

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT

and

INLAND REGIONAL CENTER,

Service Agency

OAH No. 2020040080

DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter telephonically on May 14, 2020, pursuant to OAH's April 29, 2020, Order which converted this matter from an in-person hearing to a telephonic hearing in light of the Governor's proclamation of a State of Emergency and Executive Order N-25-20 arising out of the COVID-19 pandemic.

Senait Teweldebrhan, Fair Hearing Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Brian Allen, Advocate, represented claimant.

Oral and documentary evidence was received. The record was closed and the matter submitted on May 14, 2020.

ISSUE

Is IRC required to fund Speech Therapy (ST), Occupational Therapy (OT) and Physical Therapy (PT) for claimant during the closure of claimant's school due to the COVID-19 pandemic?

SUMMARY

IRC is not required to fund ST, OT or PT services for claimant because these services are available to claimant through her school district although they are available through "distance learning" by videoconferencing due to the COVID-19 pandemic.

FACTUAL FINDINGS

Jurisdictional Matters

1. On March 24, 2020, IRC notified claimant that it was denying her request to fund ST, OT, and PT services because the school district and medical insurance "typically" provide these services and IRC is precluded from funding these services if they are available from these sources. In its letter, IRC advised claimant that it agreed to fund a temporary increase in respite care from 48 hours to 100 hours starting April 1, 2020, through August 2020.

2. On April 2, 2020, Mr. Allen, claimant's advocate, filed a Fair Hearing Request on her behalf. As the reason for this request, claimant stated:

(IRC) has denied the funding for Occupational Therapy, Physical Therapy, and Speech/Language Therapy.

In the request, claimant stated the following concerning what is needed to resolve the complaint: "(IRC) should be ordered and agree to provide funding for Occupational Therapy, Physical Therapy, and Speech Therapy in the interim do [*sic*] to the COVID 19 outbreak and due to school closures. Which [*sic*] Consumer has no access at this time."

Claimant's Motions

3. Before the hearing in this matter, claimant moved that the hearing be conducted through a video conferencing platform and, also, that IRC's evidence be excluded because IRC did not provide claimant with the materials it intended to offer as evidence by the date specified in OAH's April 29, 2020, order. Both motions were denied. Contrary to claimant's argument, IRC sent its packet of materials to claimant's representative on May 7, 2020, and claimant's advocate received this packet of proposed exhibits on May 9, 2020, according to the United States Postal Service's tracking record, which was well before the May 11, 2020, date specified in OAH's April 29, 2020, order. IRC also sent claimant's advocate the packet of its materials on May 7, 2020, by electronic mail. With respect to claimant's request to have the matter heard through a videoconference platform, the factual issues that need to be decided are not in dispute and the parties can fully present their respective cases through the telephonic conference platform. Claimant, further, did not request that the matter be continued in order that the hearing may be held in person.

Background Information

4. Claimant is thirteen years old and qualifies for regional center services under the autism and intellectual disability categories. She receives SSI, Medi-Cal through IEHP (Inland Empire Health Plan), and California Children's Services benefits. Claimant is also eligible to receive 238 hours monthly of In-Home Support Services (IHSS) in the area categories of self-care and safety. Claimant, further, has a 1:1 aide. She receives ST, OT and PT funded by the county through her middle school.

The Provision of ST, OT and PT Services to Claimant Through Her School District During the COVID-19 Pandemic

5. According to her school Individualized Education Program Plan (IEP) dated October 29, 2019, the school district is required to provide claimant OT twice per month for 20 minutes per session, ST once a week for 20 minutes, and PT twice a month for 20 minutes per session.

Due to the social restrictions in place as a result of the COVID-19 pandemic, ST, OT and PT therapists have not been able to deliver these services to claimant in person. Claimant did not dispute that these social restrictions prevent ST, OT and PT therapists from providing claimant with in person services through, at least, the time of the hearing.¹

¹ It is recognized that, at the time of the writing of this decision, state and county public health directives arising out of the COVID-19 pandemic are in the process of changing and, it is hoped, with changes in these directives, claimant will be able to receive in person ST, OT and PT therapies again through the school district. At

In a conference call on March 24, 2020, with Shelly HOFFEY, claimant's Consumer Services Coordinator, claimant's parent asked IRC to fund ST, OT and PT services because claimant's school is closed during the COVID-19 pandemic and claimant is not receiving these services.

In light of this request, on April 15, 2020, Ms. HOFFEY spoke with Dale FOLKEN, the principal at claimant's middle school, about the availability of these services to claimant. Mr. Folken told Ms. HOFFEY that due to social distancing restrictions in place as a result of the COVID-19 pandemic, the school is offering claimant OT, ST and OT therapy services remotely, by video conferencing, by Speech and Language Pathologists, Occupational Therapists, and Physical Therapists, and these services are available to claimant. Ms. HOFFEY obtained from Mr. Folken materials that detail how these therapists are to deliver these services to claimant, and children in general, at claimant's middle school. Specifically, Mr. Folken sent Ms. HOFFEY an email on April 16, 2020, in which he provided "examples of support that is being provided to all of our students (receiving the particular services) including your client". He added that "the service providers have made themselves available for daily Zoom sessions to provide support for implementation of in-home activities." Mr. Folken then identified links to website resources for OT and PT. He stated that ST had sent both packets and links to claimant, but he did not have the link or the materials. In addition, Mr. Folken provided IRC with a document entitled "Quail Valley SBCSS Classroom Distance Learning

the time of the hearing, IRC does not have the ability, even if required to fund the required services, to demand any ST, OT and PT therapists to provide claimant with in-person therapies. With this stated, claimant's concerns about her ability to receive necessary services are noted as a matter of serious concern to her and her family.

Supports” which details with contact information for ST, OT, and PT therapists, with times they are available, and resource materials. A copy of a calendar for May 2020 also identified daily school office hours, including “pick up and drop off days”.

6. Further, Mr. Folken told Ms. Hoffey that he personally delivered to claimant’s home a “Chromebook”, which is a small laptop, so that claimant can access these services through video conferencing with exercises. Mr. Folken said he had to personally deliver the Chromebook to claimant’s home because claimant’s parents did not respond to his phone calls and messages left by the school to get their supplies for distance learning.

7. Kathy Decoup, IRC Program Manager, testified in the hearing. She is Ms. Hoffey’s supervisor, reviewed claimant’s request that IRC fund services in this matter and signed the proposed denial of services letter. She stated that because these services are available to claimant, even though they are available remotely to her through her school district’s “distance learning,” and the school district has the responsibility to provide these services, IRC cannot “supplant” them under Welfare and Institutions Code section 4648, subdivision (a)(8), and can’t fund the services. She suggested that claimant must raise her concerns about the availability of the ST, OT and PT services with the school district. Ms. Decoup also stated, as a further reason to deny claimant’s request, that claimant’s health insurance should, as a generic resource, be available to fund these services.

Claimant’s Argument

8. Claimant did not dispute that, through at least the time of this hearing, ST, OT and PT therapists were unable to provide in person services to claimant due to the social restrictions in place as a result of the COVID-19 pandemic. With this noted, it

is unclear if claimant's concern is that her school is unable to provide her with adequate services through "distance learning" or that distance learning is simply inadequate in the first place. Claimant's father testified only that the IRC has not been "flexible" in providing claimant with services and has not provided her with access to services. He claimed he did not receive the Chromebook Mr. Folken stated he delivered.

9. For her argument that IRC is required to fund these services, claimant relied on a March 12, 2020, Directive from the Department of Developmental Services to regional centers concerning regional center operations during the pandemic for her assertion that this directive requires IRC to fund the ST, OT and PT services for claimant at IRC.

Nancy Bargman's, DDS's Director, prepared this directive. In it, DDS permitted regional centers to waive certain "in person meetings related to services due to the Governor's Executive Order N-25-20."² DDS also advised regional centers as follows:

While COVID-19 remains a low risk for the general population, the Department recognizes there may be instances where regional centers will need flexibility to support individuals at home for their safety and that of the general population.

10. Contrary to claimant's reading of this directive, the March 12, 2020, Directive does not require IRC to fund ST, OT and PT in person services to claimant.

² The Governor's order specifically authorized DDS to exercise waivers of the Lanterman Act. (Executive Order N-25-20 ¶ 10, signed March 12, 2020.)

Instead, it advises that regional centers may be flexible when supporting their clients. Nothing in the directive requires regional centers to fund services that are being provided by school districts, albeit in an alternative way. This Directive simply waived the requirement that regional centers provide in person services and advised regional centers to exercise "flexibility" to support regional center consumers so that they can remain safely in their homes. The Directive does not waive regional centers' duty to follow Section 4648.5 or other Welfare and Institutions Code sections at issue in claimant's matter concerning funding of services.

Further, "flexibility" in providing services at this time, as referenced in the Directive, is not interpreted to mean IRC must fund ST, OT and PT services, as claimant suggests, because claimant's school must provide these services to claimant consistent with its obligations to provide students with disabilities a free and appropriate education under Section 504 of the Individuals with Disabilities Education Act. (29 U.S.C. § 701, 29 U.S.C. § 794, subdivision (a), 34 C.F.R. §§ 104.4, 104.33 and 28 C.F.R. § 35.130.)

10. Claimant also submitted, in support of her argument that IRC must fund the requested services, a document entitled "Questions and Answers on Providing Services to Children with Disabilities During a COVID-19 Outbreak" from the United States Department of Education. The document addresses the situation where a school district "closes its school to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population". In such a situation, the school would not be required to provide services to children with disabilities.

The situation described in the document does not apply to claimant. The school district is providing ST, OT and PT services to claimant, albeit through digital means, and these services are still available to her.

LEGAL CONCLUSION

Purpose of the Lanterman Act

1. The purpose of the Lanterman Act is to provide a "pattern of facilities and services . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life." (Welfare and Institutions Code section 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

Burden of Proof

2. In a proceeding to determine whether a claimant is eligible for services, the burden of proof is on the claimant to establish he or she meets the eligibility criteria. The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Applicable Statutes

3. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq.

4. Section 4501 states:³

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

The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance . . .

[¶] . . . [¶]

An array of services and supports should be established 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. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

5. Section 4512, subdivision (a), defines "developmental disability" as follows:

"Developmental disability" means a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial disability for that individual. As defined by the

Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism.

This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

6. Section 4644, subdivisions (a) and (b), provide:

(a) In addition to any person eligible for initial intake or assessment services, regional centers may cause to be provided preventive services to any potential parent requesting these services and who is determined to be at high risk of parenting a developmentally disabled infant, or, at the request of the parent or guardian, to any infant at high risk of becoming developmentally disabled. It is the intent of the Legislature that preventive services shall be given equal priority with all other basic regional center services. These services shall, inasmuch as feasible, be provided by appropriate generic agencies, including, but not limited to, county departments of health, perinatal centers, and genetic centers. The department shall implement operating procedures to ensure that prevention activities are funded from regional center purchase of service funds only when funding for these services is

unavailable from local generic agencies. In no case, shall regional center funds be used to supplant funds budgeted by any agency which has a responsibility to provide prevention services to the general public.

(b) For purposes of this section, "generic agency" means any agency which has a legal responsibility to serve all members of the general public and which is receiving public funds for providing such services.

7. Section 4648, subdivision (a)(8), provides

Regional center funds shall not be used to supplant the budget of an agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.

8. Section 4659, subdivision (a)(1)(c), 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 supplementary program.

[¶] . . . [¶]

(c) Effective July 1, 2009, notwithstanding any other law or regulation, regional centers shall not purchase any service that would otherwise be available from Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, In-Home Support Services, California Children's Services, private insurance, or a health care service plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage. . . .

Evaluation and Disposition

9. Claimant failed to prove by a preponderance of the evidence that IRC is required to fund ST, OT and PT services at this time. These services are available to claimant through her school district, which has the legal duty to provide these services, although they are available to claimant through remote or "distance learning." As of the time of the hearing, ST, OT and PT services can only be provided by remote methods using digital platforms due to the COVID-19 pandemic and the social restrictions that are currently in place. IRC does not have the authority to require that these services be provided in person even if IRC was required to fund these services, which it is not. Because these services are available to claimant as a generic resource through her school district, IRC is prohibited from funding them under Welfare and Institutions Code section 4648, subdivision (a)(8).

ORDER

Claimant's appeal from Inland Regional Center's determination that it will not fund Speech Therapy, Occupational Therapy or Physical Therapy is denied.

DATE: May 26, 2020

ABRAHAM M. LEVY

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.