

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

CLAIMANT,

vs.

SAN GABRIEL/POMONA REGIONAL CENTER,

Service Agency.

OAH No. 2016061156

DECISION

Administrative Law Judge Thomas Heller, State of California, Office of Administrative Hearings, heard this matter at Pomona, California on August 5, 2016.

Claimant's mother and father represented Claimant, who was not present.¹

Hortencia Tafoya, Federal Programs Specialist, represented San Gabriel/Pomona Regional Center (SGPRC).

Gabino Pintado provided Spanish interpreter services for Claimant's parents.

The matter was submitted on August 5, 2016.

ISSUE

Shall SGPRC fund physical therapy services for Claimant from Rose Bowl Aquatic Center?

¹ Claimant and his parents are not identified by name to protect their privacy.

EVIDENCE RELIED UPON

Documents: SGPRC Exhibits 1 through 6, 8 through 13; Claimant's Exhibits A through C.

Testimony: Hortensia Tafoya; Claimant's parents.

FACTUAL FINDINGS

1. SGPRC determines eligibility and funds services for developmentally disabled persons under the Lanterman Developmental Disabilities Services Act (Lanterman Act), among other entitlement programs. (Welf. & Inst. Code, § 4500 et seq.)²
2. Claimant is an 11-year-old boy eligible for Lanterman Act services based on diagnoses of severe intellectual disability, spastic quadriplegia, and epilepsy.
3. On a date not established, Claimant's mother asked SGPRC to fund physical therapy services for him through Rose Bowl Aquatic Center.
4. On June 7, 2016, SGPRC sent Claimant's mother a Notice of Proposed Action, proposing to deny the request.
5. Claimant submitted a Fair Hearing Request, which SGPRC received on June 17, 2016.

BACKGROUND INFORMATION

6. Claimant lives with his parents and siblings. He cannot walk without assistance, and has significant difficulty walking even with assistance. He wears leg braces and uses a gait trainer, but is usually transported in a wheelchair. He requires total care in bathing, dressing, feeding, toileting, and other activities of daily living. He is

² Undesignated statutory references are to the Welfare and Institutions Code.

non-verbal, but communicates by smiling, laughing, and crying. He attends school in his local public school district.

7. Claimant's Individual Program Plan (IPP), dated April 9, 2015, includes three long-term goals of his parents for him: good health, appropriate academic placement, and "mak[ing] improvements with his ambulation." It also includes five "Desired Outcomes:" good health, progress with communication, making pencil marks for up to 10 seconds, respite for his parents, and keeping him clean and dry and free from diaper rash. His most recent IPP Progress Report, dated April 11, 2016, reports no progress with using a pencil, but "reasonable progress" in the other four desired outcomes. It does not mention whether his ambulation is improving, noting only that his parents walk him for about 30-45 minutes with a walker before he tires, and that he enjoys exploring and crawling around his home.

8. Claimant receives physical therapy "consultations" four times per year through California Children's Services (CCS). The consultations are brief visits to monitor his muscle development and motor skills. On a date not established, his mother asked CCS to provide more physical therapy services, but CCS denied the request, and his mother did not pursue it further.

9. Claimant receives no physical therapy from his school, although his mother hopes to change that in his next Individualized Education Program (IEP). He also receives no physical therapy through Medi-Cal. His mother has never asked his primary care doctor for a Medi-Cal physical therapy referral.

10. Unhappy with Claimant's limited physical therapy, his parents paid for a private Physical Therapy Evaluation from Rose Bowl Aquatic Center in August 2015. Alethea Crespo, Director of Therapy Programs, recommended Claimant's IEP team consider a four-pronged physical therapy approach: "Direct physical therapy services two 60-minute sessions per week, with one session occurring at school and the other in

the clinic [i.e., the Rose Bowl Aquatic Center] . . . [¶] Family education and home program instruction. [¶] Continue to monitor effectiveness of bilateral lower extremity orthotics. [¶] Continue to monitor all durable medical equipment for fit and effectiveness.” The therapy would focus on improving Claimant’s coordination, motor planning and control, strength, and balance. The goals of the therapy would include improving his abilities to propel and steer his gait trainer, complete sit to stand transitions, maintain his balance, and step side to side with less upper extremity support.

11. In October 2015, Claimant’s school district referred him to Gallagher Pediatric Therapy for another physical therapy evaluation. The evaluation reported several physical therapy concerns affecting his functional skills and independence at school, including decreased muscle strength, balance, and safety awareness. But it stopped short of making any recommendations for therapy, stating only that his physical therapy services would be discussed at his next IEP meeting. That meeting has occurred, but Claimant’s mother testified his current IEP is incomplete.

12. With more physical therapy denied by CCS and none provided at school, Claimant’s mother asked SGPRC to fund therapy by the Rose Bowl Aquatic Center. According to the Notice of Proposed Action, SGPRC denied the request because it is generally prohibited from purchasing four categories of services: “(1) Camping services and associated travel expenses. (2) Social recreation activities, except for those activities vendored as community-based day programs. (3) Educational services for children three to 17, inclusive, years of age. (4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.” (§ 4648.5, subd. (c).) Exemptions are allowed only in “extraordinary circumstances . . . 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." (§ 4648.5, subd. (c).) According to SGPRC, the request fell within one or more of the four categories of services, and did not qualify for an exemption.

13. Stephen Gichuru, a Physician's Assistant with Claimant's primary care medical clinic, wrote a letter endorsing physical therapy, stating its objectives would be "to assist and strengthen his muscle tone and help him to stand and hopefully walk on his own." Neither he nor Ms. Crespo testified. SGPRC did not present any evidence from a physical therapist or medical expert.

14. SGPRC has a state-approved "Purchase of Service Policy," stating it may purchase "[t]herapy services and supports includ[ing] occupational, speech, physical or nutritional therapies" if:

1. Therapy is required to prevent a specific deterioration (worsening) in a person's condition or to enable him or her to make progress in achieving developmental or functional skills.

AND

2. An assessment by a qualified licensed professional with a specialty in the therapy service and/or the appropriate regional center specialist has been completed and indicates that the client would benefit from therapy.

AND

3. The child or adult is not eligible for this service through CCS, Medi-Cal, Medicare, public schools, private family insurance, military health insurance or other resources.

LEGAL CONCLUSIONS

1. Disputes about the rights of disabled persons to receive services under the Lanterman Act are decided under the fair hearing and appeal procedures in the Act. (§ 4706, subd. (a).) Claimant has the burden of proving SGPRC should fund the disputed services (see *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]), and must do so by a preponderance of the evidence. (Evid. Code, § 115 [preponderance of evidence standard applies unless another law or statute provides otherwise].)

2. The determination of Claimant's services and supports under the Lanterman Act "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." (§ 4512, subd. (b).) "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." (§ 4646, subd. (a).)

3. According to the Notice of Proposed Action, SGPRC denied Claimant's request for services because funding for the services is restricted under section 4648.5, and the request does not qualify for an exemption. But the request is for physical therapy, not "social recreation activities," "nonmedical therapies," or other services described in section 4648.5. The services from Rose Bowl Aquatic Center would focus on improving Claimant's coordination, motor planning and control, strength, and balance. (Factual Finding 10.) The goals of the physical therapy would include improving Claimant's abilities to propel and steer his gait trainer, to complete sit to stand

transitions, to maintain his balance, and to step side to side with less upper extremity support. (*Ibid.*) These are medical services and goals to which the funding restrictions in section 4648.5 do not apply.

4. Furthermore, the proposed services are designed to help meet a goal stated in Claimant's IPP. His IPP says one of his parents' goals for him is to be more ambulatory; the proposed physical therapy is directed at that goal. (Factual Findings 7, 10.) He is not receiving the same services elsewhere, and both Mr. Gichuru and Ms. Crespo say he would benefit from them. (Factual Findings 10, 13.) SGPRC did not present evidence suggesting that therapy would be ineffective in meeting this goal, or not a cost-effective service option. (§ 4646, subd. (a).)

5. At the hearing, SGPRC argued Claimant has not done enough to pursue funding from Medi-Cal, CCS, or his school to satisfy SGPRC's Purchase of Service Policy and sections 4646.4 and 4648, which require SGPRC to adhere to the policy and not use funds "to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." (§§ 4646.4, subd. (a)(1), 4648, subd. (a)(8).) Notably, the Notice of Proposed Action does not include the argument, and gives a different reason for action based on section 4648.5. (Factual Finding 12.) But in any event, SGPRC presented insufficient evidence it has been assisting Claimant's parents in pursuing other funding for physical therapy. Before denying funding itself due to other alleged funding sources, SGPRC should assist the family in trying to access those sources.

6. Ms. Crespo's recommendation includes family care and home program instruction, continued monitoring of bilateral lower extremity orthotics and durable medical equipment, and two direct physical therapy sessions per week, one at school and another at the Rose Bowl Aquatic Center. But it is unclear the Rose Bowl Aquatic Center would provide in-school therapy or family care and home program instruction,

and Ms. Crespo's references to "continue[d]" monitoring of orthotics and medical equipment suggest monitoring already occurs. (See Factual Finding 10.) Given these facts, Claimant did not prove SGPRC should fund services from Rose Bowl Aquatic Center for in-school therapy, family care and home program instruction, or monitoring of orthotics and durable medical equipment. However, he did prove SGPRC should fund one weekly direct physical therapy session for him at the Rose Bowl Aquatic Center.

ORDER

Claimant's appeal is granted. SGPRC shall fund one 60-minute direct physical therapy session per week for him at the Rose Bowl Aquatic Center.

DATE: August 19, 2016

THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. Either party may seek judicial review of this decision in a court of competent jurisdiction within 90 days.