

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

**In the Matter of:**

**CLAIMANT**

**vs.**

**NORTH LOS ANGELES COUNTY REGIONAL CENTER,**

**Service Agency.**

**OAH No. 2020120695**

**DECISION**

Thomas Y. Lucero, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter by telephone and videoconference on March 1, 2021. Stella Dorian, Fair Hearing Representative, represented the North Los Angeles County Regional Center (Service Agency). Her mother represented claimant. The names of claimant and her family are omitted to protect their privacy. Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on March 1, 2021.

## **STATEMENT OF THE CASE**

This matter is governed by the Lanterman Act, that is, the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code sections 4500 through 4885. Claimant has an unconventional form of cerebral palsy (CP), for which she underwent two major surgeries in 2020. After a months-long period of immobility, she has been undergoing an aggressive program of physical therapy (PT), which her physicians believe she must not delay. (Claimant also receives Occupational Therapy (OT) associated with her PT. The references to PT below include the associated OT, unless otherwise stated.) The therapy is unusual because claimant's disability is unusual, attributable to damage to the spinal cord, not to the brain, as in most CP patients. A medical expert opined that the aggressive PT claimant is undergoing is medically and urgently necessary, will significantly improve her quality of life in the short term, prolong her life long term, and is not available from other, generic providers. Claimant's requests that the PT be funded by Medi-Cal, the Service Agency, or others, have not been successful.

## **ISSUE**

Whether the therapy, particularly PT, recommended for claimant is available to her as a generic resource, which the law prevents the Service Agency from funding, or whether the therapy, as provided by a particular provider, should be considered exceptional or unique, medically necessary, and, in the absence of other funding, appropriately funded by the Service Agency.

## **SUMMARY OF DECISION**

Expert testimony at the fair hearing established that the therapy for which claimant seeks funding is medically necessary. The Service Agency has assisted claimant in seeking other funding for the therapy. But in the absence of such other funding, the Service Agency must fund the therapy.

## **FINDINGS OF FACT**

1. Claimant timely sought a Lanterman Act fair hearing following an October 30, 2020 letter, Exhibit 1, denying her request that the Service Agency fund PT from the Neurological and Physical Abilitation Center (NAPA Center), a specialized provider that claimant's insurer has so far deemed not covered because not within its network of providers.

2. Claimant, 11 years old, is eligible for services based on a CP diagnosis. She has attended school and received school district services under an Individualized Education Plan (IEP). She lives with her mother and two siblings.

3. Ronald S. Gabriel, M.D., attested to the medical reasons for claimant's being provided PT offered by the NAPA Center.

A. Practicing as a pediatric neurologist since 1966, Dr. Gabriel has authored professional publications on neurology. He has worked for over 30 years offering medical services to children in Los Angeles. Dr. Gabriel has long and varied experience with cerebral palsy, its causes, and treatment.

B. Dr. Gabriel diagnosed claimant as an infant. Unlike for most patients, the cause of claimant's CP is not damage to the brain, but congenital abnormalities of the bones in her neck. Her cervical vertebra damaged her spinal cord, leaving her with severe four-limb weakness, a type of congenital quadriplegia.

C. Claimant has recently had two surgeries to fuse vertebra and counteract curvature of her spine. The surgeries improved her spine function, which was compressed, leading to reduced pulmonary volume. Such reduced lung function untreated would make claimant susceptible to pneumonia and death. The surgeries notwithstanding, claimant continues to be susceptible.

D. In Dr. Gabriel's opinion, anything medically possible should be done to improve claimant's ability to hold herself upright, to keep her alert, robust, and happy. She is of at least average intelligence and cognizant of her medical difficulties.

E. Dr. Gabriel is familiar with the PT offered by NAPA and knows of mother's decision, based on his urgent advice, to pay for and have claimant undergo PT at NAPA before learning whether the Service Agency might fund it. As Dr. Gabriel explained, the NAPA PT is unusually aggressive and uniquely suited to claimant's needs. Deprived of the NAPA PT, claimant would develop further contractures that would prevent her from walking or even standing. In consequence, Dr. Gabriel considers the PT essential to claimant's life expectancy. As he stated, claimant needs such vigorous therapy if she is to survive.

F. Dr. Gabriel's testimony on claimant's condition and prognosis was to the same effect as the November 18, 2020 letter, Exhibit J, he wrote the Service Agency and claimant's health insurer, Anthem Blue Cross, to advocate for their funding

NAPA PT. As the letter notes, claimant “requires the unique services of NAPA that can provide on hand intensive physical therapy that will prevent progressive contractures[,] a life threat.” (Emphasis in original.) He wrote that the NAPA Center provides advanced equipment unavailable elsewhere along with “hands on” therapy three hours per day, three days per week, and that:

This intervention is essential for progressive improvement, prevention of regression, and to maintain life support.

This intervention is essential and qualifies under the mandates of the American Disability Act, 1980 [i.e., the ADA, the Americans with Disabilities Act as amended 1990, which, as it pertains to health, is found in Title 42 United States Code sections 12101 through 12213]. Anything less will be deleterious to [claimant’s] [h]ealth and life itself and requires immediate implementation.

4. Claimant is eligible for and, in early 2020, before the COVID-19 pandemic, received in-person PT funded by her school district. A December 11, 2019 report on claimant’s IEP from the Antelope Valley SELPA (Special Education Local Plan Area), Exhibit 2, states:

[Claimant] continues to make great progress with physical therapy services. She has made good progress towards one PT goal and has met one PT goal. [Claimant] received a supportive Kidwalk [gait trainer] and has been using it for gait training around the campus, with moderate support.

During PT sessions, we work on stretching, strengthening, sitting, transitions, standing and gait training.

5. Claimant's December 10, 2020 IEP from the Antelope Valley SELPA, Exhibits N and 6, notes on page 002 that "Parent is concerned about physical therapy services." The IEP states on page 004:

[Claimant] is currently participating in Distance Learning (DL) yearlong (Acellus) program due to School Closure/COVID-19 and is therefore not receiving school based PT services this school year. In addition to this, she has also undergone recent medical procedures which will require medical clearance in order to resume school based PT services in the future.

6. In attempting to resolve any dispute, the Service Agency, as set out in the Service Agency's January 13, 2021 letter, Exhibit 7, page 2, provided mother "resources to pursue Physical Therapeutic services with California Children's Services (CCS) due to your child's eligibility with Medi-Cal."

7. The CCS resources the Service Agency identified for mother are offered by the Department of Health Care Services (DHCS). Its offerings are described in a DHCS publication, Exhibits A and 8:

CCS is a statewide program that treats children with certain physical limitations and chronic health conditions or diseases. CCS can authorize and pay for specific medical services and equipment provided by CCS-approved specialists. . . . The program is funded with state, county,

and federal tax monies, along with some fees paid by parents.

8. On January 28, 2021, mother completed the mandated DHCS form, the Application to Determine CCS Program Eligibility, Exhibits A and 8. At the time of the fair hearing, the application was pending, and claimant had not been provided CCS resources.

9. A July 10, 2020 NAPA Center invoice, Exhibit 3, describes a "Three Week Intensive Therapy Session," July 27 through August 14, 2020, three hours per day, five days per week, altogether 45 hours billed at \$118 per hour, for a total cost of \$5,310.

10. Mother submitted the July 10, 2020 NAPA Center invoice to the family's health insurer, Anthem Blue Cross, which denied the claim in an August 3, 2020 note, Exhibit 4.

11. In an August 17, 2020 letter, Exhibits E and 5, the NAPA Center described claimant's condition, her progress, and its approach to therapy.

A. NAPA Center described claimant's condition and progress:

[Claimant] presents with musculoskeletal impairments and functional limitations secondary to her diagnosis of congenital absence of posterior elements of cervical spine status post fusion, spinal stenosis, and early onset scoliosis. [claimant] received cervical spine fusion on 1/3/2020 and wore a halo until 4/20/2020. Per mother, [claimant] also is expected to have a spinal rod placed in near future, as her

most recent x-ray found her scoliosis to be 78 degrees.

[Claimant] currently has a trach and g-tube.

B. The August 17, 2020 letter described goals in occupational therapy (OT) and PT which claimant had reached 90 to 100 percent, including, for instance:

In 3 months, [claimant] will walk 50' without stopping, using reciprocal and neutral gait pattern in gait trainer with minimal assist at right lower extremity during stance phase of gait measured on 3 separate days in order to demonstrate functional lower extremity strength, endurance and coordination for independent mobility- Goal 90% achieved; [claimant] was able to walk 50 feet with minimal to occasionally moderate assistance at right limb for neutralizing alignment and foot position due to increased internal rotation of right limb.

C. Its August 17, 2020 letter described the NAPA Center's methods:

The NAPA Center is a unique facility that offers the Intensive Model of Therapy (IMOT), physical therapy/occupational therapy programs at an increased frequency and duration compared to traditional programs.

D. The NAPA Center cited professional studies that support its approach to therapy:

Empirical and clinical data also supports the utilization of increased frequency and duration schedules:



- A randomized controlled trial by Dodd (2003) showed that varied activities at a more intense frequency and duration prove to be more beneficial than traditional short duration, low intensity paradigms in people with cerebral palsy.
- Page (2004) found that patients with chronic neurological disorders had much greater physical and functional improvements when utilizing a longer duration approach to exercise than those attending traditional therapy paradigms.
- Taylors (2005) summarization of systematic reviews noted that programs of zero to marginal benefit to patients were those that did not reach a sufficient training duration and intensity in children with cerebral palsy, as compared to those subjects that did reach the necessary threshold that experienced functional and physical improvements.

E. The NAPA Center's August 17, 2020 letter closed with this summary:

Given [claimant's] diagnosis and functional limitations and impairments, it is extremely beneficial for her to have therapy at a greater duration and frequency in order to improve the quality of life of her and her family.

12. To follow up on its January 13, 2021 letter, the Service Agency sent mother a February 16, 2021 letter, Exhibit 9, which included this decision:

The Lanterman Act requires that NLACRC access all potential generic resources for consumers receiving regional center services. School District and insurance are two of the potential sources of funding identified in statute. You have requested that NLACRC pay for orthopedic services provided through NAPA. NLACRC has identified both the school district and your private health insurance as generic resources you can access to secure orthopedic services for [claimant]. As such, the Service Agency is not in agreement to fund for orthopedic services for [claimant].

Anthem Blue Cross denied covering the cost of orthopedic services for [claimant], as you have chosen to access orthopedic services through an out-of-network provider. You have informed NLACRC that the in-network providers do not have pediatric experience. It is NLACRC's recommendation that you contact Anthem Blue Cross to request a list of pediatric orthopedic service providers.

Per [claimant's] December 10, 2020 IEP document, she is eligible for special education services due to Orthopedic Impairment. It is noted in the IEP that you are concerned about physical therapy services. Per your report, the School District has agreed to conduct both OT and PT assessments for [claimant]. It is NLACRC's recommendation that you pursue OT and PT services through the District and consider requesting compensatory services from the School District.

NLACRC also recommends that you follow up with CCS regarding the status of your application for therapeutic services for [claimant].

The letter is consistent with the Service Agency's position at the fair hearing.

13. The Service Agency's ID (interdisciplinary) notes, Exhibit 10, show efforts by its personnel on claimant's behalf.

A. The notes indicate that Consumer Services Coordinator (CSC) Daleth Lopez-Mendieta in particular, as the person working most directly in collaboration with mother, was diligent in her regular communications in attempting to resolve issues of many kinds.

B. The ID notes also demonstrate that the Service Agency has been fulfilling its commitment to advocacy on consumers' behalf, as set out on page 2 of Exhibit 15, the NLACRC Service Standards (adopted on May 9, 2018 by the Service Agency's Board of Trustees and approved on November 16, 2018 by the Department of Developmental Services). A specific example is CSC Lopez-Mendieta's September 1, 2020 ID note regarding an Education Advocate who might assist efforts to obtain school district funding.

14. CCS describes its mission and services in a 31-page Handbook for CCS Families, Exhibit 16.

15. Exhibit B is a July 27, 2020 PT Evaluation of claimant performed by the NAPA Center. The evaluation notes that claimant lost strength because of her recent surgeries and the unavailability of school-provided PT during the pandemic. The Developmental Assessment of Young Children, second edition (DAYC-2), though not

standardized for people of claimant's age, was used to estimate that claimant's gross motor skills were age-equivalent to nine months.

16. The NAPA Center prepared an August 14, 2020 OT Summary of claimant's status and progress, Exhibit C.

A. Like the July 27, 2020 PT Evaluation, the OT Summary relied in part on the DAYC-2 and found that claimant's fine motor skills were age-equivalent to 41 months.

B. The OT Summary outlines "[t]herapeutic activities, direct (one-on-one) patient contact by the provider (use of dynamic activities to improve functional performance), each 15 minutes."

C. Claimant was set several goals, which she achieved, such as "improved trunk rotation as evidenced by her ability to rotate her trunk to grasp an item 10 degrees to her periphery bilaterally, with maximum support at the trunk to support with rotation and motor planning."

D. The summary recommended: "Given [claimant's] diagnosis and functional limitations and impairments, it is extremely beneficial for her to have therapy at a greater duration and frequency of OT 2x per week in order to improve the quality of life of her and her family."

17. Claimant's current school district has determined that she is eligible for adapted physical education services. A February 5, 2021 Adapted Physical Education Assessment, Exhibit F, was performed by the Westside Union School District. It concludes: "[Claimant] demonstrates severe delays in both gross motor and object control skill domains and continues to benefit from Adapted PE services. Services to be

provided in collaboration with [claimant's] aide to insure daily attention to motor skill development when we return to school."

18. In a November 10, 2020 letter, Exhibit H, a doctor who treats claimant at Children's Hospital Los Angeles, Lindsay Andras, M.D., wrote: "At this point we think removing [claimant] from the NAPA Center could not only delay services she so desperately needs to return to her baseline but essentially halt her advancement she has achieved so far." Dr. Andras performed claimant's surgeries. Operative notes from the hospital are included in Exhibit R. The notes show that claimant had some PT at the hospital.

19. There are extensive notes from Children's Hospital Los Angeles on Rehabilitation Medicine and PT recommended for claimant post-surgery in October 2020. Rebecca Jorne, a Physical Therapist, indicates on October 11, 2020:

PT Complexity History: High Complexity

PT Complexity Examination: High Complexity

PT Complexity Clinical Presentation: High Complexity

PT Complexity Decision Making: High Complexity

PT Complexity Result Charge: PT Evaluation High  
Complexity

20. Dr. Andras signed a NAPA Prescription Form, Exhibit M, effective July 9, 2020, for both PT and OT at a frequency of up to five times per week and lasting six months.

21. A September 15, 2020 Prescription for Therapy Services and/or Equipment, Exhibit K, from Children's Hospital Los Angeles, notes that claimant should "continue current therapeutic plan in place @ NAPA PT," and that she had "significant atrophy of neck and chest wall muscles following halo and vest apparatus that was worn for approximately 3 months. Our goal is to regain strength, coordination, flexibility, mobility, postural training & core strength through an intensive therapeutic program." A similar, November 10, 2020 Prescription for Therapy Services and/or Equipment, Exhibit H, from the hospital indicates that while claimant's condition, including CP and scoliosis, are lifelong, the therapy and services for recovery from her January and October 2020 surgeries will be less than a year.

22. On December 11, 2020, Dr. Andras signed the Physician Authorization, Exhibit I, for claimant's participation in M.O.V.E. (Mobility Opportunities Via Education), a program "to assist children with severe disabilities in acquiring the skills of sitting, standing and walking." The program was offered by claimant's current school district, "based on teaming the expertise of therapy and education to address the functional needs of students when they become adults."

23. Claimant and the Service Agency discussed and agreed upon an Individual Program Plan (IPP) on January 12, 2021, Exhibit 18. Claimant and her family received conversion personal assistance hours, under the IPP, as stated on page 11, for instance. As also reflected in the IPP, there was discussion of claimant's two surgeries, as well as the PT that claimant was receiving from the NAPA Center and the fair hearing to resolve whether the Service Agency might provide funding for the therapy. Other funding was discussed, including, as stated on page 10, that "Medi-Cal Anthem Blue Cross will continue to fund for [claimant's] medical needs."

24. On January 19, 2021, claimant's health insurer, Anthem Blue Cross, wrote her in explanation, Exhibit 17, of its decision not to fund PT from the NAPA Center. "We had your request reviewed by a doctor. Your plan network has providers with the same skills who are able to provide the requested service. For this reason, the referral request for higher benefit levels to apply for the out-of-network provider . . . is denied."

25. In a January 28, 2021 letter, Exhibit G, Dr. Andras wrote that "continued therapeutic treatment through the NAPA center . . . so far has shown great results. It is imperative that [claimant] continues to receive therapy in person and not via virtual means. We believe that [claimant] would benefit much more with a hands-on approach as her condition is quite severe and needs help from trained providers."

## **PRINCIPLES OF LAW**

1. Subdivision (a) of Welfare and Institutions Code section 4646 states: the Lanterman Act respects the "needs and preferences" of the developmentally disabled individual and the individual's family; takes community integration into account; and is meant to ensure that IPP's are effective in meeting their stated goals without undue expense.

2. Subdivision (d) of Welfare and Institutions Code section 4646 states that IPP's reflect the agreement of the developmentally disabled individual, the individual's family (as appropriate), and the service agency regarding purchases by the service agency or obtaining generic resources.

3. Subdivision (a)(4) of Welfare and Institutions Code section 4648.5 provides that service agencies have no authority to purchase "[n]onmedical therapies."

Under subdivision (d) of the section, however, the service agency may grant an exemption for an individual in "extraordinary circumstances" when it determines the purchase "a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, . . . and no alternative . . . is available . . . ."

4. Subdivision (a) of Welfare and Institutions Code section 4659 requires that the service agency "identify and pursue all possible sources of funding," including (1) Medi-Cal and school districts, and (2) insurance to its maximum extent. Subdivision (c) of the section prohibits a service agency's purchases available to the consumer from Medi-Cal, CCS, or private insurance, among others.

## **ANALYSIS**

1. The therapy for which claimant seeks funding is a need within the meaning of Welfare and Institutions Code section 4646, subdivision (a).

2. Claimant's need for PT has definite medical aspects. The therapy is not surgery, medicine, or medical equipment like the halo prescribed for wearing post-surgery, but the evidence demonstrates that it is crucial to claimant's health, most immediately her physical health, as opposed to her long term mental health, as discussed by Dr. Gabriel. A proper initial conclusion in these circumstances is that claimant seeks funding for a medical therapy.

3. The prohibition in Welfare and Institutions Code section 4648.5, subdivision (a)(4), against a service agency's purchase of non-medical therapies, does not apply to the Service Agency here.



4. The evidence that supports the initial conclusion above is primarily the testimony of a physician, Dr. Gabriel.

A. Dr. Gabriel's evidence may be disbelieved.

i. The finder of fact, in this case the ALJ, may reject the testimony of a witness, including a physician or other expert. even a witness's uncontradicted testimony. As the California Supreme Court, citing other authority, stated in *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890:

As a general rule, "[p]rovided the trier of fact does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted. [Citations.]" (*Hicks v. Reis* (1943) 21 Cal.2d 654, 659-660 . . . .) This rule is applied equally to expert witnesses. (*Zimmer v. Kilborn* (1913) 165 Cal. 523, 525 [other citations omitted] . . . .

ii. It was years ago that Dr. Gabriel diagnosed the condition that led to claimant's current need for therapy. Dr. Gabriel did not perform the October 2020 and January 2012 surgeries, recuperation from which the therapy will support. Well before and after the surgeries claimant's treatment was from Dr. Andras, who performed the surgeries. The evidence shows that claimant's current need for therapy is closely tied to the surgeries. In these circumstances, Dr. Gabriel may be deemed not as informed as Dr. Andras on claimant's current need for therapy or her needs in general.

iii. Dr. Andras did not testify, but the written record of her treatment and prognosis is extensive and compels credence. In her November 10, 2020 letter, Exhibit H, Dr. Andras strongly recommends PT from the NAPA Center. But

the letter does not state that the NAPA Center's services are unique or the sole safe means for claimant's recovery from the surgeries, as Dr. Gabriel so clearly testified.

iv. The notes from Children's Hospital Los Angeles state that claimant received some PT there, raising the question whether NAPA Center's PT services are not as special or necessary as Dr. Gabriel testified.

B. On balance, however, Dr. Gabriel's testimony is properly credited.

i. Taking the last point above first, it is not necessarily to be inferred from the hospital notes that PT from sources other than NAPA Center may be appropriate currently. The description of the PT at the hospital is quite different from NAPA Center's description of the PT administered there. The hospital notes show that claimant received hands-on PT there while her condition was changing for the better as she recovered from surgery, as is common after a major surgical procedure. Dr. Gabriel stressed that now that claimant has been discharged from the hospital she needs not just hands-on PT, but more specifically the aggressive sort of therapy that NAPA Center offers.

ii. The evidence from Dr. Andras is not unequivocal, but given the strong emphasis of her November 10, 2020 letter, it is properly considered corroboration of Dr. Gabriel's. The letter was written after claimant's two surgeries, when Dr. Andras was in the best position to opine on the services that NAPA Center could provide claimant.

iii. While the trier of fact is free to disbelieve an expert witness like Dr. Gabriel, the reverse may also be true. The testimony of "one credible witness may constitute substantial evidence," including the testimony of a single expert witness. (*Kearl v. Brd. of Medical Quality Assurance* (1986) 189 Cal.App.3d. 1040, 1052.)

iv. Dr. Gabriel's evidence is persuasive for a number of reasons. Dr. Gabriel has decades of experience as a pediatric neurologist, he is familiar with the details of claimant's condition, he is familiar with the services of the NAPA Center, he has examined and treated claimant himself, and his demeanor at the hearing was direct and sincere.

C. Claimant established that there is medical necessity for her receiving PT from NAPA Center rather than from other providers.

5. Generally, under Welfare and Institutions Code section 4646, subdivision (d), a claimant does not receive services unless there has been discussion with the service agency and agreement that specific services will be provided or funded as set out in an IPP. Mother on claimant's behalf participated in good faith in the IPP process and agreed to the January 12, 2021 IPP. Claimant is receiving services under the IPP, which indicates that a decision on funding for NAPA Center services was deferred.

6. Because Welfare and Institutions Code section 4659, subdivision (a), requires that a service agency identify and pursue all means of funding services, a fair inference is that a service must not fund services, however necessary, if other funding is available, such as from insurance, Medi-Cal, or CCS. With the Service Agency's assistance, claimant has diligently sought out funding from other such sources, so far unsuccessfully, however. Claimant has been paying the NAPA Center and has not waited for a final funding decision from the Service Agency or another source because of the advice of her physicians that, as a matter of medical urgency, the PT must not be delayed. In the circumstances, claimant's decision to move forward with the PT from NAPA Center is not grounds for denying funding under the Lanterman Act.

## **CONCLUSION OF LAW**

The PT that claimant's physicians have recommended is unusual in that it is aggressive and designed for her unusual disability following two major surgeries. The PT is properly considered exceptional or unique as well as medically necessary, as well as unavailable to claimant as a generic resource. The Lanterman Act does not, in these circumstances, prevent the Service Agency from funding such therapy. Given that the need for the therapy is immediate, an order that it be funded is appropriate.

## **ORDER**

Claimant's appeal is granted. North Los Angeles County Regional Center shall fund six months of physical therapy and occupational therapy provided by the Neurological and Physical Abilitation Center.

DATE:

THOMAS Y. LUCERO

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.