

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

In the Matter of:

CLAIMANT,

and

REGIONAL CENTER OF ORANGE COUNTY, Service Agency.

OAH No. 2019090758

DECISION

David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on October 29, 2019, in Tustin, California.

Paula Noden, Manager, Fair Hearings and Mediations, represented Regional Center of Orange County (Service Agency or RCOC). Claimant was represented by his mother. (Titles are used to protect confidentiality.)

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on October 29, 2019.

ISSUE PRESENTED

Should Service Agency reimburse Claimant's mother for the cost of 25 sessions of vision therapy (\$1,275) and a vision evaluation (\$135), both provided by Ketchum University?

EVIDENCE RELIED UPON

RCOC's exhibits R1 to R18 (objection to exhibit R19 was sustained), Claimant's exhibits 1 to 13, and testimony of Ublester Penaloza, Sara Bollens, Ph.D., Peter Himber, M.D., Claimant's mother, Maria Cedeno, Armida Ochoa, and Teresa Ayala. Service Agency objected to mother's request for Troy Allred, O.D. to testify by telephone. Due to the objection, telephonic testimony was not allowed.

FACTUAL FINDINGS

Request for service, attempts to schedule meeting

1. Claimant is an eight-year, ten-month-old male consumer of the Service Agency who lives in the family home with his mother, father, and siblings. Claimant has received services under the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 et. seq., referred to as the Lanterman

Act)¹, based on his diagnosis of autism. Claimant's parents receive 24 hours per month of respite funded by RCOC, as noted in his Individual Program Plan (IPP) (exhibit R3).

2. On June 24, 2019, mother submitted a Fair Hearing Request asking for RCOC to reimburse her for 25 sessions of vision therapy and an evaluation. There was no prior contact with or from RCOC on the subject of vision therapy.

3. On June 25, 2019, mother sent an email to RCOC service coordinator Ublester Penalosa requesting reimbursement for 25 sessions of vision therapy (\$1,275) and a vision evaluation (\$135) at Ketchum University. Mother also noted that Medi-Cal would fund for only the evaluation but not the therapy sessions. Penalosa replied that a Planning Team Meeting should be scheduled (he suggested for June 26) to discuss the request and possibly amend the IPP. He also sent the Service Agency's Purchase of Service Guidelines (POS) relating to therapeutic services. Mother replied with different dates, and a meeting was scheduled for July 3, 2019.

4. At mother's request, the July 3 meeting was postponed. Penalosa had contacted others at RCOC, including Dr. Himber and Dr. Ivers, for evaluation of any medical records and diagnosis relating to the request, although no records had been received by RCOC by that time. Penalosa sent an email to mother requesting records and a new meeting date. Mother replied with a new date and agreed to provide medical records.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

5. The meeting was rescheduled for July 18, 2019. On July 17, mother wrote that she was no longer available and that she was working on obtaining the medical records and would send them to RCOC. Penaloza sent an email to mother requesting the evaluation from Ketchum University and any denial letter from a health insurance company. He also asked if mother had requested that Claimant's school district provide vision therapy.

6. On July 29, 2019, mother emailed that she was available for a meeting on July 31 at 2:00 p.m. She was concerned that she would not be able to answer any questions raised by an RCOC doctor. Mother agreed to authorize RCOC to contact Claimant's doctor. Mother provided the Ketchum evaluation and a letter from Cal-Optima vision insurer VSP that their vision insurance plan covered the cost of an evaluation, but that vision therapy was not covered. Cal-Optima coordinates Claimant's Medi-Cal services.

7. On July 30, 2019, emails were exchanged. Mother wanted to know who would attend the July 31 meeting. Penaloza replied that he, his supervisor (Ms. Otto), and Dr. Himber would attend. Mother emailed, again asking why Dr. Himber was needed and that she had only the type of information that a mother would know. She again gave consent for RCOC to contact Claimant's doctor. Penaloza replied that the request was for a clinical service and that Dr. Himber was the RCOC Clinical Director. He informed mother that RCOC needed the denial from her private insurance as well as any response from the school district, as they are generic resources. Mother replied that she would like to change the meeting time to 12:30. Penaloza replied that he had another meeting at 12:30, so the time could not be changed.

8. On July 31, 2019, emails were exchanged. Penaloza sent a consent form for mother to complete to allow RCOC to contact Claimant's treating doctor, Dr.

Allred. He again asked for the denial from the medical insurance company (it is inferred that he wanted to know if mother had requested payment or services from Claimant's medical insurer and not just the vision insurance company). Mother replied that the doctor was available only at 12:30, and she asked for new meeting dates. Mother wrote that she has an agreement with the school district, which is providing supports for Claimant, but she cannot ask for added services. Further, mother believes that Claimant's vision needs are health related and different from his needs addressed by the school district. She would not sign a consent regarding Dr. Allred, as he had agreed to be a part of the meeting. Mother wrote that, if RCOC was not going to authorize the services she requested, she would like to receive a notice of action. Penaloza replied, requesting any denial from Medi-Cal in addition to the VSP denial. He also provided four dates for a meeting. Mother agreed to August 5, again noted that the VSP denial was sufficient, and that the meeting would allow Dr. Allred to answer any questions. She again requested a notice of action.

9. The Notice of Action and denial letter are both dated August 12, 2019. The reason for denial was that, although RCOC attempted to meet to obtain information and medical documents, it had been unsuccessful. The letter added that mother had not shown up for the meeting scheduled for July 31.

10. The circumstances were not exactly as depicted in the RCOC letter and Notice of Action. Mother had provided some documents and had tried to arrange for Dr. Allred to be available, but each side had problems in setting a meeting date and time. Mother notified Penaloza before the meeting on July 31 that she was unavailable, and later, another date was agreed. Nevertheless, as of August 12, 2019, when the letter and Notice of Action were sent, RCOC had not yet been able to

communicate with Dr. Allred, and it was still seeking information about school district services and any denial from a medical insurance company or Medi-Cal.

11. The RCOC letter and Notice of Action were based on claims that mother had not cooperated in providing information, documents and/or consents. However, further events occurred and the issues at the time of the fair hearing were mother's contention that there was a demonstrated need for Claimant to receive the evaluation and vision therapy, and RCOC's contentions that it needed to explore generic resources, and that vision therapy was experimental and, therefore, would not be provided.

Medical reports and opinions; generic resources

12. The medical records mother provided on July 29, 2019, include an undated Statement of Medical Necessity from C. Troy Allred, OD, testing results dated May 28, 2019, and the denial letter from VSP (exhibit R6). The Statement of Medical Necessity notes that the initial complaint was frequent letter reversals and academic difficulties due to learning-related vision problems. After evaluation, the following diagnosis was made: "H55.81, Saccadic Eye Movement Deficiency [and] F88, Visual Information Processing Deficiency (ie. [sic] Disorder of Psychological Development)." (*Id.*) Twenty-five sessions of vision therapy were prescribed. It is also noted that the University Eye Center at Ketchum University was not a provider with Claimant's medical insurance network and cannot bill the medical insurance.

13. Dr. Himber testified at the hearing that saccadic eye movement means that the eyes move as you look at something, and that it can be caused by an eye muscle problem or other eye problem, or a brain problem. It is not associated with autism. Dr. Himber noted that the code F88 is for other disorders of psychological

deficiency and makes no reference to a visual information processing disorder. He could not locate any accepted diagnostic code for a visual information processing disorder, and he is not aware of any visual information processing disorder that is associated with autism.

14. Dr. Himber researched and gathered several relevant articles and concluded that vision therapy of the type provided to Claimant is an experimental treatment. For example, he reviewed an abstract of an article on vision therapy by the American Association for Pediatric Ophthalmology and Strabismus (exhibit R11). The abstract describes the therapy as eye exercises to improve binocular function that can be beneficial to treat symptomatic convergence insufficiency. Dr. Himber noted that the sample size was small, the study was not double-blind and was of short duration, and had no reference to children with autism. He did not consider it a well-controlled study. Dr. Himber reviewed other articles regarding learning disabilities, dyslexia, and vision, and an abstract collecting articles reviewing eye exercises. He also examined the policy language of several medical insurance companies, which did not cover vision therapy. This research, and Dr. Himber's training and experience, support his conclusion that vision therapy is considered an experimental treatment or therapy.

15. The parties engaged in mediation on October 17, 2019, which did not resolve the issues. After the mediation, Dr. Himber had a telephone conversation with Dr. Allred and mother. In notes to the file, Dr. Himber wrote that Dr. Allred reported that Claimant had problems with visual tracking and visual efficiency that had improved with therapy. Dr. Himber noted that several professional organizations considered the therapy to be experimental, and that he would welcome any research articles that demonstrated efficacy of the treatment. Dr. Allred agreed to send them. At the hearing, Dr. Himber testified that he had not received any materials from Dr.

Allred, and that without a signed consent from mother, he could not have further communication with Dr. Allred or Claimant's other physicians.

16. Mother also submitted the results of a visual information processing evaluation (exhibit R6) which, although it is dated 5/28/19, indicates that Claimant was seen for examination and evaluation on 5/6/19, 5/28/19, and 6/11/19. The history section notes that Claimant reads below grade level, has letter and word reversals, reads slowly, skips lines when reading, and has autism, delayed developmental milestones, hyperactivity and difficulty with speech. Claimant had inadequate saccadic eye movement, described as the ability to make accurate eye movements from one target to another, as in reading. Claimant had adequate ability to focus and adequate eye teaming. He had inadequate eye tracking, leading to loss of place while reading, or skipping or re-reading words. He had inadequate visual spatial, visual analysis, and visual motor skills. Recommendations included 25 sessions of vision therapy, a referral for a reading evaluation, and temporary classroom accommodations.

17. The evaluation was reviewed by Sara Bollens, a clinical psychologist at RCOC. She reviewed the psychoeducational assessment by Claimant's school district in January 2017 (exhibit R14) and noted that the test results relating to Claimant's visual discrimination skills placed him in the low average range, and his fine motor skills were in the average range. He did poorly in auditory processing and working memory. In Dr. Bollens' opinion, the overall testing outcomes revealed issues that she attributed to problems in Claimant's executive function. The school district Individualized Education Plan (IEP) from January 2017 (exhibit R4) was consistent with her opinion. When she reviewed the Ketchum evaluation, she saw evidence of similar executive function issues. The IEP from January 2019 (exhibit 1) had goals and accommodations that were

well designed to meet Claimant's needs. She also noted that Claimant had received 13 therapy sessions at Ketchum and was showing progress.

18. Mother did not follow up with VSP to determine if VSP would pay for Claimant's visual evaluation. Mother testified that she submitted an application for financial aid to Ketchum University, which granted the application. As a result, the charge for the evaluation was reduced by half (presumably to \$67.50), and the cost per therapy session was reduced from \$102 to \$51, although mother was charged \$50 for the last few sessions.

19. Mother testified that she has an agreement with the school district that covers services for the school year 2019-2020, and she cannot ask for any other services for that period. For this reason, mother has not given consent for RCOC to contact the school district. Claimant attends the Prentice School, a non-public school. According to his IEP dated January 22, 2019 (exhibit 1), he has several accommodations, and receives the following special education services: group language and speech therapy, 30 minutes, twice each week; individual language and speech therapy, 30 minutes, once each week; specialized academic instruction, 45 minutes, four times each week, ELA, 30 minutes, four times each week, and math, 15 minutes, four times each week; psychological services, ten minutes, ten times per year; and behavior intervention services of applied behavioral analysis (ABA), 30 minutes, four times per month. Mother testified that Claimant participates in a social group through the ABA service, and that she pays for private therapy for math, literature and social skills. She described that ABA services at home were funded by health insurance through Cal-Optima.

20. In her testimony, mother described Claimant's progress, stating that he is a little more secure, shows more attention, and his reading fluency and attention have

advanced. As of the hearing, Claimant had attended about 15 of the 25 therapy sessions. The doctor is pleased with his progress.

21. Mother stated she has not signed consent forms to exchange information sent by Penalosa because she has asked for the purposes of the consents to be provided in writing, but gets only verbal replies. Also, she does not believe that they are necessary and would like the consents to be more specific about the information that can be gathered or exchanged. Penalosa testified that the more general consents allow him to gather or send information as needed when trying to coordinate services. Penalosa asked mother to sign two consents, one general and one specifically for school information (exhibit R5). Mother declined to sign.

22. Several friends of Claimant's family testified that they have observed the progress that Claimant has made, including that he is more alert and focused, asks questions when previously he was mostly silent, reads more fluently, and has improved in his use of language.

23. When reviewing the progress reported by Dr. Allred and mother in their phone conversation, Dr. Himber commented that Complainant receives services funded by insurance, the school district, and mother, and is getting older. He could not attribute Claimant's progress to any particular service or support being provided.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, an administrative "fair hearing" is available to determine the rights and obligations of the parties. (Section 4710.5.) Claimant requested a fair hearing to appeal the Service Agency's proposed denial of funding for

a visual evaluation and vision therapy. Jurisdiction in this case was thus established.
(Factual Finding 2.)

2. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (See Evid. Code, § 115.) A consumer seeking to obtain funding for a new service has the burden to demonstrate that the funding should be provided, because the party asserting a claim or making changes generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, Claimant bears the burden of proof regarding his request for reimbursement of costs for vision evaluation and therapy. (Factual Findings 1-23.)

3. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act mandates that an "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community." (Section 4501.) These services and supports are provided by the state's regional centers. (Section 4620, subd. (a).)

4. Vision evaluation and therapy are not included in the specific services available to consumers listed in section 4512, subdivision (b). However, the Code section does include general references to evaluation and treatment, and specialized medical care.

The process of obtaining services and developing an IPP

5. The services and supports to be provided for a consumer are determined by a team, including parents and regional center representatives, under the guidance of various sections of the Lanterman Act, some of which are discussed below.

6. Code section 4646, subdivision (a), states:

It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

7. Code section 4512, subdivision (b), states in part:

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.

8. The planning process is also described in section 4645.5, and includes gathering information from the family, providers of services, and others. Service coordination, as described in section 4647, subdivision (a), includes considering all appropriate options to meet goals and "securing, through purchasing or by obtaining from generic agencies or other resources, services and supports specified in the person's individual program plan; coordination of service and support programs; collection and dissemination of information"

Consideration of generic resources

9. Sources for funding of needed services include not only the regional centers but others, such as an insurance company, school district, Medi-Cal, other public sources, and family members. As discussed in more detail below, Claimant must access these other sources if available before seeking support from RCOC.

10. By law, the Service Agency is required to determine if the needed services can be obtained from other sources, usually denoted as "generic" sources or agencies. This legal obligation is found in several places. For example, Code section 4646.5, subdivision (a)(4), provides that the IPP should include:

A schedule of the type and amount of services and supports to be purchased by the regional center or obtained from generic agencies or other resources in order to achieve the individual program plan goals and objectives, and identification of the provider or providers of service responsible for attaining each objective, including, but not

limited to, vendors, contracted providers, generic service agencies, and natural supports. The plan shall specify the approximate scheduled start date for services and supports and shall contain timelines for actions necessary to begin services and supports, including generic services.

11. A more direct limitation is found in Code section 4648, subdivision (a)(8):

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

12. Claimant must explore whether private medical insurance or Medi-Cal will cover the vision therapy before RCOC can provide funding. Section 4659, subdivision (c), provides, in part, that "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. . . ."

13. As noted in Factual Findings 3, 6 and 18, VSP would pay for a visual evaluation, but mother has not sought payment from VSP. This is a generic source that must be exhausted before RCOC may consider providing payment for the evaluation.

14. Claimant's school district is also a generic resource to be accessed before RCOC may be obligated to pay for services. However, mother has not signed a consent for RCOC to exchange information with the school district to determine whether

services are being provided to meet Claimant's academic needs, and how his vision problems factor into the school district services that are being provided. Although mother stated that she cannot request more school district services until the end of the current school year in June 2020, the exchange of information requested by RCOC will help RCOC assess whether the school district, as a generic resource, is providing services that address the needs identified in the Ketchum University evaluation. Consent to exchange information would not violate an agreement to make no further request for services.

15. If a generic agency is required to provide services, but fails or refuses to do so, such services must be provided by the regional center, or it must make up any service shortfall, as regional centers are known as the "payer of last resort" under Code section 4659.10, which states:

It is the intent of the Legislature that this article shall be implemented consistent with the responsibilities of the department and the regional centers to provide services and supports pursuant to the requirements of this division and the California Early Intervention Program. It is further the intent of the Legislature that the department and the regional centers shall continue to be the payers of last resort consistent with the requirements of this division and the California Early Intervention Program.

Cooperation in gathering information and preparing the IPP is necessary

16. Developing the IPP is a collaborative process. It is not the intention of the Legislature to have IPP programming and implementation of that programming decided unilaterally, either by a consumer or his representatives, or by the regional center. The fact that Claimant's mother has chosen a particular program or service or provider, is an insufficient basis upon which to compel the Service Agency to fund that choice. It was not the intent of the Lanterman Act to extend to a consumer or his parents the sole discretion or an unlimited unilateral authority over programming choices. Rather it is the intent to assure that consumer and family choices and preferences are taken into consideration and made a part of the consumer's IPP if all other requisites are met.

17. The regional centers cannot discharge their duties if they do not have the right to obtain information, the power to obtain that information, and the opportunity to use that information in the IPP process. At the same time, a person who seeks benefits from a regional center must bear the burden of providing information, submitting to reasonable exams and assessments, and cooperating in the planning process. (See Civil Code section 3521: "He who takes the benefit must bear the burden.") Of course, parents can refuse to do anything that they feel works to the detriment of their children. If services cannot be effectively designed, delivered, monitored, and measured against goals and objectives, the regional center may be under no obligation to serve that consumer.

18. Here, mother has the right to refuse to consent to RCOC getting or giving information about Claimant. However, such refusal may limit RCOC's ability to discharge its duties under law to coordinate services for Claimant. Without

cooperation from mother, RCOC may be prevented from, or hindered in, performing these functions.

Reimbursement for services obtained without RCOC agreement

19. The Lanterman Act does not specifically authorize retroactive reimbursement of costs to families in the fair hearing context. The statutes detailing the IPP process suggest that reimbursement is generally not available, particularly where the development of the IPP is supposed to be a collaborative process between the parties, and the process necessarily requires prior consideration and approval of any service or support provided to an individual client. Nevertheless, the absence of statutory authority is not necessarily dispositive of the issue of reimbursement because general principles of equity may require reimbursement in particular cases in order to fulfill the purposes and intent of the Lanterman Act. (See *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.)

20. In pursuing her claim for reimbursement, mother bears the burden of proving how much was paid and for what services, and establishing that she requested RCOC to provide the services as soon as the need was known. Here, the first chronological event was mother's Fair Hearing Request (June 24, 2016) followed by her email to Penaloza (June 25, 2016). (Factual Findings 2 and 3.) Mother made no prior request before the evaluation had taken place and the therapy sessions had begun. Further, although mother asked for the full costs, she has received a discount based on financial need. In so doing, mother has bypassed the IPP process yet seeks to have RCOC pay for services it did not know about and has not had the opportunity to fully consider.

RCOC may not pay for experimental therapy

21. Code section 4648, subdivision (a)(16), provides:

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 or safe or for which risks and complications are unknown.

Determination

22. Mother has not sought payment from VSP for the reduced cost of the vision evaluation. RCOC has not been allowed to explore the availability of other generic resources, such as private medical insurance or the school district, regarding the services that mother is requesting. Mother did not make a request for RCOC to pay for the evaluation or vision therapy before they occurred and, therefore, bypassed the IPP process of collaborative decision-making. Further, RCOC submitted sufficient evidence that the visual therapy requested is an experimental therapy and, therefore, outside of its responsibility. Under these circumstances, mother's request will be denied.

23. Mother and RCOC should continue in their efforts to have Claimant's needs for services and supports considered in the future, for the benefit of Claimant's continuing progress, independence, and integration into the community.

ORDER

Claimant's appeal of the Service Agency's decision to deny reimbursement for a visual evaluation and vision therapy services is denied.

DATE:

DAVID B. ROSENMAN

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.