

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CLAIMANT

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH No. 2018100771

DECISION

Thomas Y. Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on November 27, 2018, in Bakersfield, California. Mother represented claimant, who attended the hearing. (Family members' names are withheld to protect privacy.) Ana Leheny, M.Ed., Program Manager, represented Kern Regional Center (service agency). Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on November 27, 2018.

ISSUE

Whether the service agency should fund claimant's participation in a program at the M.A.R.E. Therapeutic Riding Center (program).

FACTUAL FINDINGS

1. Claimant is eligible for services based on a diagnosis of mild intellectual disability. Claimant has also been diagnosed with: (i) Down Syndrome, a chromosomal

abnormality affecting development from birth in a number of ways; (ii) hypotonia, or low muscle tone; and (iii) hypothyroidism, congenital, without goiter, that is, an underactive thyroid producing insufficient hormones. (Exhibit 3.) Claimant is 14 years old, generally in good health, lives with mother and father, and has recently begun attending high school. Claimant's March 29, 2018 Individual Program Plan (IPP), developed in cooperation with the service agency, states that claimant depends on family for all home and self care. (Exhibit 4, p. 16.)

2. The service agency advised in an October 2, 2018 Notice of Proposed Action (NOPA) that it would not fund the program. It deemed the program not directly related to the diagnosis that makes claimant eligible for services, as well as a duplication of services. On October 9, 2018, claimant filed a timely appeal.

3. The operator of the program describes itself as a non-profit organization offering "equine-assisted therapies and activities for people with special needs and disabilities." (Exhibit A, p. 15.) Mother maintains that the program would promote personal growth and increase claimant's life skills in a therapeutic setting. Claimant used to visit a ranch and benefitted from being around horses. On a visit to the program, mother and claimant found it similar to the ranch, to which claimant no longer has access. Claimant proposes weekly sessions during which the program would teach claimant patience, how to follow directions, and other basic work skills.

4. Judy Hilburn, licensed in Occupational Therapy (OT), wrote an OT Evaluation of claimant on April 24, 2018. She noted, among other things, that claimant has difficulty with stairs, especially going down stairs. Claimant's coordination is poor. Claimant finds it difficult to jump in place and could not jump off a low step. Claimant has trouble with finger control and grasping. To improve claimant's balance, she planned practice of various kinds, including squats and running. She wrote that learning

horse-keeping skills and participation in sport riding at the program would benefit claimant. (Exhibit 10.)

5. In a June 4, 2018 letter, Rosanna V. Abary, M.D., a pediatrician at Kaiser Permanente, Bakersfield, notes that claimant last visited her office on May 8, 2018, and that claimant's diagnosis is "Trisomy 21, Downs Syndrome," a genetic anomaly occurring when a person has three instead of the normal two copies of chromosome 21. Dr. Abary further wrote that claimant "can participate and would benefit from the M.A.R.E. Program, this would enable [claimant] to ameliorate . . . balance and posture." (Exhibit 12.)

6. In a July 9, 2018 email to the service agency, mother explained why participation in the program should be funded. When the family resided in Moreno Valley, California, the program was a benefit covered by their medical insurance from Kaiser Permanente. The insurer does not provide that benefit for residents in the area of Kern County where the family now reside. Mother wrote that the program would "ameliorate [claimant's] problem solving skills, fine motor skills, posture, balance, body awareness and so much more." (Exhibit 9.) At hearing she explained the phrase, "so much more," stating the program would help claimant make friends with those who share claimant's passion for horses. She noted, "This is a therapy program," more likely to improve claimant's skills "in a natural environment that he loves so much." (*Ibid.*) She wrote that claimant would become "more independent in his life skills." (*Ibid.*) She continued:

Here is two examples, Balance – stairs/steps working on going up and down stairs will help [claimant] be able to do this independently. [Claimant] currently goes slowly up and down the stairs, but going down some steps [claimant]

requires assistance or . . . sits down to go down one step at a time.

Reaching above [claimant's] head – Reaching for food, dishes, clothes, towels etc. from a cabinet above should[er] height, this therapy would help [claimant] learn . . . body awareness and strengthen [claimant's] core. The therapy will also help [claimant] become more independent, they will also be working on hand strengthening at the same time.

[Claimant] does not know how to move [claimant's] body and feel safe mounting on a horse . . . [claimant] has a passion for horses that [claimant] has acquired in the last couple of years. [Claimant] would not even get near one in the past. I feel horse therapy is a motivating way for [claimant] to work on . . . skills that are needed in a natural environment.

(Ibid., Exhibit 9.)

7. In a July 11, 2018 letter, claimant's primary care physician, Emily Marg Garabedian, M.D., Ph.D., wrote that claimant "has been medically cleared for participation in the hippotherapy (horse therapy) program through M.A.R.E., however, hippotherapy is NOT A COVERED BENEFIT through [claimant's] Kaiser Insurance."

(Exhibit 11, emphasis in original.)

8. Bonnie Whiting, PT, DPT, CSCS (that is, licensed to provide physical therapy, PT, a Doctor of PT, and a Certified Strength and Conditioning Specialist), has worked with claimant at the Terrio Kids clinic in Bakersfield, to which Dr. Abary referred claimant. Ms. Whiting prepared an initial evaluation on July 18, 2018, in which she noted

that claimant had received PT “throughout the years.” (Exhibit 8.) She noted his hypotonia. The plan was for a half hour of PT weekly for 12 weeks, with possible discharge to a fitness program after that. She set a number of goals for improvement in the hips and ankles and in balance.

9. In a September 6, 2018 letter, Ms. Whiting wrote that, based on claimant’s recent assessment, claimant would be “working on [claimant’s] strength, balance, posture, coordination, and endurance while practicing functional skills such as transfers and stair negotiation.” (Exhibit 8.) She noted that claimant “was compliant with all directions, participated well, and cooperated with his therapist. [Claimant] was positive and tried [claimant’s] best with all testing items.” (*Ibid.*) She recommended participation in the program, explaining:

[Claimant] would benefit from participating in therapeutic riding for a variety of reasons. First, it would improve [claimant’s] core strength and postural control, which would benefit [claimant] in . . . physical therapy, while also decreasing [claimant’s] likelihood of back pain in the future (which can be common in individuals with Down Syndrome). Riding and completing barn activities would help improve [claimant’s] global strength and endurance. This would contribute to [claimant’s] cardiovascular health and decrease [claimant’s] risk of obesity, which is also common in individuals with Down Syndrome.

(*Ibid.*, Exhibit 8.)

10. In a November 15, 2018 letter to mother, Stephanie G¹, Senior Case Manager, Member Services Department at Kaiser Permanente, noted that Dr. Garabedian had opined that the program was not medically needed. She stated further:

I sent your concerns to the Therapy Coordinator on November 9, 2018, for review and action as needed.

I received an answer the same day. They stated that hippotherapy is not a covered benefit. [Claimant] is approved to received [*sic*] skilled occupational therapy and physical therapy through Terrio Physical Therapy Fitness, Incorporated.

We denied your request for [claimant] to get hippotherapy because it is not evidence-based treatment. Only medically needed services are covered

(Exhibit N.)

11. Against the service agency's denial of funding for the program, mother cited Welfare and Institutions Code section 4648.5, subdivision (c). The statute, quoted below, provides that in exceptional circumstances a service agency may fund services normally disallowed. Mother also noted the program's website, which states that the service agency is one of its "VIP sponsors." (Exhibit A.)

12. Mother urged that the service agency's Purchase of Service Guidelines (Guidelines) support funding for claimant's participation in the program. She referenced page 44 in particular, regarding "Socialization, Leisure and Recreational Skills." The

¹ The evidence is unclear on whether this is a full name.

Guidelines state that the service agency recognizes that, because of a consumer's characteristics, the consumer is sometimes "precluded from participation in typical social activities" (Guidelines, p. 44.) Criteria for when the service agency might fund a program for such activities, include:

- An opportunity has been identified to achieve an improvement in the client's social, recreational and leisure life in the community or to develop friendships; and
- No socialization, leisure or recreational opportunity is otherwise available to the client. In making this determination, the KRC, the family and the client must first make reasonable efforts to identify and use typical community socialization, leisure or recreation programs to meet the client's needs. . . ; and
- The need for the purchased service is documented in the client's Individual Program Plan which also includes specific desired outcomes and plans to develop social skills or friendships

(Guidelines, p. 44.)

LEGAL CONCLUSIONS

1. The party asserting a claim generally has the burden of proof in administrative proceedings. In this case, claimant bears the burden of proving eligibility for services. (Evid. Code, § 500.) Claimant did not meet this burden.

2. "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court; except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.) "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.'" (citations omitted) The sole focus of the legal definition of 'preponderance' in the phrase

'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325, emphasis in original.) In meeting the burden of proof by a preponderance of the evidence, claimant "must produce substantial evidence, contradicted or uncontradicted, which supports the finding." (*In re Shelley J.* (1998) 68 Cal.App.4th 322 at p. 329.)

LAW PERTINENT TO FUNDING THERAPY

3. Welfare and Institutions Code section 4646.4 provides in pertinent part:

(a) Regional centers shall ensure . . . the establishment of an internal process.

This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

(1) Conformance with the regional center's purchase of service policies

4. 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, a regional center's 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.

[¶] . . . [¶]

- (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.
- 5. Welfare and Institutions Code section 5001 provides in pertinent part:
The provisions of this part and Part 1.5 (commencing with Section 5585) shall be construed to promote the legislative intent as follows: [¶] . . . [¶]
- (f) To encourage the full use of all existing agencies, professional personnel, and public funds to accomplish . . . objectives and to prevent duplication of services and unnecessary expenditures.

DISCUSSION

6. The program would provide claimant multiple significant benefits. As the OT and PT therapists stated, the program would benefit claimant's physical development. It would ameliorate his ability to grasp and to balance and to climb and descend stairs, among other things. As mother testified, the program would benefit claimant's socialization as well, because claimant would have the opportunity to share a passion for horses.

7. Funding the program, however, would not be in conformance with the service agency's policies on the purchase of services, as required by Welfare and Institutions Code section 4646.4, subdivision (a)(1). The evidence did not establish that claimant is precluded from participation in typical social activities. The evidence did not

indicate, for instance, that claimant cannot participate in social activities at school or that claimant is unable to form friendships.

8. No showing was made that claimant meets pertinent criteria. All of the Guidelines' pertinent criteria, including those quoted in Finding 12, must be met before the service agency may purchase organized activities or therapy, such as the program, designed to provide socialization, leisure, or recreational opportunity.

- A. By participating in the program, claimant would participate in community activities. But this is not the same as identifying an opportunity to achieve an improvement in community participation.
- B. It was not shown that claimant has no socialization, leisure or recreational opportunity other than by participation in the program.
- C. Specific desired outcomes and plans to develop social skills or friendships by means of program participation have not been documented.

9. OT therapist, Ms. Hilburn, wrote that the program would be beneficial, indicating it would help claimant overcome various difficulties. The difficulties Ms. Hilburn identified are the same difficulties she is attempting to ameliorate by means of OT. As the program would be similar or supplemental to OT, authorizing the program would duplicate services already provided as OT, contrary to Welfare and Institutions Code section 5001, subdivision (f).

10. PT therapist, Ms. Whiting, joined in the consensus that the program would benefit claimant and fully recommended participation. As she stated, the program "would benefit [claimant] in his physical therapy." (Exhibit 8, Finding 9.) The program would be similar or supplemental to PT. It would be duplicative of PT, as it is of OT. Absent extraordinary circumstances, the service agency is precluded from funding the program. (Welf. & Inst. Code, § 5001, subd. (f).)

11. There is no evidence that the program is medically necessary. To the contrary, Dr. Garabedian opined that the program is not medically needed. (Finding 10.) Under Welfare and Institutions Code section 4648.5, subdivision (a)(4), the service agency is prohibited from funding the program, like other programs that are “[n]onmedical therapies, including . . . specialized recreation” The program is not directly related to the diagnosis that makes claimant eligible for services.

12. No evidence establishes that there exist, or that the program presents, extraordinary circumstances such that the program should be considered “a primary or critical means for ameliorating” claimant’s intellectual disability. (Welf. & Inst. Code, § 4648.5, subd. (c).) Mother urged that there are such circumstances, but evidence of them was lacking. Claimant has medical insurance from Kaiser Permanente under which the program will not be funded based, in part, on place of residence. But this circumstance is not out of the ordinary, not in the sense that it deprives claimant in some way crucial to claimant’s ability, either to deal with intellectual disability or to improve claimant’s life.

13. The evidence did not establish that the program is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of claimant’s developmental disability, or the service is necessary to enable claimant’s living in the family home, or that there is no alternative service available to meet claimant’s needs.

ORDER

Claimant’s appeal is denied.

DATED:

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.