

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

In the Matter of:

CLAIMANT

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH Case No. 2020040902

DECISION

Deena R. Ghaly, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter by videoconference on August 13, 2020. Matthew F. Bahr, attorney, represented Kern Regional Center (Service Agency or KRC). Claimant's father (Father) was present and, as his authorized representative, represented Claimant.

Oral and documentary evidence was received. At the conclusion of the hearing, the parties stipulated to waiving all applicable statutory time limits in order to allow them to prepare and file post-hearing submissions addressing which party has the burden of proof and whether the legal concept of estoppel applied. The post-hearing submissions also addressed an evidentiary issue stemming from KRC's objection to

admitting one of Claimant's exhibits, a 2009 letter from KRC finding that the PT sessions fulfilled a "critical need" for Claimant and would therefore be funded by KRC. This ALJ reserved ruling on these issues pending the post-hearing submissions.

KRC timely submitted its brief and a responding brief marked Exhibit 7 and 8, respectively and lodged with the record. Claimant also timely submitted a brief, which was marked Exhibit E and lodged with the record. On October 15, 2020, the final submission day, the record was closed and the matter submitted.

RULINGS ON RESERVED ISSUES

Burden of Proof

PARTIES' ARGUMENTS

For more than a decade, KRC funded Claimant's one-on-one personal exercise training sessions (PT sessions) with a certified trainer through reimbursements to Claimant's mother (Mother), a KRC vendor for this purpose. The central issue is whether KRC will continue to fund these sessions. At the hearing, the parties contested whether KRC bears the burden to prove that it is no longer required to fund the PT sessions or whether Claimant must prove that he has a right to receiving the funding.

KRC argued that the 2019 and 2020 Individual Program Plans (IPP) gave notice to Claimant and his parents that KRC would not continuing to fund the PT sessions and their signature on the summary forms provided at the end of the meeting, indicated their assent. Moreover, KRC argued that the sessions, bought in yearly allotments, were necessarily "self-limiting," not ongoing and the decision whether to

fund each year's sessions was addressing a yearly new request by Claimant for which he bears the burden of proof.

Claimant argued that KRC did not clearly indicate that the PT sessions would not be funded during the IPP process and that he never assented to such a change and that the April 13, 2020 Notice of Proposed Action (NOPA) stating "The request for reimbursement for gym fees for [Claimant] have (sic) been denied due to the following . . . Gym fees are considered social recreation and are not currently being funded by the Regional Center" (Exh. 1, p. 11) was the first clear communication that KRC intended to cease funding the PT sessions.

Claimant and his family participated in the Claimant's 2019 and 2020 IPP process as it had every year since Claimant became a KRC client. At the conclusion of the 2019 IPP meeting on February 19, 2020, participants, including Claimant and his family signed a form noting their participation and listing the services and support "that will be included in the written (or will be changed from the previous IPP" (Exh. 7, p. 1). Hand-written notations do not reference the PT sessions.

The full IPP, a 54-page document, was not provided to Claimant and his family until almost a year later and just days before the 2020 IPP meeting took place. The 2019 written report includes the following statement regarding the PT sessions: "KRC will deny future funding as it is not deemed related to his eligible condition. A notice of intended action will be sent out to [Claimant and his family] with the appeals process information." (Exh. 4, p. 51.) In February 2019, KRC reimbursed Mother for 88 prepaid PT sessions, which Claimant used over the next year.

Claimant's 2020 IPP meeting occurred on February 19, 2020. Regional Center personnel completed the approval process finalizing the full IPP document on April 9,

2020. Under a section entitled "Current Authorizations for Purchase of Service," the IPP shows payment to Mother in the amount of \$5,720 as reimbursement for PT sessions and states:

Justification: To maintain his health and safety, [Claimant] per his physician requires consistent exercise and due to his eligible condition, he is unable to utilize the gym independently.

(Exh. 4, p. 4.)

Under a section entitled Supports and Services Needed, the IPP states "KRC previously funded for reimbursement to [Mother] in the amount of \$5720 (in February 2019), for personal trainer/sports club, in accordance with KRC policies and procedures." (*Ibid.*, at p. 11.)

At the administrative hearing, Father testified that KRC personnel had "signaled" that it would not agree to continue funding the PT sessions before and during the 2019 and 2020 IPP meetings; however, they were never definitive and, in fact, invited him to provide documentation to establish the benefits of the PT sessions, further leading Father to believe that KRC had not made a final decision. KRC personnel also assured Father that, if KRC made such a decision, Claimant and his family would receive formal notice and instructions about how to appeal the decision.

The signature pages of the 2019 and 2020 IPP's do not communicate KRC's intention to cease funding the PT sessions. Necessarily then, Claimant and his parents' signatures on the pages cannot signify their assent. The 2019 IPP full written report states that KRC will no longer fund the PT sessions; however, in 2019, KRC did fund the sessions. The 2020 IPP acknowledged KRC's funding of the PT sessions and included a

justification for the funding and does not include any statements to the effect that KRC would discontinue funding of the PT sessions.

ANALYSIS

The Lanterman Act sets out procedures for conducting fair hearings. (Welf. & Inst. §4700 et seq.). These procedures do not address burden of proof. Administrative adjudicators have relied on Evidence Code § 500, which provides that “(e)xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.”

Administrative hearings do not necessarily have to follow technical rules of evidence, however. and in this case, given the contradictions between KRC’s words and actions, exactly what is to be affirmatively proven and by who is not clear from the IPP process. The clear indication of KRC’s intentions did not come until the April 2020 NOPA. The NOPA communicates a cessation of previously provided services. As such, it is KRC, the party affirmatively seeking a change, which properly bears the burden of proof.

“Waiver by Estoppel” and Evidentiary Ruling

Parties’ Arguments

Claimant has argued that KRC’s longstanding practice of funding the PT sessions itself as well as a 2009 KRC letter, (Exh. A, p. 1), arising from an informal appeal process bar KRC from ever ceasing funding the PT session. Claimant refers to the legal principle of estoppel to support this position.

KRC did not directly address Claimant's estoppel argument but objected to admitting the 2009 KRC letter because, it argued, the letter is a settlement document and therefore properly excluded under Evidence Code section 1119. To that end, Respondent requested that this ALJ take official notice of a prior OAH decision, involving a similar case, *Claimant v. Inland Regional Center*, OAH Case Number 2015010774.

In 2009, in response to changes to the Lanterman Act prohibiting regional centers from funding certain services, KRC sent a Notice of Intended Action communicating that it would no longer be funding Claimant's PT sessions. Claimant's parents appealed and participated in an informal meeting about the dispute. The KRC 2009 letter memorializing the results of the meeting, stating in part: "After a discussion, it was agreed that Kern Regional Center will fund the continuation of Quest Fitness as this is meeting a critical physical need for [Claimant]."

ANALYSIS

Evidence Code section 1119 provides:

No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in and any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, pursuant to, a mediation or a mediation consultation, is admissible, or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

In *Claimant v. Inland Regional Center*, Case No. OAH 2015010774, the administrative law judge sustained an objection to move a "Lanternman Mediation Summary" document, citing Evidence Code section 1119.

Estoppel is generally defined as "a legal bar to alleging or denying a fact because of one's own previous words or acts to the contrary." (Merriam-Webster.com/estoppel.) The elements of estoppel are: (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) reasonableness of the reliance; and (4) injury due to the party's reliance on the promise. (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 894, 901) An estoppel cannot be asserted against a public entity when to do so would be contrary to public policy. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Authority* (2000) 23 Cal.4th 305, 316.)

While, contrary to KRC's assertions, the 2009 KRC letter is not related to the mediation process, a separate proceeding under the Lanterman Act, and is therefore admitted into the record, neither it nor KRC's history of funding the IP sessions can be a basis for Claimant's estoppel claim. They do not constitute a promise of future services and, in fact, such a promise would violate the Lanterman Act's IPP procedure, which by its nature involves an annual review and re-consideration of services (Welf. & Inst. Code, § 4646.5, subd. (b)) and, thereby, violate public policy.

ISSUE

Should Service Agency fund Claimant's personal training sessions?

EVIDENCE RELIED UPON

In reaching this Decision, the ALJ relied upon Exhibits 1 through 8 submitted by KRC and Exhibits A through E submitted by Claimant, as well as the testimony of Father and Service Coordinator Cindy Martinez.

FACTUAL FINDINGS

1. Claimant is a non-conserved 28-year-old man eligible for regional center services based on a diagnosis of profound intellectual disability, possibly resulting from an additional diagnosis of Down's Syndrome. He currently lives with his parents. Claimant receives medical insurance through Medi-Cal and receives Supplemental Security Income (SSI) of approximately \$900 per month.

2. Claimant can generally meet his own care needs with some assistance from Mother. He is prone to disruptive behavior or tantruming, particularly when he is in unfamiliar situations. Claimant normally attends a day program. Due to the current public health emergency, Claimant's day program is closed.

3. As noted above, until recently KRC paid a yearly amount for prepaid PT sessions Claimant attended twice weekly. The sessions are intended to address and counteract Claimant's tendency to overweight and inactivity while keeping him safe from injuring himself or eloping. Due to the current public health emergency, Claimant's gym is closed and he cannot attend the PT session.

4. A. On April 13, 2020, Cindy Martinez, the KRC service coordinator assigned to Claimant, signed a Notice of Proposed Action stating that "gym fees" will be denied. "Reason for Action: [Claimant] should pay for gym fees with his SSI funds. Social Recreation services are not currently being funded by the Regional Center. Effective date: 05/14/20." (Exh. 1, p. 11). The Notice cited Welfare and Institutions Code section 4648.5, subdivisions (a)(2) and (4).

B. Ms. Martinez testified at the administrative hearing. Asked whether Claimant needed the personal training sessions, Ms. Martinez replied in the affirmative though she noted that she believed he needed them due to his underlying condition of Down's Syndrome, not the condition for which he qualifies for regional center services, intellectual disability.

5. Father testified at the administrative hearing. Father stated that, without the focus and attention of a PT trainer, Claimant is unable to maintain any sustained activity. Without constant supervision, he may wander away and is not capable of keeping himself safe around the weights and other machines in the gym.

6. Father submitted a letter from Claimant's health care provider, Angela Nguyen, in which she states that the PT sessions benefit Claimant's health and address his tendency to become inactive. (See Exh. D.) Father also introduced a letter from the owner of the gym Claimant attended before the pandemic, Tim Gojich. Mr. Gojich discussed how the sessions are designed to address the usual goals of health and weight control but are also designed with Claimant's limitations in mind, especially his short attention span and inability to safely exercise independently. (See Exh. B.)

LEGAL CONCLUSIONS

1. The Lanterman Act, codified at Welfare and Institutions Code section 4500, et seq., acknowledges the state's responsibility to provide services and supports for developmentally disabled individuals. It also recognizes that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (Welf. & Inst. Code, § 4501.)

2. Services and supports provided under the Lanterman Act are those "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." (Welf. & Inst. Code, § 4512, subd. (b).)

3. The determination of which services and supports are necessary for each consumer are made through the IPP process and 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 IPP participants,

the effectiveness of each option in meeting the goals stated in the IPP, and the cost-effectiveness of each option. (Welf. & Inst. Code, § 4512.)

4. The Lanterman Act requires regional centers to control costs as much as possible and conserve these public resources, which must be shared by many consumers. (Welf. & Inst. Code, §§ 4512, subd. (b), 4640.7, subd. (b), 4651, subd. (a), 4659, & 4697.) Additionally, since July 1, 2009, amendments to the Lanterman Act suspend service agencies' authority to purchase social recreation activities and nonmedical therapies. (Welf. & Inst. Code, § 4648.5, subd. (a)(2) and (4).)

5. An exception to these limitations may be granted in extraordinary circumstances in which a service agency 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 in his home and no alternative service is available to meet the consumer's needs. (Welf. & Inst. Code, § 4648.5, subd. (c).)

6. KRC has not produced any substantive evidence supporting its attempt to change the current services, particularly since the NOPA was served outside the IPP process. The only factual evidence presented by KRC was Ms. Martinez's testimony and she only confirmed the Claimant's need for the PT sessions albeit based on his Down's Syndrome diagnosis, not intellectual disability, Claimant's qualifying condition. The NOPA only lists the limitations of Welfare & Institutions Code section 4648.5 as the basis for discontinuing the funding. In the absence of any evidence supporting its effort to discontinue funding PT sessions, Claimant's appeal must be granted.

ORDER

Claimant's appeal is granted. Kern Regional Center shall provide funding for the purchase of Claimant's private personal training sessions until such time as changed circumstances or a new IPP warrants otherwise.

DATE:

DEENA R. GHALY
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.