

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2017120359

DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on January 9, 2018.

Claimant's parents represented claimant.

Jennifer Cummings, Program Manager, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

The matter was submitted on January 9, 2018.

ISSUE

Is IRC required to fund out-of-home placement for claimant?

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. Claimant is a 17-year-old male who qualifies for regional center services under the autism category. Claimant has been diagnosed with Schizoaffective disorder, Mood disorder, Anxiety unspecified, and Intermittent Explosive Syndrome, in addition to

the qualifying Autism diagnosis. He receives Supplemental Security Income (SSI). Claimant is not presently attending school as a result of the circumstances detailed in this decision.

2. Until recently, claimant lived with his maternal grandmother and mother. But, due to a recent violent confrontation he had with his grandmother where he tried to choke her, he was placed on a 72-hour hold under Welfare and Institutions Code section 5150 (5150 hold). At the time of the hearing, he remained under the 5150 hold and his parents were discussing his after discharge placement with a hospital social worker.

3. Since August 2017, claimant has been placed on five 5150 holds and after one of these holds, on October 28, 2017, he was discharged to a psychiatric hospital.¹ On August 5, 2017, October 18, 2017, October 25, 2017, and October 27, 2017, police were called to respond to various incidents and claimant was then placed on the 5150 holds referenced above.² Claimant was placed on these holds after he assaulted his mother, his maternal grandmother, with whom his mother lives, and his paternal grandmother, with whom his father lives. These confrontations have caused his family members to fear for their safety and well-being. As a result, his family is unwilling to allow him to return to live in their homes.

¹ It appears from Consumer Services Coordinator Brenda Rodriguez's Title 19 notes that claimant was admitted to College Hospital, the psychiatric facility on two occasions, in August 2017 and October 2017.

² At the time of the hearing he was on another 5150 hold.

4. The concerns for their safety are well-founded. Claimant's emotional outbursts and violence are not predictable and weighing 245 pounds and standing over six feet tall, he is intimidating when he is angry. When upset, claimant cries hysterically, yells, is inconsolable, and his behaviors quickly escalate into violence. He has used a knife and a crowbar during incidents. On one occasion on October 18, 2017, he took a knife he hid in the cupboard in his closet and repeatedly stabbed his bed with it.³ After knives were removed from the home following this incident, on October 25, 2017, when he was upset that his grandmother saw him looking for a knife in the kitchen⁴ he became angry and choked her. On October 27, 2017, he became upset with this mother, went to the garage, found a crowbar, came back into the house and hit his mother in the head with it. After this incident he was admitted as an inpatient in a psychiatric hospital on October 28, 2017. His father wrote in his diary, which was received into evidence, that on December 8, 2017, claimant came after him and he needed to restrain him.

5. After the incident where claimant hit his mother with a crowbar, claimant's mother asked IRC on October 30, 2017, to place claimant out of the home.

6. On November 8, 2017, IRC issued a Notice of Proposed Action denying claimant's request for out-of-home placement.

In a November 7, 2017, letter attached to the Notice of Proposed Action, Robert Garcia, IRC Program Manager, stated that IRC must consider every possible way to assist

³ Claimant's mother described this incident in a diary she kept, which is discussed below.

⁴ Claimant's mother also described this incident in her diary, which is discussed below.

families in maintaining children in their homes, when living at home is in their best interest, before considering out-of-home placement. He stated that IRC believes claimant will continue to benefit from wrap-around services provided by Uplift and is willing to discuss additional services to help maintain him in the home. Mr. Garcia added that as of November 1, 2017, IRC approved 248 hours per month of Specialized Individual Training (SIT) provided by California Psychcare Inc. (CPC) to maintain him in the home.

On November 22, 2017, claimant's mother submitted a fair hearing request to contest IRC's proposed action. She stated claimant is seeking "GAP funding for residential placement until Generic Funding is put in place." She cited Welfare and Institutions Code sections 4648, subdivision (g), and 4648, subdivision (a)(9)(C)(v).⁵

7. On December 11, 2017, Mr. Garcia and Brenda Rodriguez, claimant's Consumer Service Coordinator (CSC), held an informal conference with claimant's parents. As detailed in the December 12, 2017, conference summary, claimant's parents had talked to his school about a plan to get claimant back into school, possibly through a non-public school. Claimant was scheduled for mental health appointments and he was noted to have begun taking medications and attending counseling.

⁵ The sections do not directly apply to the issue whether IRC must fund out-of-home placement for claimant. Section 4668, subdivision (g), concerns the situation where there is a gap in services or supports where the Department of Developmental Services may be required to fund the service directly. Section 4668, subdivision (a)(9)(C)(v), requires a regional center to perform an assessment after a consumer's admission for mental disease by another entity.

IRC stated it stood by its decision to deny claimant's request for out-of-home placement. IRC noted that in order to provide supports and services to maintain claimant in the home, several support services were in place, including SIT services, wrap-around services and In Home Supportive Services (IHSS)⁶, and there was a plan to reintroduce him back into school. At the same time, IRC advised claimant's parents that they may wish to contact Child Protective Services for out-of-home placement.

CLAIMANT'S AUGUST 24, 2017, IPP

8. Claimant's most recent Individual Program Plan (IPP) is dated August 24, 2017, and was developed with claimant's mother, claimant and CSC Rodriguez. Its goal was to provide supports and services to claimant to allow him to reside in the family home and decrease his non-compliant behaviors.

The IPP described claimant as being at risk for placement. Due to an increase in negative behaviors, respite was increased from 24 hours to 48 hours so that claimant's mother can have relief from her daily supervision and care of claimant. At the time of the IPP, claimant's father was living in Arizona. He returned to help with claimant's care at some point after August 2017. Claimant was noted to be in school on the high school diploma track with a behavior intervention plan in place due to outbursts and aggressive behaviors displayed last year.

At the hearing, IRC expressed willingness to schedule a new IPP as soon as possible to address additional supports necessary to keep claimant at home.

⁶ IHSS denied claimant's request for services.

CLAIMANT'S SCHOOL ATTENDANCE AT FEBRUARY 2018 IEP

9. Claimant is on "home and hospital instruction" due to his high anxiety level when at school. The school sends a teacher to claimant's home.⁷ As a result, his family must provide care and supervise him during the day. Given his behaviors, this represents a challenge for claimant's parents and grandparents. Claimant's mother works from 7:00 a.m. until 3:00 p.m. His father, who is not working, has made himself available to help care for claimant, and has been helping care for him, but claimant prefers staying with this mother.

At claimant's recent Individualized Education Program (IEP) meeting held on December 12, 2017, claimant's attendance at a non-public school, or a modified schedule with a shortened day, was discussed.⁸ Claimant's parents wanted him to be on a regular school schedule. According to a December 7, 2017, note in Uplift's Crisis Intervention Plan, claimant expressed a desire to return to school full-time. A February 2018 IEP meeting is scheduled and, depending on the results of a pending psychological evaluation, claimant may be referred for non-public school services.

SUPPORTS AND SERVICES CURRENTLY IN PLACE

10. Ms. Rodriguez testified that since August 2017, in response to claimant's family's concerns about maintaining claimant in the home due to his behaviors, she doubled the amount of respite; switched respite from preferred to routine; referred

⁷ Education Code section 48206.3 authorizes individual home instruction for a student with a temporary disability.

⁸ The IEP was not submitted into evidence but a summary of the IEP was in the Title 19 notes. Claimant's parents did not dispute the summary.

claimant for Uplift wrap-around services⁹ on October 18, 2017; and authorized 248 hours of SIT through CPC. Ms. Rodriguez stated that the authorized 248 hours of SIT is intended to ensure that a provider with a background in addressing problem consumer behaviors is in the home eight hours a day. But claimant's family was not utilizing the full extent of this service because the family did not want to overwhelm claimant and also claimant's parents did not want to intrude on his grandparents with a lot of services for claimant. As a result, claimant has a CPC/SIT provider in the home just three hours a day.

11. The services and supports Uplift provides claimant and his family are detailed in a 15-page Crisis Intervention Plan and Report (the plan) prepared and signed by Kelley Krueger, Ph.D., BCBA, Program Manager, Diana Juarez, BCBA, and Corey Thompson, MA, Program Coordinator, at Uplift. The plan contains a detailed action plan and identified the efforts by a Crisis Team to stabilize claimant and help his family between October 2017 and December 21, 2017. The Crisis Team consisted of representatives from Uplift, IRC and Easter Seals, which arranges ABA¹⁰ services, and visits with claimant's psychiatrist and behavioral specialists. This plan included mental

⁹ Uplift Family Services was previously known as EMQ Families First (EMQ). Excerpts from EMQ's Program Design, which outlined the services it provides families in crisis, were received into evidence. As detailed in these excerpts, the program provides individualized wrap-around services to stabilize children and adolescents who have mental health problems. The program utilizes highly trained mental health practitioners with master's and doctorate level degrees who have direct service experience.

¹⁰ Applied Behavior Analysis (ABA) is a method for teaching individuals with autism a wide variety of skills in order to reduce problem behaviors.

health support, direct support, and service coordination, and contained recommendations regarding dietary changes, exercise, adaptive sports, and arrangements for direct consumer behavioral training. Safety measures were also recommended and noted as implemented.

12. A number of the recommendations contained in the plan, including behavioral training, exercise and adaptive sports, have not yet been implemented due to claimant's instability.

13. The services and supports CPC provides are detailed in a Service Summary Report dated January 5, 2018, prepared by CPC Case Coordinators Jason Patterson and Cidnie Warren. Claimant's family was noted to have utilized 24 percent of the total hours authorized because, as noted earlier, his family did not want to overwhelm claimant and also because CPC was unable to provide services until he was released from the hospital in December 2017.

Also, as detailed in this report, Mr. Patterson and Ms. Warren advised that the family decided to terminate ABA services with Easter Seals in January 2018. However, this is not correct. According to Uplift's report, Easter Seals chose not to provide direct services to claimant until he stabilizes.

TESTIMONY OF ROBERT GARCIA, IRC PROGRAM MANAGER

14. Robert Garcia testified that he believes that services can be put in place to help claimant remain in the home, including SIT and respite in combination. Towards this end, IRC would agree to fund 1:1 ABA services, which would include a family training component. Claimant's family has asked claimant's health plan for ABA services, but Mr. Garcia stated that IRC would approve ABA pending the health plan's decision.

Notwithstanding his belief that a support plan can be put in place to keep claimant in the home, Mr. Garcia stated that a mental health placement, as opposed to a regional center placement, with appropriate structure and support, would be better able

to help claimant stabilize. He added that it would be difficult for IRC to place claimant and it may take time to find a placement for claimant either within the IRC catchment area or outside of it, assuming IRC is required to find out-of-home placement for him.

TESTIMONY OF CLAIMANT'S MOTHER, FAMILY MEMBERS AND OTHER EVIDENCE

15. Claimant's mother stated that if she had her own place she would try the services to see if they work. She stated that she believes that at the February 2018 IEP, assuming the psychological assessment finds that he has an emotional disturbance, the school may refer claimant for residential placement. Her testimony was emotional. It was apparent that the stress of claimant's behaviors and her concerns for his welfare have deeply affected, troubled and exhausted her.

16. In a diary she kept that was received into evidence, claimant's mother detailed claimant's daily behaviors between September 2017 and October 27, 2017. During this time, she documented that claimant displayed intense anxiety when separated from her, calling her obsessively, he had almost daily sustained crying and yelling fits in public and in the home, and he engaged in self-injurious behaviors.

In her diary she also described several troubling incidents. On October 18, 2017, claimant's sister called her at work and told her that claimant was having a meltdown and had a knife. His grandmother found him in his room repeatedly stabbing his bed with the knife that he had hidden in a cupboard in his closet. His head was bleeding after he hit his head against his bedroom wall causing it to bleed. Police were called and his family took him to the emergency room.

On October 25, 2017, claimant was not happy because a CPC/SIT behavioral specialist was at the house. He became enraged when the behavioral specialist attempted to talk to him and he was unable to talk to his mother. He then came out of his room and grabbed his grandmother by the neck and tried to strangle her. The behavioral specialist began to intervene and claimant went back to his room. Claimant

then came out of his room and was looking for knives in the kitchen drawer. He yelled, "Where's all the fucking knives?" The behavioral specialist then restrained him and the police were called. After he calmed down, he talked to his mother on the phone and told her, "I couldn't find the knives. I wanted to kill everyone."

Shortly after this incident, on October 27, 2017, claimant became enraged after his mother asked him to put on a seatbelt while they were driving. He told her that he does not want to work with the CPC/SIT behavioral specialist and claimant's mother told claimant she wanted him to work with the specialist. Claimant then tried to hit her in the chin and he began to yell and scream and tried to jump out of the moving car.

After they arrived home, claimant's mother asked him to come inside and, instead, he waited until she went inside and he went into the garage. He then came to the back window of the house and got more upset. His sister went to check on him and told their mother that he had a crowbar. Claimant's mother became concerned for her safety and the safety of his sister and tried to lock the house door but he ran into the house. Claimant then hit his mother on the left side of the head with the crowbar. Claimant's mother proceeded to wrestle him and with all her weight was able to remove the crowbar from his hands. Her relatives next door heard yelling and called 911.

17. Both of his grandparents described their struggles to calm claimant and their inability to do so. His paternal grandmother described him as a "walking time bomb." His maternal grandmother described him as out of control, very destructive, and verbally abusive. She has heart problems and has limited ability to control claimant.

18. Claimant's teenage sister also testified at the hearing and described the emotional toll the stress claimant's behaviors have had on her and her family.

IRC'S ARGUMENTS

19. IRC argued that additional time is needed to see if supports and services, including 1:1 ABA therapy, respite, a behavioral specialist who can be in the home, and

the supports identified in claimant's February 2018 IEP, will help claimant and his family and allow him to remain in the home. IRC also noted that SIT services can be provided in the home with or without the family in the home. IRC emphasized that it is willing to work with the family to come up with a plan for claimant with additional supports and services.

In the alternative, IRC argued that the school district is responsible to place claimant as an available generic resource and IRC should not be required to fund out-of-home placement for claimant.

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LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish by a preponderance of the evidence that IRC should fund the requested service. (Evid. Code, §§ 115, 500; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.)

2. A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

THE LANTERMAN ACT

3. Under the Lanterman Act (Welf. & Inst. Code, § 4500, et seq.), the State of California accepts responsibility for persons with developmental disabilities. 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; *Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384.)

A person is eligible for services under the Lanterman Act if he or she can establish that he or she is suffering from a substantial disability that is attributable to intellectual disability, cerebral palsy, epilepsy, autism, or what is referred to as the fifth category – a disabling condition closely related to intellectual disability or requiring treatment similar to that required for intellectually disabled individuals. (Welf. & Inst. Code, § 4512, subd. (a).) A qualifying condition must also start before the age 18 and be expected to continue indefinitely. (Welf. & Inst. Code, § 4512.)

SERVICES AND SUPPORTS AND GENERIC RESOURCES

4. To that end, section 4501 states:

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life

5. “Services and supports” are defined in Welfare and Institutions Code section 4512, subdivision (b), as follows:

“Services and supports for persons with developmental disabilities” means specialized services and supports or special adaptations of generic services and supports 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. . . . Services and supports listed in the individual program plan may include, but are not limited to . . . personal care, day care, special living arrangements, . . . protective and other social and sociolegal services, information and referral services . . . [and] supported living arrangements

6. A regional center must secure services and supports that meet the needs of a consumer, as determined by the consumer's IPP, and "within the context of the (IPP)." (Welf. & Inst. Code, § 4648, subd. (a)(1).) In implementing IPPs, services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family. (Welf. & Inst. Code, § 4648, subd. (a)(2).)

7. A regional center is required to consider generic resources and the family's responsibility for providing services and supports when considering the purchase of regional center supports and services for its consumers. (Welf. & Inst. Code, § 4646.4.)

8. Section 4648, subdivision (a)(8), provides that "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."

OUT-OF-HOME PLACEMENT AS AN AVAILABLE SERVICE

9. The Legislature places a high priority on providing opportunities for children with developmental disabilities to live with their families, when living at home is the preferred objective in the child's individual program plan. (Welf. & Inst. Code, § 4685, subd. (a).) It is the intent of the Legislature that regional centers provide or secure family support services that, among other factors, respect and support the decision-making authority of the family, and are flexible and creative in meeting the unique and

individual needs of families as they evolve over time. (Welf. & Inst. Code, § 4685, subds. (b)(1) and (2).) When caring for children at home is the preferred objective in the individual program plan, the department and regional centers shall give a very high priority to the development and expansion of services and supports designed to assist families that are caring for their children at home. (Welf. & Inst. Code, § 4685, subds. (c)(1).)

10. Welfare and Institutions Code section 4685, subdivision (c)(2), provides as follows:

When children with developmental disabilities live with their families, the individual program plan shall include a family plan component which describes those services and supports necessary to successfully maintain the child at home.

Regional centers shall consider every possible way to assist families in maintaining their children at home, when living at home will be in the best interest of the child, before considering out-of-home placement alternatives. When the regional center first becomes aware that a family may consider an out-of-home placement, or is in need of additional specialized services to assist in caring for the child in the home, the regional center shall meet with the family to discuss the situation and the family's current needs, solicit from the family what supports would be necessary to maintain the child in the home, and utilize creative and innovative ways of meeting the family's needs and providing adequate supports to keep the family together, if possible.

REGIONAL CENTERS' DUTY TO ENSURE PROVISION OF SERVICES

11. When an individual is found to have a developmental disability under the Lanterman Act, the State of California, through a regional center, accepts responsibility for providing services to that person to support his or her integration into the mainstream life in the community. (Welf. & Inst. Code, § 4501.) The Lanterman Act acknowledges the "complexities" of providing services and supports to people with developmental disabilities "to ensure that no gaps occur in . . . [the] provision of services and supports." (Welf. & Inst. Code, § 4501.) When there are identified gaps in the system of supports and services or where there are identified consumers for whom no provider will provide services and supports contained in his or her IPP, the department may provide the services and supports directly. (Welf. & Inst. Code, § 4648, subdivision (g).)

EVALUATION

12. Regional centers must consider every possible way to assist families in maintaining their children at home, when living at home is in the best interest of the child, before considering out-of-home placement alternatives. (Welf. & Inst. Code, § 4685, subd. (c)(2).) Here, the preponderance of the evidence established that it is not in claimant's best interest to remain in his family home and out-of-home placement is necessary. In his home, since his last IPP in August 2017, he has become increasingly violent, emotional and unstable. He has been placed on five 5150 holds after he assaulted his grandparents and parents, with police being called each time, and he was hospitalized in an inpatient mental health hospital. At the time of the hearing, he was on a 5150 hold. As a result of claimant's mental state, and to ensure their safety and well-being, claimant's family made the difficult but necessary decision that he cannot return home. Considering the threat that claimant poses to them, their decision must be given deference.

In an effort to maintain claimant in the home, and within the context of claimant's IPP, IRC has considered multiple available service options for claimant and acted expeditiously on claimant's and his family behalf to arrange services for him. However, based on Uplift's reports and other evidence of record, claimant is not amenable to any interventions or therapies until he is stabilized. To emphasize this point, Easter Seals, which provides ABA services, declined to provide direct ABA intervention therapy for claimant until he is stable.

Consistent with the Lanterman Act's goal to ensure no gaps occur in the provision of services, IRC will be required to fund out-of-home placement notwithstanding that other generic resources, including services through the school district, may be available. (Welf. & Inst. Code, § 4501.)

ORDER

Claimant's appeal from IRC's determination to deny claimant's request to fund out-of-home placement is granted. IRC shall fund out-of-home placement for claimant.

DATED: January 19, 2018

ABRAHAM M. LEVY

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 ninety days.