

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

JAYDEN E.,

Claimant,

v.

EASTERN LOS ANGELES REGIONAL CENTER,

Service Agency.

OAH Case No. 2012110285

DECISION

Administrative Law Judge Jankhana Desai, Office of Administrative Hearings, State of California, heard this matter on January 2, 2013, in Alhambra, California.

Jayden E.¹ (Claimant) was not present at hearing; she was represented by her mother Tina E. (Mother). Judy Castañeda, Fair Hearing Coordinator, represented the Eastern Los Angeles Regional Center (Service Agency).

Oral and documentary evidence was received and argument heard. The record was closed and the matter submitted on January 2, 2013.

ISSUE

Should the Service Agency be required to fund music therapy for Claimant?

¹ The surnames of Claimant and her family have been omitted to protect their privacy.

FACTUAL FINDINGS

1. Claimant is an eight-year-old female who receives services from the Service Agency pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq.² She has a qualifying diagnosis of mental retardation.³

2. Claimant lives with Mother, who is a single mother of two children, Claimant and her 13-year-old sibling. Claimant is non-verbal and non-ambulatory. She uses a walker and wheelchair-stroller for mobility. She relies on a gastrostomy tube for primary nutrition. Claimant communicates with vocalizations, facial expressions, and gestures. She also uses a communication device.

3. At school, Claimant receives speech, occupational, physical, and music therapy. She receives speech services for 40 minutes per week, occupational therapy for 75 minutes per week, physical therapy for 50 minutes per week, music therapy for 60 minutes per week, and a one-one-one aide support and nursing services daily.

4. Mother requested the Service Agency to provide music therapy for Claimant.

5. On October 26, 2012, the Service Agency issued Claimant a Notice of Proposed Action (NOPA) stating that the Service Agency was denying Claimant's request for music therapy.⁴

² All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

³ Mother objected to mental retardation being the qualifying diagnosis; however, the record indicates that Claimant is receiving services on the basis of a diagnosis of mental retardation and, in any event, the issue of Claimant's qualifying diagnosis was not an issue of the instant proceeding.

⁴ Other requests made by Claimant that were denied in the October 26, 2012 NOPA

6. Claimant timely appealed the decision.

7. The Service Agency's position is that music therapy at this time is a duplication of services currently being provided to Claimant. Specifically, its position is that the components of music therapy, including the speech and learning components, are already being addressed at school. As for the behavioral component of music therapy, the Service Agency is conducting an assessment for behavioral intervention services. However, Claimant has not begun to receive behavioral intervention services. The Service Agency is also in the process of performing a comprehensive evaluation for speech and physical therapy for Claimant.

8. Mother's position is that Claimant has greatly benefitted from music therapy. Claimant enjoys music and gravitates towards it. She started receiving music therapy at school in September 2011. Only two months after that time, she started expressing more emotion, showed behavioral and communication improvements, and improved her fine motor skills. Mother attributes Claimant's progress to music therapy. According to Mother, music has helped Claimant communicate, say the word "mama," and try to sing. Music therapy helps Claimant in many different areas. Mother feels that music improves Claimant's life.

Mother feels that music therapy is all encompassing and helps Claimant in cognitive, communication, and behavioral areas. Mother feels that she does not have the tools to teach Claimant at home through music and would like a licensed music therapist to come in the home to work with Claimant. One of Mother's major concerns is Claimant's behavioral issues and Mother feels that music therapy helps Claimant alleviate her behavioral issues. At the hearing, Mother provided examples of how music therapy has benefitted Claimant. Claimant enjoys musical toys. Prior to receiving music therapy, if the

were settled by the parties prior to the hearing.

batteries died for a particular toy, Claimant would bang her head, bite herself, throw herself on the floor, and stick her fingers down her throat. Now, Claimant will drag her toy to the kitchen and wait for Mother to install new batteries into the toy. Claimant is also showing greater emotion as a result of receiving music therapy. Prior to receiving music therapy, Claimant would ask Mother to put her down if Mother were carrying her. Now, Claimant shows physical affection towards Mother, something Mother never experienced prior to Claimant receiving music therapy. Mother provided a third example. She testified that Claimant would not respond to Mother's inquiry to her as to what kind of toy she wanted. Now, after receiving music therapy, Claimant will give Mother the toy of her liking when asked by Mother.

9. Claimant's music therapy progress report from the Music Therapy Services of Orange County, dated November 7, 2011, and revised December 20, 2011, describes music therapy. It states, "Music therapy is a therapy in which a qualified professional uses music activities and experiences as a tool to elicit behavior, emotional, cognitive, social, sensory, communication, and physical outcomes." The progress report shows the Claimant has benefitted from music therapy services and music therapy has helped her improve her cognitive, imitation, and name and number identification skills. In a letter dated December 28, 2012, Claimant's music therapist, Stephanie Ignatius (Ignatius), wrote that Claimant is very motivated by music. Ignatius wrote that music therapy has been used to improve Claimant's "grasp of an object, identify number and colors, use appropriate greeting skills, identify characters in a book, and improve her gross motor skills."

10. Claimant's Individual Program Plan (IPP), dated February 23, 2012, indicates that the school is attempting to cease music therapy for Claimant, and Claimant is in due process with the school district to prevent cessation of music therapy services for Claimant.

LEGAL CONCLUSIONS

1. The purpose of the Lanterman Act is primarily to prevent or minimize the

institutionalization of developmentally disabled persons and their dislocation from family and community (§§ 4501, 4509 and 4685), and to enable them to approximate the pattern of everyday living of non-disabled persons of the same age and to lead more independent and productive lives in the community. (§§ 4501 and 4750-4751.) Accordingly, persons with developmental disabilities have certain statutory rights, including the right to treatment and habilitation services and the right to services and supports based upon individual needs and preferences. (§§ 4502, 4512, 4620 and 4646-4648.) Consumers also have the right to a "fair hearing" to determine the rights and obligations of the parties in the event of a dispute. (§§ 4700-4716.)

2. The determination of which services and supports are necessary for a consumer is made through the IPP process. The IPP must be developed through a process of individual needs determination, which may include the consumer, the consumer's parents, a legal guardian or conservator, or authorized representative. The consumer and the family must have the opportunity to actively participate in the development of the plan. (§ 4646, subd. (b).) The IPP must include a statement of the consumer's goals and objectives based on the consumer's needs and preferences or, when appropriate, the needs and preferences of the consumer's family. (§ 4646, subd. (a).) The development of the IPP must include consideration of a range of service options proposed by the IPP participants, the effectiveness of each option in meeting the goals stated in the IPP, the cost-effectiveness of each option, and "generic services and supports when appropriate." (§ 4512, subd. (b); § 4646.4, subd. (a).)

3. Section 4648.5 states in pertinent part:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers' 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 costs of providing the following services:

[¶] . . . [¶]

(4) Nonmedical therapies, including, but not limited to, specialized recreation, art . . . 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 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.

4. Given the forgoing, Claimant's appeal must be granted. The evidence showed that Claimant has benefitted, and continues to benefit, from music therapy she receives at school, and Mother needs the service for Claimant so that she is able to use

music therapy in the home to assist Claimant. Although the Service Agency argues that it is addressing the behavioral component addressed by music therapy, Claimant has not begun to receive behavioral intervention services. The same holds for speech therapy. At this time, the Service Agency is conducting a comprehensive assessment of Claimant's speech therapy needs; however, Claimant has not begun receiving speech therapy services. At this time, therefore, music therapy would not be a duplication of services that Claimant needs in the home. Section 4648.5 has suspended the Service Agency's authority to purchase non-medical therapies such as music therapy. To qualify for the statutory exemption, music therapy must serve as a primary or critical means for ameliorating the physical, cognitive or psychosocial effects of Claimant's developmental disability, or be necessary to enable Claimant to remain in her home. The evidence showed that music therapy is both primary and critical in managing Claimant's behaviors. Further, music therapy has helped to improve Claimant's aggression issues, and her communication skills. Accordingly, an exemption, pursuant to section 4648.5, subdivision (c), is warranted.

ORDER

Claimant Jayden E.'s appeal is granted and the Service Agency shall fund music therapy services for Claimant.

DATED: January 16, 2013

JANKHANA DESAI

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.