

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2017060473

DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on July 27, 2017, in Torrance, California.

Latrina Fannin, Manager of Rights and Quality Assurance, represented Harbor Regional Center (HRC or Service Agency). Claimant¹ was represented by his mother (Mother). Mother was assisted by her friend, Rubi Saldana. Lilly Lucas, Certified Court Interpreter, provided Spanish language interpreter services.

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on July 27, 2017.

¹ Names of Claimant and his family members are not used to protect Claimant's privacy.

ISSUES²

1. Must the Service Agency fund personal assistant services for Claimant in the amount of 50 hours per month?
2. Must the Service Agency fund aquatic therapy to address Claimant's sleep and water safety issues?

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FINDINGS OF FACT

1. Claimant is a 12 year-old boy who lives with Mother within Service Agency's catchment area. Mother is Claimant's sole primary caregiver. Claimant has been diagnosed with Autism Spectrum Disorder and is eligible for services pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code section 4500, et seq.³

2. Claimant is curious and impulsive, particularly in unfamiliar settings, and has a tendency to elope. He also has difficulty waiting his turn, lacks safety, danger, and stranger awareness, and does not understand personal boundaries. Claimant often requires verbal reminders to give people their personal space when talking to them, and to not reach out to touch their faces, or hug or kiss them. Claimant has erratic sleeping patterns, waking up multiple times in the middle of the night to roam around the house, preventing Mother from properly resting and sleeping. Claimant participates in extracurricular activities, such as football, and other social activities.

² The Fair Hearing Request listed five issues, but the parties resolved three of them, leaving two issues for hearing.

³ All statutory references are to the Welfare and Institutions Code.

3. Claimant has a demanding schedule that includes school where he receives specialized academic instruction, adaptive physical education, and speech and language therapy. Additionally, outside of school, Claimant receives tutoring and applied behavior analysis (ABA) therapy. Claimant also receives in-home supportive services (IHSS) from the Department of Public Social Services, but Mother has declined to disclose to the Service Agency how many IHSS hours Claimant receives. Claimant also receives 30 hours per month, or 90 hours per quarter, of respite services.

4. Mother testified that she wished to have the Service Agency fund 50 hours per week of personal assistant services to help address the demands of Claimant's busy daily schedule, particularly tutoring, sports, and social activities, asserting Claimant requires constant supervision. At hearing, Mother testified that Claimant needs personal assistant services because she wants him to be integrated into society, and believes a personal assistant could help Claimant engage in activities outside of the home when Mother is unavailable to assist him with these activities. She believes a personal assistant will reinforce what Claimant is taught in his social skills program and in his ABA program, helping him to advance faster and be included in the community. Mother believes a personal assistant can help Claimant access places he does not generally frequent, such as museums, bookstores, and clothing stores.

5. Mother also requested that the Service Agency fund aquatic therapy to help normalize Claimant's sleep. In response, the Service Agency mailed consent forms to Mother to obtain Claimant's current medical records and to consult with Claimant's medical team. The Service Agency also advised Mother that if Claimant required treatment to address his sleep issues, the Service Agency would first need to determine whether the need could be met by Claimant's private insurance and Medi-Cal, as generic resources.

6. At hearing, Mother testified that she also wants aquatic therapy in order to address certain safety concerns. Specifically, Mother explained that Claimant has a strong attraction to bodies of water, and has no understanding as to the dangers of water or the risk of death that it poses. Rubi Saldana, an advocate and Mother's friend, testified at hearing and corroborated Mother's assertion that Claimant is strongly attracted to water. Ms. Saldana, who has known Claimant since he was five years-old, explained that when he visited her apartment on one occasion, Claimant eloped and scaled a locked gate to access the swimming pool. Although Claimant does not have a swimming pool at his home, Mother conducted some research and discovered that individuals with autism are attracted to water more than those who are not on the autism spectrum. Mother and Ms. Saldana, who is the mother of two autistic children, shared the opinion that Claimant needed aquatic therapy, because they believed an aquatic therapist would have more specialized knowledge and training in instructing individuals with developmental disabilities, and could teach Claimant how to survive should he end up in a swimming pool or any other body of water. Ms. Saldana explained that "any kid can go to swimming lessons, but there needs to be someone with specialized knowledge on how to teach kids with disabilities like [Claimant], because [Claimant] forgets what he is told . . . [and] needs to be redirected constantly." Ms. Saldana also expressed that "if [Claimant] took regular swimming lessons, it would take him a lot longer for him to learn."

7. On May 19, 2017, the Service Agency sent Mother a letter denying her request for personal assistant services on the grounds that it had received no records establishing that Claimant required additional support while participating in extracurricular activities. The Service Agency also denied Mother's request for aquatic therapy on the grounds that (1) Claimant had provided no proof establishing that Claimant required treatment for his sleep issues; (2) the Service Agency did not believe

that swimming was the primary or critical means of ameliorating Claimant's disability; (3) it had not been determined that aquatic therapy is evidence-based, and therefore, the Service Agency was statutorily prohibited from funding such a service; and (4) the Service Agency considered swimming as socially recreational in nature, and thus, it was statutorily prohibited from funding it. Mother filed a timely fair hearing request on June 8, 2017, and this matter ensued.

SERVICE AGENCY'S WITNESSES

8. Ahoo Sahba, M.D., who serves as the Service Agency's board certified pediatrician, testified at hearing. Dr. Sahba reviewed Claimant's medical records and noted that aside from autism spectrum disorder and obesity, Claimant had not been diagnosed with any other long-term medical issues. Nothing in the records described any sleeping disorders. Dr. Sahba would not recommend aquatic therapy to address the sleeping issue Mother described. Dr. Sahba explained that aquatic therapy would be appropriate, for example, for an individual with muscular skeletal issues or for someone who needed upper body strength or muscle strengthening.

9. Pablo Ibanez, who serves as the Service Agency's client services manager, explained that the Service Agency denied Mother's request for personal assistant services because Claimant is a very bright, capable, young man who is more akin to typically-developing 12 year-olds. As such, Claimant did not demonstrate that he required constant one-on-one care, despite Mother's assertion to the contrary. Mr. Ibanez also noted that Claimant's Individualized Education Program (IEP) did not demonstrate that Claimant required one-on-one assistance. Mr. Ibanez explained that even if Claimant objectively required personal assistant services, the Service Agency would not be able to fund such services without first establishing that all generic resources had been exhausted. Because Mother has declined to disclose the number of IHSS hours Claimant receives, it is difficult to know if all generic resources have been

exhausted. Mr. Ibanez acknowledged that while IHSS primarily provides services in the home, there are instances when it is permissible for IHSS workers to assist clients outside of the home, such as for doctor's appointments or for protective supervisory care in limited circumstances. Additionally, Mr. Ibanez noted that Claimant has not demonstrated to the Service Agency that he has an extraordinary personal need that cannot be met by natural supports.

10. Mr. Ibanez acknowledged that while Mother wished to procure personal assistant services in order to help Claimant become more independent in the community, Claimant's special education services as well as his behavioral program show that Claimant's school and ABA program are addressing Claimant's independence.

11. Colleen Mock, who serves as the Service Agency's director of community services, testified at hearing, and is responsible for the development and monitoring of services. Ms. Mock explained that the Service Agency has specific policies regarding the purchase of services. With respect to therapy services, the Service Agency, specifically HRC, "may purchase therapy services for a client only if the following criteria are met:

"1. the client requires therapy to prevent a specific deterioration in his/her condition, or to assist the client to achieve a specific desired outcome set forth in his /her Individual/Family Service Plan; and

"2. when the client is of public school age, the desired income is not related to their educational plan; and

"3. an independent assessment by a professional with a specialty in the therapy, and/or the appropriate regional center specialist, has been completed and indicates that the therapy will assist the client to achieve a specific desired outcome; and

"4. the client has been denied or is not eligible for Medi-Cal, California Children's Services, private insurance or another third party payer coverage; and

“5. when the client is a child, the therapy focuses on strengthening the parents’ ability to promote their child’s development or minimize their child’s impairment through demonstration, observation, coaching, and parent education.” (Exhibit 10.)

12. In light of the first criterion, which requires that the therapy be used to prevent a specific deterioration in the client’s condition, the Service Agency concluded that aquatic therapy would not prevent a specific deterioration in the effects of Claimant’s autism.

13. Ms. Mock also explained that effective July 1, 2009, pursuant to statutory authority, regional centers’ authority to purchase social recreation activities, such as swimming and water safety lessons, was suspended, and, to date, has not been reinstated. An exemption to this suspension could be implemented only when extraordinary circumstances exist and the social recreation activity is a primary or critical means for ameliorating the effects of the client’s disability. (Exhibit 12.)

LEGAL CONCLUSIONS

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

2. The services to be provided to any consumer of regional center services must be individually suited to meet the unique needs of the individual consumer in question, and within the bounds of the law each consumer’s particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), and 4648, subds. (a)(1) and (a)(2).) Otherwise, no IPP would have to be undertaken; the regional centers could simply provide the same

services for all consumers. The Lanterman Act assigns a priority to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subds. (a)(1) & (a)(2).)

3. Section 4512, subdivision (b), of the Lanterman Act states in part:

"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's family, and shall include consideration of . . . the effectiveness of each option of 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, diagnosis, evaluation, treatment, personal care, day care, . . . special living arrangements, physical, occupational, and speech therapy, . . . education, . . . recreation, . . . community integration services, . . . daily living skills training, . . . and transportation services necessary to ensure delivery of services to persons with developmental disabilities."

4. Services provided must be cost effective (§ 4512, subd. (b), *ante*), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, *e.g.*, §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) The regional centers' obligations to other consumers are not controlling in the individual decision-making process, but a fair reading of the law is that a regional center is not required to meet a consumer's every possible need or desire, in part because it is obligated to meet the needs of many disabled persons and their families.

5. Services are to be chosen through the IPP process. (§ 4512, subd. (b).) The IPP is to be prepared jointly by the planning team, and services are to be 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 disabled individual, or his or her 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).)

6. Pursuant to section 4646, subdivision (a), the planning process is to take into account the needs and preferences of the consumer and his or her family "where appropriate." Further, services and supports are to assist disabled consumers in achieving the greatest amount of self-sufficiency possible; the planning team is to give the highest preference to services and supports that will enable an adult person with developmental disabilities to live as independently in the community as possible. (§ 4648, subd. (a)(1).) Services and supports are subject to regular periodic review and reevaluation, particularly in response to a consumer's changing needs. (§ 4646.5, subds. (a)(7) and (b).)

7. Section 4646.4, subdivision (a)(4), provides that during the IPP process, when determining the purchase of services and supports, regional centers must consider "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."

8. Section 4648, subdivision (a)(2), provides that "effective July 1, 2009, a regional centers' authority to purchase the following services shall be suspended . . . [for] [s]ocial recreation activities, except for those activities vendored as community-based day programs."

9. Here, Claimant failed to meet his burden of establishing that the Service Agency must fund personal assistant or aquatic therapy services. With respect to personal assistant services, Claimant failed to establish that he requires personal assistant services to support his activities outside of the home. Specifically, Claimant proffered no expert testimony demonstrating that Claimant requires such a service to integrate into the community, or that Claimant requires more support to generalize skills learned in his ABA or social skills programs.

10. With respect to aquatic therapy, Claimant failed to establish that he requires aquatic therapy to address his sleeping issues. Specifically, Claimant proffered no medical records or testimony from a medical expert demonstrating that Claimant requires aquatic therapy to ameliorate his erratic sleep patterns. Additionally, Claimant did not demonstrate that he requires aquatic therapy, rather than community swimming lessons, to address water safety issues. Swimming lessons are provided by parents to children without disabilities (see Section 4646.4, subdivision (a)(4)), and are recreational in nature. Thus the Service Agency is prohibited from funding such services, pursuant to Section 4648, subdivision (a)(2).

11. Given the above, the Service Agency shall not be required to fund personal assistant and aquatic therapy services.

ORDER

Claimant's appeal is denied.

Date:

CARLA L. GARRETT
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 90 days.