society, by minimizing the need for special education and related services in later school years and by minimizing the likelihood of institutionalization." (Gov. Code, § 95001, subd. (a)(2).) The Legislature has recognized that time is of the essence and that "[t]he earlier intervention is started, the greater is the ultimate cost-effectiveness and the higher is the educational attainment and quality of life achieved by children with disabilities." (*Id.*)

4. Early intervention services are defined as those services "designed to meet the developmental needs of each eligible infant or toddler and the needs of the family related to the infant or toddler's development." (20 U.S.C. § 1432(4)(A); Cal. Code Regs., tit. 17, § 52000, subd. (b)(12).)

5. A regional center service coordinator shall continuously seek the appropriate services and service providers necessary to enhance the development of each infant or toddler being served for the duration of the infant's or toddler's eligibility. (Cal. Code Regs., tit. 17, § 52121, subd. (a)(6).) The service coordinator shall also monitor the delivery of services and the degree to which progress toward achieving outcomes is being made through the periodic review of the IFSP. (Cal. Code Regs., tit. 17, § 52121, subd. (a)(9).) An initial individualized family service plan (IFSP) shall be developed within 45 days of eligibility, and thereafter reviewed every six months or more frequently if a parent so requests. (Cal. Code Regs., tit. 17, § 52102, subd. (b).) The service coordinator shall also facilitate the exchange of information between service providers including health providers, medical case managers, regional centers and local school authorities. (Cal. Code Regs., tit. 17, § 52121, subd. (a)(11).)

6. Pursuant to Government Code section 95004, subdivision (a), the provisions of the Lanterman Act, located at Welfare and Institutions Code sections 4500 through 4846, also apply to the Early Start program. Under the Lanterman Act, the equivalent of an IFSP is the individual program plan (IPP). The planning process relative to an IPP (and therefore an IFSP by analogy) is supposed to be collaborative. (Welf. & Inst. Code, § 4646.) The IPP is created after a conference consisting of the consumer and/or his family, regional center representatives and other appropriate participants. Services and supports are only funded by the regional center after such collaboration and where both parties agree. (Welf. & Inst. Code, §§ 4646 & 4648)

7. Welfare and Institutions Code section 4659, subdivision (c), and Government Code section 95004, subdivision (b), provide that a regional center may not purchase any service that would otherwise be available from a consumer's health care plan, Medi-Cal, health insurance or other generic resources.

8. Here, ELARC provided funding for speech and language therapy twice per week while Claimant's parents applied and waited for their Kaiser health plan to approve speech and language therapy. The application and assessment process was lengthy. During the interim, Claimant became comfortable with ELARC's vendored speech and language pathologist and the vendor was able to provide evening appointments which were easier for Claimant's working parents to attend. Once Kaiser agreed to provide speech and language therapy, ELARC notified Claimant that it would cancel funding for its own vendor speech and language pathologist. ELARC was not receptive to the arguments of Claimant's parents about the convenience of evening appointments or Claimant's difficulty in transitioning to a new provider and possible regression with a new provider. Kaiser has only approved one session per week of therapy for Claimant and not the two sessions that ELARC has stated are necessary. Claimant's parents have requested that Kaiser provide the two sessions per week that ELARC's current vendor provides according to his assessed need. Claimant's parents have started the process of transitioning Claimant to Kaiser's speech and language pathologist, but are frustrated by Claimant's tantrums and resistance to the new provider. The transition comes at a difficult time as Claimant's mother expects to give birth to his new sibling in September and Father has started a new job while Claimant will soon be transitioning to a new preschool and starting occupational therapy.

9. California law clearly requires Claimant to utilize his health plan funding and other generic resources before accessing ELARC funds for speech and language therapy regardless of the inconvenience to Parents or the disruption to Claimant. Here, Claimant is currently receiving only one session of speech and language therapy funded by Kaiser, but requires two sessions per week to remediate his disability. Speech and language therapy are critical to the amelioration of Claimant's disability. Accordingly, it is appropriate to grant a limited exemption for ELARC to continue funding one session of speech and language therapy with its vendor until Kaiser assumes responsibility for both sessions or Claimant turns three years old or an assessment indicates that Claimant no longer needs two sessions of speech and language therapy per week. Presently, Claimant has an unmet assessed need which is identified in his IFSP and is not addressed by generic resources. Since time is of the essence under the Early Start Program, the parties do not have the luxury of suspending services while awaiting Kaiser's decision. Moreover, this will provide the ELARC vendor with time to assist Claimant in his transition to Kaiser and school based services which will occur on his third birthday.

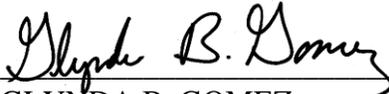
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ORDER

1. Claimant's appeal is granted in part and denied in part.
2. ELARC shall fund one session per week of speech and language therapy for Claimant until either Kaiser approves a second session of speech and language therapy each week, Claimant's assessed need for two one hour sessions of speech and language therapy change, or Claimant turns three years old.

DATED: June 28, 2013



GLYNDA B. GOMEZ
Administrative Law Judge
Office of Administrative Hearings