

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

CLAIMANT

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH No. 2017080210

DECISION

Thomas Y. Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 21, 2017, in Bakersfield, California.

His mother represented claimant (claimant or consumer). (Family members' names are withheld to protect privacy.)

Mark Meyer, Special Projects Program Manager, represented Kern Regional Center.

Pre-marked Exhibit A was redesignated 1, B redesignated 2, and so on, through F, redesignated Exhibit 6.

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on September 21, 2017

ISSUE

Whether the service agency should pay for claimant's participation in MARE (Mastering Abilities Riding Equines), a program that provides horses and horse-riding for people with special needs and disabilities.

## FACTUAL FINDINGS

1. Claimant qualifies for the service agency's services based on diagnoses of mild intellectual disability and epilepsy. Claimant is also afflicted with left hemiparesis, weakness of the entire left side of his body.

2. On June 30, 2017, the service agency sent claimant a Notice of Proposed Action (NOPA), which denied funding for therapy based on horse-riding. The NOPA cited, among other laws, Welfare and Institutions Code sections 4548.5, subdivision (a)(2), and 4648, the former prohibiting a service agency's purchase of most social recreational activities, the latter prohibiting a service agency's purchase of experimental treatments, therapeutic services, or devices not clinically or scientifically proven.

3. On August 1, 2017, claimant filed a timely appeal of the service agency's denial and the fair hearing ensued.

4. Claimant is 10 years old. He lives with mother, stepfather, and two sisters. Mother shares custody with claimant's father. Claimant attends a public elementary school in Bakersfield, California.

5. At school claimant receives one-on-one instruction, which has alleviated some of his challenging behaviors. He often tries to run away and when he must remain in one place finds it difficult not to move about a great deal. At the same time, claimant is often unable to maintain his stability. In addition to hemiparesis, he has a drop foot, for which surgery is planned. He has fallen frequently and sustained injuries as a result. One recent fall caused him head trauma. Claimant must be monitored at all times in order to prevent his being injured or lost.

6. Claimant was receiving occupational therapy (OT) and physical therapy (PT), funded by a health insurance plan issued by Kaiser Permanente (Kaiser). The provider of both the OT and PT was Terrio Physical Therapy and Fitness (Terrio). Terrio stopped providing services to claimant in early 2017, however, citing his challenging

behaviors.

7. Claimant's most recent Individual Program Plan is dated April 13, 2017. It provides in part:

[Service agency] to be responsible for seeking Regional Center funding for any needed medications, feeding clinic, evaluations, equipment, transportation, co-pays, therapies, etcetera, which are not funded for by other sources and are related to [claimant's] diagnosis.

8. So that he might resume OT and PT from Terrio, mother sought ways to mitigate claimant's challenging behaviors. A physician who examined claimant at mother's request prescribed medications for this purpose. But while mother was willing to administer the medications, father refused. Father then suggested MARE, which he favored because claimant tried the program and enjoyed it and because it did not include or require medications for claimant. Father sought claimant's participation in MARE primarily to alleviate his hemiparesis.

9. Father asked that Juliana O. Opong, M.D., write Kaiser to request that the carrier fund claimant's participation in MARE. On April 18, 2017, Kaiser sent father a claim denial:

A physician review of your child's medical records shows the referral is for occupational therapy and physical therapy for hemiparesis (one sided weakness). Our Physician has confirmed that Kaiser has qualified medical professionals in occupational therapy and physical therapy that can evaluate and care for your child's condition. The request for an out of plan referral to MARE Therapeutic Riding Center is denied

because care is available from Plan. (Exhibit 6.)

10. The service agency learned on the day of the fair hearing that mother lost the job which provided the health insurance from Kaiser that covered her and claimant. At the time of hearing, the coverage was set to expire on September 30, 2017.

11. The service agency maintained that available to claimant are generic services and supports which alleviate the medical conditions, mild intellectual disability and epilepsy, that MARE does not address, or does not address medically or therapeutically. Among these generic services and supports are the OT and PT, from which claimant has benefitted, though at present they are discontinued because of Terrio's decision based on claimant's behaviors and father's later decision not to allow claimant to take medications, which in turn might change claimant's behavior in a way that would allow for OT and PT from Terrio.

12. The service agency further maintained that it is prohibited from funding MARE because the program is not medical or therapeutic, and rather a form of specialized recreation.

## LEGAL CONCLUSIONS

1. The party asserting a claim generally has the burden of proof in administrative proceedings. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that the service agency is obligated to pay for his participation in MARE. (Evid. Code, § 115.)

2. Welfare and Institutions Code section 4512, subdivision (b), provides in pertinent 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, and 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 or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in 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, . . . training, education, [and] . . . recreation . . . . Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.

3. Welfare and Institutions Code section 4646.4, subdivision (a)(2), provides that a service agency must ensure, among other things, "utilization of generic services and supports when appropriate."

4. Welfare and Institutions Code section 4648, subdivision (a)(16), provides in

pertinent part:

Notwithstanding any other law or regulation, effective July 1, 2009, regional centers shall not purchase experimental treatments, therapeutic services, or devices that have not been clinically determined or scientifically proven to be effective . . . .

5. Welfare and Institutions Code section 4648.5 provides in pertinent part:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, . . . regional centers' [sic] authority to purchase the following services shall be suspended . . . : [¶] . . . [¶]

(2) Social recreation activities, except for those activities vendored as community-based day programs.

(4) Nonmedical therapies, including, but not limited to, specialized recreation . . . .

6. Welfare and Institutions Code section 4659, subdivision (c), provides that "[e]ffective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional centers shall not purchase any service that would otherwise be available from . . . private insurance . . . when a consumer or a family meets the criteria of this coverage but choose not to pursue that coverage."

7. Father prefers that claimant not be medicated, though with medication claimant might continue to have OT and PT from Terrio. This preference of father's should have some weight here, as indicated under Welfare and Institutions Code section

4512, subdivision (b). The preference does not weigh heavily in these circumstances, however, because mother does not share it, and has been willing to see it overridden by a physician's decision to administer medication.

8. As indicated below, MARE was not shown to be a medical therapy or a substitute for generic services like OT and PT. Especially given the absence of evidence indicating that claimant would benefit medically or therapeutically from MARE, father's preference against medication should not outweigh mother's decision for medication. Medication, as prescribed by the physician mother consulted, would allow the service agency to fund OT and PT, assuming both that the medication mitigated claimant's challenging behaviors sufficiently for treatment from Terrio and that the therapies were not funded as in the past by Kaiser or some entity other than the service agency.

9. In the absence of father's agreement to medication, both mother and father seek the service agency's funding of MARE. The service agency may not fund the program for several reasons, however.

A. MARE was not shown to be other than a social recreation activity, or such an activity vendored as a community-based day program. (Welf. & Inst. Code, § 4648.5, subd. (a)(2).)

B. MARE was not shown to be other than a non-medical therapy, a form of specialized recreation. (Welf. & Inst. Code, § 4648.5, subd. (a)(4).)

C. There was no evidence that MARE provides therapeutic services, or devices that have been clinically determined or scientifically proven to be effective. In consequence, MARE's funding would be contrary to Welfare and Institutions Code section 4648, subdivision (a)(16).

D. The PT and OT which claimant used to receive are therapeutic and are generic services within the meaning of Welfare and Institutions Code section 4512, subdivision (b). Horse-riding and the related equestrian activities that MARE may

provide are said to be therapeutic, but they were not shown to be equivalent to services such as PT or OT or other generic services or supports. Moreover, to the extent MARE is considered equivalent to OT or PT or both, its funding by the service agency is prohibited by Welfare and Institutions Code section 4659, subdivision (c). Under the statute, when services are funded by private insurance, they are not properly funded by the service agency. Father's refusal to allow claimant's being medicated in order to allow insurance-funded services constitutes, in these circumstances, a choice by the family not to avail themselves of insurance-funded services.

E. The non-generic nature of services or supports MARE may provide is not in itself an insurmountable statutory obstacle to the service agency's funding the program. Welfare and Institutions Code section 4646.4, subdivision (a)(2), provides a consumer and service agency some flexibility. If a generic service or support may be considered inappropriate for a particular consumer, a service agency may consider funding a non-generic service or support. As indicated above, the generic services, OT and PT, which claimant used to receive, may be unavailable in a sense, given that Terrio refused to continue to provide them and father is unwilling to have them provided if the price is claimant's undergoing medication. However, there was no showing that OT and PT are unavailable to claimant from providers other than Terrio. The evidence was rather only that Kaiser would not fund other providers. In these circumstances, the evidence did not establish that MARE may be considered a reasonable alternative to OT or PT, in preference to a vendor (other than Terrio) that regularly provides OT or PT or both.

F. There was no evidence that MARE would provide adaptive equipment and supplies within the meaning of Welfare and Institutions Code section 4512, subdivision (b). There was evidence that claimant has difficulties with mobility, with walking, for instance, and he sometimes falls. Equipment, such as horse-riding equipment, might provide claimant a type of mobility, but this type of mobility was not



shown to promote any therapeutic purpose, or any purpose beyond recreation. There was likewise no showing that MARE might take the place of equipment, such as a cane, a wheelchair, or a leg brace, that would help with claimant's personal ability to walk or move, or offer claimant some other medical assistance with mobility. MARE does not provide such adaptive equipment or supplies as are properly funded by a service agency under Welfare and Institutions Code section 4512, subdivision (b).

G. There was no evidence that MARE would promote claimant's habilitation or rehabilitation, whether social, personal, physical, or otherwise. Mother testified at the fair hearing that claimant enjoyed the time he has spent at MARE. But there was no showing that that enjoyment is more than a transitory feeling, or that any of claimant's experiences at MARE may be considered steps "toward the achievement and maintenance of [an] independent, productive, and normal" life. (*Ibid.*)

H. There was no evidence that MARE may be considered training, education, or recreation within the meaning of Welfare and Institutions Code section 4512, subdivision (b). MARE may train and educate claimant in the handling of horses, and the horse-riding it provides may be considered recreation, but again there was no showing that these activities may be considered steps "toward the achievement and maintenance of [an] independent, productive, and normal" life. (Welf. & Inst. Code, § 4512, subd. (b).)

10. Father suggested MARE at least in part to mitigate claimant's hemiparesis. There was no showing, however, that hemiparesis is related to the medical conditions, mild intellectual disorder and epilepsy, that qualify claimant for services from the service agency. Because the evidence did not indicate that MARE is "directed toward the alleviation" of a qualifying developmental disability within the meaning of Welfare and Institutions Code section 4512, subdivision (b), its funding by the service agency in these circumstances is not warranted.

11. If MARE were a substitute for OT or PT, its funding might be warranted in some circumstances, because OT and PT are directed to claimant's qualifying conditions. But the evidence did not indicate that MARE is so directed. The service agency is properly concerned that if it were to fund MARE, instead of, for instance, medication that might allow claimant to resume OT and PT with Terrio, the service agency would not be ensuring the "utilization of generic services and supports when appropriate," as provided in Welfare and Institutions Code section 4646.4, subdivision (a)(2).

## ORDER

Claimant's appeal is denied. The service agency will not be required to fund claimant's participation in MARE.

DATED:

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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.