

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ELLIOT E.,

Claimant,

vs.

SAN ANDREAS REGIONAL CENTER,

Service Agency.

OAH No. 2012080352

DECISION

Administrative Law Judge Diane Schneider, Office of Administrative Hearings, State of California, heard this matter in San Francisco, California, on September 19, 2012.

Jack Maitre, Fair Hearing Designee, represented San Andreas Regional Center (SARC), the service agency.

Claimant, Elliot E., was represented by his father, KE.

The matter was submitted for decision on September 19, 2012.

ISSUES

- 1) Did SARC err when it denied claimant's request to fund co-payments for up to 25 hours per week of intensive behavioral intervention services?
- 2) Did SARC err when it denied claimant's request to fund co-payments for two hours per week of occupational therapy?
- 3) Did SARC err when it denied claimant's request to fund co-payments for three hours per week of speech therapy?

FACTUAL FINDINGS

Background to Hearing

1. Claimant, a seven-year-old boy and consumer of SARC services, was diagnosed with autism approximately four years ago. He lives with his parents and older sister. Claimant currently attends first grade at a private school. Claimant's father works outside of the home, and claimant's mother devotes herself to caring for him on a full-time basis. Claimant suffers from a host of impairments in self-care, safety and interpersonal skills. These impairments require that he be closely supervised around the clock.

2. Claimant currently receives 25 hours per week of behavioral services (15 hours in-home and 10 hours in a social setting), three hours per week of speech therapy and two hours per week of occupational therapy. After a long and arduous appeal process, claimant's parents obtained coverage for claimant's behavioral services and speech and language therapy from claimant's medical insurer, Blue Shield. As a result, Blue Shield covers the cost of these services, except for annual co-payments, which cost about \$2,000 per year.

3. Claimant's father has advocated tirelessly on behalf of his son. On June 3, 2009, claimant's father submitted a written request to SARC that it fund behavioral therapy, speech therapy and occupational therapy. It does not appear that SARC initiated an Individual Program Plan team meeting, or otherwise evaluated claimant's request for funding of such services in his Individual Program Plan, as is contemplated by Welfare and Institutions Code section 4645.5, subdivisions (a)(6), and (b).¹ Additionally, it does not appear that SARC ever formally denied the requested services with a Notice of Proposed Action, as is contemplated by Welfare and Institutions Code section 4710, subdivision (b).²

4. In May 2010, claimant's father reiterated his request to SARC for assistance with funding for behavioral services, and speech and occupational therapy. In a May 27, 2010 email to SARC Service Coordinator Sarah Pachner, claimant's father wrote:

¹ Welfare and Institutions Code section 4645.5, subdivision (a)(6), requires that the planning process for each consumer include periodic reviews to ascertain, among other things, that "consumers and families are satisfied with the individual program plan and its implementation." Welfare and Institutions Code section 4645.5, subdivision (b), provides that Individual Program Plan's (IPP's) shall be reviewed, as necessary, in response to a consumer's changing needs. It is the responsibility of the service coordinator to oversee and monitor each IPP. (Welf. & Inst. Code, § 4647, subdivision (b).)

² Welfare and Institutions Code section 4710, subdivision (b), provides that "[a]dequate notice shall be sent . . . no more than five working days after the agency makes a decision without the mutual consent . . . to deny the initiation of a service or support requested for the inclusion in the individual program plan."

I am curious as to whether SARC can provide additional assistance as regards funding for any of his speech, occupational therapy or ABA, given the safety concerns raised in Section IV [of claimant's Individual Program Plan] and the "work preparedness" concerns raised here in Section V of [claimant's Individual Program Plan].

5. On May 28, Pachner wrote back to claimant's father that speech and occupational therapy services are "educational services" and "regional centers are prohibited from purchasing such services." She also wrote that SARC did not fund ABA services because the educational system is "technically responsible" for providing ABA services. Pachner did not convene an Individual Program Plan team meeting to review claimant's requests for services, nor did she cause a Notice of Proposed Action to be filed by SARC setting forth its denial of claimant's request for services.

6. At hearing Pachner claimed that claimant's father did not request SARC funding for speech and occupational therapy or ABA services until July 2012. Pachner believes that claimant's email did not constitute a "formal request" sufficient to trigger the issuance of a Notice of Proposed Action. This view is unsupported by fact or law. SARC failed to follow the processes in the Welfare and Institutions Code outlined above, for responding to claimant's request for services.

7. Claimant's father is frustrated and upset by SARC's lack of responsiveness to his requests for occupational and speech therapies and behavioral services, dating back to 2009. In his words, he has been "asking for this forever" and was never issued a Notice of Proposed Action prior to August 1, 2012. For this reason, claimant's father requests reimbursement for such services dating back to his original request for services in 2009.

Issues on Appeal

8. By July 2012, Blue Shield was paying for claimant's behavioral, speech and occupational services. Claimant's father requested SARC to cover the cost of the annual co-payments for 25 hours of behavioral intervention services, three hours of speech therapy and two hours of occupational therapy.

9. In a letter to claimant's parents dated August 1, 2012, and Notices of Proposed Action dated on the same day, SARC declined to fund co-payments for claimant's speech and occupational therapy. Separate Notices were filed for the denial of speech and occupational therapy, but the Notices are identical. The Notices cite Welfare and Institutions Code section 4648, subdivision (a)(8), and state that the reason for the denial of services is that speech therapy and occupational therapy are

traditionally available through a generic resource; namely a child's school district. [Claimant's] parents have elected not to pursue having [claimant's] school district of residence fund [speech and occupational] Therapy services.

10. On August 1, 2012, SARC informed claimant's parents, by letter, of its decision that it would fund co-payments for 15 hours per month Intensive Behavioral Intervention Services.³ The reason given for its decision not to fund the co-payments for additional services is that SARC determined that claimant only requires 15 hours per month of behavioral services.

11. On August 9, 2012, claimant appealed SARC's denial of his request to fund his co-payments for speech and occupation therapy and behavioral therapy, and this hearing followed.

Claimant's Individual Program Plan

12. Claimant's most recent IPP is dated May 14, 2010. According to the IPP, claimant requires help with a majority of self-care tasks such as eating, dressing and toileting. He is not attuned to safety risks at home and in the community. He is prone to wandering off and engages in self-injurious behaviors. At times, he can also engage in aggressive behavior and emotional outbursts. As a result, he requires close supervision. The IPP states that the parents may contact the service coordinator to obtain assistance from an adaptive skills trainer.

13. The 2010 IPP noted that, although claimant is eligible to receive special education services from the Los Altos School District (LASD), a lack of appropriate programs in the LASD resulted in claimant's parents funding the majority of claimant's educational placement at a preschool at the local Jewish Community Center (JCC), with some of the costs offset by a settlement provided by the school district. Claimant's parents also privately fund behavioral services provided by "I Can Too" as well as claimant's speech and language therapy.

14. The 2011 IPP Annual Review determined that no new services were required to meet claimant's needs. Claimant's father was advised, however, to contact his service coordinator in the event that he wanted SARC to fund the adaptive training skills provided by "I Can Too."

³ SARC did not issue a Notice of Proposed Action for its denial of claimant's request to fund co-payments for 25 hours of behavioral services, as it should have, pursuant to Welfare and Institutions Code section 4710, subdivision (b). According to Pachner, a Notice of Proposed Action was not filed in response to claimant's request that SARC fund co-payments for 25 hours of behavioral services because it offered to fund co-payments for 15 hours per month of such services. At hearing, the parties agreed that SARC's August 1, 2012 letter was sufficient to provide claimant with notice of SARC's decision. Indeed, claimant's Request for Hearing includes an appeal from SARC's determination that it would only fund co-payments for 15 hours per month of behavioral services. For these reasons, SARC's August 1 letter is treated as a Notice of Proposed Action with respect to its denial of claimant's request that it fund co-payments for 25 hours per week of behavioral services.

15. The most recent IPP Annual Review, dated May 18, 2012, noted that claimant continues to require assistance with a variety of self-care tasks such as potty training, bathing, eating and dressing. The IPP Annual Review also noted that claimant's safety skills are undeveloped, which places him at risk for harming himself. For example, he cannot tell the difference between hot and cold, and sharp and dull objects. He lacks awareness of "stranger danger" as well as developed traffic safety skills, which can result in his running into the street and standing behind cars that are backing up. The 2012 IPP Annual Review determined that no new services were required to meet claimant's needs.

Claimant's Individualized Education Program

16. Claimant is eligible for special education services, primarily based upon his diagnosis of autism, and secondarily, based upon his speech and language impairments. Claimant's most recent Individualized Educational Program (IEP) is dated May 8, 2012. The IEP was not finalized in May 2012. The IEP team met again on August 21, 2012, at which time the district made the following offer of FAPE⁴ to claimant: placement in a special day class for five days per week (six hours per day), which includes three hours of integrated occupational therapy services. In addition claimant was offered one and one-half hours of Language and Speech Therapy per week (one hour of group therapy and 30 minutes of individual therapy.) He was also offered behavioral services from the Kidstars social skills program for one and one-half hours per week, and an additional one and one-half hours per week for a behavioral aide to work with claimant in the SDC classroom. The IEP notes state that claimant's father wanted to discuss the IEP with claimant's mother before deciding whether or not to accept the school district's offer.

17. At hearing, claimant's father indicated that he is in the process of appealing the school district's offer of FAPE. Claimant's parents currently pay claimant's private school tuition from their own funds.

Occupational and Speech Therapy

18. Because claimant's IPP does not provide occupational or speech therapy, it is his burden to prove that he is entitled to such services.

19. Psychologist Carrie Molho, Ph.D., works for SARC as an Autistic Spectrum Disorder Clinical Specialist. Her duties include providing SARC with advice on policies and procedures relating to the provision of services to consumers who are diagnosed with autism. Dr. Molho testified that claimant's requests for occupational and speech therapy were denied because these services are typically provided by the school district.

⁴ FAPE stands for fair and appropriate education.

Claimant's father believes that the occupational and speech services he is requesting are medical and not educational services. He also contends that the speech and occupational therapy services offered by the school district are insufficient to meet claimant's needs.

20. Occupational Therapy: Claimant was referred to Jane Swank, O.T.R./L., by the school district's IEP assessment team to help them determine the extent of claimant's school-based needs for occupational therapy. In an evaluation dated June 2, 2012, Swank noted that claimant had a variety of needs for occupational therapy in the school setting and recommended that claimant receive school-based occupational therapy.

21. Claimant's father contends that claimant requires occupational therapy services to address his problems with dressing and feeding, and that the services offered by the school are insufficient to meet these needs. Claimant's difficulties with dressing and feeding are well-documented, as is his need for occupational therapy to address these issues. The school-based occupational therapy services offered by the school district are, therefore, insufficient to meet his needs.

22. Dr. Molho reviewed claimant's IPP and IEP and concluded that concluded that the district's offer of three hours of integrated occupational therapy services in the classroom setting is sufficient to meet claimant's needs for occupational therapy. In light of the evidence to the contrary, her opinion was not persuasive.

23. Insofar as the school district has offered claimant three hours of in-class occupational therapy services, SARC may not be required to fund the entire amount of occupational therapy requested by claimant. Because the services offered by the district can address his need for occupational therapy in school, claimant's request for two hours of occupational therapy is denied. Instead, SARC shall be responsible to fund the co-payment for one hour of occupational therapy outside of school.

24. Speech Therapy: Claimant's parents referred him to Mosaic Child and Family Therapy Services for a follow-up psychological and speech and language assessment. He was evaluated in May 2011 by Speech and Language Pathologist Amy Travers, MS, CCC-SLP, and Lori E. Bond, Ph.D. Their report, dated July 6, 2011, outlined claimant's speech and language impairments and established that claimant requires one hour of individual speech and language therapy per week, one hour of dyadic therapy and one hour of consultation with claimant's other service providers and parents, for a total of three hours per week.

25. Dr. Molho reviewed claimant's IPP and IEP and concluded that the school district's offer of one and one-half hours of speech therapy in the classroom setting was sufficient to meet claimant's needs for speech therapy. In light of the evidence to the contrary, her opinion was not persuasive.

26. The one and one-half hours of school-based speech and language services offered by the school district, however, must be taken into account, as it is a resource that is

available to claimant. Accordingly, SARC shall be responsible for funding co-payments for one and one-half hours of speech and language therapy.

Intensive Behavioral Intervention Services

27. Because claimant's IPP does not provide him with intensive behavioral intervention services (behavioral services), it is claimant's burden to prove that such services are necessary to meet his needs.

28. Claimant's Evidence: Since 2009, on a date not established by the record, claimant has received approximately 25 hours per week of behavioral services from I Can Too Learning Center, Inc., which is now a division of Trumpet Behavioral Health (Trumpet). At Trumpet, claimant is receiving treatment geared toward helping him address impairments that are well-documented in his IPP. For example, he is learning self-help skills, such as dressing, bathing, making meals and performing chores. In addition, he is learning safety skills such as not wandering off, relating to strangers, crossing the street, and asking for help in emergency situations or in new environments. His tendency towards emotional outbursts and his tendency to wander off are also addressed through this service, which employs Applied Behavior Analysis (ABA).

29. Trumpet Clinical Director Natalie Parks, Ph.D, submitted a letter dated August 28, 2012. She opines that 25 hours per month of behavioral services are necessary to ensure claimant's safety, well-being, and his placement at home. Dr. Parks' assessment of claimant's substantial behavioral challenges is consistent with those outlined in his IPP.

30. Trumpet Program Director Kristen Cooper Borkenhagen, M.A., M.F.T, has supervised the services provided to claimant since November 2009. For this reason, her evaluation and recommendations are accorded great weight. In her treatment plan dated June 12, 2012, Borkenhagen outlines claimant's treatment plan and recommends that he receive 25 hours of services per week.

31. The reports of Parks and Borkenhagen establish claimant's need for 25 hours of behavioral services per week.

32. SARC Evidence: According to Dr. Molho, SARC does not provide funding for behavioral services because it is the school district's job to provide these services. SARC does fund behavioral services to target specific behaviors that are documented in a consumer's IPP. Dr. Molho opined claimant's IEP is "absolutely suited" to meet claimant's needs.

33. According to Dr. Molho, SARC is willing to fund 15 hours per month (approximately three and one-half hours per week) of behavioral services to address claimant's deficits in safety and self-care skills. Dr. Molho determined that claimant met the criteria for what she described as "Level B" services, and the maximum amount allowed for "Level B" is 15 hours per month. According to Dr. Molho, "Level B" is an "internal protocol

... to determine the service needs of individuals.” Dr. Molho declined to provide the “Level B” protocol inasmuch as “SARC does not provide internal documents” to justify its funding decisions.

34. Dr. Molho’s testimony that the amount of behavioral services offered by SARC and the school district are sufficient to meet claimant’s needs for was unpersuasive, in light of the evidence to the contrary. In particular, her assessment of claimant’s level of challenges in the areas of self-care, adaptive living skills and safety skills did not square with the picture of claimant portrayed in his IPP and other evaluations.

35. SARC may not be required to fund the co-payments for the entire 25 hours per week of behavioral services requested by claimant. The three hours of weekly behavioral services offered to claimant by the school district must be taken into account in assessing SARC’s responsibility to provide behavioral services. Accordingly, SARC shall be responsible to fund the co-payment for up to 22 hours of behavioral services.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Act). (Welf. & Inst. Code, § 4500, et seq.)⁵ The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

2. The Act directs regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP states the consumer’s goals and objectives and delineates the services and supports needed by the consumer to implement his goals and objectives. (§§ 4646, 4646.5, 4512, subd. (b).) Each consumer is assigned a service coordinator, who is charged with the task of implementing, and monitoring each IPP. (§ 4647.)

3. Whether or not claimant is entitled to have SARC fund his co-payments for occupational and speech therapy and behavioral services depends on whether claimant is entitled to such services in the first instance.

4. While regional centers have a duty to provide a wide array of services to consumers, they are also directed by the Legislature to provide the services in a cost-effective manner. (§ 4640.7, subd. (b).) Accordingly, regional centers may not fund duplicate services

⁵ All citations are to the Welfare and Institutions Code unless otherwise indicated.

that are available through another public agency. This prohibition, often referred to as “supplanting generic resources,” is contained in section 4648, subdivision (a), which states:

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.

Towards this end, regional centers must identify and pursue all possible sources of public funding for services, including those programs required to pay the cost of medical services, including funding that may be available from school districts.⁶ (§ 4659, subd. (a)(1).)

5. SARC argues that the prohibition against supplanting generic resources precludes it from funding co-payments for claimant’s occupational and speech therapies because they are otherwise available from the school district. SARC is correct that the services offered by the school are a generic resource. The analysis, however, does not stop here. The question in the instant case is whether the services offered by the district are sufficient to meet claimant’s needs. If they are, SARC is under no duty to fund claimant’s co-payments for such services. If they are not, SARC must fund the co-payments for the services he requires in addition to those available from the school district.

6. With respect to occupational therapy, based upon the matters set forth in Factual Finding 21, it is determined that claimant established that he requires occupational therapy in addition to what is available in the school milieu. In recognition that a generic resource exists to meet claimant’s occupational therapy needs in school with the provision of three hours of services per week, it is determined that claimant is entitled to one additional hour of occupational therapy outside of school, and not two, as requested. SARC shall therefore fund the co-payment for one hour of occupational therapy per week.

7. With respect to speech therapy, based upon the matters set forth in Factual Finding 24, claimant established that he requires speech and language therapy in addition to what is available in the school milieu. Taking into account the generic resource of one hour and one-half of speech therapy per week available to claimant, it is determined that claimant is entitled to an additional hour and one-half of speech therapy outside of school, and not three, as requested. SARC shall therefore fund the co-payment for one and one-half hours of speech therapy per week.

8. With respect to behavioral services, as set forth in Factual Findings 28 through 31, claimant established that he requires 25 hours per week of behavioral services. Although Dr. Molho disagrees with this assessment of claimant’s needs, her testimony on this point was

⁶ Generic services may include medical services if they are provided by a governmental entity or program that is required to pay the cost of such services, such as Medi-Cal or Medicare. (§ 4659, subd. (a).) For this reason, claimant’s contention that the services he requests are medical rather than generic services, is incorrect.

unpersuasive. Insofar as there is a generic resource available to provide three hours per week of behavioral services, however, SARC need only fund co-payments for 22 hours per week of behavioral services.

9. Claimant's request for retroactive reimbursement for speech and language, and behavioral services back to 2009, when he first requested such services must be denied, as there is no authority for retroactive reimbursement for services under the Act.

10. Any contentions raised by the parties and not discussed above have been found to be without merit and are hereby rejected.

ORDER

The appeal of Elliot E. is granted as follows: SARC shall fund co-payments for up to 22 hours per week of Behavioral Intervention Services; SARC shall fund co-payments for one hour of occupational therapy; SARC shall fund co-payments for one and one-half hours of speech therapy. In all other respects claimant's appeal is denied.

DATED: _____

DIANE SCHNEIDER
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.