

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

AILEY G.Y.,

Claimant,

v.

SAN GABRIEL POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2012030338

DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, on July 17, 2012, in Pomona. Claimant Ailey G.Y. was represented by her mother, Susana G. San Gabriel Pomona Regional Center (Service Agency) was represented by Elizabeth Cooley Annamraju, L.M.F.T., Behavior Analyst.

Both the Service Agency and claimant presented documentary evidence, which was received in evidence pursuant to Welfare and Institutions Code section 4712, subdivision (i). In addition, claimant presented the testimony of her mother, music therapist, and nurse.

At the conclusion of the hearing, the Administrative Law Judge granted claimant's request to hold the record open so that claimant could file articles or studies that were referenced in the testimony of the music therapist. On July 20, 2012, claimant filed two articles, which were collectively marked as claimant's Exhibit 20 and admitted into evidence.

Oral and documentary evidence having been received, the Administrative Law Judge submitted this matter for decision on July 20, 2012, and finds as follows:

ISSUE

The issue presented for decision is whether claimant should receive music therapy from the Service Agency.

FACTUAL FINDINGS

1. Claimant was born on August 21, 2008, and is almost four years old. She lives with her parents and two siblings in the family home in Arcadia. Claimant has suffered cardiac arrests, seizures, and a brain injury. She was diagnosed with Wolff-Parkinson White Syndrome, a heart condition that causes tachycardia, and profound mental retardation.

2. Based on her developmental disabilities and handicaps, claimant is a client of and eligible to receive services from the Service Agency. The Service Agency has authorized claimant to receive family counseling services and, last year, purchased a pulse oximeter for her as a matter of medical need. Before she turned three years old, claimant was eligible for services under the Early Start Program but it was not established what early intervention services were provided to her.

3. Claimant is not ambulatory and has limited mobility. She is unable to perform any daily living tasks independently and needs constant care and assistance for all of her self-care needs. She cannot use a spoon or a cup. She is beginning to grasp and hold objects. With assistance, claimant can bear her own weight with her lower extremities and sit and support her trunk and head. However, she has limited control of her head and neck when she is supported in a seated position. Claimant is partially sighted. She is able to hear and responds to sounds. She is largely non-verbal but communicates by facial expressions, vocal sounds, body movements, and crying.

4. Claimant has several medical needs. She uses a gastrostomy tube (G-tube) and a pump for feeding and has a pacemaker. She eats food that is pureed or finely cut for her. She uses eyeglasses and receives vision therapy. Claimant takes prescribed medications for her heart condition and seizures and sees several medical specialists on a regular basis. In addition to the G-tube, she uses various other medical devices or equipment, including a suction machine, nebulizer, splints, wheelchair, and a stander. Claimant receives occupational, physical, and speech therapies at Kaiser Permanente through private and public health insurance. Due to her varied health and medical needs, claimant receives shift nursing services under the Early and Periodic Screening, Diagnosis, and Treatment program.

5. Based on her meeting the eligibility criteria for multiple disabilities, claimant receives special education services and supports from the Arcadia Unified School District (school district). The school district provides claimant with an in-home infant stimulation program, occupational therapy, physical therapy, and speech pathology services.

6. Under the objectives and plans of her Individual Program Plan (IPP) dated November 16, 2011, claimant's parents have indicated they would like their daughter to develop her social and verbal skills, learn prerequisite skills to be able to socialize, and increase her mobility. The IPP indicates that claimant will have the necessary supports to function and thrive and the Service Agency will explore appropriate funding and generic program resources for her. If generic resources are not available and claimant's family requests regional center funding for services, the Service Agency may provide services, including social skills training, in accordance with its service policies.

7. In this appeal, claimant's mother requests regional center funding for music therapy. She takes claimant to Mommy-and-Me classes so that her daughter can be around other children even though she cannot play with them or directly participate in the activities. Since September 2010, claimant's mother has also taken her to weekly music therapy sessions at Integrated Music Therapy Services in Alhambra. The mother started music therapy for her daughter after attending a music therapy seminar at the Service Agency that was presented by Andrew Tubman, the founder of Integrated Music Therapy Services (Tubman). Claimant's mother believes that music therapy has helped her daughter to learn to make vocal sounds, communicate, move her limbs, and engage in gross motor movements. Claimant enjoys attending music therapy.

8. Tubman attained a bachelor of arts degree in music therapy from Temple University in Philadelphia. He holds certification in music therapy and has approximately 14 years of experience in treating children with special needs and brain injuries by providing them with music therapy. According to Tubman, music therapy has grown in acceptance in the last few years as the science and efficacy of music therapy has been studied. Tubman attested that the protocols for music therapy help to engage persons and children to use different parts of their brains and brain functions, such as language, memory, and motor functions, and thus help to stimulate, develop, and repair brain pathways. Tubman has found that, through music therapy, children learn to listen and use sounds and rhythm to make vocal sounds, move their bodies, control their motor functions, and communicate through language and movement.

9. In a progress report dated October 18, 2011, Tubman noted that claimant has been attending music therapy once weekly in sessions that last 30 to 60 minutes. Initially, claimant had difficulty in vocalizing, controlling her head movement, taking turns, and responding to directions. She was unable to hold a

mallet or instrument and had low energy and a flat affect. However, claimant appeared to be engaged and motivated by musical activities. After 10 months of music therapy, Tubman has found that claimant has made significant progress in communication skills and gross and fine motor movements. In communication, she has improved her ability to vocalize at appropriate times and is able to mimic changes in pitch and vowels while singing. She improved in “call and response” vocalization exercises. She is able to wait for a song to progress before responding at a break in the music. In the area of motor movements, claimant has improved her ability to control her neck and head while engaged in musical movement activity but is not able to sit with her trunk and head held in an upright position without support. She has improved her ability to reach for and to pull an instrument to make a sound. With verbal cues, claimant has learned to kick at and play a tambourine at a break in the music. In this report, Tubman defined measurable goals and bench marks to chart claimant’s progress while receiving music therapy. Her family has reported that claimant has uttered single words.

10. (A) As established by the testimony of her nurse, claimant has responded positively to music therapy from the outset. Before receiving music therapy, she only made sounds or noises. Now, she is able to vocalize sounds, babble, and say approximately 15 words, including “go” and “Mom.”

(B) Claimant’s speech therapist at Kaiser Permanente has observed that, since she started music therapy, claimant has shown an increase in spontaneous phonations and vocalizations. The speech therapist supports the provision of music therapy for claimant.

(C) On April 18, 2012, claimant’s neurologist at Kaiser Permanente wrote a letter, supporting her participation in music therapy to maximize her development. Claimant’s mother had reported to the neurologist that her daughter had made gains in vocalizations and spontaneous activity since starting music therapy.

11. On June 30, 2011, claimant was evaluated by an optometrist at the Center for the Partially Sighted in Los Angeles. The optometrist diagnosed claimant with neurological vision impairment, nystagmus, and astigmatism. The optometrist recommended, in part, that she wear eyeglasses, receive verbal commands to gain her attention, and use music during her therapies as directed by her music therapist Tubman.

12. On July 28, 2011, claimant underwent a speech and language evaluation by a speech and language pathologist who specializes in brain injuries. The speech and language pathologist recommended that claimant receive speech therapy and ongoing assessments of her swallowing ability and her functional communication through the use of augmentative communication devices. With respect to short term goals for speech therapy, the speech and language pathologist

recommended, in part, that claimant learn to demonstrate awareness of “cause-and-effect” through the use of augmentative communication and to turn her head toward visual and/or auditory stimuli.

13. On April 3, 2012, claimant received an Interdisciplinary Augmentative and Alternative Communication Team Assessment at Pasadena Child Development Associates. During the assessment, claimant produced spontaneous vocalizations and began vocalizing or singing during appropriate breaks in the assessment. She demonstrated comprehension of simple verbal commands after receiving tactile and movement cues. She responded to verbal directions after a delay of several seconds, during which she smiled and tried to produce movements as shown by her facial expressions and changes in posture. Claimant was diagnosed with a severe speech and language impairment secondary to “profound physical limitations.” Her prognosis for developing communication and accessing educational curriculum was deemed “good” if she is given the support of assistive technology, augmentative and alternative communication devices, and individual speech and language intervention.

14. On an undetermined date in 2011, claimant’s mother requested that the Service Agency provide or pay for music therapy for her daughter. Earlier, Kaiser Permanente and the school district had declined to provide music therapy for claimant. On January 30, 2012, the Service Agency issued a Notice of Proposed Action, denying claimant’s request for music therapy based on its conclusion that music therapy is not a primary or critical means of ameliorating claimant’s developmental disability or necessary to enable claimant to remain in her home and cannot be provided under the Lanterman Developmental Disabilities Services Act (Lanterman Act). Claimant’s mother filed a Fair Hearing Request to appeal the decision of the Service Agency.

15. (A) On or about February 20, 2012, the Service Agency referred claimant to California Pediatric and Family Services, Inc., in Azusa (California Pediatric) for an assessment of her communication and self-feeding skills. On March 26, 2012, claimant underwent an adaptive skills assessment at home. In a written assessment report, California Pediatric staff noted the services that claimant was receiving, including music therapy and the infant stimulation program, and found that claimant has limited self-advocacy skills. California Pediatric indicated claimant would improve her self-advocacy skills by participating in an adaptive skills program. As “potential reinforcers” in the social area, California Pediatric noted claimant sang, played the piano, listened to music, and enjoyed the company of her siblings. Singing was noted as the most effective way to communicate with claimant. Claimant was found to be playful with people who enjoy singing. Her parents were working with claimant to say “Mom” by singing to her and using melody.

(B) With respect to the service objectives in communication, California Pediatric proposed that claimant learn to emit vocalizations and associate her parents and siblings with their names using minimal prompts. As a service intervention, photographs of family members were proposed to assist claimant to associate faces of family members with their names. With respect to the service objectives in self-feeding, California Pediatric proposed that claimant be able to use a spoon and cup with minimal spillage. As a service intervention, a variety of activities were proposed to build claimant's fine motor skill in grasping and multiple trials of lifting a spoon or a cup to her mouth with assistance would be presented. Reinforcement of skills was proposed through the use of food or beverage, encouragement, and verbal praise. California Pediatric recommended that claimant receive adaptive skills training for 20 hours per month for six months.

16. Since issuance of its notice of proposed action in January 2012, the Service Agency approved adaptive skills training for claimant to be provided by California Pediatric. In June 2012, claimant began the adaptive skills training. However, her mother is not entirely pleased with the service and the Service Agency plans to discuss the service with her.

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Based on the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1. Grounds exist under the Lanterman Act to grant claimant's request for music therapy, based on Findings 1 – 16 above.
2. Under the Lanterman Act, the Legislature has decreed that persons with developmental disabilities have a right to treatment and rehabilitative services and supports in the least restrictive environment and provided in the natural community settings as well as the right to choose their own program planning and implementation. (Welf. & Inst. Code, § 4502.)¹

Services and supports for persons with developmental disabilities means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability or toward the achievement and maintenance of independent, productive, normal lives. (§ 4512, subd. (b).) Services and supports may

¹ Further section references are to the Welfare and Institutions Code unless indicated otherwise.

include special living arrangements, training, education, recreation, behavior training, camping, daily living skills, community integration services, social skills training, and community support, and supported living arrangements. (*Ibid.*)

The Legislature has further declared regional centers are to provide or secure family supports that, in part, respect and support the decision making authority of the family, are flexible and creative in meeting the unique and individual needs of the families as they evolve over time, and build on family strengths and natural supports. (§ 4685, subd. (b).) Services by regional centers must be provided in the most cost-effective and beneficial manner (§§ 4685, subd. (c)(3), and 4848, subd. (a)(11)) and must be individually tailored to the consumer (§ 4648, subd. (a)(2)).

Further, section 4648, subdivision (a)(8), provides that the regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving funds to provide those services. Section 4659, subdivision (a)(1), directs regional centers to identify and pursue all possible sources of funding for consumers receiving regional center services. Effective on September 1, 2008, section 4646.4, subdivision (a), requires regional centers, when purchasing services and supports, to ensure conformance with purchase of service policies and to utilize generic services and supports when appropriate.

On August 1, 2009, section 4648.5 was added to the Welfare and Institutions Code and provides, in pertinent part, that the authority of regional centers to purchase camping services, social recreation activities, educational services for children ages three to 17, and non-medical therapies, including specialized recreation, shall be suspended until the Individual Choice Budget is implemented and certified to result in sufficient state budget savings to offset the costs of providing such services. (§ 4648.5, subd. (a).) An exemption may be granted on an individual basis in extraordinary circumstances to permit the purchase of these services when a regional center determines that the service is a primary or critical means for 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. (§ 4648.5, subd. (c).)

3. Discussion—The music therapy that claimant's mother has requested for her daughter constitutes a non-medical therapy that the Service Agency is barred from purchasing under section 4648.5, subdivision (a), unless the service qualifies for an exemption under section 4648.5, subdivision (c). Here, claimant's disabilities include limited mobility, inability to perform self-help tasks, and limited communication skills. For educational purposes, claimant receives infant stimulation programming and occupational, physical, and speech therapies from her school district. She receives speech and other therapies through her health insurance.

Recently, in June 2012, the Service Agency began providing adaptive skills training to claimant to improve her communication and feeding skills. However, it is music therapy that constitutes claimant's primary and critical means for ameliorating the physical, cognitive, or psychological effects of her developmental disability. Through her once weekly music therapy sessions, claimant has learned to move, vocalize, and communicate with her family. Her nurse and the speech therapist and neurologist at Kaiser Permanente have seen improvements in claimant's ability to vocalize sounds and to engage in spontaneous activity since starting music therapy. Her examining optometrist has recommended that music be used during her therapies. According to her music therapist, claimant has improved her ability to control her neck and head through movements during music therapy. In fact, California Pediatric, the provider of the adaptive skills training, has referenced music as a potential reinforcement tool and the most effective way to communicate with claimant. As such, the evidence demonstrated music therapy has had a major impact upon claimant's development and her physical mobility and communication skills. Under these circumstances, music therapy qualifies for exemption from the suspension of services under section 4648.5, subdivision (c), and should be provided to claimant.

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Wherefore, the following Order is hereby made:

ORDER

The appeal of claimant Ailey G.Y. from the decision of the San Gabriel Pomona Regional Center denying her request for music therapy is granted, based on Conclusions of Law 1 – 3 above, jointly and for all. San Gabriel Pomona Regional Center shall provide claimant with once weekly music therapy for 12 months. The Service Agency shall review claimant's progress after six months and re-evaluate her need for music therapy after 12 months.

Dated: August 3, 2012

Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings