

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

I.M.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2013070914

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on October 15, 2013, in Culver City.

Heather Zakson, Attorney at Law, represented claimant I.M., who was not present for the hearing.¹

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (WRC or Service Agency).

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on October 15, 2013.

ISSUE

Whether the Service Agency must retroactively fund an independent psycho-

¹ Initials and family titles are used to protect the privacy of claimant and her family.

educational assessment to assist claimant in the Individualized Education Program (IEP) process.

EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1 through 8; claimant's exhibits A through O.

Testimony: Lisa Basiri; Ron Lopez; L.M. (claimant's mother).

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a four-year-old girl who is a consumer of WRC based on her qualifying diagnosis of Autism. She began receiving services from WRC through the Early Start Program² at the age of two and one-half; when she transitioned out of the Early Start Program, she was found eligible and began receiving regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act).

2. Claimant currently receives from WRC 116 hours per month of behavior intervention services, seven hours per month of respite, and three cases of diapers per month, in accordance with claimant's Individual Program Plan (IPP) dated September 13, 2012. WRC plans to reassess claimant in one year to clarify her diagnosis. Claimant also

² The "Early Start Program" is a term commonly used to refer to the California Early Intervention Services Act (Gov. Code, § 95000 et seq.), which supplements the federal Individuals with Disabilities Education Act (20 U.S.C. § 1431 et seq.), and under which services are provided to meet the developmental needs of infants and toddlers under the age of three. (20 U.S.C. § 1432(4)(A); Cal. Code Regs., tit. 17, §§ 52000, subd. (b)(12), 52100 et seq.)

receives speech therapy and occupational therapy through the Hawthorne Elementary School District; she is not currently attending preschool.

3. On June 11, 2013, claimant's mother requested that WRC fund an independent psycho-educational assessment for claimant. Claimant's mother wished to use the assessment to assist her in advocating for an educational placement different from the one claimant had received through the IEP process with the Hawthorne Elementary School District. Claimant's mother informed WRC that the estimated cost of the assessment was \$5,000. WRC refused the request, writing that the Lanterman Act does not require regional centers to fund assessments for the purpose requested.

4. On June 18, 2013, claimant's mother submitted to WRC a Fair Hearing Request on claimant's behalf. This hearing ensued.

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CLAIMANT'S IEPs, PROGRAM PLACEMENT, AND PSYCHO-EDUCATIONAL ASSESSMENT

5. As part of claimant's transition out of the Early Start Program, the Service Agency coordinated a transition meeting with the Hawthorne Elementary School District, which took place on April 17, 2012. The parties agreed that the school district would conduct an IEP meeting and that claimant would begin school at age three.

6. The IEP meeting was scheduled to take place on September 7, 2012. On July 24, 2012, L.M. asked claimant's Early Start Service Coordinator at WRC for assistance in the IEP process. She wanted the school district to assess claimant for educational purposes prior to the IEP meeting. She did not feel that the special day class offered by the school district, two months prior to the IEP meeting, was appropriate for claimant.

7. L.M.'s request was forwarded to Ron Lopez, a WRC educational advocacy

specialist. WRC staff provides advocacy services to consumers and their parents as part of their regular case management services. With regard to educational issues, Service Agency specialists are available to attend IEP meetings between parents and their children's school districts. WRC also offers information and free classes to families concerning consumers' rights in educational settings and in the IEP process in order to help train families to become effective advocates for the consumer. L.M. was aware of these services and supports.

8. Lopez contacted L.M. and offered to attend the IEP meeting to assist her in advocating for claimant. Lopez told L.M. that the school district cannot offer a placement prior to the IEP meeting, and that the placement would be determined at the IEP meeting based on current assessments.³

9. At the September 7, 2012, IEP meeting, Lopez "shared that parent would like further academically based assessments to assist in determining goals and objectives and services," and he discussed proposed goals and objectives for claimant. (Ex. E.) The IEP team decided to use existing assessments to determine goals and objectives,⁴ but agreed

³ Claimant's mother also told Lopez that she had engaged the services of a private advocate, but that the advocate was not returning her telephone calls; Lopez told L.M. that WRC would not provide an advocate at the IEP meeting if a private paid advocate was attending on claimant's behalf.

⁴ Specifically, the IEP team relied on a psychological assessment performed for regional center diagnostic purposes on June 4, 2012, by Jessica Quevedo, Psy.D., in which Dr. Quevedo provisionally diagnosed claimant with Autistic Disorder. Dr. Quevedo did not perform a psycho-educational assessment of claimant.

to “complete academically based assessments [and] review progress within 30 days to . . . determine whether goals and objectives need to be added/adjusted.” (*Id.*) The IEP team determined that claimant was eligible for special education services due to speech and language impairment and autistic characteristics. The IEP team tentatively scheduled another IEP meeting for September 25, 2012.

10. After the meeting, Lopez told L.M. that the district should assess claimant before placing her in a preschool program, and that claimant’s mother could challenge the district’s failure to do so. L.M. testified that Lopez did not instruct her how to challenge the district’s actions, and that she feared the process would be difficult, time-consuming, and expensive. In the weeks following the IEP meeting, L.M. never informed Lopez that the school district had failed to follow up to provide further assessments, nor did Lopez contact her to inquire.

11. In claimant’s September 13, 2012 IPP, claimant’s new service coordinator at WRC, John Amador, wrote that claimant:

was referred to the preschool programs at Hawthorne School District. The IEP was held last week. Mother has chosen not to enroll her child in school until the school performs their own special ed assessments. It is customary for the school to take the progress reports from Regional Center and then assess the child as she attends school. For some reason, the mother did not like this process. During today’s interview, I advised mother to enroll her child in school as some schooling is better than no schooling.

(Ex. 6.) There was no evidence introduced at hearing to show that Amador based his advice

on claimant's individual needs or on an evaluation of the program offered by the school district. According to the IPP, the desired outcomes regarding claimant's school activities were that claimant's mother would enroll claimant "in an appropriate school program" and that the WRC coordinator would "monitor claimant's progress annually and assist as needed." (*Id.*)

12. Claimant's mother enrolled claimant in the school district's preschool program. L.M. observed the preschool session on the first day and concluded that there was insufficient structure and supervision. At the close of the third day of class, which L.M. was not permitted to observe, claimant was released to her mother after class with a bite on her wrist and a black eye. L.M. iced her wounds and then talked to the school nurse, who said she had not been informed of the injuries. Claimant's teacher professed ignorance as to the cause of the injuries. At that point, L.M. withdrew claimant from the program.

13. A second IEP meeting was held in November 2012. L.M. did not invite Lopez to attend, but she believed he would attend because the meeting had been tentatively scheduled at the September 7, 2012, IEP meeting. Lopez did not attend; he testified that he believed his assistance was not needed at the second IEP meeting because L.M. did not call him to schedule his attendance at the meeting. L.M. brought a privately retained advocate to the IEP meeting; L.M. and the advocate asked the school district to fund an independent psycho-educational assessment. The district provided L.M. and her advocate a list of psychologists; the advocate chose one psychologist, Robert Patterson, Psy.D., from the list to perform the assessment, telling L.M. she had worked with Dr. Patterson in the past. Dr. Patterson performed an assessment and concluded that the preschool special day classes offered through the Hawthorne Elementary School District could address claimant's needs. Based on that conclusion, the district informed L.M. that claimant's placement was

appropriate.

14. Claimant engaged the services of Ms. Zakson to represent her in her efforts to obtain services for claimant. On October 1, 2013, Zakson wrote to WRC to ask that someone attend an IEP meeting scheduled for October 8 to advocate on claimant's behalf.⁵ Lopez asked Zakson to have L.M. contact him directly to set up advocacy support for the IEP meeting. L.M. did not contact Lopez.

15. Zakson recommended to L.M. that she retain Dr. Betty B. Bostani, a licensed clinical psychologist, to perform another independent assessment. Dr. Bostani informed L.M. that the assessment would cost \$5,000. L.M. asked WRC to fund that assessment; WRC refused. In September 2013, L.M. obtained a loan from the Jewish Free Loan Association in the amount of \$5,000 and engaged Dr. Bostani, who is in the process of assessing claimant.

16. Claimant's mother testified that she believes the assessment performed by Dr. Patterson was inadequate and that she believes the assessment being performed by Dr. Bostani will enable her to persuade the school district to change claimant's preschool placement. She wants claimant to be placed in a non-special-education preschool with a one-to-one aide. She complained that WRC counselors should not have advised her to allow claimant to attend the preschool program chosen by the school district, and that WRC did not effectively advocate for claimant.

LEGAL CONCLUSIONS

1. Cause exists to deny claimant's appeal, as set forth in Factual Findings 1

⁵ There had been another IEP meeting on April 16, 2013. No one from WRC attended or was asked to attend.

through 16, and Legal Conclusions 2 through 12.

2. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.⁶) An administrative “fair hearing” to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) L.M. requested a fair hearing to appeal the denial of funding for an independent psycho-educational assessment to assist her in the IEP process at her school district, and to appeal the manner in which the Service Agency attempted to fulfill its obligation to advocate for her in the IEP process. Jurisdiction in this case was thus established. (Factual Findings 1-4.)

3. The standard of proof in this case is the preponderance of the evidence, because no other law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) The burden of proof is on the party seeking government benefits or services. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) When, on the other hand, a regional center seeks to change a service previously provided to a consumer, the regional center has the burden to demonstrate its decision is correct, because the party asserting a new claim or proposing 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; Evid. Code, § 500.) In this case, claimant has the burden of proof.

4. The Lanterman Act acknowledges the state’s responsibility to provide services and supports for developmentally disabled individuals and their families. (§ 4501.) The state agency charged with implementing the Lanterman Act, the Department of

⁶ All further statutory references are to the Welfare and Institutions Code, unless otherwise stated.

Developmental Services (DDS), is authorized to contract with regional centers to provide developmentally disabled individuals with access to the services and supports best suited to them throughout their lifetime. (§ 4520.)

5. Regional centers are responsible for conducting a planning process that results in an individual program plan (IPP). The IPP is developed by an interdisciplinary team and must include participation by the client or his or her representative. Among other things, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services based upon the client's developmental needs and the effectiveness of the means selected to assist the consumer in achieving the agreed-upon goals, contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences. (§§ 4646, subd. (a)(1), (2), and (4), 4646.5, subd. (a), 4512, subd. (b), 4648, subd. (a)(6)(E).)

6. Although regional centers are mandated to provide a wide range of services to facilitate implementation of the IPP, they must do so in a cost-effective manner. (§§ 4640.7, subd. (b), 4646, subd. (a).) A regional center is not required to provide all of the services that a client may require but is required to "find innovative and economical methods of achieving the objectives" of the IPP. (§ 4651.) Regional centers are specifically directed not to fund duplicate services that are available through another publicly funded agency or "generic resource." Regional centers are required to ". . . identify and pursue all possible sources of funding. . . ." (§ 4659, subd. (a).) But if a service specified in a client's IPP is not provided by a generic agency, the regional center must fund the service in order to meet the goals set forth in the IPP. (§ 4648, subd. (a)(1).)

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7. Services and supports available to persons with developmental disabilities

generally include advocacy assistance, including self-advocacy training, facilitation, and peer advocates. (§ 4512, subd. (b).) Regional centers must conduct “[a]dvocacy for, and protection of, the civil, legal, and service rights of persons with developmental disabilities as established in this division.” (§ 4648, subd. (b)(1).) When a regional center’s advocacy efforts “prove ineffective,” the regional center, consumer, or consumer’s representative may request the area board to initiate action. (§ 4648, subd. (b)(2).) An area board shall have the authority to pursue legal, administrative and other appropriate remedies to ensure the protection of the legal, civil, and service rights of consumers in its area. (§ 46548, subd. (d)(1).)

8. The Lanterman Act does not specify any circumstances under which a regional center is required to provide advocacy assistance to a consumer beyond advocacy training and the services of a consumer services coordinator.

9. In this case, no legal basis was established for requiring the Service Agency to fund an independent psycho-educational assessment for use in the IEP process, or for requiring the Service Agency to fund such an assessment retroactively, or to provide an advocate at an IEP meeting for which the consumer’s parent had retained an independent advocate at her own expense.⁷ The Service Agency has fulfilled the mandates of the Lanterman Act regarding advocacy services by providing claimant’s mother with the information, resources, and referrals necessary for her to become informed and advocate for herself and her daughter, or to contact the appropriate agencies in case of concerns over claimant’s legal, civil, and service rights. It provided an education specialist who

⁷ The Lanterman Act does not contain any provision specifically requiring the provision of a paid advocate to a consumer at regional center expense.

attended the first IEP meeting, advocated for claimant at the meeting, and informed claimant's mother after the meeting of what he considered to be flaws in the IEP process and of her rights to challenge the school district in further proceedings. Claimant's mother testified that she did not understand what such a challenge would involve and that she was intimidated by the prospect of engaging in such a challenge. There was also testimony, however, that WRC provided free training for parents of consumers to enable them to advocate for themselves in such a challenge process, and that L.M. knew of those services. (Factual Findings 5-16.)

10. This is not to say that WRC's advocates and service coordinators could not have been clearer or more sensitive to claimant's mother's confusion and provided more effective guidance to her. But although there may have been a failure to communicate as effectively as possible with L.M., that failure does not rise to a violation of WRC's advocacy obligations under the Lanterman Act.

11. Claimant's mother decided, on the advice of counsel, to retain a psychologist to perform an independent psycho-educational assessment to present to the school district, and to borrow the money to pay for that assessment. She did so after being informed by WRC that the Lanterman Act does not obligate regional centers to pay for such an assessment. There is no authority for the proposition that the Service Agency is required to fund the assessment. In addition, it was not established that Dr. Bostani's assessment or any additional assessment, whether or not funded by the Service Agency, will result in any changes to claimant's IEP or to the services provided by claimant's school district.

12. The absence in the Lanterman Act of a specific provision that advocacy services include funding independent assessments for use in the IEP process does not necessarily mean that there are no circumstances in which such funding might be required.

In this case, however, claimant did not establish as a factual matter that the assessment performed specifically to assist claimant's mother in a dispute with claimant's school district falls within the scope of the Service Agency's advocacy obligations under the Lanterman Act. Nor does the evidence establish that claimant is entitled to funding for an advocate to represent her in future IEP meetings for which claimant's mother has retained the use of a private advocate.

ORDER

The appeal by claimant I.M. is denied.

DATED: November 1, 2013



HOWARD W. COHEN

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.