

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

Claimant,

vs.

SAN GABRIEL/ POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2018050491

DECISION

This matter was heard by Nana Chin, Administrative Law Judge, Office of Administrative Hearings, on August 21, 2018, in Pomona, California.

Claimant¹ was represented by her parents. Claimant did not attend the hearing.

Danielle Santana, Fair Hearing Manager, represented San Gabriel/Pomona Regional Center (SG/PRC or Service Agency).

The record was held open until September 4, 2018, for Claimant to submit a medical report regarding Claimant's request for speech therapy and Claimant's updated Individualized Education Plan (IEP). The Service Agency was provided until September 17, 2018, to submit a response to Claimant's medical report and Claimant's newest Individual Program Plan (IPP).

¹ Claimant and her family members are not identified by name to protect their privacy.

Claimant failed to file a medical report addressing Claimant's need for speech therapy.

On September 6, 2018, Claimant's parents filed her 2018 IEP, a medical prescription dated August 28, 2018, a statement from Claimant's mother and two letters from Quantum Behavioral Solutions. These documents were marked and admitted in order as Exhibit A, B, C and D.

As the documents submitted by Claimant's parents were outside the scope of what was requested, the record was reopened to September 19, 2018, to permit the Service Agency to submit a response to Claimant's documents.

On September 18, 2018, the Service Agency submitted Claimant's 2018 IPP Progress Report and a written response to the additional documents submitted by Claimant's parents. The Service Agency written response was marked and admitted as Exhibit 11. The 2018 IPP Progress Report was marked and admitted as Exhibit 12.

Upon review of the 2018 IPP Progress Report, the ALJ noted some discrepancies in the document. The most glaring discrepancy was the fact that the 2018 IPP Report indicates that the meeting took place between the Service Coordinator (SC) Christine Yu and another regional center client and his parents. In view of these discrepancies, there was a concern that the document that had been submitted by the Service Agency was not Claimant's finalized 2018 IPP Progress Report but rather a draft copy. Consequently, the Administrative Law Judge, on her own motion, re-opened the record on September 28, 2018, and ordered the Service Agency to file and serve the Claimant's most recent 2018 IPP Progress Report, with an explanation of any discrepancies found in the report. Claimant's parents were provided an opportunity to review the document and submit comments/argument regarding the validity of the submission.

The Service Agency submitted Claimant's updated 2018 IPP Progress Report on October 8, 2018. The 2018 IPP Progress Report that was submitted on September 18,

2018, and the Service Agency's response to the September 28, 2018 Order were marked and admitted as Exhibits 12B and 12C. Claimant's parents did not file any additional response.

The record was reclosed and the matter was submitted on October 23, 2018.

ISSUE

The parties agreed that the issue to be decided is as follows:

Should the Service Agency provide Claimant funding for speech therapy services?

EVIDENCE RELIED UPON

Documents: Exhibits 1-12, 12B, 12C and A-D.

Testimony: Daniela Santana, Fair Hearing Coordinator, and Claimant's parents.

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FACTUAL FINDINGS

JURISDICTION

1. Claimant is a consumer who is eligible for Lanterman Developmental Disabilities Services Act services (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.)² based upon a qualifying diagnosis of autism.

2. On April 25, 2018, SG/PRC issued a Notice of Proposed Action (NOPA) denying funding for speech therapy.

3. Claimant's mother submitted a Fair Hearing Request dated May 4, 2018, and the matter was set for hearing on June 21, 2016. On June 13, 2018, Claimant's mother filed a motion to continue the hearing, waiving Claimant's right to have a final administrative

² Undesignated statutory references are to the Welfare and Institutions Code.

decision rendered within 80 days³ of the date SG/PRC received the Fair Hearing Request. The motion was granted and the hearing was set for August 21, 2018.

4. All jurisdictional requirements have been met.

BACKGROUND

5. Claimant is a nine-year-old girl who lives with her parents and younger sibling in the family home. Claimant's father works full-time as a choir conductor to support the family and Claimant's mother is a homemaker and the primary caregiver for Claimant and her sister.

6. Claimant attends a combination of special day classes and general education classes in public integrated school that is in a school district that is part of the East San Gabriel Valley Special Education Local Plan Area (ESGV-SELPA).

7. On August 10, 2016, an Individual Program Plan (IPP) meeting was held with Claimant, her parents and SG/PRC SC Seong Byun.

8. Seven objectives were noted in Claimant's 2016 IPP report. Three of the listed objectives were related to Claimant's issues with communication:

Outcome #: 2. Mother would like [Claimant] to communicate her wants, needs and emotions spontaneously with minimal assistance.

[¶] . . . [¶]

Outcome #: 3. Mother would like [Claimant] to express her frustration appropriately . . .

[¶] . . . [¶]

³ Section 4712.5, subdivision (a)

Outcome #: 4. Mother would like for [Claimant] to initiate, engage and maintain interaction appropriately with her peers and others.

[¶] . . . [¶]

(Exhibit 4.)

9. In order to achieve those objectives, the Service Agency agreed to assist “[Claimant’s] parents in advocating for [Claimant’s] educational needs;” and “monitor provision of educational services with family, including attending [Individualized Educational Program] meetings at the invitation of the parent when possible.” (Exhibit 4.)

REQUEST FOR SPEECH THERAPY THROUGH CLAIMANT’S INSURANCE

10. On November 23, 2017, Claimant’s mother contacted Claimant’s SC⁴ to request that the SG/PRC fund speech therapy for Claimant. Claimant’s mother advised the SC that though Claimant’s insurance⁵ had authorized additional speech therapy, the therapist was located 45 minutes away from her home and “that the family cannot drive too far.” (Exhibit 7.)

11. On December 13, 2017, the SC discussed Claimant’s request with “MCS Yanded” who recommended the SC contact Mayra Pizeno, the Health Care Support Specialist at SG/PRC, so that she could assist Claimant’s mother in exploring the generic

⁴ Between August 16, 2016, and August 8, 2018, Claimant was assigned a new SC. It was not established by the record when the change occurred. The SG/PRC I.D. Notes which were admitted as Exhibit 7, do not identify the SC by name.

⁵ The exhibits submitted by the Service Agency reference Claimant’s insurance as being both “LA Care” and “Preferred IPA” interchangeably.

resource. (Exhibit 7.) MCS Yanded also informed the SC to present Claimant's mother with a notice of proposed action (NOPA) if Claimant's mother requested a denial in writing.

12. On December 15, 2018, the SC notified Claimant's mother that SG/PRC typically does not fund speech therapy and that Claimant would first have to utilize generic resources. Claimant's mother again informed the SC that speech therapy had, in fact, been requested and authorized through their insurance but that Claimant has been unable to access the services as Claimant's mother was not comfortable driving such a distance. The SC did not advise Claimant's mother of her right to a NOPA as directed by the MCS but did offer to send a referral to Ms. Pizeno who could contact Claimant's insurance and attempt to get a speech therapy services closer to the family home. Claimant's mother agreed to the referral and provided the Service Agency with a signed information release agreement (202 document) on January 3, 2018.

13. From November 23, 2017, until February 13, 2018, the Service Agency did not provide Claimant with a NOPA regarding the denial of Claimant's request for speech therapy, with an explanation to Claimant that SG/PRC considered speech therapy to be an educational service which is the responsibility of the school district; or offer to assist in advocating for those services at Claimant's IEP.

14. On February 13, 2018, an Individual Education Program (IEP) meeting was conducted, and both of Claimant's parents attended the meeting. The SC was not present at the meeting.

15a. During the IEP meeting, Claimant's general education teacher and special education specialist reported that Claimant was doing well in her general education classes. Due to Claimant's progress, IEP team members agreed to have Claimant mainstreamed into general education classes for science and social studies. Though Claimant's parents had expressed their concerns regarding Claimant's communication

deficits, they were told by the team members that, as Claimant had not exhibited these behaviors in the school setting, speech therapy could not be provided by the ESGV-SELPA to address those issues.

15b. At the conclusion of the IEP meeting, ESGV-SELPA offered Claimant the following services: Continued placement in the SELPA ASD program with mainstreaming with 149 minutes of specialized academic instruction (SAI); 30 minutes of speech therapy twice a week in a group; and extended school year services with 235 minutes of SAI and 30 minutes of weekly speech therapy. The IEP noted that parents were in agreement with the offer of the free and appropriate public education (FAPE) and signed the February 13, 2018 IEP.

16. On April 9, 2018, Claimant's mother emailed the SC regarding the status of the referral to Ms. Pizeno as she had not been provided any updates regarding that process. The SC contacted Ms. Pizeno, who advised the SC that she was waiting for LA Care to call back with information regarding speech therapy services which were closer to the family home.

17. On April 12, 2018, the SC advised Claimant's mother that the Service Agency was still waiting for information from LA Care. Claimant's mother again requested that the Service Agency fund Claimant's speech therapy.

18. On April 17, 2018, for the first time, the SC advised Claimant's mother should request speech therapy from the school and offered to provide her with a NOPA. Claimant's mother agreed to receive the NOPA for the speech therapy denial.

19. On April 25, 2018, approximately five months after Claimant made the original request for services, the Service Agency provided Claimant's mother with a NOPA stating, in part, that "Speech therapy is considered an educationally related service Educational services are the responsibility of the local school district. [Claimant's school district] is a generic resource responsible to address your concerns in the area of

speech/language delay. . . and you may present your request to the [District] through the Individualized Education Program process.” (Exhibit 1.)

NECESSITY FOR SPEECH THERAPY

20. In February 2016, a speech and language assessment was conducted by Patricia Gordon, Speech/Language Pathologist with the ESGV-SELP ASD as part of a triennial evaluation to determine Claimant’s special education eligibility under the Education Code and to determine whether speech/language direct instructional services were required for Claimant to access the general education curriculum.

21. The assessment consisted of testing which occurred on five different days in February 2016. According to Ms. Gordon’s report:

[Claimant] continues to meet the criteria for speech/language disorder as she demonstrates moderate delays in the area of receptive and expressive language and severe delay in pragmatic communication including the nonverbal aspects of communication Deficits in these areas may negatively impact her ability to participate in learning groups, reading comprehension, written expression, development of friendships and understanding of situations and behavioral expectations. Articulation, fluency and voice are considered in the average range and areas of strength for her.

(Exhibit 6.)

22. The February 2016 language and speech assessment report recommended continued speech/language services but did not contain any recommendation regarding the number of hours of speech therapy for Claimant.

23. Following the hearing, Claimant submitted a prescription from her pediatrician, Kum S. Kim., M.D., diagnosing Claimant with ASD, delayed speech and development, and social communication and interaction deficits. Dr. Kim did not prepare a report or otherwise indicate that Claimant required speech therapy beyond what is currently being provided by ESGV-SELPA.

24. Viviana Peun, M.A., BCBA, the corporate clinical director of Quantum Behavioral Solutions, Inc. (Quantum), prepared a letter on behalf of Claimant. According to Ms. Peun, Claimant is currently receiving in-home Applied Behavior Analysis (ABA) Behavioral Intervention services through Quantum. According to Ms. Peun, she believes Claimant would benefit from speech-language pathology (SLP) services to focus on her expressive and receptive language skills. There is no indication in the letter of the basis upon which Ms. Peun has made her opinion. The letter also does not indicate whether Ms. Peun is aware that Claimant is currently receiving speech therapy from the school and whether she believes Claimant requires more speech therapy beyond what is currently being provided by ESGV-SELPA.

25. Annie Keorhagian, Claimant's behavioral therapist at Quantum, also expressed that, due to her difficulties in forming sentences and responding properly to other people, Claimant would benefit from speech therapy. (Exhibit C.) Ms. Keorhagian has noted throughout her therapy sessions that Claimant struggles to verbally express herself and opined that Claimant needs professional assistance. According to Ms. Keorhagian, she believes Claimant would benefit from SLP services.

26. On August 8, 2018, an IPP meeting was conducted with Claimant, her mother, and SC Yu. The objectives remained unchanged from the 2016 IPP report. Despite Claimant's ongoing request for speech therapy, there was no mention of Claimant's request in the 2018 IPP Progress Report.

SERVICE AGENCY CONTENTIONS

27. The Service Agency concedes that Claimant requires speech therapy. The Service Agency, however, maintains that it is not the proper agency to continue funding the speech therapy services. The Service Agency contends that, pursuant to Welfare and Institutions Code section 4648, it is prohibited from funding services that are currently being provided by the school district and authorized by Claimant's insurance carrier.

28. The Service Agency has offered its services in assisting Claimant's parents in advocating for more speech therapy hours through the school district and offered to assist to obtaining authorization from Claimant's insurance carrier.

CONTENTIONS OF CLAIMANT'S PARENTS

29. Claimant's parents believe Claimant has significant speech deficits and requires more than the one hour per week of speech therapy that is currently being provided through ESGV-SELPA.

30. Claimant's parents also believe that Claimant requires speech therapy services not only to access her education but also to facilitate her ability to communicate in other settings as well. On one occasion, Claimant's mother testified that she saw Claimant being bullied by a neighborhood child and Claimant being unable to say anything to the child in response.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (See Evid. Code, §§ 115, 500.) The burden of proof is on the person whose request for government benefits or services has been denied. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964))

231 Cal.App.2d 156, 161 (disability benefits).) As the party seeking funding for a previously unfunded service, the burden of proof in this matter is on the Claimant.

JURISDICTION

2. The Lanterman Act governs this case. (§ 4500 et seq.) An administrative “fair hearing” to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.)

3. Pursuant to Section 4710.5, subdivision (a), “Any ... authorized representative of the applicant or recipient, who is dissatisfied with any decision or action of the service agency which he or she believes to be illegal, discriminatory, or not in the recipient’s or applicant’s best interests, shall ... be afforded an opportunity for a fair hearing.”

4. An essential part of a fair hearing is “adequate notice” to a consumer of a regional center’s proposed action. Section 4710, subdivision (b), requires “[a]dequate notice shall be sent to the recipient and the authorized representative, if any, 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 a service or support requested for inclusion in the individual program plan.” “Adequate notice” is defined as “a written notice” which must include, information regarding “[t]he action the service agency proposes to take,” “the reason or reasons for that action,” “the specific law, regulation, or policy supporting the action” and information regarding the consumer’s appeal rights. (§ 4701.)

APPLICABLE LAW

5. In enacting the Lanterman Act, the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (§ 4501.) The Lanterman Act gives regional centers, such as

SG/PRC, a critical role in the coordination and delivery of services and supports for persons with disabilities. (§ 4620, et seq.) Regional centers are responsible for developing and implementing IPPs, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (§§ 4640.7, 4646, 4646.5, 4647, and 4648.)

6. A regional center is required to secure services and supports that: meet the individual needs and preferences of consumers (§§ 4501 and 4646, subd. (a).); support their integration into the mainstream life of the community (§§ 4501 and 4646, subd. (a).); “foster the developmental potential of the person” (§ 4502, subd. (a).); and “maximize opportunities and choices for living, working, learning and recreating in the community” (§ 4640.7, subd. (a).).

7. The “services and supports” which may be provided to a consumer include “speech therapy, training, education, . . . behavior training and behavior modification programs, . . . [and] social skills training . . .” (§ 4512, subd. (n).)

8. The consumer’s needs are determined through the IPP process. (§ 4646.) “Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer’s goals, objectives, and services and supports that will be included in the consumer’s [IPP] and purchased by the regional center or obtained from generic agencies shall be made by agreement between the regional center representative and the consumer or, where appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting.” (§4646, subd. (b).)

9. Despite a consumer’s entitlement to services and supports, “[r]egional 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 public funds for providing those services.” (§ 4648, subd. (a)(8).)

10. A service agency is required to identify and pursue all possible sources of funding for its consumers from other generic resources, including school districts (§ 4659,

subd. (a)(1)), and to secure services from generic sources where possible (§§ 4647, subd. (a), and 4646.5, subd. (a)(4)). Additionally, a service agency should provide a consumer advocate to assist consumers in the area of special education (§ 4640.6, subd. (g)(2)), and should advocate for the protection of consumers' rights (§ 4648, subd. (b)).

11. If a generic agency fails or refuses to provide a regional center consumer with those supports and services which are needed to maximize his/her potential for integration into the community, the Lanterman Act requires the regional centers fill the gap (i.e., fund the service) in order to meet the goals set forth in the IPP. (§ 4648, subd. (a)(1); *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390.)

REQUEST FOR SPEECH THERAPY

12. In this instance, the request that the Service Agency fund speech therapy services was made on November 23, 2017. Though the Service Agency denied the request, Claimant was not provided with a NOPA within five days after it made the determination to deny services which would explain the reason the denial in violation of Section 4710. Instead, the Service Agency offered to provide Claimant assistance in obtaining speech therapy services from her private insurance. There was no evidence of what efforts, if any, were made to secure those services. From January 3, 2018, until the date of the hearing, however, there was no indication that Claimant's insurance agency would be willing to provide Claimant with speech therapy services in close proximity to claimant.

13. The Service Agency does not deny that Claimant requires additional speech therapy services. (Factual Finding 26.) However, they maintain that it is an educational service which should be provided by ESGV-SELPA. This information, however, was not conveyed to Claimant's parents until well after Claimant's IEP on February 13, 2018. Due to this lack of notice, Claimant's parents were unaware that these services should be

requested from ESGV-SELPA during Claimant's 2018 IEP meeting or that they should request that a representative of the Service Agency be present during the IEP to provide advocacy services. Had Claimant's parents sought additional speech therapy services from the school district, and the school district refused to provide such services, the Service Agency would have been required to provide Claimant the services in order to fill any "gap" in services.

ORDER

1. Claimant's appeal is granted. SG/PRC shall provide funding for speech therapy services Claimant until such time as changed circumstances or a new IPP warrants otherwise.

2. The Service Agency shall provide Claimant with assistance in pursuing funding from the school district for after-school speech therapy.

DATED:

NANA CHIN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)