

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

B.G.,

Claimant,

v.

FRANK D. LANTERMAN REGIONAL
CENTER,
Service Agency.

OAH Case No. 2012010437

DECISION

Daniel Juárez, Administrative Law Judge, Office of Administrative Hearings, heard this matter on March 1, 2012, in Los Angeles, California.

Claimant was represented by his father.¹ Claimant was not present.

Marc Baca, Appeals Coordinator, represented the Frank D. Lanterman Regional Center (Service Agency).

The parties submitted the matter for decision on March 1, 2012.

STATEMENT OF THE CASE

The issue in this matter is whether the Service Agency may terminate its funding of music therapy for Claimant.

¹Initials are used to identify Claimant and family title is used to identify Claimant's representative to preserve Claimant's privacy.

The Service Agency contends it must terminate the service pursuant to legislation that suspends its authority to fund such services.

Claimant contends he meets the exemption criteria in the pertinent legislation and therefore the Service Agency need not terminate the service at issue.

FACTUAL FINDINGS

1. Claimant is an 11-year-old boy with autism. He lives at home with his family.
2. Claimant began receiving music therapy in approximately March 2008. He currently receives music therapy one time per week.
3. Sometime in 2011, Claimant transferred from the Eastern Los Angeles Regional Center (ELARC) to the Service Agency. Claimant's current Individual Program Plan (IPP), dated June 7, 2011, was developed while he was still a client of ELARC. The IPP establishes that ELARC funded music therapy to meet Claimant's socialization needs.
4. The IPP further establishes that Claimant's father and ELARC discussed the Legislature's suspension of the Service Agency's authority to fund music therapy. In its discussion of music therapy, the IPP reads, "Father was provided with a list of the Social Recreational Programs, and other generic resources. The new trailer bill language . . . was explained to consumer's father and its impact on the services before granted to our consumer"
5. Upon Claimant's transfer to the Service Agency, the Service Agency accepted and implemented the current IPP in whole; however, on January 3, 2012, the parties agreed to amend the IPP, agreeing that the Service Agency would fund music therapy one time per week, solely from November 1, 2011, through February 29, 2012. Claimant's father signed the amendment to continue music therapy through February 2012, but made clear that he was not in agreement with the termination of the service.

By the amendment, the Service Agency explained to Claimant's father the need to seek alternative services to meet Claimant's needs, since the Legislature had suspended the Service Agency's ability to fund music therapy. Pursuant to the amendment, the Service Agency also agreed to fund a social skills assessment for Claimant, as it was and is the Service Agency's contention that a social skills training program is more appropriate for Claimant's needs and a viable alternative to music therapy.

6. Claimant's father does not agree to have the Service Agency assess Claimant for a social skills training program.

7. The Service Agency issued a Notice of Proposed Action, dated December 8, 2011, informing Claimant's parents that it intended to terminate music therapy because Welfare and Institutions Code section 4648.5 suspended the Service Agency's authority to fund non-medical therapies, including music therapy. The Notice of Proposed Action was mailed on or about December 8, 2011, and again on or about January 4, 2012.

8. Claimant requested a fair hearing on January 13, 2012. Claimant's request was timely.

9. In addition to noting that the Legislature has suspended its authority to purchase music therapy, the Service Agency opines that Claimant, at age 11, is better suited to begin interacting with peers in social skills training, than continuing with individualized music therapy. It was established that music therapy generally ends at age 12 for most persons because their need for social skills changes as they become pre-teens.

10. On behalf of the Service Agency, Claimant's service coordinator testified, as did a Service Agency manager and psychologist. None of the Service Agency witnesses had ever met Claimant. Claimant's father argued that, due to this fact, the

opinions of the Service Agency's witnesses merited no weight. However, the analysis in this matter is whether Claimant meets the exemption criteria in Welfare and Institutions Code section 4648.5, subdivision (c). As such, the fact that the Service Agency's witnesses have not met or observed Claimant does not diminish the Service Agency's position.

11. The Service Agency's witnesses, particularly the testimony of Jean Johnson, Ph.D., established that social skills training is an appropriate alternative service to music therapy. Johnson received her Ph.D. in Speech and Hearing Sciences from the University of California at Santa Barbara. Her areas of specialty within her doctoral studies included autism. Johnson has research and teaching experience that includes the topics of educating children with autism. Johnson has an adequate clinical and academic background to credit her opinions; and her opinions were persuasive on this point.

12. Claimant proffered the testimony of two certified music therapists who currently work with Claimant. It was established that music therapy has been beneficial for Claimant and that he has developed his social skills as a result. Claimant's music therapist opined that Claimant is not ready to engage in social skills training in a group setting with peers. The music therapist explained that, while he has made progress to date, Claimant still exhibits fear and a demeanor of discomfort when anyone enters the room where he receives music therapy. The music therapist further clarified that he does not react negatively all of the time, but in his opinion, it occurs with enough regularity that he does not believe a social skills training group is appropriate for Claimant at this time.

13. The most recent music therapy progress report, dated July 26, 2011, contains the following goals: "increase number of purposeful interactions," and

“demonstrate the ability to be comforted through trusted relationships within musical experiences.”

14. Claimant’s father argued that music therapy is not solely recreational in nature, but provides Claimant with behavioral modification, and better communication skills. Claimant’s father argued that the clinical model on which Claimant’s music therapy is based changes the nature of the service to a more serious therapeutic service, more serious than what “music therapy” generally connotes. As such, Claimant’s father argued that music therapy meets Claimant’s disability-related needs in this more clinical and therapeutic manner and should therefore be exempt from the applicable legislation. The evidence presented by Claimant established that the music therapy at issue is based on clinical and therapeutic research that considers the social developmental milestones of persons with developmental disabilities. In addition, Claimant’s father noted that the Service Agency solely funds music therapy for Claimant. As Claimant receives no other funded services, Claimant’s father argued that music therapy should qualify for the statutory exemption. These arguments by Claimant’s father were unpersuasive.

15. Claimant’s father has been an active participant throughout the provision of Claimant’s music therapy.

16. Claimant’s father testified that without music therapy, he will not have the professional advice he needs on how to handle Claimant when his behaviors or social interactions become challenging. This assertion was not credible, given that Claimant has received music therapy, with father as an avid participant for the past four years. Claimant’s father also asserted that social skills training would not be appropriate for Claimant since Claimant received such services from ELARC in 2008, and they were, in Claimant’s father’s opinion, unsuccessful. Claimant’s father wants music therapy to continue until he no longer needs it.

17. Tracy Waddles-Williams, Education Specialist with the Los Angeles Unified School District, wrote a letter, dated February 14, 2012, in support of Claimant. Waddles-Williams asserted that Claimant's "attitude, self-esteem, and work productivity" have improved since Claimant has received music therapy and that it would be "detrimental to his progress" if music therapy were terminated. Waddles-Williams has been Claimant's teacher for the past two years. Waddles-Williams's opinion was not credited. First, Waddles-Williams's background, credentials, and knowledge of music therapy were not established. Second, it was not established by her letter that Claimant's improvements were the direct result of music therapy. Third, as Waddles-Williams has only observed Claimant for two years, her written opinion could not establish that she was aware of Claimant's "attitude, self-esteem, and work productivity" before Claimant received music therapy.

18. Claimant's minor sisters, Heather and Amy, wrote letters in support of Claimant. Claimant's sisters wrote eloquent, insightful letters stating that Claimant has made significant progress through music therapy and argued that the therapy should continue for his benefit. Claimant's sister, Jacqueline, testified and through her similarly eloquent statements, asserted the same, further explaining that Claimant is now more affectionate and can carry a conversation for a longer duration than before receiving music therapy. Claimant's sisters' testimony established that Claimant benefits greatly from music therapy.

19. Despite music therapy's benefits and utility for Claimant, the evidence did not establish that the provision or termination of music therapy for Claimant constituted extraordinary circumstances.

LEGAL CONCLUSIONS

1. As the Service Agency seeks to terminate an on-going service, it bears the burden of proof by a preponderance of the evidence.

2. Welfare and Institutions Code section 4648.5 states in part:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers' authority to purchase the following services shall be suspended pending implementation of the Individual Choice Budget and certification by the Director of Developmental Services that the Individual Choice Budget has been implemented and will result in state budget savings sufficient to offset the costs of providing the following services:

[¶] . . . [¶]

(4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

(b) For regional center consumers receiving services described in subdivision (c) as part of their individual program plan (IPP) or individualized family service plan (IFSP), the prohibition in subdivision (a) shall take effect on August 1, 2009.

(c) An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs.

3. Music therapy is a non-medical therapy subject to Welfare and Institutions Code section 4648.5. Therefore, the Service Agency may not fund Claimant's music therapy unless it meets the exemption criteria. (Welf. & Inst. Code, § 4648.5, subd. (c).)

4. The relevant analysis therefore, is whether music therapy, in this case, is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of Claimant's autism, and whether Claimant's circumstances in this regard, constitute extraordinary circumstances.

5. There was no evidence that music therapy is necessary to enable Claimant to remain in his home. Thus, Claimant did not establish that criterion.

6. Claimant undoubtedly benefits from music therapy. It is a service that meets his social needs. However, the evidence did not establish that the therapy is a primary or critical means of addressing his disability, or that his music therapy or the absence of that therapy constitutes extraordinary circumstances. Music therapy is the only service currently funded by the Service Agency; however, that fact alone does not make it a primary means, as contemplated by the Legislature. This is supported by the Legislature's wording. It is noted that the statute reads "a primary" and not "the primary." Further, the Service Agency is willing to assess Claimant for social skills training. The evidence established that, at his age, social skills training is a viable alternative to music therapy that warrants assessment and consideration. That Claimant attempted social skills training in 2008, when Claimant was either seven or eight, is not relevant to the analysis because his needs and ability to benefit from such training has undoubtedly changed at age 11. There was insufficient evidence that without music therapy, Claimant would regress in his disability or otherwise suffer harm. Thus, music therapy is not a critical means to address Claimant's disability-related needs.

7. While the clinical and therapeutic nature of music therapy was established, the nature of the therapy did not further the exemption analysis in Claimant's favor.

8. Claimant's music therapy does not qualify for exemption pursuant to Welfare and Institutions Code section 4648.5, subdivision (c).

9. Cause exists to deny Claimant's appeal, as set forth in Factual Findings 1-19, and Legal Conclusions 1-8.

ORDER

Claimant's appeal is denied in case number 2012010437.

Dated: March 14, 2012

DANIEL JUAREZ

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. This Decision binds both parties. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.