

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

FAIRVIEW DEVELOPMENTAL CENTER,

Service Agency.

OAH Case No. 2013030922

DECISION

Daniel Juárez, Administrative Law Judge, Office of Administrative Hearings, heard this matter on May 22, 2013, in Costa Mesa, California.

Jason L. Aldrich, Esq., represented Claimant.¹ Mr. Aldrich is Claimant's attorney and stepfather. Claimant's mother, who is Claimant's probate conservator, was present at the hearing. Claimant was not present.

Cheryl Scates, Program 3 Director, represented the Fairview Developmental Center (Service Agency or FDC).

The parties submitted the matter for decision on May 22, 2013.

STATEMENT OF THE CASE

Claimant seeks an order requiring the Service Agency to purchase an iPad 2 (hereafter, iPad) and particular software as an augmentative adaptive communication device. Claimant currently uses an iPad to communicate; the Service Agency purchased

¹ Claimant is referred to by party title to preserve his privacy.

the device and software in 2010. The Service Agency proposes to remove the iPad from Claimant's possession and use upon completing his schooling at the end of June 2013.

The Service Agency contends that Claimant's use of the iPad must end once he completes his education, as it has not received authorization to purchase the device for his use thereafter.

Claimant contends that he needs the device to communicate.

FACTUAL FINDINGS

1. Claimant is a 22-year-old man with moderate intellectual disability, autism, obsessive/compulsive disorder, impulsive control disorder, and type I diabetes mellitus, among other things. He is non-verbal. When frustrated, he can be aggressive and can harm himself and others.

2. After the age of three, Claimant experienced several brief psychiatric hospitalizations until his admission to FDC at the approximate age of 15 on November 29, 2006. According to an AAC (Augmentative Adaptive Communication) evaluation, by Joell Adkins (Adkins), Licensed Speech Pathologist, dated April 10, 2013, Claimant "was placed at [FDC] because his parents felt they were no longer able to manage his frequent aggressive and self-injurious behavior. Much of [Claimant's] maladaptive behavior appears to be related to his difficulty communicating." The parties did not dispute these assertions. The AAC evaluation describes Claimant's violent behaviors as, "Hits head, [h]its others, [s]cratches others, [a]ttempts to destroy property, [b]reaks objects and [s]tomp[ing] on feet of others."

3. In approximately 2010, the Service Agency funded the purchase of an iPad with the "Proloquo2go" application software (software) for Claimant's use to

communicate.² The software provides a digital interface that allows Claimant to select icons that engage a synthesized voice. The iPad speaks for Claimant, upon his direction. Without the iPad, Claimant cannot communicate effectively.

4. On a date undetermined by the evidence, the Service Agency informed Claimant that he would not be able to retain or use the iPad after completing his schooling. Claimant's schooling ends on June 30, 2013.

5. On March 15, 2013, Claimant, through his conservator and mother, requested an administrative hearing to contest the Service Agency's proposed action.

6. On March 29, 2013, the parties met in an informal meeting. (Welf. & Inst. Code, § 4710.7.) The parties did not resolve the dispute at that meeting.

7. On May 17, 2013, the parties participated in a mediation. (Welf. & Inst. Code, § 4711.5.) The parties did not resolve the dispute at the mediation. The instant hearing ensued.

8. According to his individual program plan (IPP), dated November 4, 2011, Claimant "does not exhibit functional speech although there are some vocal responses. [Claimant] is able to comprehend simple, concrete speech, and he can follow simple directions. He utilizes a Dynavox and an [iPad] for communication." The Dynavox was a communication device that the Service Agency provided to Claimant before funding the iPad in 2010. At hearing, the Service Agency did not argue that the Dynavox was a viable alternative to the iPad. The parties agreed that the Dynavox was a much more expensive device than the iPad.

9. Claimant's November 30, 2012 IPP, his current IPP, contains a similar notation to the quotation in Factual Finding 8, except that this current IPP no longer

² The reference to "iPad" herein refers to the iPad device and the "Proloquo2go" application software.

references the Dynavox and further states, "He [Claimant] requires some prompting to use the [iPad]. He has training . . . to increase his skill with the use of the [iPad]."

10. Claimant's 2012 IPP contains the following two goals regarding communication: "[Claimant] will improve his communication skills, utilizing his [iPad] for enhanced communication by [November 30, 2013]"; and "[Claimant] will increase his communication skills by touching an icon on his [iPad] that relates to life skills or items in his environment by [November 30, 2013]."

11. The April 10, 2013 AAC evaluation states that Claimant is "sometimes" motivated to communicate with the iPad, and although he "rarely independently switches on the device," "staff typically will initiate use of this device to gain clarification of his needs and wants." While Claimant rarely communicates independently and will not spontaneously communicate using the iPad, staff state that Claimant "sometimes feels competent in using the device." Adkins, the speech pathologist who performed the AAC evaluation, recommended in her evaluation report that Claimant continue to use the iPad "to increase [Claimant's] communication abilities."

12. A physician order from Steven Silverman, M.D., dated May 21, 2013, states, "Based on the Speech and Language evaluation we are requesting client [Claimant] receive an Augmentative Alternative [*sic*] Communication device (AAC) specific to iPad with the program of Proloquo2go that will facilitate his ability to communicate more effectively." The Service Agency proffered this physician order at hearing.

13. The Service Agency presented evidence that its budget is constrained and in a deficit for the current fiscal year. There was no testimonial evidence to explain the particulars of the Service Agency's budget and deficit. The Service Agency asserted that it would seek possible funding for Claimant's iPad through Medi-Cal or Claimant's regional center.

14. At hearing, the Service Agency agreed to the following facts by stipulation: Claimant needs the iPad to communicate in his daily living activities, including his vocational training efforts, after the end of his academic schooling.

15. At hearing, the Service Agency described Claimant's need to communicate using the iPad as "crucial."

16. The Service Agency cited Welfare and Institutions Code section 4511, subdivision (c), in support of its case and argued that it has been unable to obtain authorization to purchase an iPad for Claimant after he completes his academic schooling.

17. The parties agreed that the iPad costs between approximately \$500 and \$700, and the software costs approximately \$200. The parties further agreed that any iPad and software, if purchased by the Service Agency for Claimant's use, would be the property of the State, via the Service Agency.

18. Claimant argued that the iPad is an adaptive device that helps Claimant communicate in the same way that a wheelchair helps a mobility-impaired person ambulate.

LEGAL CONCLUSIONS

1. Claimant bore the burden of proof by a preponderance of the evidence.

2. Welfare and Institutions Code section 4512, subdivision (b) states:

(b) "Services and supports for persons with developmental disabilities" means specialized services and supports or special adaptations of generic services and supports directed . . . toward the social, personal, physical, or economic habilitation . . . of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The

determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to . . . adaptive equipment and supplies . . .

3. Welfare and Institutions Code section 4646 states:

(a) It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual . . . and takes into account the needs and preferences of the individual . . .

4. Welfare and Institutions Code section 4648 states:

In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities including, but not limited to all of the following:

(a) Securing needed services and supports.

(1) . . . The regional center shall secure services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan . . .

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5. Without the iPad, Claimant cannot communicate effectively. Claimant's IPP contains goals and objectives on effective communication that rely on Claimant's use of an iPad. Claimant's goals to communicate and improve his communication are reasonable. Claimant's IPP supports the conclusion that Claimant needs the iPad for communication in his daily living, beyond his academic schooling. The opinions of Joell

Adkins, a speech pathologist, and Steven Silverman, a physician, support this conclusion. The iPad constitutes adaptive equipment as described in Welfare and Institutions Code section 4512, subdivision (b). The Service Agency did not offer other, more cost-effective devices or options as alternatives to the iPad. Thus, the iPad is the most cost-effective option in meeting Claimant's IPP-documented communication needs. The budgetary constraints of the Service Agency, while severe, do not bar the Service Agency from funding the iPad. (Welf. & Inst. Code, §§ 4512, subd. (b), 4646, subd. (a), & 4648, subd. (a)(1).)


6. Cause exists to grant Claimant's appeal, as set forth in Factual Findings 1-18, and Legal Conclusions 1-5.

ORDER

1. Claimant's appeal is granted. The Service Agency shall fund an iPad 2 and the Proloquo2go application software for Claimant's communication needs. Claimant is allowed to use the device and software after he completes his academic schooling.

2. The device and software shall remain the property of the State of California at all times.

Dated: May 28, 2013



DANIEL JUAREZ

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. This Decision binds both parties. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.