

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

DEPARTMENT OF DEVELOPMENTAL
SERVICES,

and

REGIONAL CENTER OF ORANGE
COUNTY,

Service Agencies.

OAH No. 2016070702

DECISION

Howard W. Cohen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on March 9, 2017, in Santa Ana.

Alyssa M. Carroll, Staff Counsel, Office of Legal Affairs, represented the California Department of Developmental Services (DDS or Department).¹

Paula Noden, Manager, Fair Hearings and Mediations, represented Regional Center of Orange County (RCOC).

Claimant's parents, her co-conservators and authorized representatives, represented claimant, who was not present for the hearing.²

Oral and documentary evidence was received. The record was held open to allow briefing by the parties. DDS and RCOC jointly filed a closing brief, marked as Exhibit 10. Claimant filed a closing brief, marked as Exhibit A.

¹ By order dated March 8, 2017, the ALJ ruled that, with respect to this matter, DDS is a Service Agency and a necessary party.

² Family titles are used to protect the privacy of claimant and her family.

The record was closed and the matter was submitted for decision on March 24, 2017.

ISSUE

Whether DDS must fund residential services for claimant, currently and retroactively, while she receives educational services funded by her school district at Heartspring Therapeutic and Residential Day School (Heartspring) in Wichita, Kansas.

EVIDENCE RELIED UPON

Documents. DDS's and RCOC's joint exhibits 1, 2, and 4 through 10; claimant's exhibit A.

Testimony. Shelton Dent, Jack Stanton, Patrick Ruppe, Sarita Franco, claimant's father.

FACTUAL FINDINGS

PARTIES, JURISDICTION, AND BACKGROUND

1. Claimant is a 19-year-old conserved woman who is a consumer of RCOC based on her qualifying diagnoses of intellectual disability and autism spectrum disorder. She began receiving regional center services in 2010 under the Lanterman Developmental Disabilities Services Act (Lanterman Act).

2. Claimant presents with significant behavioral challenges, including severe self-injurious behavior and physical aggression towards others, such as hitting, kicking, scratching, and pinching. She bangs her head on walls, floors, windows, and other hard surfaces. On the bus to and from school in 2015, claimant cut her head on the metal railing of the bus windows and required medical attention. She engages in violent behavior several times per day and must wear a helmet 24 hours per day. She also needs "almost complete assistance" with her activities of daily living. (Ex. 6, p. 6.) Claimant has a twin sister who is also a consumer of RCOC services and supports.

3. At the time of claimant's October 2015 IPP, RCOC was providing claimant 180 hours per month of Personal Assistance/Crisis Assistance in-home support through a

vended provider, SAILS, at a rate of \$35.98 per hour, or \$6,476.40 per month. Claimant also received 24 hours per week of Applied Behavior Analysis (ABA) services funded by the family's private insurer.

4. In November 2015, while exploring in-state residential options for claimant, including group homes, claimant's parents requested assistance from RCOC in pursuing an out-of-state residential placement. At the time, claimant was receiving funding for special education services from her school district in a local private school placement. At least in part because of the harm claimant inflicted on herself while traveling to and from school, claimant's parents asked the school district to consider funding an out-of-state educational placement for claimant.

5. In December 2015, claimant's school district agreed that, if claimant were placed at Heartspring, it would fund the educational services portion of claimant's placement there. The evidence on this record does not reflect the terms of the agreement with the school district.³ The educational services portion of claimant's placement at Heartspring costs her school district \$11,000 per month.

6. In February 2016, claimant's mother informed RCOC that she did not want to place claimant in a group home, in part because she had no success with the group homes recommended by RCOC. While RCOC was attempting to find other group home referrals for claimant, on May 2, 2016, without prior notice to or agreement with RCOC or DDS, claimant's parents placed claimant at Heartspring.

7. On May 27, 2016, RCOC emailed claimant's parents to inform them that RCOC would be closing claimant's case because she was residing out of state. Claimant's father replied by email, instructing RCOC to keep claimant's file open because she was still a resident of Orange County despite attending school in Kansas, and asking RCOC to reimburse him for the cost of the residential portion of claimant's stay at Heartspring,

³ No writing reflecting the terms of the agreement or documentary evidence of the agreement's incorporation into claimant's Individualized Educational Program was submitted.

which was \$13,289 per month.⁴ He informed RCOC that he had paid for May and June, and sent an invoice and receipt for May 2016. RCOC emailed claimant's father, suggesting they discuss the matter at a Planning Team Meeting to be held on June 21, 2016, and informing him that regional centers cannot fund out-of-state services without prior written authorization from DDS.

8. On June 21, 2016, at the Planning Team Meeting at RCOC, claimant's parents again asked RCOC to fund, at least in part, the residential services portion of the out-of-state placement at Heartspring.

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9. By a Notice of Proposed Action (NOPA) and a letter dated June 27, 2016, signed by Sarita Franco, claimant's service coordinator, RCOC denied claimant's request on the grounds that "RCOC by law cannot authorize out of state placement and this decision has to be approved by the state," citing Welfare and Institutions Code section 4519.⁵ (Ex. 4, p. 4.) Franco wrote that section 4519 required that, before submitting to the Department a request for funding for out-of-state services, RCOC perform a comprehensive assessment, convene a subsequent Individual Program Plan (IPP) meeting "to determine the services and supports needed for the consumer to receive services in California," and request assistance from the Department in the form of a Special Service Resource Search (SSRS) to identify options to serve the consumer in California. (Ex. 4, pp. 1-2.)

10. In her NOPA letter, Franco wrote that claimant:

⁴ Claimant's father testified that he requested only \$6,813 per month, the difference between the cost of residential services and the cost of services and supports RCOC was then funding for claimant in California.

⁵ All statutory references are to the Welfare and Institutions Code, unless otherwise stated.

could have been moved to a residential facility in Orange County and been under the jurisdiction of a different School District that may have been able to meet her needs or be willing to send her to a different, local, non-public school. There are other local non-public schools that have not been tried. In addition, it has not been demonstrated that there are not local residential placements that can meet [claimant's] needs, as the family chose not to pursue the options that were provided by RCOC. During the [Planning Team Meeting, claimant's father] indicated that he felt that the referrals for group homes in Orange County, as provided by RCOC[,] were not appropriate for [claimant]. [He] also expressed that he felt that there were no appropriate educational resources for [claimant] in the State of California.

(Ex. 4, p. 1.) Franco concluded in her NOPA letter that,

[b]ased upon the information provided during the Planning Team Meeting that occurred on June 21, 2016, RCOC cannot support your request to fund for the Heartspring program in Kansas. Per [section] 4519, Regional Centers are prohibited from purchasing services outside of California without a demonstrated lack of available options in California. At this time there are options within the state of California that would be able to meet [claimant's] needs.

(Ex. 4, p. 2.)

11. Since claimant moved to Heartspring, she has received no RCOC funding for any services.

12. Claimant's parents filed a Fair Hearing Request on July 12, 2016, asking that RCOC fund the residential services costs for claimant's placement at Heartspring.⁶

13. After further communication with claimant's parents, RCOC agreed to request funding from DDS for claimant's out-of-state residential services. Claimant's most recent IPP, dated October 4, 2016, relates that,

[d]ue to the severity of the behaviors [claimant] has been displaying recently both at home and in school settings, family does not feel that home is the safest environment for her. They do not wish to explore group home options in Orange County at this [time] due to her recent injuries suffered during transport to school. They feel an all inclusive educational and residential program would be the most appropriate placement option. RCOC is unable to offer this type of setting in Orange County, and is unaware of any type of program in California. Due to the lack of available options, RCOC would agree that Heartspring would offer her the least restrictive and safest environment at this time. [¶] . . . [¶] [Claimant] was placed by her family at Heartspring in Kansas on approximately May 2nd 2016. She was placed without [sic] assistance of the regional center or school district as her family had decided she was in an urgent health and safety situation and required an inclusive residential and educational setting that would meet all of her needs. RCOC is unable to offer her this type of setting in California.

⁶ The ALJ takes official notice of and, on his own motion, has marked for identification as Exhibit 9 and admitted into evidence for jurisdictional purposes only, claimant's Fair Hearing Request, which RCOC filed with OAH on July 15, 2016, but which none of the parties offered into evidence at the hearing.

(Ex. 5, p. 2.) The family reported that claimant “has made some progress since her placement and she has remained in a safe environment.” (Ex. 5, p. 4.)

14. In an October 5, 2016 letter, Larry Landauer, Executive Director of RCOC, wrote to Nancy Bargmann, Director of DDS, that because of claimant’s self-injurious and aggressive behaviors, her school district determined it could not safely meet her needs and authorized funding the educational portion of claimant’s placement at Heartspring. He continued:

RCOC has discussed possible placement options that may be available for [claimant] within the State of California; however, her family has indicated that her home is with them at this time and that her education and behavioral needs must be addressed in a safe and therapeutic setting before she can be safe within the family home or other setting. As such, RCOC has not completed a state-wide search for placement options or requested assistance through the [SSRS] program. Family has indicated that they would not be in agreement with alternative placement options were they to be located and offered to [claimant]. [¶] RCOC is requesting authorization for funding for an initial six month period, starting on the date of actual placement of May 2, 2016, and ending on October 31, 2016.⁷ Continued authorization may be pursued after the initial time frame depending on her level of success within this program. . . . [¶] . . . [¶] RCOC plans to maintain face to face visitation with [claimant] on a quarterly basis. RCOC will send a service coordinator to visit her at the program in person no less than quarterly

⁷ Claimant’s parents seek reimbursement for the living expenses they incurred at Heartspring for the period beginning May 2, 2016.

(Ex. 3, pp. 1-2.)

15. By reply letter from Shelton Dent, Assistant Deputy Director, DDS, to Landauer dated February 21, 2017, DDS denied the request for approval on the grounds that "the request provided by RCOC does not meet the statutory requirements for approval" (Ex. 1, p. 2.) Dent, citing section 4519, as amended in 2012, wrote that:

[t]he RCOC letter does not include details regarding all [in-state] options considered and an explanation of why those options cannot meet [claimant's] needs. [Claimant's] Individual Program Plan does not include a plan for an out-of-state service to be funded by RCOC. The "Comprehensive Assessment" submitted by RCOC is dated after the request; does not discuss the services and supports needed for [claimant] to receive services in California; and RCOC did not access the [SSRS] program to identify other options in California. Finally, there is no specific plan to transition [claimant] back to California.

(Ex. 1, p. 1.)

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16. Because the matters raised in the July 2016 Fair Hearing Request were not resolved, this hearing ensued.

TESTIMONY AT HEARING

17. According to Jack Stanton, RCOC's manager of consumer and community resources, RCOC was aware when Landauer sent his October 2016 funding request letter to DDS that RCOC had not satisfied the requirements for requesting authorization for purchasing out-of-state services. The letter plainly acknowledged that RCOC had conducted no Comprehensive Assessment, created no subsequent IPP, requested no SSRS program search for alternative services in California, and prepared no transition plan. The letter's effect was to create an opportunity for DDS to deny the request for funding, at least until RCOC took additional steps required by statute, and create the jurisdictional

grounds for a hearing. RCOC has not taken the additional steps identified by DDS. RCOC's funding request to DDS prior to taking statutorily-required action is not what the Lanterman Act contemplates. (See Legal Conclusions 8-10.)

18. At the hearing, Dent reiterated the statutory basis for his February 2017 denial of Landauer's request that DDS fund claimants' out-of-state residential services. He testified that DDS serves over 300,000 California consumers. In describing the steps section 4519 requires before DDS will consider funding out-of-state services, Dent also testified that, if the consumer's needs cannot be met using current programs in California, regional centers must determine how long it would take to develop a new California program to meet a consumer's needs and develop a transition plan to return the consumer to California. The plan must take into account newly developed programs as well as existing California programs. Currently, according to Dent, DDS funds out-of-state services for 10 consumers, two of whom are at Heartspring.⁸ The number has decreased from 41 consumers receiving such funding in 2012, when section 4519 was amended, because the State of California began providing funding to regional centers to develop programs to serve those consumers in this state.

19. Dent was aware that RCOC and claimant's parents were discussing placing claimant in a group home before she was placed in Heartspring. At the hearing, Dent and Stanton distinguished the various levels of care and the nature of services provided by group homes. Dent testified that additional staffing would be available in appropriate circumstances to accompany self-injurious consumers on school buses or other modes of transportation to and from school. Both Dent and Stanton noted that specialized residential facilities are currently being developed to serve the particular needs of all regional center consumers. They did not opine on whether current resources exist to

⁸ Dent testified that DDS approved funding the residential portion of two consumer placements at Heartspring; neither of them is an RCOC consumer. No evidence was offered regarding the circumstances of those placements and the services and supports provided to those two consumers.

appropriately address claimant's needs, which is understandable in view of the incomplete status of RCOC's investigation into that issue.

20. Stanton described the process for identifying or creating appropriate resources within Orange County for RCOC consumers. Stanton conceded that there is no all-inclusive living and educational facility in Orange County for RCOC consumers, and that RCOC requested DDS funding for Heartspring because the family insisted on an all-inclusive facility for claimant. He testified that, after a recent search, he has found at least two residential facilities available in Orange County that can provide claimant with her needed level of support; they are not, however, all-inclusive residential and educational facilities. Claimant's school district would still have to find her an appropriate local educational placement.

21. The Service Agencies do not contest the severity of claimant's needs or, necessarily, whether Heartspring can address those needs. They contest any obligation to fund out-of-state services until all the steps prescribed in section 4519 have been accomplished, so they can determine whether appropriate services can be provided to claimant in California.

22. Given claimant's self-inflicted injuries on the school bus, despite services funded by the school district and RCOC to protect her, claimant's parents deemed the danger claimant posed to herself to be an emergency warranting an immediate change. They did not agree that claimant's placement in a group home would suffice to protect claimant. And claimant's school district agreed, according to claimant's father, that it was unable to meet claimant's needs in California. He testified that she only has two more years of schooling left, and that though he and claimant's mother would prefer that claimant live with them, they want her to receive appropriate educational services, which they believe can be safely delivered only at Heartspring.

23. Having agreed with claimant's parents to support claimant's request for DDS funding, RCOC could have, and should have, expeditiously and in a manner timely enough to address claimant's safety needs, completed a Comprehensive Assessment, a new IPP, an SSRS, and a transition plan, prior to seeking DDS funding for an out-of-state placement if those steps supported that placement. RCOC's omission of those preliminary steps leaves

the record unclear as to whether services appropriate to address claimant's needs are unavailable in California or cannot be made available in the near future.

24. Finally, the Service Agencies contest any obligation to fund the residential services portion of what is essentially an educational placement. Dent testified, and the Service Agencies argued in their closing brief, that DDS and regional centers are not responsible for funding educational services where, as here, a generic source of funding for educational services, i.e., claimant's school district, is available. The Service Agencies argue that the residential portion of claimant's educational placement must be funded by claimant's school district. (See Legal Conclusions 6-8 and 11.)

LEGAL CONCLUSIONS

1. Cause exists to deny claimant's appeal, as set forth in Factual Findings 1 through 24 and Legal Conclusions 2 through 12.

2. The Lanterman Act governs this case. (§ 4500 et seq.) An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal a denial of funding for an out-of-state placement. Jurisdiction was established. (Factual Findings 1-16.)

3. The standard of proof in this case is the preponderance of the evidence, because no law or statute requires otherwise. (Evid. Code, § 115.) Claimant, who is seeking government benefits or services, has the burden of proof in this case. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits); compare *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789 fn. 9; Evid. Code, § 500.)

4. The Lanterman Act acknowledges the state's responsibility to provide services and supports for developmentally disabled individuals and their families, and to "ensure that no gaps occur in communication or provision of services and supports." (§ 4501.) DDS, the state agency charged with implementing the Lanterman Act, 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 IPP. The IPP is developed by an interdisciplinary team and must include

participation by the consumer or his or her representative. Among other things, the IPP must set forth goals and objectives for the consumer, contain provisions for the acquisition of services based on 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).) "The right of individuals with developmental disabilities to make choices in their own lives requires that all public or private agencies receiving state funds for the purpose of serving persons with developmental disabilities . . . shall respect the choices made by consumers or, where appropriate, their parents . . ." (§ 4502.1.)

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).) The Legislative protections embodied in a remedial statute such as the Lanterman Act cannot be frustrated or circumnavigated by narrow interpretation or insistence upon ministerial technicality. (*California State Restaurant Association v. Whitlow* (1981) 58 Cal.App.3d 340, 347; see also *Montessori Schoolhouse of Orange County, Inc. v. Department of Social Services* (1981) 120 Cal.App.3d 248, 256.)

7. No legal support was offered to demonstrate that Service Agencies are responsible to fund the cost of a residential placement solely necessary to provide for the consumer's education. Although the evidence does not reflect the terms of claimant's parents' agreement with claimant's school district (see Factual Finding 5, fn. 3), case law supports a finding that the school district, a generic source of funding, must fund residential services attendant upon what is solely an educational placement. For example,

in a dispute between parents and their child's school district over who had responsibility for paying for residential services in connection with an educational placement under the federal Education For All Handicapped Children Act (20 U.S.C. § 1400 et seq.), the Court of Appeal found that, "if private residential placement is necessary to provide a handicapped child with an appropriate education, such a program, including nonmedical care and room and board, shall be provided at no cost to the parents of the child." (*In re John K.* (1985) 170 Cal.App.3d 783, 791; see also *Kruelle v. New Castle County School Dist.* (1981) 642 F.2d 687, 691, *Christopher T. by Brogna v. San Francisco Unified School Dist.* (1982) 553 F.Supp. 1107, 1119.)

8. For the residential services attendant upon claimant's out-of-state educational placement, the school district is a generic source of funding to which claimant must look first. RCOC may assist claimant in the pursuit of that funding. But only after claimant's parents exhaust the possibility of generic sources of funding, a fact not established on this record (see Factual Finding 5) would the Service Agencies, as payors of last resort, become responsible for funding any portion of claimant's placement, and then only after taking the steps required under section 4519 to establish the non-existence of appropriate in-state resources.

9. Section 4519, which governs funding for out of state placements, provides in pertinent part:

- (a) The department shall not expend funds, and a regional center shall not expend funds allocated to it by the department, for the purchase of any service outside the state unless the Director of Developmental Services or the director's designee has received, reviewed, and approved a plan for out-of-state service in the client's individual program plan developed pursuant to Sections 4646 to 4648, inclusive. Prior to submitting a request for out-of-state services, the regional center *shall conduct a comprehensive assessment and convene an individual program plan meeting to determine the services and supports needed for the consumer to receive services in California and shall request assistance from the department's statewide specialized resource service in identifying options to serve the consumer in California.* The request shall include details regarding all options considered and an

explanation of why these options cannot meet the consumer's needs. The department shall authorize for no more than six months the purchase of out-of-state services when the director determines the proposed service or an appropriate alternative, as determined by the director, is not available from resources and facilities within the state. Any extension beyond six months shall be based on a new and complete comprehensive assessment of the consumer's needs, review of available options, and determination that the consumer's needs cannot be met in California. An extension shall not exceed six months. For the purposes of this section, the department shall be considered a service agency under Chapter 7 (commencing with Section 4700). [¶] . . . [¶]

- (c) When a regional center places a client out of state pursuant to subdivision (a), it shall prepare a report for inclusion in the client's individual program plan. This report shall summarize the regional centers efforts to locate, develop, or adapt an appropriate program for the client within the state. This report shall be reviewed and updated every three months and a copy sent to the director. *Each comprehensive assessment and report shall include identification of the services and supports needed and the timeline for identifying or developing those services needed to transition the consumer back to California.* (Italics added.)

10. RCOC has not provided DDS with all the statutorily-mandated information necessary to make a decision to fund claimant's placement at Heartspring. (Factual Findings 13-15.) Section 4519 contemplates that a regional center will provide DDS with a Comprehensive Assessment, an IPP reflecting the IPP team's determination of services and supports needed, information concerning an SSRS search to attempt to identify options within California and information concerning any alternative options considered and the reason they will not meet the consumer's needs, and a transition plan for returning the consumer to California. RCOC did not take any of those steps, submitting its request for funding based entirely on claimant's parents' insistence that claimant live in the same facility in which she attends school, an option available at Heartspring, where claimant's parents had already placed her.

11. Putting aside what in this case is the determinative issue—claimant’s failure to demonstrate that she has exhausted generic sources of funding for residential services attendant upon her solely educational placement—RCOC, having agreed to request funding from DDS, should have undertaken the steps prescribed in section 4519, in a manner timely enough to be effective and consistent with the remedial purposes of the Lanterman Act, prior to requesting DDS funding for claimant’s placement. In this case, because those steps were not taken, the evidence did not establish that for claimant an out-of-state placement is the only safe and appropriate option at this time, or that claimant’s parents’ placing claimant out of state without involving RCOC was sufficiently justified as to warrant funding without following the scheme set forth in section 4519.

12. While the Lanterman Act does not specifically authorize retroactive reimbursement to families who prevail at fair hearing, it does not proscribe administrative law judges from awarding this remedy. (See Cal. Code Regs., tit. 17, § 50612, subd. (b) (authorization for funding shall be obtained in advance of providing the services, “except . . . [w]here the regional center determines that the services was necessary and appropriate”).) But because claimant’s appeal is denied on the grounds that claimant’s school district is responsible for funding the residential portion of what is solely an educational placement outside of California, the matter of retroactive funding is not reached. This decision does not address whether appropriate resources are available to address claimant’s needs in California, in part because it has not been shown on this record that generic sources of funding have been exhausted (see, e.g., Factual Finding 5), and in part because RCOC never undertook the statutory steps that would yield such information. Nor does this decision address, because the matter was not raised, whether Service Agencies must fund services and supports, other than residential services, they otherwise would fund in California when a consumer is placed out of state for educational services by a school district.

ORDER

Claimant’s appeal is denied.

DATED:

HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; all parties are bound by this decision. Any party may appeal this decision to a court of competent jurisdiction within 90 days.