

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ELIJAH D.,

Claimant,

vs.

SAN GABRIEL/POMONA REGIONAL

CENTER,

Service Agency.

OAH No. 2013051154

DECISION

This matter was heard by Sabrina Kong, Administrative Law Judge with the Office of Administrative Hearings, on July 10, 2013, in Pomona, California. Elijah D. (Claimant) was represented by his mother (Mother).¹ San Gabriel/Pomona Regional Center (SGPRC or Service Agency) was represented by its Manager of Early Intervention Services, Salvador Gonzalez.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on July 10, 2013.

ISSUE

Did SGPRC properly deny funding for Claimant's enrollment in the Motor Development Clinic at Cal Poly Pomona (MDC)?

¹ Claimant is identified by first name and last initial to protect his privacy.

FACTUAL FINDINGS

1. Claimant is a nine year old boy who qualifies for, and is receiving agency services. He is a client of SGPRC pursuant to a qualifying diagnosis of autism. (Service Agency Exhibit 1.)

2. Claimant has lived with his parents within the area serviced by the SGPRC at all relevant times. Claimant's individual program plan (IPP) progress report for the period ending November 2011 showed that Claimant needed support in socialization and behavior redirection, but did not indicate needs in any motor development services. SGPRC had placed Claimant in a social skills training group from October 12, 2010 to January 31, 2013 at Casa Colina. Subsequent progress reports from Casa Colina also confirmed Claimant's need for social skills training. (Service Agency Exhibits 1 and 7.)

3. Mother requested that SGPRC fund Claimant's attendance at MDC during the summer of 2013. At hearing, Mother explained that enrollment at MDC would give Claimant the opportunity to work on his social skills with non-developmentally disabled children to avoid social regression over the summer. Claimant aged out of the Casa Colina social skills training group funded by SGPRC and is not currently enrolled in any social skills group. Mother is currently working on scheduling an assessment for Claimant with her insurance carrier so SGPRC can recommend an appropriate social skills program. In the meantime, Mother believes that MDC's curriculum, which includes bike riding, swimming, team obstacle courses and other body movement activities, would be a beneficial replacement social program. (Testimony of Mother.)

4. MDC enrolls typical and autistic children, and charges the same \$300 for all enrollees. Teachers of the program are students of Cal Poly without any specific credentials or particular training in working with autistic children and dealing with their social skill deficits. MDC is a program that is designed to develop and improve motor skills which incorporates a wide variety of games, water play and sports skills. The brochure itself states "The name of the clinic is highly significant to its purpose and goals." Claimant is not currently enrolled in the program because Mother could not afford MDC without funding

from SGPRC. While there has been no history that Claimant needed motor development services, Mother believes MDC will help Claimant advance socially with the added benefit of motor development training. (Exhibits 2 and 3, Testimony of Mr. Gonzalez and Mother.)

5. MDC has been vendored as "camping services" since September 26, 1998 and updated under the same category on January 22, 2009. (Service Agency Exhibit 4.)

6. MDC is not a social skills program. Development of Claimant's motor skills is not a need identified in Claimant's IPP. (Exhibits 1 through 7, Testimony of Mr. Gonzalez.)

7. On May 16, 2013, SGPRC issued its Notice of Proposed Action (NOPA) to Mother by Certified Mail which stated that it proposed to deny funding of Claimant's enrollment at the MDC. (Service Agency Exhibit 1 and Testimony of Mr. Gonzalez and Mother.)

8. The NOPA specifically stated the reason for its action as follows:

The Motor Development Clinic offers activities for six weeks during the summer which addresses sports skills, physical attributes, rhythms, games, and water activities/swimming that are available for children in the community. The Lanterman Developmental Disabilities Services Act, Welfares and Institutions Code, Section 4646.4(a)(4) requires that Regional Center consider the family's responsibility for providing similar services and supports for a minor child without disabilities.

On July 28, 2009, California State Law suspended Regional Center authority to fund educational services for children ages three to 17, camping services, social recreation activities, and non-medical therapies (including but not limited to specialized recreational, art, dance, music), retroactive to 7/1/09. An exemption may be granted on an individual basis in an extraordinary circumstance to permit the purchase of the

service identified 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. You have not notified SG/PRC of an extraordinary circumstance to be considered for an exemption.

Welfare and Institutions code section 4646.4(a) also states "Effective September 1, 2008, regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed . . . (1)

Conformance with the regional center's purchase of service policies, . . . (2) Utilization of generic services and supports when appropriate. (3) Utilization of other services and sources of funding as contained in Section 4659. (4) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting . . . Elijah previously attended „Kid's Crew" social skills training group at Casa Colina from (10/12/10-1/31/13). The last Kid's Crew notes stated Elijah continued to work on body awareness, personal space, sharing, and social cues such as identifying others feelings. Elijah has "aged out" of this social skills program. Autism Committee will be reviewing Elijah's case to recommend an appropriate social skills program.

9. On May 20, 2013, Mother filed a Fair Hearing Request appealing SGPRC's denial of funding of Claimant's enrollment in the MDC. (Service Agency Exhibit 1, and Testimony of Mr. Gonzalez and Mother.)

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.) An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act. (Welf. & Inst. Code, §§ 4700-4716.) Mother requested a fair hearing to obtain funding of MDC from SGPRC. Jurisdiction in this case was thus established.

2. The burden of proof is on Claimant as the party seeking to change the status quo and obtain funding for MDC, a program which SGPRC never provided to Claimant. The standard of proof in this matter is a preponderance of the evidence. (*See*, Evid. Code, §§ 115 and 500.)

3. The Lanterman Act is a comprehensive statutory scheme to provide "[a]n array of services and supports . . . which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community." (Welf. & Inst. Code, § 4501.) The services and supports should "enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (*Id.*)

4. In enacting the Lanterman Act, the Legislature codified the state's 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. A regional center is required to provide services and supports for eligible consumers in accordance with the Act. (Welf. & Inst. Code, § 4500 et seq.)

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

6. Welfare and Institutions Code section 4646, subdivision (a) provides:

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 the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

7. Welfare and Institutions Code section 4646.4, subdivision (a) provides:

Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan . . . the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

(1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.

(2) Utilization of generic services and supports when appropriate.

(3) Utilization of other services and sources of funding as contained in Section 4659.

8. Welfare and Institutions Code 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' [sic] 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:

(1) Camping services and associated travel expenses.

(2) Social recreation activities, except for those activities vendored as community-based day programs.

[¶] . . . [¶]

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

(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.

9. Welfare and Institutions Code section 4648, subdivision (a)(8), states:

Regional 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." (Emphasis added.)

10. Welfare and Institutions Code section 4659, in turn, provides:

(a) Except as otherwise provided in subdivision (b) or (e), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplemental program.

(2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance or medical assistance to the consumer.

11. SGPRC does not dispute Claimant's need for social skills development.

Mother was informed by her SGPRC service coordinator and in the NOPA that, after assessment, an appropriate social skills program will be recommended. In the meantime, since Claimant aged out of the SGPRC funded social skills group, Mother concluded that MDC may be a good replacement to prevent social regression and provide an opportunity to be with mainstream children over the summer. While this was undisputed by Mr. Gonzalez at the hearing, MDC is not a social skills program, is not designed to alleviate social deficits in autistic children, and does not specifically address Claimant's behavioral needs of "working on body awareness, personal space, sharing and social cues." Further, there is no evidence that any of MDC's teachers are credentialed or trained in teaching social skills or working with autistic children. In fact, MDC's purpose as evidenced by its name and literature is motor development. However, there is no evidence that Claimant will be able to generalize MDC's activities to his specific needs for social skills support, or that

Claimant's participation in MDC would address any of his identified needs specifically, as opposed to any other social recreation program. (Factual Findings 1 through 9.)

12. Additionally, the SGPRC's conclusion that the MDC was a recreational service was corroborated by its vendor codes. Although last updated prior to the effective date of Welfare and Institutions Code section 4648.5, SGPRC's vendor list considered the MDC program as the equivalent of "camping services." (Factual Findings 4 and 5.)

13. SGPRC is prohibited from funding camping services, social recreational services and nonmedical therapies unless extraordinary circumstances exist. Extraordinary circumstances is specifically defined as a service that is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of a developmental disability, or a service necessary to enable the person to remain in the home in the absence of an alternative service available to meet his needs. Both historically, and based on the evidence at hearing, the MDC program is a generic recreational activity, and while beneficial, is not the primary program addressing Claimant's socialization needs or autistic behavior. Also absent is any evidence that enrollment in MDC is necessary for Claimant to remain in the home and that no alternative service is available to meet Claimant's needs. Without any evidence showing that MDC falls within the exceptions for which SGPRC funding is permitted under Welfare and Institutions Code section 4648.5, subdivision (c), Mother's belief that MDC provides a good replacement social program for Claimant is insufficient to compel SGPRC's funding. Under these facts, Claimant did not prove by a preponderance of the evidence that SGPRC is required to fund MDC. (Factual Findings 1 through 9.)

ORDER

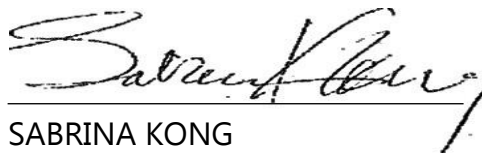
Claimant's appeal of the Service Agency's refusal to fund MDC is denied. SGPRC's decision not to fund MDC was appropriate.

NOTICE

This is the final administrative decision; both parties are bound by this decision.

Either party may this decision to a court of competent jurisdiction within 90 days. (Welf. & Inst. Code, § 4712.5, subd. (a).)

DATED: July 18, 2013

A handwritten signature in black ink, appearing to read "Sabrina Kong", is written over a horizontal line.

SABRINA KONG

Administrative Law Judge

Office of Administrative Hearings