

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request
of:

OAH Case No. 2012070194

CHANCE A.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

DECISION GRANTING THE APPEAL

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on July 31, 2012, in Alhambra. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Chance A. (Claimant), who was present, was represented by his mother.¹

The Eastern Los Angeles Regional Center (Service Agency) was represented by Elizabeth Ornelas, Supervisor.

ISSUE

Shall the Service Agency provide funding for Claimant to receive occupational and physical therapy from the Center for Developing Kids one time per week during the inter-session period between the end of summer school and the next school year?

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

EVIDENCE RELIED ON

In making this Decision, the ALJ relied upon exhibits 1-9 submitted by the Service Agency, exhibits A-D submitted by Claimant's mother, and the testimony of Service Coordinator Vanessa Lara, and Claimant's mother.

FACTUAL FINDINGS

1. Claimant is a five-year-old boy who is a Service Agency consumer based on his qualifying diagnosis of severe mental retardation. In early June of 2012, his mother requested the subject funding from the Service Agency.

2. By a Notice of Proposed Action dated June 19, 2012, Claimant's parents were advised that the Service Agency had denied the requested funding.

3. On June 22, 2012, a Fair Hearing Request on Claimant's behalf was submitted to the Service Agency, which appealed the denial of his service request.

4. Claimant lives at home with his parents. He receives special education services from his local school district. Claimant is non-verbal, non-ambulatory and uses a wheelchair.

5. During the regular school year and summer school, Claimant receives physical therapy (PT) and occupational therapy (OT) services provided by the Center for Developing Kids (CDK), each twice per week for 60 minutes. Those services are funded by Claimant's school district as part of his special education program provided in his Individualized Education Program (IEP).

6. In the past, the Service Agency has agreed to provide funding for Claimant to receive the PT and OT services from CDK during the summer inter-session period between the end of summer school and the beginning of the following school year. However, the Service Agency last agreed to provide that funding during the summer of 2011. The Service Agency has since maintained that in the future the family should

exhaust generic resources, including their private insurance and the school district, before it would consider providing that funding again.

7. The PT and OT services are necessary to prevent regression of the skills Claimant has developed and the progress he has made toward the goals and objectives established by CDK and in his IEP.

8. Claimant's family is requesting one hour per week each of OT and PT so as to prevent such regression until the regular school year starts in early September.

9. This summer, the inter-session period lasts six weeks, from the week of July 16, 2012, through the week of August 23, 2012. At the request of Claimant's mother, the school district agreed to provide the requested PT and OT funding to cover the first two weeks of the summer inter-session period. The remaining four weeks are at issue. According to Claimant's mother, the family cannot afford to pay for the service, so Claimant will not receive it unless and until the Service Agency is ordered to provide it.

10. The goals and objectives established in the PT and OT programs provided by CDK are not purely educational in nature, but rather are a mix of goals and objectives Claimant needs to access school, home and his community. For example, the OT addresses attention for purposeful activities, motor control, walking, standing and climbing. The PT addresses strengthening, motor planning, mobility and gait training.

11. Claimant's family has requested funding for the requested service from generic resources to no avail. For example, their private insurance will not fund the services from CDK. And CDK will not accept Medi-Cal; it will only accept cash or funding agreements from school districts or regional centers. During the last two IEP meetings, Claimant's family has requested that the school district provide the funding. The school is fully aware of the Service Agency's position. However, the school district views its legal responsibility for funding to only cover the regular school year and extended school year during summer school. Nonetheless, the school district agreed to provide funding

for two weeks during the summer inter-session period. Claimant's mother testified that she does not believe the school district is responsible for providing any further funding, and that the family does not have the funds necessary to retain an attorney to file a Due Process complaint over the remaining four weeks in question.

12. The Service Agency has established a purchase of service (POS) guideline with respect to OT and PT. Relative to school-age children, the Service Agency requires that generic resources be exhausted before it will consider funding, including families initiating the Due Process procedure. The POS acknowledges that Service Agency funding may be used for such services to prevent regression. The POS also recognizes that such funding may be available in extraordinary circumstances when the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability.

DISCUSSION

JURISDICTION AND BURDEN OF PROOF

The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.²) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established. (Factual Findings 1-3.)

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.)

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

When one seeks government benefits or services, the burden of proof is on him. (*See, e.g., Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) In this case, Claimant bears the burden of proof.

RESPONSIBILITY FOR FUNDING DURING THE SUMMER INTER-SESSION PERIOD

The Lanterman Act provides “a pattern of facilities and services . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life.” (§ 4501.) The purpose of the scheme is twofold: (1) to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (§§ 4501, 4509 & 4685); and, (2) to enable developmentally disabled persons to approximate the pattern of living of non-disabled persons of the same age and to lead more independent and productive lives in the community. (§§ 4501, 4750-4751.)

Generally, the Lanterman Act provides that regional centers are the payer of last resort, ultimately responsible for gaps in services. Thus, when a generic agency fails or refuses to provide a consumer with those supports and services needed to allow disabled people to maximize potential for normal lives, the Lanterman Act generally requires the regional centers to make up the service shortfall under the appropriate circumstances. (§ 4648, subdivision (g).)

In light of the state’s recent budget crisis, various cost containment measures have been added by the Legislature to the Lanterman Act. For example, section 4648.5, subdivision (a)(3), expressly suspends regional center funding for “[e]ducational services for children three to 17.” However, pursuant to section 4648.5, subdivision (c), an exemption may be granted “in extraordinary circumstances” when 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."

In this case, it was not established that the services in question are purely educational in nature. Instead, the services are a blend of various skills, goals and objectives that pertain to all phases of Claimant's life, i.e., at school, at home and in the community. Thus, it is not apparent that the funding restriction specified in section 4648.5, subdivision (a)(3), was intended to apply to such services. Put another way, requiring the Service Agency to fund only four out of 52 weeks during the year would not cause it to over-step its home and community based funding responsibilities or supplant the funding of the school district for any purely educational benefits derived by the services in question. This is further indication that the funding restriction of section 4648.5, subdivision (a)(3), is not implicated in this matter.

Even if the services in question are purely educational and therefore subject to the funding restriction, the exemption provided for by section 4648.5, subdivision (c), is applicable. This is an extraordinary circumstance where a funding gap during a brief six week period threatens to undo the benefits derived from the past year(s) of service. The PT and OT are critical means for ameliorating the physical effects of Claimant's developmental disability.

The Service Agency also points to section 4646.4, which was also recently added to the Lanterman Act in response to the current state budget crisis. Section 4646.4, subdivision (a), requires regional centers to conform to their POS guidelines and utilize available generic resources before agreeing to provide funding. These are relevant concerns.

However, Claimant's family has attempted to exhaust available generic resources to no avail. The law simply requires families to request Medi-Cal and their private insurance carriers to fund a service; it does not require families to use only providers

who accept Medi-Cal or are part of their insurance plan's network. Moreover, the family tapped into the Due Process procedures by requesting the school district to fund the services in question during the last two IEP meetings. It would be unreasonable for the family to initiate Due Process litigation for a service period of only four weeks under these circumstances, especially where the school district has provided funding for one-third of the disputed non-school year period and where the family does not feel that a Due Process complaint would have merit.

Finally, while it is true that the Service Agency has a POS that generally frowns on the requested funding, the same POS acknowledges that funding is appropriate when the exemption criteria of section 4648.5 have been established. In this case, it was. In any event, a service policy established by a regional center to generally govern the provision of services may not take precedence over the established individual needs of the consumer, as is the case here. (*Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390-393.)

FUNDING IS ORDERED ONLY FOR THIS SUMMER

Claimant's request for an order that the inter-session funding cover "future years" is denied. The Lanterman Act allows both parties the right to discuss all service issues during the periodic Individual Program Plan (IPP) review meetings. Because Claimant's needs and services may change over time, it would be improvident to prevent the Service Agency from revisiting this issue during the IPP process. However, should it appear that Claimant's situation has not changed next year when this issue is revisited, the Service Agency would have no cause to refuse similar funding, all other circumstances described above remaining the same.

Finally, Claimant's mother requested compensatory services for the time her son would not receive the OT and PT while this matter was pending. Unlike the laws

