

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2016051238

DECISION

Administrative Law Judge Michael A. Scarlett, State of California, Office of Administrative Hearings, heard this matter on October 18, 2016, in Whittier, California.

Jacob Romero, Fair Hearing Coordinator, represented Eastern Los Angeles Regional Center (Service Agency or ELARC).

Claimant was represented by his Mother, and his Father, who was present during half of the hearing.¹

Oral and documentary evidence was received and the record was left open until October 25, 2016, for the Service Agency to submit an Addendum to the Individual Program Plan and/or authorization that added the 90 hours per month of Personal Assistance hours at issue in this case. Service Agency submitted the requested documentation, which was marked as Exhibit 16. Mother submitted no response and

¹ Claimant and Claimant's parents' names are omitted to protect their privacy and confidentially in this proceeding.

Exhibit 16 was admitted without objection. The matter was submitted for decision on October 25, 2016.

ISSUE PRESENTED

Whether Service Agency properly denied Claimant's request for continued funding of 90 hours per-month of personal assistance services?

FACTUAL FINDINGS

THE PARTIES AND JURISDICTION

1. Claimant is 15 years old and a consumer of services of the Service Agency. He receives regional center services based on a diagnosis of Cerebral Palsy and unspecified Intellectual Disability. Pursuant to the January 4, 2016, Individual Program Plan (IPP), Claimant receives the following regional center services: 100 hours per-month of In-Home Respite services; 21 days of Out-Of-Home Respite services; 40 hours per-month of Life coordinated Services through Easter Seals; 90 hours per-month personal assistance (PA): 3 hours/day seven days per week, (these PA services were funded based on a neck injury suffered by Mother in July 2015 and the IPP indicated that the need for the services would be reviewed every three (3) months) – Service Agency also funded additional hours of PA services for Claimant for medical appointments and school breaks; 10 hours per-month of mental health counseling through ASD Counseling Consultancy; DIR/Floor Time services through Holding Hands; and Crisis Intervention Training through BRIA for the PA staff. The January 2016 IPP also approved a behavioral assessment for Applied Behavioral Analysis (ABA) services through Center For Autism Related Disorders (CARD). CARD performed an initial intake behavioral assessment on March 31, 2016. The CARD assessment recommended that Claimant receive ABA services. However, Mother disagreed that ABA services would be beneficial and implementation of ABA services was

not initiated. Mother also receives 283 hours per month of In-Home Supportive Services (IHSS) through the County of Los Angeles. Mother is the service provider for the IHSS.

2. On April 22, 2016, Service Agency issued a Notice of Proposed Action (NOPA), denying Claimant's request for Service Agency to continue funding 90 hours per-month of PA services related to Mother's neck injury. Service Agency stated that the 90 hours of PA services were subject to review every three months to determine the continued need for the services. On April 12, 2016, Mother provided medical records from her treating specialist (physician) which were reviewed by Service Agency and deemed insufficient to warrant continued funding of the PA services based on Mother's neck injury. Service Agency stated that the medical information failed to specify the nature of Mother's limitations and restrictions, and whether such restrictions prevented Mother from providing IHSS hours.

3. On May 9, 2016, Mother filed a Fair Hearing Request (FHR) on Claimant's behalf. In the FHR Mother sought funding for "2:1 staffing" for Claimant due to his "increased needs, size, strength, and with consideration of mother's physical limitations," without specifically asserting her request for continued funding of the 90 hours per-month of PA services, the specific issue in the NOPA. Mother requested a review of all Claimant's medical records and reports in assessing Claimant's current needs for regional center services.

4. The sole issue presented is whether Service Agency should continue funding 90 hours per-month of PA services based on an injury Mother incurred. In July 2015, Mother incurred an injury to her neck when Claimant slipped and Mother attempted to prevent him from falling by reaching out grabbing Claimant. Claimant bit her hand and pulled Mother's hair, causing injury to the nerves in Mother's hand and neck. Mother was examined by her physicians, placed on restrictions, and referred for physical therapy and occupational therapy. On August 12, 2015, Service Agency authorized 90 hours per month of PA services for Mother, based on the injury to her neck.

The authorization clearly indicated that the PA services for Mother would be reviewed every three months to determine the need for continued funding.

5. Mother appears to assert in the FHR, and argues at hearing, that continued funding of the 90 hours per-month of PA hours is warranted because of Claimant's serious medical condition, his increased maladaptive behaviors, and because Claimant has gotten larger with age and needs additional assistance to continue to effectively care for him at home. Mother presented significant portions of Claimant's medical records and evaluations dating back several years, and an August 22, 2016, test results showing that Claimant had recently been diagnosed with a new medical condition, "Xia – Gibbs Syndrome," a condition associated with hypotonia, intellectual disability, global developmental delay, mild dysmorphic facial features, brain anomalies, including hypoplasia of the corpus callosum, simplified gyral pattern and delayed myelination. Mother contends that the new diagnosis explains Claimant's significant behavior symptoms, significant seizures, and his increased pain, which she believes causes the increased maladaptive behaviors. Consequently, Mother argues, irrespective of her medical condition, Claimant's individual condition requires increased and continued funding of PA hours.

6. Service Agency conversely contends that funding for the 90 hours of PA services was based on Mother's July 2015 neck injury, and continued funding is predicated on Mother's continued need for treatment of her injury. Service Agency also argued that Mother is the service provider for 283 hours per-month of IHSS, and that she could not reasonably perform that many IHSS hours if her neck was actually injured. Finally, at hearing Service Agency argued that Mother's rejection of the CARD ABA services (projected to be funded at 40 hours per week) removed a service that could decrease the need for additional PA services by addressing Claimant's aggressive behaviors.

7. There is no dispute that Claimant's medical condition, aggressive behaviors, and increase in size and age present a challenge for parents in caring for Claimant in the home. However, Service Agency correctly asserts that the current 90 hours per-month of PA services funded by Service Agency is based on Mother's July 2015, neck injury, not Claimant's individual needs for additional PA services. What is determinative in this proceeding is whether Mother's July 2015 injuries, and her resulting medical condition, warrant continued funding of the PA services originally funded in July 2015.

8. At hearing, Mother offered sufficient medical evidence to show that as of September 2016, she was still undergoing medical treatment for her neck injury suffered in July 2015. Mother is receiving care and treatment from two orthopedic and pain management physicians, Ali Hafezi, M.D., and Tala Malhis, M.D., who have diagnosed Mother with a cervical disc herniation, cervical radiculopathy, strain left trapezius, and hypertriglyceridemia which is causing shoulder and neck pain. Mother credibly testified that these conditions emanate from the injury she sustained in July 2015, and that she has been receiving ongoing treatment from these physicians since that date. Mother has been referred for a Neurosurgery Evaluation by Dr. Malhis. On September 22, 2016, Dr. Malhis placed Mother on continued restrictions, including no excessive lifting, no overhead lifting, and no strenuous and repetitive support of child ambulation. Steven R. Kay, Chiropractor, Q.M.E., confirmed that as of September 15, 2016, Mother was being treated for injuries to her neck and spine that caused Mother headaches and difficulty sleeping. Dr. Kay restricted Mother to lifting no more than 25 pounds. On September 19, 2016, Mother was also referred for physical therapy by Hye Jin Jae, M.D., at PIH Physical Therapy. The medical problem given for the physical therapy referral was strain of left trapezius muscle and chronic neck pain.

9. Regarding Service Agency's contention that Mother's 283 hours per month of IHSS negates her need for PA hours, it is noted that at the time Service Agency funded the 90 hours of PA, Mother was the service provider for the IHSS hours. Service Agency

asserts that Mother's medical documents did not sufficiently indicate what her restrictions were and whether she could perform her IHSS hours. However, the overwhelming majority of the IHSS hours provided by Mother include "protective supervision," and a relatively small percentage is allotted for Claimant's personal care services, such as bathing, dressing, ambulation etc. Mother's physicians' restrictions indicate that she is restricted from excessive lifting and strenuous repetitive support of child ambulation. The IHSS protective supervision hours do not include such activities. Finally, Mother credibly testified that she was unable to hire caregivers that would work with Claimant for the hourly wage that could be paid with the IHSS funding. Consequently, Mother out of necessity, is required to perform the IHSS hours.

10. The issue in this case is limited to Service Agency's funding of PA hours based on Mother's need for assistance because of her injury, not Claimant's condition. To the extent that a change in Claimant's medical condition and behaviors warrant additional general PA hours based on Claimant's individual circumstances, this issue must first be discussed and determined through the IPP process. Mother's reluctance to pursue ABA services and any concerns about the impact of Mother's IHSS hours should be considered at that time.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to Code section 4710 et seq., based on Factual Findings 1 through 3.

2. In enacting the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.,² the

² All further statutory citations shall be to the Welfare and Institutions Code, unless otherwise noted.

Legislature accepted its 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. (§ 4501.)

3. Services are to be provided in conformity with the IPP, per section 4646, subdivision (d). Consumer choice is to play a part in the construction of the IPP. (See §§ 4512, subd. (b); 4646, subd. (a).) Where the parties cannot agree on the terms and conditions of the IPP, a Fair Hearing decision may, in essence, establish such terms. (See § 4710.5, subd. (a).)

4. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each client's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subd. (a)(1) & (a)(2).) Otherwise, no IPP would have to be undertaken. A priority is assigned to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1), (a)(2).)

5. Section 4512, subdivision (b), of the Lanterman Act defines the services and supports that may be funded, and sets forth the process through which such are identified, namely, the IPP process, a collaborative process involving consumer and service agency representatives:

'Services and supports for persons with developmental disabilities' means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation 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 where 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

6. The IPP is to be prepared jointly by the planning team, and services purchased or otherwise obtained by agreement between the regional center representative and the consumer or his or her parents or guardian. (§ 4646, subd. (d).) The planning team, which is to determine the content of the IPP and the services to be purchased is made up of the individual consumer, or their parents, guardian or representative, one or more regional center representatives, including the designated service coordinator, and any person, including service providers, invited by the consumer. (§ 4512, subd. (j).)

7. Here, Service Agency discontinued funding for 90 hours per-month of PA services funded for an injury sustained by Mother in July 2015. Mother presented sufficient evidence to show that she is still undergoing medical treatment for her July 2015 injuries, and is restricted in her activities, including providing care for Claimant that requires excessive lifting and ambulatory assistance for Claimant. Consequently, Mother's appeal of the Service Agency's denial of funding for the 90 hours of PA per-month is granted.

8. To the extent Mother seeks additional general PA services on behalf of Claimant based on a change in Claimant's medical condition and circumstances, Mother

must avail herself of the IPP process to address this issue. Service Agency's NOPA relates solely to Mother's need for PA services based on her medical condition, which is subject to review every three months to determine Mother's continued need for the service, and not Claimant's specific needs. Any dispute Claimant and Service Agency have regarding the current level of Claimant's PA services, currently provided for medical appointments and school breaks only, is improperly raised in this proceeding.

ORDER

1. Claimant's appeal is granted. The Service Agency shall fund 90 hours per-month of personal assistance services based on Mother's ongoing medical treatment for injuries that resulted from her July 2015 neck injury.

2. The 90 hours per-month of personal assistance services shall be reviewed every three (3) months to determine Mother's continued need for services.

DATED: November 8, 2016

MICHAEL A. SCARLETT

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 NINETY (90) DAYS.