

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

CLAIMANT,

and

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2019010294

DECISION

Administrative Law Judge Carmen D. Snuggs, Office of Administrative Hearings, State of California, heard this matter in Pomona, California, on February 20, 2019.

Claimant, who was not present, was represented by her parents.¹

Daniel Ibarra, Fair Hearing Specialist, represented the San Gabriel/Pomona Regional Center (Service Agency or SGPRC).

The record was closed and the matter was submitted for decision on February 20, 2019.

¹ Initials and family titles are used to protect the privacy of Claimant and his family.

ISSUE

Shall SGPRC be responsible for funding physical therapy in the form of aquatic therapy for Claimant at the Rose Bowl Aquatic Center (RBAC)?²

EVIDENCE CONSIDERED

The Service Agency's Exhibits and Witnesses: Service Agency's exhibits 1-10. Yaned Busch, Manager of Family Services, testified on behalf of the service agency.

Claimant's Exhibits and Witnesses: Claimant's Exhibits A and B. Claimant's parents and Alethea Crespo, Director of Therapy Programs, RBAC, testified on Claimant's behalf.

FACTUAL FINDINGS

1. On December 12, 2018, the Service Agency issued a Notice of Proposed Action proposing a denial of Claimant's request for funding for physical therapy. Claimant filed a timely request for fair hearing.

2. Claimant is a non-verbal 5-year-old female consumer of the Service Agency, who is eligible for services due to mild intellectual disability. Claimant has been diagnosed with 1p36.3 Deletion Syndrome, a "congenital genetic disorder that can cause developmental delays and intellectual disabilities of various degrees . . ." (Ex. 4, p. 17.). In addition, 1p36.3 Deletion Syndrome causes Claimant to suffer from hypotonia (low muscle tone), walk with an unsteady gait, experience poor balance and coordination, and suffer from a brain to body signal gap that affects Claimant's fine and

² Claimant's fair hearing request raised an issue concerning the Service Agency's denial of Claimant's request to fund speech therapy services. However, the parties informed the ALJ that they resolved this issue prior to the hearing.

gross motor skills. Claimant is insured under her family's private health insurance plan. She is not eligible for services through California Children's Services (CCS).

3. Claimant attends an elementary school within the Pasadena Unified School District (PUSD). Pursuant to her Individualized Education Program (IEP), Claimant receives physical therapy that is "concentrated [on] the school setting" and focused on basic gross motor skills, once per week for 30 minutes with PUSD. She also receives physical therapy services at DSC Physical Therapy, Inc. and Sportsmedicine (DSC), which is covered by her private insurance. The most recent report from DSC dated May 23, 2018, indicated that Claimant received therapy on an intermittent basis ranging from zero to twice per week "depending on Claimant's availability, illness, or other family/personal circumstances." (Ex. 10, p. 16.)

4. Pursuant to Claimant's August 28, 2018 Individual Program Plan Progress Report, Claimant progressed to ascending a flight of stairs with little to no support using handrails, but she needed assistance descending a flight of stairs. Claimant's parents also reported that Claimant had acquired the ability to run. The desired outcome related to mobility was Claimant's ability to "jump, run, and walk with greater stability and stamina as well as navigate stairs without handrails." (Ex. 3, p. 11.) Claimant's parents also wanted her to be able to climb on an outdoor climbing apparatus without assistance.

5a. Since 2016, Claimant has participated in aquatic therapy at the RBAC two days per week for 30 minute sessions. She initially presented at the RBAC with low muscle tone, poor balance, poor postural control and unsteady gait.

5b. Alethea Crespo, MPT, is the Director of Therapy Programs as well as an Aquatic Physical Therapist at the RBAC. She has obtained a Master's Degree in physical therapy and an undergraduate degree in human development. Ms. Crespo has been employed at the RBAC for 10 years and supervises physical therapists, physical therapy

assistants, and adaptive swim instructors, who modify swim lessons to teach water safety to individuals with physical and cognitive intellectual disabilities. Ms. Crespo explained that aquatic therapy supplements the physical therapy the client receives on land and includes lessons in water and community safety. Because Claimant's 1p36.3 Deletion Syndrome is a rare condition, she has not provided services to any other individual with that disorder. However, Ms. Crespo's testimony is afforded weight in light of her education and experience.

5c. Ms. Crespo testified that as a result of Claimant's participation in aquatic therapy, she has made significant improvement in her core strength and now walks with a more coordinated, forward-progressing gait. Claimant also demonstrates improved balance. Ms. Crespo opined that Claimant is not receiving the physical therapy service from PUSD that she needs to address the deficits caused by 1p36.3 Deletion Syndrome in that the physical therapy is limited in time and scope. She explained that physical therapy offered by PUSD addresses Claimant's school environment only and is focused on teaching Claimant to travel from point A to point B at school. Ms. Crespo further opined that Claimant would receive the most benefit from concurrent land-based and aquatic therapy. She further explained that the drag, bouncing, and pressure of the water addresses Claimant's sensory deficits and gross motor needs, and the water's resistance assists with strengthening Claimant's muscles. Ms. Crespo concluded that continued aquatic therapy will assist Claimant with achieving greater function and quality of life. Ms. Crespo's opinion is supported by Claimant's physical therapist at DSC who stated in his May 23, 2018 report that aquatic therapy will assist with strengthening Claimant's upper extremities and improve her coordination.

6a. SGPRC follows its Purchase of Service Policy when authorizing consumers' and families' service requests for therapy services. (Ex. 9.) SGPRC's Purchase of Service Policy authorizes SGPRC to purchase therapy services and supports for its clients where:

1. The therapy is required to prevent deterioration (worsening) in person's condition or to enable him or her to make progress in achieving developmental or functioning skills.

AND

2. An assessment by a qualified licensed professional with a specialty in the therapy service and/or the appropriate regional center specialist has been completed and indicates that the client would benefit from therapy.

AND

3. The child or adult is not eligible for this service through CCS, Medi-Cal, Medicare, public schools, private family insurance, military health insurance or other resources.

(Ex. 9, p. 108.)

6b. In addition, SGPRC's purchase of therapy services must be reviewed at least every six months, and the services must be purchased pursuant to a specific limited-time course of action. SGPRC may only purchase therapy services that relate to the client's developmental disability, developmental delay, or established risk condition, and to specific IPP objectives.

7a. Yaned Busch, SGPRC's Manger of Family Services, testified at the hearing. As a part of her duties, Ms. Busch helps parents locate resources, she collaborates with school districts regarding the provision of services and supports, and she advocates on behalf of the service agency's clients with special needs. In addition, Ms. Busch supervises Claimant's service coordinator, who presented Ms. Busch with Claimant's request for funding for aquatic therapy. She explained that SGPRC denied Claimant's request because Claimant receives physical therapy services through her educational

program with the PUSD and private insurance and, therefore, SGPRC is prohibited from purchasing physical therapy services under SGPRC's Purchase of Service Policy. She also indicated that SGPRC could only fund therapy services if the services were not funded by a generic resource such as private insurance or an educational program.

7b. Ms. Busch testified that she is not a clinician and therefore she did not know the difference between the land-based physical therapy Claimant received at school and the physical therapy in the form of aquatic therapy provided by the RBAC. She was also not aware of the amount of therapy Claimant received through private insurance.

8a. Claimant's mother testified that she learned of the RBAC's aquatic therapy services through a support group for parents of children with 1p36.3 Deletion Syndrome. She explained that because Claimant is sensory seeking and requires more stimulation because of her disorder, the water provides the stimulation that she needs. Claimant's mother stated that she saw an immediate change in Claimant once she began participating in aquatic therapy in the form of improved posture, muscle tone, and balance. Claimant's mother further testified that Claimant's demeanor has improved with aquatic therapy and she has become more verbal as a result of the program at RBAC.

8b. Claimant's family's private health insurance plan covers aquatic therapy, but the RCAB is not an in-network provider. Moreover, Claimant's mother asserted that she was informed that there are no in-network providers in the area where Claimant resides. If Claimant obtained aquatic therapy from an out-of-network provider, Claimant's family would be required to pay 100 percent of the costs until they met a \$5,000 deductible. Claimant's family previously paid for Claimant's aquatic therapy, but they have experienced a change in their financial circumstances and can no longer afford the out-of-pocket costs. Claimant's mother testified that she expects the family's

financial situation to improve in the near future and that Claimant is seeking temporary funding of aquatic therapy at RBAC.

8c. Claimant's mother testified that she was informed by the physical therapist at Claimant's school that Claimant does not work on strength exercises that work her muscles and the therapy is not designed to increase Claimant's strength. Instead, the physical therapy services Claimant receives through the PUSD focuses on assisting her navigate the playground to ensure that she can safely navigate the play structure and walk up and down the steps at school using the handrail.

9. Claimant's father testified that Claimant's family is concerned for her safety when she is near water. He explained that because of the sensory stimulation water provides to Claimant, she is drawn to it. Claimant's father further explained that Claimant's family lives near a river and that when they take her for walks she must be physically restrained or she will attempt to run into the water. Claimant's father stated that Claimant can never be left alone near any water because it is a danger. He asserted that Claimant is learning to swim at the RBAC during aquatic therapy.

LEGAL CONCLUSIONS

1. This case is governed by the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 et. seq., referred to as the Lanterman Act). Under the Lanterman Act, an administrative "fair hearing" is available to determine the rights and obligations of the parties. (§ 4710.5.) Claimant requested a fair hearing to appeal the Service Agency's proposed denial of funding for aquatic therapy at RBAC for Claimant. Jurisdiction in this case was thus established.

2. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Claimant is requesting that the Service Agency fund physical therapy services in

the form of aquatic therapy for Claimant. Under these circumstances, Claimant bears the burden of proof.

3. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community.” (§ 4501.) These services and supports are provided by the state’s regional centers. (§ 4620, subd. (a).)

4. The California Legislature enacted the Lanterman Act “to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community . . . and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community.” (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

5. Regional centers must develop and implement IPPs, which shall identify services and supports “on the basis of the needs and preferences of the consumer, or where appropriate, the consumer’s family, and shall include consideration of . . . the cost-effectiveness of each option” (§ 4512, subd. (b); see also §§ 4646, 4646.5, 4647, and 4648.) The Lanterman Act assigns a priority to services that will maximize the consumer’s participation in the community. (§§ 4646.5, subd. (a)(2), and 4648, subd. (a)(1), (2).)

6. Regional centers have a duty to identify and pursue all possible sources of funding for consumers receiving regional centers, including governmental or other entities or programs required to provide or pay for a service, Medi-Cal and private insurance. (§ 4659, subd. (a)(1) and (a)(2).) They are prohibited from purchasing any service that would otherwise be available from Medi-Cal, private insurance, or a health

care services plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage. (§ 4659, subd. (c).) In addition, a regional center is prohibited from purchasing medical services for a consumer unless the regional center is provided with documentation of a Medi-Cal, private insurance, or a health care service plan denial, and the regional center determines that an appeal by the consumer or family of the denial does not have merit. (§ 4659, subd. (d)(1).) However, a regional center may pay for medical or dental services while generic coverage is being pursued, but before a denial is made. (§ 4659, subd. (d)(1)(A).) The regional center may also pay for medical or dental services until the commencement of services by Medi-Cal, private insurance, or a health care service plan. (§ 4659, subd. (d)(1)(C).) SGPRC's Purchase of Service Policy is consistent with the foregoing statutes in that SGPRC is prohibited from purchasing physical therapy services where the service is otherwise available through a governmental agency or program, Medi-Cal, private insurance, or a health care service plan. (Ex. 9.)

7. Section 4646.4, subdivision (a)(4), requires regional centers to consider a family's responsibility for providing "similar services and supports for a minor child without disabilities. . . ."

8. Section 4648, subdivision (a)(8), prohibits regional centers from supplanting the budget of any other agency which may provide the funding in question.

9. In this case, the evidence established that Claimant suffers from 1p36.3 Deletion Syndrome which has resulted in mild intellectual disability, low muscle tone, and poor coordination and balance. Although Claimant receives physical therapy through the PUSD, those services do not address Claimant's low muscle tone or mobility skills outside of the school environment. Ms. Crespo and Claimant's land-based physical therapist opined that aquatic therapy will assist with increasing Claimant's muscle tone and coordination and it will compliment land-based physical therapy. Accordingly,

aquatic therapy services are not duplicative of the physical therapy services provide by PUSD. A generic resource is not available to fund aquatic therapy at the RBAC or any other facility in that no in-network aquatic therapy provider is available in Claimant's area. In addition, aquatic therapy at the RBAC addresses Claimant's need to become water safe in light of Claimant's need for sensory stimulation and her compulsion to run into water as described in Factual Finding 9. A child without disabilities would not need the same type of extensive training and frequency of swim lessons in light of Claimant's continuing need to become water safe after receiving aquatic therapy for more than two years. As such, SGPRC's Purchase of Service Policy does not preclude the service agency's funding of aquatic therapy services for Claimant at the RBAC, and application of the limitations in sections 4646.4 and 4648 is not warranted.

10. Claimant's parents requested "temporary" funding of aquatic therapy at RBAC but did provide any evidence regarding when Claimant is expected to become water safe or obtain the maximum results of aquatic therapy. Therefore, SGPRC shall fund aquatic therapy at the RBAC and review the provision of services after six months as required by SGPRC's Purchase of Service Policy.

ORDER

Claimant's appeal is granted. The San Gabriel/Pomona Regional Center shall provide funding for Claimant to receive aquatic therapy services at the Rose Bowl Aquatic Center twice per week for 30 minutes for no more than six consecutive months, at which time San Gabriel/Pomona Regional Center shall review the provision of those services and Claimant's progress, consistent with Legal Conclusion 10 above.

DATED: March 4, 2019

CARMEN D. SNUGGS

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision.
Either party may appeal this decision to a court of competent jurisdiction within 90 days.