

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DAMION A.,

Claimant,

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2013060817

DECISION

Administrative Law Judge Jerry Smilowitz, State of California, Office of Administrative Hearings, heard this matter on August 14, 2013, in Pomona, California, at the offices of San Gabriel/Pomona Regional Center (SGPRC or Service Agency).

Damion A. (Claimant) was not present. He was represented by his mother.¹

Jon Hope, Associate Director, Client Services, represented the Service Agency.

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on August 14, 2013.

ISSUE

The parties agreed on the following statement of the issue to be decided: Shall the Service Agency terminate funding at AbilityFirst² and fund all of Claimant's day care needs

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

² This program is referred to by both SGPRC and Claimant as "Ability First,"

while the program refers to itself as "AbilityFirst" -- the difference being an absence of a space between "Ability" and "First." Throughout this decision, the program is designated as "AbilityFirst." at Oak Tree Day School, because of cost-effectiveness and finding a suitable program that is integrated with non-disabled individuals?

EVIDENCE RELIED UPON

Documents. Service Agency's exhibits 1- 3, Claimant's exhibits 1 - 12

Testimony. For Service Agency, Stacey Dumitrescu, Service Coordinator; for Claimant, his mother and representative, his grandmother, and Bonita Ramos, Program Supervisor, AbilityFirst.

FACTUAL FINDINGS

1. Claimant is a 14-year old boy with a diagnosis of autism who has been found eligible for regional center services. He lives at home with his mother and maternal grandmother. His parents are divorced, and he spends Thursday evenings with his father, his father's wife, and his half-sister. On Friday morning, his father drops him off at day care. Both parents work.

2 As disclosed by his last Individual Program Plan (IPP), dated May 31, 2013, Claimant is non-verbal, and communicates through grunting, making noises and smiling. He uses an IPAD at school and receives speech therapy twice per week. He acknowledges others and takes turns.

3. On Claimant's self-care needs, the IPP states, "Damion is ambulatory with full use of all extremities. He is able to feed himself using a fork and spoon and does not make a mess. He can get himself snacks and pour drinks. He can do some cooking/meal preparation with supervision and assistance. Damion can use the toilet independently with no prompts or assistance. He does not have any incontinence issues."

4. On behavioral issues, the IPP reports, "Damion is reported to have a history of hitting and pushing others. Mother stated this is very rare now, but will occasionally occur with his younger sister. [Claimant] does not exhibit self-injurious behavior or property destruction. He does not wander off/run away and does not have emotional outbursts."

5. According to the IPP, Claimant "is in good overall health." He is lactose intolerant, has seasonal allergies and asthma, and is considered to be pre-diabetic. He is large for his age, and is overweight.

6. The IPP, at pages 6-7, identifies improving Claimant's ability to socialize and communicate with others as a long term goal, and communicating consistently and more spontaneously interacting with others, along with learning to cook and prepare a meal once per week, as short term goals.

7. Claimant completed the 8th grade, is attending summer school services at a middle school, and then will be transferred to high school for the fall. His mother reports that Claimant is doing great in school and has no concerns.

8. Claimant does not have any friends outside of school, and spends time with his extended family. They go out to eat, watch movies, and engage in roller skating. Claimant enjoys attending his half-sister's sports practices. He is out in the community at least two to three times a week. He enjoys playing video games, basketball, football and soccer.

9. The only description of day care anywhere in this record comes from the IPP, wherein it is stated that "[Claimant] will be supervised and cared for while mother is at work."

10. Claimant's first attendance at the Oak Tree Day School was from February of 2011 to July of 2012. His father was the primary person picking up Claimant from day care

owing to his mother's work schedule and commute distance. Claimant was the first child at this new day care program.

11. Claimant's father reports that Claimant did well at Oak Tree until more children started attending and he was the only child with a disability. The program also changed over time, with more quiet time. During the school year, the staff focused on the children doing their homework. The father often arrived to find Claimant sitting alone in the corner with his head on a table, pacing, looking sadly out the window, or standing outside because he had been told to step out to pass gas, which Claimant does when he is frustrated. During the summer, the kids had to be seated and spend time reading or doing puzzles, activities Claimant cannot do for extended periods because, when he is frustrated, he needs to walk around and hum. Claimant would push other kids, and the father received daily verbal reports from staff of Claimant's aggressive behavior. The father tried to break up Claimant's day by picking him up early and taking him to work with him or leaving a half day early from work and picking up Claimant to take him to his home. But when Claimant's father realized that he could not continue to miss work, he asked Claimant's mother if there were day care centers that worked with children with disabilities.

12. Claimant's mother already had placed Claimant's name on a waiting list for AbilityFirst, and in August of 2012, he was accepted into the program. Service Agency funded 76 hours per month of day care at AbilityFirst, and agreed to purchase reimbursements for Friday mornings at Oak Tree.

13. Claimant's family started to notice an appreciable difference in Claimant, particularly with respect to his socialization skills. His father, who continued to drive Claimant to day care until November of 2012, when his mother assumed the responsibility, was pleased to see his son interacting with peers—"shooting hoops," singing on a video game, exercising, swimming, working on the computer or relating to his father the details of a field trip he had been on. Claimant was learning manners and becoming much more

social. Claimant took trips to the mall, restaurants and to amusement parks, which he could not handle in the past.

14. His grandmother also started to notice that Claimant's socialization skills were improving. She has lived with Claimant since he was age three. Because she works during the day, she cannot be his babysitter. After starting with AbilityFirst, Claimant became much more social. At a birthday party, for the first time, she heard him sing. Before, he would only interact with close family members. Now, he interacts with others at Ability First, and knows how to share. She thought Oak Tree was not a good environment for him. Children there were much younger, they would sit at tables with books, and everyone looked "totally bored." She believes that if anyone was to get hurt, it would be due to Claimant pushing much smaller kids. Claimant now extends his hand to her when helping her carry groceries.

15. Claimant's mother had enrolled Claimant at earlier day care programs where he manifested aggressive behavior programs. One day care program asked him to leave. At a later placement, he had a 1:1 relationship with the director or his assistant if Claimant was not in his regular class. If the director or an assistant could not be 1:1 with claimant, the program would call to have him picked up. With AbilityFirst, she has seen great improvement. Claimant now tries to communicate, says his goodbyes right away, loud enough, and on cue. He is working on cleaning up and feeding himself at the programs. She believes that her son loves being at AbilityFirst, is very involved with the other kids, and enjoys the swimming, computer lab and field trips offered. She feels that he was not as involved when he was at Oak Tree and that the latter's staff did not know how to interact or relate with him there due to his disability.

16. Bonita Ramos, the Program Director at AbilityFirst, testified that Claimant's goals while at the program are to increase his socialization skills and his appropriate communication skills. All kids in the program are 14-17 years old. If a child is dangerous, he is exited from the program. AbilityFirst is more than just a day care center. Unlike the

staff at Oak Tree, the staff at AbilityFirst is very skilled at working with children with developmental disabilities. Claimant had transitioned from a peer group of 1-13 year olds. This change has given him further opportunities to grow. He is actively involved in cooking tasks, such as properly using kitchen items, cutting foods, measuring ingredients, and cleaning the kitchen. Claimant enjoys his time in the kitchen. When he retreats to sitting and watching the group, a particular teenager in his group will often invite him to join in the activities. He readily goes with her and appears to be making friends. Unlike at Oak Tree, he now stays on task for the duration of an art activity and no longer gets up to walk around the room after five to ten minutes. In Ms. Ramos' opinion, Claimant "has made tremendous progress" while in AbilityFirst.

17. Mother works full time, 8:30 a.m. to 5:00 p.m., Monday to Friday. SGPRC funds 76 hours per month of day care at AbilityFirst, and purchases reimbursements for the Friday mornings Claimant spends at Oak Tree after being dropped off there by his father. Claimant had been at Oak Tree on Friday mornings from 6:45 a.m. to 8:30 a.m. This school year, Claimant would stay there until 8:00 a.m. If so, in mother's opinion, there is no longer a need for Oak Tree as the change is more conducive with her work schedule.

18. Following mother's request, SGPRC reviewed its funding for day care services provided to Claimant and his family. The Service Agency presently spends \$1307.24 a month, five days/week, for both day care programs. Over the course of the new school year, Oak Tree would charge \$740 a month as a flat rate which covers school closures due to holidays, staff development days, and other breaks in the school year. AbilityFirst would charge \$1082 per month on an hourly basis with an additional charge of \$379 for five full days of school breaks throughout the school year. The difference in funding costs between the two programs is \$567 a month. As a result of this review, the Service Agency determined that Claimant continues to meet the policy for day care through the regular school year, but decided to terminate all funding of day care at AbilityFirst, instead funding all of claimant's day care hours through Oak Tree.

19. By a Notice of Proposed Action dated June 5, 2013, SGPRC notified Claimant's mother that it was terminating funding for day care through AbilityFirst as of July 7, 2013. The Notice states, in part: "[Claimant] can perform most all daily living tasks independently, some with reminders. He does need assistance with preparing food or getting himself a snack. He has a history of some behaviors, but is taking medications that have been able to control that. He is reported to be very friendly and easy going. Ability First is considered to be a facility for children with specialized care needs, such as significant medical or behavioral needs. Damion's need for day care can be met at Oak Tree Day School. Regional Center is willing to continue funding Damion's need for day care at Oak Tree Day School through purchase reimbursement."

20. Claimant filed a timely notice of appeal.

21. At the hearing, Claimant's Service Coordinator testified that, in part, Oak Tree is a suitable place for Claimant because his half-sister also attends Oak Tree. However, his half-sister no longer goes there.

22. In its direct presentation, the Service Coordinator summarized that part of the Service Policy that deals with Social Skills Training. No one at SGPRC had read the reports prepared by AbilityFirst because SGPRC received them shortly before the hearing.

CONCLUSIONS OF LAW AND DISCUSSION

1. Welfare and Institutions Code section 4646, subdivision (a), provides, in part, that, "It is the . . . 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.* (Added emphasis).

2. Welfare and Institutions Code section 4646.4, subdivision (a), directs a regional center to establish an internal process to ensure, when purchasing services and

supports, conformance with the regional center's purchase of service policy, as approved by the Department of Developmental Services (DDS).

3. SGPRC's Purchase of Service Policy (Service Policy) was approved by its Board on December 9, 2009, and approved by DDS on July 2010. At issue in this matter is not whether Claimant requires day care. The parties are in agreement that there is no natural support to provide day care. Both of his parents and his grandmother work during the day. The family's ability to contribute to at least part of day care is also not a consideration in this matter. What is at issue is whether Oak Tree Day School, the less-costly program, can meet Claimant's day care needs. The Service Policy broadly provides, at page 3, that "The individual shall not be required to use the least costly provider if it will result in the client moving from an existing provider of services or supports to more restrictive or less integrated services and supports," Oak Tree is not more restrictive than AbilityFirst and is an integrated program, which AbilityFirst is not. Both programs have provided Claimant with safe and secure environments.

4. The Service Policy is in accord with the IPP's depiction of day care as being the supervision and care of a child while a parent is at work. In the section on day care, at page 9, the Service Policy states that regional center support "is not intended to cover all costs associated with providing care and supervision for a child with a developmental disability (under age 18) who is unable to care for himself or herself." Although not applicable here, because Claimant is age 14 and therefore eligible for full regional center funding, parents of children under age 13 are "expected to pay the typical cost of day care for a child without disabilities" The Service Policy further states that, "Day care shall only be provided if a degree of care beyond that normally associated with the care of an individual without a developmental disability is required."

5. AbilityFirst is a specialized day care program.

6. At pages 9-10, SGPRC's Service Policy provides:

In determining whether the child requires specialized day care, the parent, legal guardian, and the regional center shall take into consideration the following factors and circumstances:

1. Significant behavior challenges, including disruptive hyperactivity, self-abusive behavior, aggressive acting-out behavior, assaultive behavior and/or emotional difficulties;
2. Significant medical or physical needs, including use of equipment requiring a specially trained care person, feeding needs that require extensive time and effort by a care person, suctioning, tube feeding, uncontrolled seizures, or any other medical-physical need that requires extensive time and effort or special training;
3. A child, over the age of 5, has significant self-care needs including lack of toilet training, inability to communicate basic needs, lack of self- help skills such as bathing, toileting, dressing, eating, and lack of ability to ambulate.

7. Claimant does not have *significant* behavior challenges, *significant* medical or physical needs, or *significant* self-care needs. Therefore, in compliance with its Service Policy on day care, Service Agency may fund Claimant's day care needs at Oak Tree only.

8. However, Claimant may qualify for social skills training as set forth in the Service Policy at pages 29-30, which states that "Social skills training is typically provided one to two times per week and is time-limited, usually not to exceed one to two years. It entails a detailed curriculum with meaningful and measurable outcomes and parent participation. It is expected to address specific goals and objectives identified by the Individual Program (IPP) team and prepare the child or young adult to transition to inclusive environments where he/she will be able to practice the skills learned and continue to build new skills."

9. SGPRC may purchase social skills training if the following criteria are met:

1. The child or young adult exhibits significant needs in communication and social interaction that prevent him/her from forming relationships in the community or benefiting from social and recreational activities with typical peers.

AND

2. An assessment conducted by a qualified professional provides evidence that the individual's social skills will improve with a structured, time-limited intervention.

AND

3. The parents or primary caretaker agree to assume a major role in implementing training strategies between sessions.

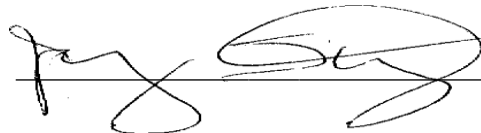
10. As demonstrated by the testimony of Ms. Ramos and the reports from AbilityFirst, Claimant has made considerable progress on improving his ability to socialize and communicate with others. Ms. Ramos, a qualified professional, points to Claimant's strides as an indication that he responds well to a structured intervention. Left open is the issue whether Claimant will continue to show and retain his improvement if the training is limited to one to two years and provided only one to two times a week, in keeping with SGPRC's policy. Also in question is whether Claimant's parents are required and able to attend such training.

11. SGPRC acknowledged that it had not read the reports from AbilityFirst before the hearing. Regardless, the question of whether Claimant qualifies for social skills training was not raised in this appeal, other than Service Agency's recitation of its policy on this type of training. While the evidence indicates that Claimant greatly benefitted from his time at AbilityFirst, SGPRC has not addressed the social skills training issue, and nothing in the ensuing Order either precludes or requires SGPRC to do so.

ORDER

The appeal of Claimant from the notice of decision by Service Agency to only fund for day care services provided by Oak Tree Day School, and not AbilityFirst, is denied.

Dated: August 28, 2013

A handwritten signature in black ink, appearing to read 'Jerry Smilowitz', is written over a horizontal line.

JERRY SMILOWITZ

Administrative Law Judge

Office of Administrative Hearings

NOTICE

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