

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:
WILLOW C. ,

OAH Nos. 2012050169

Claimant,

vs.

NORTH LOS ANGELES COUNTY REGIONAL
CENTER,

Service Agency.

DECISION

The hearing in the above-captioned matters was held on October 29, 2012, before Joseph D. Montoya, Administrative Law Judge, Office of Administrative Hearings. Claimant Willow C. was represented by her parents, Richard and Sarah C.¹ The Service Agency, North Los Angeles County Regional Center (NLARC) was represented by Stella Dorian, Fair Hearing Representative.

Evidence was received, the case argued, and the matter submitted for decision on the hearing date. It should be noted that Claimant submitted a number of documents in evidence, which were not clearly labeled at the hearing, but which have been identified, and received, as follows:

Exhibit A: Wellspring Homecare Services Timesheet.

Exhibit B: Letter from Melanie Lenington, Ph.D.

¹ Initials are used in the place of the family surname in the interests of privacy.

Exhibit C: Copies of e-mails.

Exhibit D: Chart of expenses.

Exhibit E: Copies of Checks to Flores

Exhibit F: Copies of Checks to Smith.

Exhibit G: Written Statement Re: the Claims

Exhibit H: DVD

The ALJ hereby makes his factual findings, legal conclusions, and orders, as follows:

ISSUE PRESENTED

Should the Service Agency pay reimbursement totaling \$855 to Claimant's parents, for respite care previously provided? To clarify the issue presented, Claimant seeks \$655 in reimbursement for monies paid by Claimant's family to Claimant's respite worker after the worker's employing firm, a vendor of the Service Agency, abruptly went out of business. The balance sought is for payment for behavioral respite services.

FACTUAL FINDINGS

THE PARTIES, PROCEDURAL HISTORY, AND JURISDICTION

1. Claimant is a fourteen-year-old-girl who is eligible to receive services from the Service Agency pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.² due to her diagnosis of autism.

2. On April 20, 2012, the Service Agency issued a Notice of Proposed Action

² All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

(NOPA) to Claimant, denying her family's request for reimbursement of monies spent for a respite worker during March 2012, and for payment of a respite worker at the rate of \$20 per hour. Claimant's parents filed a Fair Hearing Request on April 24, 2012. An informal meeting took place, but the parties were unable to resolve the matter, and this proceeding ensued. All jurisdictional requirements have been met.

CLAIMANT'S BEHAVIORAL CHALLENGES

3. According to Claimant's Individual Program Plan (IPP) developed during August and September 2011 (2011 IPP), Claimant demonstrated significant behavioral challenges to her family, which consists of her parents and her younger brother. At that point—some weeks after her 13th birthday—she had very limited communication skills,³ and needed constant supervision and direction, including help completing feeding, bathing, and hygiene tasks. (Ex. 12, p. 2.) Intensive behavioral interventions had decreased her tantrums to approximately two per week. She did not understand personal boundaries, touching others inappropriately. (*Id.*) She could not be left alone even when engaged in simple tasks, as her impulsive behavior would lead to problems such as Claimant opening several packages at once, or eating all the sugar that was not hidden from her. Getting the child to sleep was often challenging, and she might sleep for only five or six hours in a night. (*Id.*, at p. 6.)

4. Claimant was described as needing a very structured routine and home life because she could not tolerate routine changes without regression. (Ex. 12, p. 3.) Excursions into the community, such as to stores or to her younger brother's baseball games, were difficult at best in light of her behavioral responses. Excursions were further complicated by her lack of safety awareness.

³ Her language skills were described as significantly below her cognitive ability and it was stated in the IPP "that many basic structures and requirements are absent." (Ex. 12, p. 8.)

SERVICES PRIOR TO MARCH 2012

5. To respond to Claimant's challenging behaviors, and to other aspects of her autism, the 2011 IPP authorized various services for Claimant and her family. This included respite services that would provide a break for Claimant's parents from the rigors of caring for her, and which would also allow her parents to spend time with their son. The IPP document indicates that at some point prior to the 2011 IPP respite services had been provided at the rate of 48 hours per month, an exception to the statutory maximum of 30 hours per month. It appears that the exemption expired in November 2011, per the terms of the 2011 IPP, in that testimony at the hearing indicated that 30 hours were in place when a crisis arose in March 2012. (See Ex. 12, p. 5, at "Plan for NLACRC Supports.")

6. Claimant had been receiving intensive behavioral interventions from a firm known as AST since at least February 2010, which helped decrease tantrums and self-injurious behavior. In September 2011, Claimant's parents and NLARC agreed to transition her to a less intensive program that would provide parent training and would provide adaptive skills training for Claimant. The 2011 IPP indicated that the intensive behavioral interventions would terminate at the end of September of that year. An adaptive skills assessment was authorized. (Ex. 12, pp. 5-6.) However, there was some delay in the transition from the first program to the second.

7. The 2011 IPP does not clearly indicate that personal assistance services were authorized, although the last page of the document, apparently generated by staff, indicates 12 hours per month of "attendant care" was being provided as well. The testimony during the hearing indicated that the family was receiving 23 hours per month of personal assistance services in March 2012, just prior to an increase authorized during that month.

8. As noted, respite services were funded by the Service Agency, initially through parent vendoring. Claimant's parents had employed Ms. Martha Flores as the respite provider to Claimant for approximately 10 years, and she was very familiar with the

child and her needs. However, the system of parent vendoring was phased out, and beginning in early 2012, the respite care was to be provided by a third party vendor, Wellspring, Inc. Ms. Flores went to work for Wellspring, Inc., which had the salutary benefit of providing continuity of care.

ESCALATION IN CLAIMANT'S MALADAPTIVE BEHAVIORS AND THE SERVICE AGENCY'S RESPONSE

9. On March 5, 2012, Claimant's father contacted the service coordinator assigned to the case, Ms. Dimashki, he informed her that Claimant had been engaging in very disruptive and disturbing behaviors and things had reached a crisis point for Claimant's family. Her behaviors were generally described as screaming and maniacal laughing. (Ex. 3, p. 1.) To make matters worse, she would follow family members around the house while acting out in this way. Mr. C. reported that things had become so bad that, the week before his call to the service coordinator, Claimant's younger brother had fled the house because he could not tolerate the situation any more; he did not want his parents to look for him. Although he was found, down the street, it was clear that his ability to cope with the situation was seriously compromised. On another occasion, a neighbor had summoned the police to Claimant's home because of Claimant's constant screaming.

10. During that conversation, Mr. C. made it clear that the family was exhausted and overwhelmed. He told the service coordinator that he believed that a one-month delay in the transition from behavior intervention to adaptive skills training had led to his daughter's behavioral regression. In the course of the conversation, Ms. Dimashki raised the possibility of placing Claimant outside the family home, an option that Mr. C. was willing to consider at that point. From this it can be inferred that both sides to the IPP perceived the situation as critical.⁴ The service coordinator further suggested contacting

⁴ This inference follows from the fact that the Lanterman Act favors keeping developmentally disabled children in the home (§§ 4646.5, subd. (a)(3); 4685, subd. (a), (c)),

Claimant's school about bringing the Department of Mental Health into the picture.

11. The day after receiving Mr. C.'s call about Claimant's behavioral problems, the service coordinator obtained authority to increase the personal assistance staffing to 18 hours per week, from the previous 23 hours per month, until at least July 2012. (Ex. 3, p. 3.) This represented a tripling of those services.

12. On March 13, 2012, Mr. C. contacted the service coordinator, and he raised the issue of obtaining a functional behavior analysis of Claimant, with an eye toward developing behavioral therapies that might reduce or eliminate Claimant's maladaptive behaviors. During this phone call Mr. C. let the service coordinator know that the family perceived a residential placement as the last resort, and during that call an IPP meeting was set for March 22, 2012, to discuss alternatives. (Ex. 3, p. 4.)

13. The IPP meeting was held on March 22, 2012. At that meeting, Ms. Judy Mark, a parent of an autistic child who is active in the community of families with autistic members, assisted Claimant's parents and acted as an advocate for Claimant. In the course of the meeting, Claimant's parents asked for overnight respite services. They also asserted that the rate paid to the respite worker and personal assistance worker should be increased to \$20 per hour, so that a person could provide respite and behavioral intervention at the same time. Further, a request for more respite hours was made, to provide coverage during spring break. At that time, the service agency staff did not commit to providing any of the requested services. (Ex. 3, p. 5.)

14. Amy Gandin, Ms. Dimashki's supervisor, had participated in the March 22 IPP meeting. She attempted to obtain an increase in respite hours, to a total of 48 hours per month. Her initial attempt, which took her to the Executive Director of NLARC because her

given the expense to a regional center for an outside placement, and given the knowledge, obtained through scores of fair hearings, that parents generally want to avoid an outside placement.

supervisors were out of the office, was unsuccessful. This fact was communicated to Claimant's family on April 5. (Ex. 3, p. 7.) However, she took the matter through other channels, and on April 11 she and the service coordinator were able to call Mr. C. and let him know that more respite hours had been added, even though it was not the full amount that the family had requested,⁵ nor were the respite hours behavioral respite. (*Id.*, p. 8.) The two understood from Mr. C. that he was going to pursue obtaining behavior respite from one of the vendors then working on the case.

THE DEMISE OF WELLSRING, INC. AND PAYMENT TO THE RESPITE WORKER BY CLAIMANT'S FAMILY

15. As noted above, at some point before March 2012, the family's respite worker, Ms. Flores, had to move to the staff of the third party respite services vendor because parent vendoring was being phased out. Ms. Flores went to work for Wellspring, Inc. However, during the third week of March 2012, Wellspring, Inc. suddenly ceased operations, without warning to Claimant's family or NLARC. This adversely affected not only Claimant's family, but the families of other consumers of NLARC's services as well. Just when each side to this dispute learned of that firm's failure is not crystal-clear, but the knowledge was obtained in a two or three day period.⁶ Other potential vendors were identified, and another vendor was chosen. It should be noted that Ms. Dimashki e-mailed

⁵ The family had requested 64 hours per month of respite services.

⁶ Testimony of NLARC's supervisor, Ms. Gandin, indicated that Wellspring phoned the Service Agency on March 23 and said they were shutting down, and that a referral for another provider was made three days later. Mr. C.'s recollection was that he heard of the shut down on the news, and he had to phone the service coordinator in order to obtain confirmation, and to start the process of getting another respite vendor. His recollection was that he contacted NLARC shortly after the shutdown.

a list of potential new vendors to Mr. C. on the morning of March 26, 2012.

16. Ms. Flores had provided services to Claimant during March 2012, and had not been paid by Wellspring, then her employer, at the time it went out of business. Claimant's parents therefore paid her for her time, in the total amount of \$655. This is the main part of their reimbursement claim.

17. There is no evidence that Ms. Flores has recovered any of the wages due her from Wellspring, and no evidence that NLARC has paid Wellspring for providing Ms. Flores' services to Claimant.

THE BALANCE OF THE REIMBURSEMENT CLAIM

18. Claimant's parents seek reimbursement of \$200 above the amount paid to Ms. Flores. Mr. C. testified that this amount represents payment for extra respite care that was necessary to keep Claimant under control from the time that the family requested behavioral respite, until it was authorized and then provided by the Service Agency in late April, 2012. As part of the claim, it is asserted that the time from a request for behavioral respite until it was authorized was too long a period.

19. It appears that Claimant's family made the decision to hire behavior respite services from a person who was not employed by a Service Agency vendor, and to pay them at the rate of \$20.00 an hour, significantly higher than the rate that had been paid to Ms. Flores. The justification for that step is that the family believed a better-trained respite worker was essential to providing services to their child, and that a request for behavioral respite should have been promptly granted when matter was raised at the March 22, 2012 IPP meeting.

20. To be sure, there is some indication that the family had asserted Ms. Flores ought to be paid that higher rate, and that Claimant's parents thought her adequately trained so that she would qualify for the higher pay rate. (See Ex. 1, p. 12.) The parents were also asserting, and have in this proceeding, that the pay rate for regular respite workers was too low, making it difficult to hire qualified people.

21. Exhibit F indicates that Meg Smith was paid for behavior respite on April 1 and April 15, in an amount exceeding \$200. The record also indicates that a vendor known as BRIA was authorized on April 25 to provide behavioral respite services, though it was not clear whether the services could start that day, or on May 1. Thereafter the family took steps to have Ms. Smith employed through that firm. (Ex. F, pp.4-6.)

22. It appears from Service Agency ID Notes that Claimant's father was advised, as of April 5, that he could not parent vendor a behavioral respite worker, and he was advised to contract BRIA to see about that firm hiring that person. (Ex. 3, p. 7.) This indicates that the Service Agency was considering the provision of behavioral respite to Claimant at that point in April. It should be noted that the allocation of 18 more hours of regular respite care was authorized six days later. (*Id.*, at pp. 7-8.) As of April 17, Mr. C. was disputing the payment rate for the additional respite services, apparently seeking payment at the behavioral respite rate. (*Id.*, p. 9.) As noted above, behavioral respite was eventually authorized and was in place at the time of the hearing.

LEGAL CONCLUSIONS

1. Jurisdiction to proceed in this matter was established pursuant to section 4710.5, based on Factual Findings 1 and 2.

2. (A) Reimbursement may be ordered in fair hearings that have been requested pursuant to the Lanterman Act. Section 4706, subdivision (a), provides a broad grant of authority to resolve all issues regarding services to a developmentally disabled person, and encompasses a claim for reimbursement.

(B) Reimbursement has been ordered in fair hearings in cases where a regional center has failed to provide services and supports, and family or others have been required to discharge the regional center's obligation. (*E.g., Dylan F. v. Regional Center of Orange County* (2004) OAH No. 2004030452 (Scarlett, ALJ); *Rachel R. v. Tri-Counties Regional Center* (2007) OAH No. 2006100874 (Reyes, ALJ).) As noted by ALJ David Rosenman, considerations of justice, notice, and fair play dictate that a consumer should only obtain

reimbursement in cases where the regional center had been asked to provide the services. (*Hannah G. v. Harbor Regional Center* (2002) OAH No. L2002090357.)

(C) The award of reimbursement must be carefully considered to avoid the circumvention of the IPP process, because the IPP process is one of the cornerstones of the Lanterman Act. Thus, it may not be enough that a service was requested; if a regional center has not had adequate opportunity to engage in the process and to evaluate the request, it would most likely be improper to order reimbursement in such circumstances. And, where there has been adherence to the IPP process, reimbursement does not follow simply because the regional center in question could not sustain its position during a fair hearing, especially where the center's position was asserted in good faith. Indeed, when it has been ordered, the situation has been one where the equities of the case heavily favor the family.

3. (A) Regarding the IPP process, services are to be provided in conformity with the IPP, per section 4646, subdivision (d). Consumer choice is to play a part in the construction of the IPP. (See §§ 4512, subd. (b); 4646, subd. (a).) Where the parties can not agree on the terms and conditions of the IPP, a Fair Hearing decision may, in essence, establish such terms. (See § 4710.5, subd. (a).)

(B) The services to be provided to any consumer under an IPP must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each client's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subd. (a)(1) & (a)(2).) Otherwise, no IPP would have to be undertaken. A priority is assigned to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).) At the same time, a priority is assigned to keeping a disabled child in the family home. (§§ 4646.5, subd. (a)(3); 4685, subd. (a), (c).)

(C) The IPP is to be prepared jointly by the planning team, and services purchased or otherwise obtained by agreement between the regional center representative and the

consumer or his or her parents or guardian. (§ 4646, subd. (d).) The planning team, which is to determine the content of the IPP and the services to be purchased thereby, is made up of the disabled individual, or their parents, guardian or representative; one or more regional center representatives, including the designated service coordinator, and any person, including service providers, invited by the consumer. (§ 4512, subd. (j).)

(D) Pursuant to section 4646, subdivision (a), the planning process is to take into account the needs and preferences of the consumer and his or her family, "where appropriate." Further, services and supports are to assist disabled consumers in achieving the greatest amount of self-sufficiency possible.

(E) The planning process includes the gathering of information about the consumer and "conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. . . . Assessments shall be conducted by qualified individuals" (§ 4646.5, subd. (a)(1).) Given that services must be cost effective and designed to meet the consumer's needs, it is plain that assessments must be made so that appropriate services can be provided.

4. (A) Obtaining services and supports by reimbursement should not be the norm, but an exception. Claimant and her father should take notice that in the future, such avenues may not be fruitful; while reimbursement is occasionally ordered in Fair Hearings, the undersigned has often denied reimbursement requests. (E.g., *N.F. v. North Los Angeles County Regional Center*, L2000030072; *T.S. & J.S. v. North Los Angeles County Regional Center*, L2004030702.)

(B) Notwithstanding the foregoing, it is reasonable to order the Service Agency to cover the cost of Ms. Flores's services, if some protections for the parties can be provided. Essentially, NLARC committed to pay for her, through the vendor, but due to the vendor's demise, NLARC has not done so. This represents a small windfall to the Service Agency, to the detriment of Claimant's parents. If NLARC can receive appropriate waivers from Ms.

Flores, so that it will not have to risk paying twice, then it can reimburse Claimant's parents.

(C) As to payment for Ms. Smith, this payment was made by Claimant's parents while services were being provided, and while the IPP process was going forward. With some respite services in place, the family should not have unilaterally made the decision that a different rate of pay should be provided, so that a different level of service could be provided. To reimburse for this expense tends to do violence to the IPP process, notwithstanding the spike in Claimant's maladaptive behaviors.

ORDER

1. Claimant's appeal is denied in part, and granted in part, the grant having conditions set forth below.

2. Claimant's request for reimbursement of \$200 is denied based on all the foregoing.

3. Claimant's request for reimbursement of \$655 is granted, on the condition that Claimant submits to the Service Agency a document signed by Ms. Flores, with her signature notarized, which states the following:

"I acknowledge receipt of payment of \$655 from the parents of Willow C.⁷ for services rendered to Willow and her family during March 2012. I hereby waive any claim against Wellspring Homecare Services for such wages, in the amount of \$655, for that time period, as I have been paid. Likewise, I waive any claim for such monies from North Los Angeles County Regional Center."

⁷ The family surname should be inserted in the document executed by Ms. Flores.

December 3, 2012

/s/

Joseph D. Montoya

Administrative Law Judge

Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.