

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

**In the Matter of the Appeal of:**

**CLAIMANT**

**vs.**

**VALLEY MOUNTAIN REGIONAL CENTER, Service Agency**

**OAH No. 2020040880**

**DECISION**

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter by videoconference on August 18 and 27, September 15 and 18, and October 12, 2020.<sup>1</sup>

Claimant was represented by her mother, who was assisted by a Spanish language interpreter.

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<sup>1</sup> This matter was consolidated for hearing with claimant's appeal in OAH No. 2020040684. A separate Decision addressing that appeal will be prepared pursuant to VMRC's request and California Code of Regulations, title 1, section 1016, subdivision (d).

Attorney Matthew F. Bahr represented Valley Mountain Regional Center (VMRC).

Evidence was received, the record closed, and the matter submitted for written decision on October 12, 2020. Three days later, the record was reopened to include the most recent Individual Program Plan (IPP) signed by VMRC and claimant's authorized representative, and to receive claimant's objections, if any, to the admissibility of the IPP. The Order Reopening Record is marked as Exhibit 22. The IPP is marked as Exhibit 23 and is admitted for all purposes, without objection.

The record was closed, and the matter resubmitted for written decision on October 26, 2020.

## **ISSUE**

Is VMRC required to fund claimant's request for speech therapy?

## **FACTUAL FINDINGS**

### **Jurisdictional Matters**

1. On April 10, 2020, VMRC issued a Notice of Proposed Action (NOPA) denying claimant's mother's request for speech therapy. The NOPA explained that claimant's mother must pursue speech therapy from "all generic resources" before VMRC will fund speech therapy and should appeal her insurance company's denial of speech therapy. Additionally, the NOPA explained that VMRC must:

[I]dentify a schedule of the type and amount of services and supports purchased by the regional center or obtained from generic resources, i.e. the school district. Parent will not sign release of information for regional center to contact school district and inquire about speech services being provided either remotely or in the future through compensatory services.

2. Claimant's mother signed a Fair Hearing Request two weeks later. She explained she "exhausted all the generic resources at [her] disposal, for almost two years and until this day [she has] not been able to obtain speech therapy for [her] daughter [claimant]." She requested authorization to obtain a speech therapist who specializes in treating clients with autism.

## **Background**

3. Claimant is a four-year-old girl who qualifies for regional center services based on a diagnosis of Autism Spectrum Disorder. She lives at home with her parents, older sister, and the family's dog, birds, cats, and fish. She enjoys singing, reading books, and solving puzzles.

4. Claimant requires constant supervision and assistance. Claimant's mother provides for all her daughter's bathing needs, although claimant can mimic simple tasks her mother performs on herself. Claimant is learning to dress herself with the help of a behaviorist, but still requires prompts and reminders to complete the process. She enjoys brushing her teeth, but cannot perform the task independently. She can use the restroom without prompts or reminders, and can communicate her

need to use the restroom. She requires prompts and reminders for washing her hands after using the restroom, and needs assistance with pulling her pants up correctly.

5. Claimant uses one or two words to communicate her wants and needs, and can independently say "I want water," "what happened," and "oh my gosh." She has learned to identify the colors red, yellow, green, orange, purple, and blue. She also uses facial expressions, finger-pointing, or pulls her mother over to what she wants or needs.

## **Provision of Services and Supports**

### **STOCKTON UNIFIED SCHOOL DISTRICT**

6. Claimant was referred to the Stockton Unified School District (SUSD) for assessment for eligibility for special education services on November 26, 2018. An Individualized Education Program (IEP) team meeting was held on February 19, 2019, to determine her eligibility for services. The IEP team included claimant's parents, representatives from SUSD, and representatives from VMRC.

7. Formal assessment results revealed that claimant's "receptive and expressive language skills are significantly delayed." Informal assessment results based on self-reporting by claimant's mother indicated that claimant's communication strategies included "approximately 10 spontaneous vocabulary words, 4 signs, leading adults, pointing, and getting items herself." She initiated attempts to communicate with others, but did not respond to the examiner's attempts to communicate with her.

8. A Critical Communication Skills Worksheet was completed based on claimant's parents' answers. Claimant was not using language functionally. She communicated her needs mainly through nonverbal methods, and only sporadically

used verbal methods. She communicated her desire for more food or activity by imitating the sign for "more" or saying "este." She was able to verbalize "no." She did not respond to her name, and required multiple repetitions of instructions to complete simple tasks.

9. The IEP team concluded claimant "exhibits a severe disorder in the area of her functional use of language morphology, syntax, semantics and/or pragmatics in comparison to her chronological age." She was determined to be eligible for special education and related services from SUSD. Specifically, SUSD agreed to provide specialized academic instruction in "functional communication, pre-academic, academic and functional skills across settings using evidence [*sic*] based practices" for 330 minutes each day, five days a week. Additionally, SUSD agreed to provide speech therapy "to promote independent and spontaneous communication skills throughout the classroom routine" for 30 minutes each day, five days a week. Such services were to be provided through February 19, 2020.

10. In addition to providing the above services during the traditional school year, SUSD also agreed to provide "Extended School Year" services from June 17, 2019, through July 12, 2019. It agreed to provide specialized academic instruction in "functional communication, play/social skills, self-regulation, independence, pre-academic, academic, and functional skills across settings using evidence [*sic*] based practices" for 240 minutes each day, five days a week. An IEP documenting the services SUSD agreed to provide was signed by the team members on February 19, 2019. Claimant's parents checked the box on the IEP indicating their agreement "to all parts of the IEP."

11. SUSD provided speech therapy to claimant from October 2019 through March 2020. SUSD was shut down due to the COVID-19 pandemic on March 11, 2020.

Speech therapy sessions stopped for a period, but eventually resumed through “distance learning” in April 2020. Claimant moved out of the district on May 15, 2020.

12. Claimant’s mother attended the speech therapy sessions provided by SUSD. The sessions were 40 minutes in length and occurred once a week, but claimant felt her daughter would have been better served if sessions were 60 minutes. Additionally, she objected to sessions being held by Zoom after the shutdown because her daughter was unable to sit in front of a computer screen for 40 minutes. Claimant’s mother never requested an IEP team meeting to address her concerns with the length of speech therapy sessions or the sessions being held by Zoom.

13. Claimant’s mother attended an IEP team meeting on November 21, 2019, to discuss updating claimant’s February 19, 2019 IEP, but did not request longer speech therapy sessions. Instead, the team discussed claimant’s placement within SUSD. Discussions were not completed, and a second meeting was held on March 5, 2020. Claimant’s mother did not raise the subject of speech therapy at the second meeting. The team agreed to scheduling a third meeting in April 2020, but that meeting was never scheduled because of SUSD’s shutdown. No one from SUSD has ever told claimant’s parents that the district would stop providing speech therapy to claimant.

### **LODI UNIFIED SCHOOL DISTRICT**

14. Claimant transferred out of SUSD’s jurisdiction and into the Lodi Unified School District’s (LUSD) jurisdiction on May 15, 2020. She has not been enrolled in LUSD as of October 12, 2020. Claimant’s mother explained that they were on vacation and then needed to find out where she needed to go and with whom she needed to speak to enroll her daughter.

15. Claimant's mother initially claimed she requested an IEP with LUSD and an IEP team meeting to assess claimant's eligibility was scheduled for September 15, 2020, but had to be continued because of this hearing. Later, claimant's mother claimed that having her daughter assessed for special education services was only a topic she was intending to discuss at the meeting originally scheduled for September 15, 2020.

### **PRIVATE INSURANCE**

16. Claimant has private health insurance through the Health Plan of San Joaquin, a health maintenance organization that contracts with the California Department of Health Care Services to manage healthcare for Medi-Cal members residing in San Joaquin and Stanislaus Counties. Her primary physician referred her for speech therapy, and she was approved for 10 sessions.

17. Claimant attended three speech therapy sessions at Sutter Tracy Community Hospital between December 4 and 18, 2019, after which the therapist purportedly refused to schedule any further appointments without explanation. Claimant's mother attempted to contact the therapist to learn why her daughter was not being provided the seven remaining therapy sessions, but the therapist supposedly would not return claimant's mother's telephone calls.

18. Claimant's mother returned to her daughter's primary care physician, who referred claimant to a different speech therapist. The referral was denied by insurance. The March 4, 2020 denial letter explained that the request for speech therapy was being denied because the speech therapy notes needed to properly evaluate the request were not provided.

19. Claimant's mother successfully appealed the Health Plan of San Joaquin's denial of speech therapy, and claimant was granted eight sessions at Sutter Tracy Community Hospital. Those sessions were provided on July 3, 5, and 15, 2020, after which the therapist provided correspondence explaining claimant's therapy sessions "have to be postponed because the therapist working with her is going on medical leave until Sept 20." The correspondence further explained that "there are no available therapists at this hospital to help [claimant] at this time."

20. Claimant's mother called the Health Plan of San Joaquin and requested a new speech therapist, but her request was denied. She did not appeal the denial, but filed a complaint with the insurance company. Claimant produced no written correspondence stating the Health Plan of San Joaquin would not provide her speech therapy after July 15, 2020.

## **VMRC**

21. Emaley Escalera is a Service Coordinator in VMRC's Children's Unit, which serves regional center clients who are ages 3 through 16 years. Ms. Escalera has been claimant's Service Coordinator since claimant transferred to the Children's Unit shortly after her third birthday. Ms. Escalera agrees that claimant would benefit from speech therapy.

22. Ms. Escalera was part of claimant's initial IEP team when SUSD evaluated claimant for special education services on February 19, 2019. She advocated for SUSD to provide speech therapy to claimant.

23. Ms. Escalera attended the November 21, 2019, and March 5, 2020, IEP team meetings with SUSD to advocate for services on behalf of claimant. She was

intending to attend the meeting that was supposed to be scheduled in April 2020 but was never scheduled due to SUSD's shutdown.

24. Ms. Escalera never received any information from SUSD indicating it was terminating special education or related services for claimant. Nor has she been invited to participate in creating an IEP with LUSD. She expressed her willingness to participate in such process and advocate for claimant's needs if invited to do so.

25. Ms. Escalera participated in the March 25, 2020 Individual Program Plan (IPP) meeting at which claimant's mother requested that VMRC fund speech therapy. Claimant's mother explained that she felt her daughter's IEP with SUSD did not provide for adequate goals. Additionally, private insurance had authorized 10 physical therapy sessions, but services were abruptly terminated after only three because the therapist went on leave and there were no other providers available in the area. Ms. Escalera agreed to request funding for speech therapy.

26. At hearing, Ms. Escalera explained that VMRC has adopted a service standard to determine when a consumer qualifies for speech therapy. The service standard requires that VMRC "first utilize the consumer's Medi-cal [*sic*], Medicare, private insurance or school services through the IEP process to provide or pay for these services." However, the standard also recognizes that every consumer is unique, and provides that a Purchase of Service (POS) Exception request should be completed "if the Planning Team determines that sufficient support exists to request an exception to the standards."

## **DANIELLE WELLS**

27. Danielle Wells is a Program Manager in VMRC's Children's Unit and Ms. Escalera's immediate supervisor. Ms. Wells has been a Program Manager since around

the time claimant transitioned into the Children's Unit. Ms. Wells agrees that claimant would benefit from speech therapy.

28. Ms. Wells supervises 12 Service Coordinators. She does not familiarize herself with the details of all her subordinates' cases, unless a specific matter is brought to her attention or she otherwise learns of a need to become involved in a particular matter.

29. Ms. Wells attended claimant's second IEP team meeting with SUSD at Ms. Escalera's request. Ms. Wells also intended to attend the third meeting that was supposed to be scheduled for April 2020 but was not due to COVID-19.

30. Ms. Wells never received any information from SUSD indicating it was terminating special education or related services for claimant. Nor has she been invited to participate in creating an IEP with LUSD. She expressed her willingness to participate in such process and advocate for claimant's needs if invited to do so.

31. Ms. Wells participated in the March 25, 2020 IPP meeting and heard claimant's mother's request that VMRC fund speech therapy. She told claimant's mother at the meeting that claimant was not eligible for speech therapy under VMRC's service standard because claimant's mother had not exhausted her generic resources. Specifically, SUSD was providing speech therapy until it was shut down due to COVID-19. Ms. Wells suggested that claimant's mother contact the speech therapist to explore the possibility of continuing therapy during the shutdown.<sup>2</sup>

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<sup>2</sup> The IPP meeting occurred prior to SUSD making the decision to provide speech therapy through Zoom.

32. Additionally, Ms. Wells interpreted the Health Plan of San Joaquin's March 4, 2020 denial letter as being based on a lack of sufficient information to determine the medical necessity for speech therapy, rather than the determination that claimant is not entitled to services under any circumstances. The letter specifically stated, "We need Speech Therapy notes." Therefore, claimant's mother was advised to follow up with insurance to provide the missing information and to file an appeal of the denial if necessary.

33. Despite claimant not meeting VMRC's eligibility criteria for speech therapy, Ms. Wells agreed to Ms. Escalera's request to complete a POS Exception request and present it to the POS Exception Committee. The request was presented on April 3, 2020, and a decision was initially "deferred" pending confirmation from SUSD that speech therapy would not be offered through distance learning. The request was later denied once SUSD confirmed that speech therapy was being provided through distance learning.

### **Claimant's Witnesses**

34. In addition to claimant's mother, three other witnesses testified on behalf of claimant and advocated for VMRC funding speech therapy. Elizabeth Barrios Gomez is a director of Integrated Community Collaborative (ICC), a nonprofit organization that helps families with special needs members to navigate multiple systems of services and supports, and to advocate on behalf of the special needs member. Dora Contreras and Gricelda Estrada are volunteers with ICC. Ms. Contreras is also a retired school administrator and teacher.

35. Ms. Gomez is familiar with the requirement that a regional center consumer exhaust generic resources before a regional center will fund services and

supports. Ms. Gomez explained that trying to obtain speech therapy through generic resources “can take a long time.” When one of the potential generic resources is health insurance, the process can take even longer. And obtaining services from a school district further lengthens the process because of the requirement of developing an IEP. Ms. Gomez opined that COVID-19 has “magnified the process.”

36. Ms. Contreras and Ms. Estrada confirmed that claimant has not been enrolled in LUSD and is not receiving special education or related services from that district. Ms. Contreras initially explained that claimant “just moved” into LUSD, but then admitted she was “not actually sure” when the move occurred. Ms. Estrada explained that claimant has not been enrolled in LUSD because claimant’s mother is waiting for an appointment to have her daughter assessed for special education and related services and for SUSD to send claimant’s files.

## **Analysis**

37. It was undisputed that claimant requires speech therapy. However, the issue at fair hearing was not whether claimant requires speech therapy, but whether VMRC is required to fund speech therapy. VMRC’s service standard for speech therapy expressly provides that a consumer must first exhaust her generic resources before VMRC will fund the service, and “VMRC is the payer of last resort.”

38. It was also undisputed that a generic resource available to claimant for speech therapy is her local school district. SUSD provided speech therapy to claimant from December 2019 until she moved out of the district on May 15, 2020, except for a brief period after the district shut down because of COVID-19 and before it began providing speech therapy via Zoom a few weeks later. Claimant moved to LUSD more

than five months ago, yet her mother still has not enrolled her in the district. Claimant has no IEP with LUSD.

39. Claimant's difficulty with engaging in speech therapy through distance learning due to her young age may be grounds for modifying her IEP to require the parties to explore alternative means of providing therapy, but it does not justify ignoring the school district as an available generic resource. Similarly, claimant's mother's dissatisfaction with the goals provided in the current IEP may be grounds for an amendment, but does not negate the school district as an available generic resource.

40. It was further undisputed that the Health Plan of San Joaquin is potentially available as a generic resource for speech therapy. Three therapy sessions were provided in December 2019, and the reason the remaining seven sessions originally authorized were not provided is irrelevant because the Health Plan of San Joaquin subsequently authorized eight therapy sessions. Although only three of those sessions were provided before the therapist left on medical leave and claimant's mother was informed that there were no other available therapists, no evidence was produced that the Health Plan of San Joaquin refused to provide additional speech therapy or that claimant's mother exhausted her appeal rights with the insurance plan.

## **LEGAL CONCLUSIONS**

### **Applicable Burden/Standard of Proof**

1. Claimant has the burden of proving by a preponderance of the evidence that VMRC is required to fund her request for speech therapy. (*Lindsay v. San Diego Retirement Board* (1964) 231 Cal.App.2d 156, 161 [the party seeking government

benefits has the burden of proving entitlement to such benefits]; Evid. Code, § 115 [the standard of proof is preponderance of the evidence, unless otherwise provided by law].) This evidentiary standard requires claimant to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, claimant must prove it is more likely than not that VMRC is required to fund her request for speech therapy. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

## **Applicable Law**

2. Under the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.), the State of California accepts responsibility for persons with developmental disabilities and pays for the majority of the “treatment and habilitation services and supports” to enable such persons to live “in the least restrictive environment.” (Welf. & Inst. Code, § 4502, subd. (b)(1).) “The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community [citations], and to enable them to approximate a pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community [citations].” (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

3. To determine how an individual consumer is to be served, regional centers are directed to conduct a planning process that results in an IPP designed to promote as normal a lifestyle as possible. (Welf. & Inst. Code, § 4646; *Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d at p. 389.) The IPP is developed by an interdisciplinary team and must include participation by the consumer and/or her representative. Among other things, the IPP must set forth

goals and objectives for the consumer, contain provisions for the acquisition of services (which must be based upon the consumer's developmental needs), contain a statement of time-limited objectives for improving the consumer's situation, and reflect the consumer's particular desires and preferences. (Welf. & Inst. Code, §§ 4646, subd. (a)(1), (2), & (4); 4646.5, subd. (a); 4512, subd. (b); & 4648, subd. (a)(6)(E).) The regional center must then "secure services and supports that meet the needs of the consumer" within the context of the IPP. (Welf. & Inst. Code, § 4648, subd. (a)(1).)

4. Regional centers are mandated to provide a wide range of services to facilitate implementation of a consumer's IPP, but must do so in a cost-effective manner. (Welf. & Inst. Code, §§ 4640.7, subd. (b), 4646, subd. (a).) They must "identify and pursue all possible sources of funding for consumers receiving regional center services." (Welf. & Inst. Code, § 4659, subd. (a).) Regional centers are not required to provide all the services a consumer may require, but are required to "find innovative and economical methods of achieving the objectives" of the IPP. (Welf. & Inst. Code, § 4651.) They are specifically prohibited from funding services that are available through another publicly funded agency. (Welf. & Inst. Code, § 4659, subd. (c).) This prohibition is often referred to as "supplanting generic resources."

5. "Every individual with exceptional needs who is eligible to receive special education instruction and related services under this part, shall receive that instruction and those services at no cost to . . . her parents or, as appropriate, to . . . her." (Ed. Code, § 56040, subd. (a).) "Individuals with exceptional needs" are those meeting the following criteria: 1) identified by an individualized education program team as having a disability; 2) requires instruction and services beyond modification of the regular school program to ensure receipt of a free appropriate public education; 3) between

the ages of three and five years; and 4) satisfies eligibility criteria adopted by the board of education. (Ed. Code, § 56026.) Education Code section 56333 provides:

A pupil shall be assessed as having a language or speech disorder which makes . . . her eligible for special education and related services when . . . she demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects . . . her educational performance and cannot be corrected without special education and related services.

## **Conclusion**

6. The undisputed evidence established that claimant's mother failed to exhaust generic resources for speech therapy prior to asking VMRC to fund such services for her daughter. Specifically, the Education Code requires school districts to provide speech therapy. The Stockton Unified School District provided claimant speech therapy prior to her moving out of the district on May 15, 2020. She has not been enrolled in the Lodi Unified School District during the last five months, and has not been assessed by that district for special education and related services. There was no evidence that the Lodi Unified School District has refused to provide speech therapy to claimant. She simply has not accessed those services yet.

7. Additionally, the Health Plan of San Joaquin provided claimant speech therapy in December 2019 and July 2020. Although therapy was abruptly terminated on July 15, 2020, there was no evidence that the Health Plan of San Joaquin refused to provide services after that date, and there was no evidence claimant's mother appealed the termination of services.

## **ORDER**

Claimant's appeal from Valley Mountain Regional Center's April 10, 2020 Notice of Proposed Action denying claimant's request for funding for speech therapy is DENIED.

DATE: November 6, 2020

COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings

## **NOTICE**

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)