

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

In the Matter of:

CLAIMANT,

vs.

REGIONAL CENTER OF ORANGE COUNTY,

Service Agency.

DECISION

Administrative Law Judge Michael C. Starkey, State of California, Office of Administrative Hearings, heard this matter on January 18 and February 8, 2022, via videoconference and telephone.

Armida Ochoa represented claimant. Claimant's mother and conservator Socorro Valdivia was also present throughout the hearing.

Attorney Keith R. Dobyms represented Regional Center of Orange County (RCOC), the service agency.

The record closed and the matter was submitted on February 8, 2022.

ISSUE

Is RCOC obligated to fund 30 hours per week of in-home personal assistance to help claimant continue attending school remotely?

FACTUAL FINDINGS

Introduction and Procedural History

1. Claimant is 20 years old.¹ She is eligible for regional center services based upon autism and intellectual disability.

2. On September 16, 2021, RCOC issued a notice of proposed action notifying claimant that it did not agree to fund "in home respite support related to COVID-19 from" 8:00 a.m. to 2:00 p.m. during school days because there "are generic resources available to address the identified needs." On October 8, 2021, claimant submitted a fair hearing request. On November 2, 2021, the parties engaged in an informal meeting. On November 9, 2021, RCOC issued an informal meeting decision denying claimant's request. This proceeding followed.

Background

3. Claimant lives in Anaheim with her family. She has limited language skills and limited comprehension. She has poor safety awareness and requires constant supervision. She needs assistance getting dressed, using the restroom, or crossing a

¹ Claimant's name is withheld to protect her privacy.

street. She has difficulty communicating that she is in pain or has basic needs such as hunger and thirst. She also suffers from anxiety and has difficulty interacting effectively with peers.

4. Claimant's mother works from 6:00 p.m. to 1:00 a.m. During that time a personal assistant cares for claimant. Claimant's mother sleeps on the floor in the doorway of claimant's room because claimant previously left the house unaccompanied in the middle of night, which is not safe.

5. Claimant is prediabetic. She has high cholesterol, a side effect of one of her medications. Four or five years ago, it was discovered that claimant has only one kidney. Claimant also has allergies and regular problems with her skin, such as rashes.

6. Claimant received in-person educational services (also known as special education services) through a local public high school under an Individual Education Plan (IEP) for many years. In response to the COVID-19 pandemic, the school stopped in-person services and switched to remote learning.

7. Claimant is unable to safely and effectively use these remote services without supervision at her location (home). The school district has not provided any such supervision. At some point after March 2020, claimant requested and RCOC provided funding for one-on-one personal assistance for claimant from 8:00 a.m. to 2:00 p.m. on school days.

8. Claimant has been fully vaccinated against COVID-19 since approximately April 2021, and more recently received a third booster vaccination against COVID-19.

9. Claimant's school resumed in-person learning for the 2021/2022 school year. Claimant was offered this option, but she declined. Her mother believes that it is still not safe for claimant to return to school because she is unable to follow safety protocols and has certain health problems. Claimant did not return to in-person learning and continues to receive educational services at home via remote learning. Claimant's mother reports that she asked the school district for one-on-one supervision of claimant in her home during school hours, but the district refused. She does not contend that she has asked the school district for any accommodation to facilitate claimant's return to in-person learning.

10. On October 6, 2021, claimant's mother entered into an Independent Study Master Agreement with claimant's school district in which she agreed that claimant would perform independent study and that it would take place virtually, not in person. The agreement contained notices that this independent study program was voluntary and was to be substantially equivalent in quantity and quality to classroom instruction. The agreement covered the period August 30, 2021, through December 17, 2021, but it appears that claimant continues to receive educational services under these same terms.

11. Claimant's mother reports that claimant only receives 45 minutes of virtual instruction per school day and that is not enough to keep claimant occupied during her normal school hours (8:00 a.m. to 2:00 p.m.). Claimant's mother regards the amount of virtual class time as insufficient, in addition to the lack of one-on-one in-person supervision. She reports that she was represented by an attorney at the most recent IEP meeting with the school district, but cannot afford to hire an attorney to appeal the district's refusal to provide one-on-one supervision of claimant in her home during school hours. Claimant's mother reports that she would be willing to

challenge the district's refusal if RCOC would provide funds to pay for an attorney to do so.

12. Currently, claimant's mother supervises claimant during school hours, which makes it difficult or impossible for claimant's mother to attend medical appointments or run certain errands.

13. Claimant also receives 45 minutes of speech therapy twice a week from the school district. Her mother drives her to these appointments at the school, which are one-on-one.

14. Claimant's regular school class consists of approximately nine students. Some are currently attending class in person. The school sometimes takes these students out into the community to learn life skills. Claimant's mother reports that while she was waiting in the parking lot of the school during one of claimant's speech therapy appointments, she observed such an excursion and noticed that some of the teachers and students were not wearing masks.

15. Claimant submitted a letter dated August 17, 2020, from Robin Steinberg Epstein, M.D., a board-certified pediatrician and professor of medicine who has treated claimant for 15 years. Dr. Steinberg Epstein reports that claimant enjoys being around same age peers and that some programs that require claimant to interact outside the home have been helpful to her. She opines:

[Claimant] and her family are wonderful to work with. Mom works all the time to meet [claimant's] needs, but [claimant] needs to get used to other people. This will give mom a break and allow [claimant] to learn how to work with other people. This will be critically important for her future.

16. Claimant also submitted a one-page document entitled "RETURN TO SCHOOL CERTIFICATE"² from Ana Rey Concepcion-Medina, M.D., a pediatrician who has been treating claimant for approximately 14 years. The document is undated. In it, Dr. Concepcion-Medina states: "please allow [claimant] to do distance learning due to [claimant] having severe autism. [Claimant] does not understand the risk of the virus and is not keeping mask on." The letter contains no other information or analysis regarding the risks COVID-19 poses to claimant if she were to return to in-person learning. Claimant submitted no other medical evidence showing that claimant is unable to return to in-person learning due to the COVID-19 pandemic. Neither Dr. Steinberg Epstein nor Dr. Concepcion-Medina testified at hearing.

17. Peter Himber, M.D., testified at hearing. Dr. Himber graduated from medical school in 1986 and has been licensed as a physician since 1988. He practiced as a staff physician for 19 years and has been RCOC's medical director for the last ten years. Dr. Himber is board-certified in child neurology and has expertise in developmental disabilities.

18. Dr. Himber is not an infectious disease specialist. However, he is a member of the COVID-19 Advisory Committee of the Orange County Healthcare Agency. He was asked to join the committee to represent individuals with developmental disabilities. The committee consists of approximately 25 people in senior leadership positions throughout the county and has been meeting regularly for one year. The committee helps guide and suggest policies related to COVID-19. Dr. Himber has received much information about COVID-19 from the committee and the

² The words "RETURN TO" were struck through, apparently by hand, in the document.

meetings he attends. He is also on “all of the mailing lists for the CDC [Centers for Disease Control and Prevention] and the California Department of Public Health.”

19. Dr. Himber acknowledges that many persons with developmental disabilities have difficulty or resist wearing a mask. However, he opines that this population also does poorly with virtual schooling and there is “real harm associated with that,” therefore it is important to get them back to in-person learning. Dr. Himber reports that COVID-19 transmission has been lower than expected in schools and that school districts generally have good plans to keep students safe from COVID-19. Dr. Himber reports that the vast majority of RCOC clients—including those with severe autism—have returned to in-person learning to some degree. Dr. Himber opined that severe autism has not been a sufficient reason to stay home from school since the beginning of the 2021/2022 school year.

20. Dr. Himber has never met or examined claimant or reviewed most of her medical records, but he is generally familiar with her diagnoses. He is aware that she has only one kidney. Dr. Himber opines that most people with one kidney function normally and are not considered sick. He opines that having only one kidney is not a risk factor for complications if an individual contracts COVID-19.

21. Dr. Himber has reviewed the form executed by Dr. Concepcion-Medina. In his opinion, this document is “very broad” and does not at all address medical issues that would prevent claimant from returning to school. He explains that, if it said claimant was immune compromised, or had a history of severe lung disease, that would be different. However, in his opinion it is “most definitely” possible for claimant to safely return to in-person learning at her school with some accommodations. He recommends that claimant use the school district’s IEP process to address any concerns about claimant safely returning to in-person learning.

Ultimate Factual Finding

22. The concerns of claimant's mother are sincere. However, claimant failed to prove that she has been unable to receive in-person educational services since the beginning of the 2021/2022 school year due to COVID-19. Claimant is 20 years old and fully vaccinated. Dr. Concepcion-Medina's document is the only evidence of a medical opinion that claimant needs to continue with learning remotely. However, she did not testify at hearing and the rationale for that opinion is unknown. On the other hand, Dr. Himber's contrary opinions were persuasive and supported by an analysis of relevant factors. Claimant's contention that she is medically precluded from returning to in-person learning is rejected. Claimant failed to prove that the in-person educational services offered by her school district are insufficient to meet her educational needs.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act (Welf. & Inst. Code, § 4500, et seq.)³ (Act). 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. (§§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Act is a remedial statute; as such it

³ All statutory references are to the Welfare and Institutions Code.

must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

2. The Act mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community.” (§ 4501.) Regional centers have the responsibility of carrying out the state’s responsibilities to the developmentally disabled under the Act. (§ 4620, subd. (a).) The Act directs regional centers to develop and implement an Individual Program Plan (IPP) for each individual who is eligible for services, setting forth the services and supports needed by the consumer to meet his or her goals and objectives. (§ 4646.) The determination of which services and supports are necessary is made after analyzing the needs and preferences of the consumer, the range of service options available, the effectiveness of each option in meeting the goals of the IPP, and the cost of each option. (§§ 4646, 4646.5 & 4648.)

3. Claimant has the burden of proving by a preponderance of the evidence that she is entitled to the services she seeks. (See *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161; *Greatoroex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57; Evid. Code, § 500.)

4. It is not disputed that claimant needs supervised educational services. However, regional centers are directed by the Legislature to provide services in a manner that reflects the cost-effective use of public resources. (§§ 4646, subd. (a), 4640.7, subd. (b).) Accordingly, regional centers may not fund duplicate services that are available through another public agency that has a legal responsibility to serve the general public. This prohibition against “supplanting generic resources” is contained in section 4648, subdivision (a)(8). Regional centers must identify and pursue all possible

sources of funding for services, including generic services (§ 4646.4, subd. (a)(2)), governmental entities or programs that are required to pay the cost of providing services (§ 4659, subd. (a)(1)), and private entities that may be liable for the cost of services to the consumer (§ 4659, subd. (a)(2)). Each regional center is also required to comply with the purchase of service policies established for the regional center and approved by the Department. (§ 4646.4, subd. (a).)

5. Claimant's school district has offered her in-person educational services since the beginning of the 2021/2022 school year. Claimant failed to prove that these in-person services are insufficient to meet her educational needs, notwithstanding her preference to continue with remote learning. (Factual Finding 22.) These services constitute a generic resource that can fulfill claimant's educational needs. Accordingly, personal assistance to allow claimant to attend school remotely from her home is a duplicative and unnecessary service that RCOC is not authorized to fund. Claimant's appeal must be denied.

ORDER

Claimant's appeal of the Notice of Proposed Action dated September 16, 2021, pertaining to RCOC's denial of funding for 30 hours per week of in-home personal assistance during school hours, is DENIED.

DATE:

MICHAEL C. STARKEY
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.