

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2012090004

ASHLEY A.,

Claimant,

vs.

REGIONAL CENTER OF THE EAST
BAY,

Service Agency.

DECISION

This matter was heard before Dianna L. Albini, Administrative Law Judge, State of California, Office of Administrative Hearings. The hearing was conducted in San Leandro, California, on October 1 and 2, 2012.

Dianne M., claimant's mother, represented claimant Ashley A. Claimant was not present at the hearing.

Mary Dugan represented Regional Center of the East Bay, the service agency.

The record was held open for the parties to continue settlement discussions regarding the fair hearing issue of claimant's day care. On October 10, the Office of Administrative Hearings received notice from the parties that the day care issue had been resolved and that claimant withdrew that issue from her fair hearing request. Claimant's withdrawal of the day care fair hearing request was marked for identification as Exhibit "EE" and admitted into evidence. The record was closed and the matter was submitted for decision on October 10, 2012.

ISSUES

1. Has Regional Center of the East Bay erred in determining to terminate one-to-one aide for claimant while she is attending Lake Merritt College?
2. Has Regional Center of the East Bay erred by denying claimant's request for assistive technology?

FACTUAL FINDINGS

1. Claimant is a 24-year-old consumer of Regional Center of the East Bay (RCEB) who lives at home with her mother and father. Claimant has been diagnosed with mild mental retardation, epilepsy, Hashimoto's hypothyroidism and is blind. Claimant is able to use the fingers of both hands to manipulate objects, but struggles with fine motor tasks due to a lack of sensitivity in her fingers. She can walk alone, but due to her visual impairment she relies on the use of a white cane to navigate her surroundings. Claimant is eligible for regional center services based on her diagnosis of mild mental retardation and visual impairment.

Claimant is independent with toileting, but needs assistance to ensure that the toilet seat is clean and dry. Additionally, claimant needs assistance in zipping and buttoning shirts and pants, and bra hooks, and tying shoe laces.

Claimant has limited safety skills, and is rarely left alone. Claimant receives 282.2 hours-per-month of In-Home Support Services, based on her need for 24 – hour supervision.

She is in good health. Claimant has expressed a desire to get more exercise.

2. Claimant is verbal and able to express her needs and wants effectively to others. Claimant relies on assistance from her parents and day program staff for verbal guidance and physical support for assistance navigating in the community. Claimant requires assistance in taking her medications as she is unable to decipher which pill

comes from which bottle. She can feed herself, but needs assistance to indicate where the fork or spoon is placed on the table.

3. In 2009, claimant completed her studies at the California School for the Blind in Fremont, California. Thereafter, claimant began to participate in a day program at "Toolworks." In the spring of 2010, claimant began attending Merritt College in Oakland, California, where she continues her studies. Claimant has completed 43 units at Merritt College and maintains a cumulative grade point average of 3.071.

MERRITT COLLEGE

4. Claimant submitted a declaration at hearing from Ron Nelson, Merritt College Counselor with the Department of Disabled Student Program and Services. Nelson has been claimant's counselor at Merritt College since 2010 and is familiar with her "blindness and cognitive" disabilities. Nelson is familiar with the assistance and accommodations that are available to Merritt College disabled students. The Merritt College Disabled Service Program provides golf cart drivers who pick up and drop off disabled students between classes. The golf cart drivers need specific times when students need to be picked up. They cannot wait for students. If the student is not at a pickup spot at a pre-scheduled time, the drivers have to leave to do other pickups. If the driver has time, he may swing by one more time to see if the student has arrived, but this is not guaranteed. The golf cart drivers do not provide "escort" services for disabled students. The services provided by the golf cart drivers do not include supervision or personal assistance for disabled students.

5. Merritt College Disabled Student Services does not assist claimant with personal safety issues, such as protecting her from other people or students who might harm or take advantage of her, helping her in an emergency such as an earthquake, assisting her with zipping or unzipping her coats, jackets or other clothing, handling or

organizing her books or materials for or during class, helping claimant use her money to buy lunch, or provide a safety escort when she goes to the bathroom.

6. Merritt College does not have its own note taking staff. The Disabled Student Services Department attempts to retain "reliable" students to take notes for disabled students. The note taking student only provides a copy of their own class notes to a disabled student. This "reliable" student is not responsible for providing any personal assistance or supervision of the disabled student and usually does not even sit next to, or near the disabled student. Merritt College does not have the resources to train note takers to accommodate students with visual disabilities, such as recording lectures audibly or using Braille for blind students.

2012 INDIVIDUAL PROGRAM PLAN

7. On August 6, 2012, RCEB prepared an Independent Program Plan Adult (IPP) for claimant. Claimant's stated IPP goals were to: continue to live with family; increase her independence; furthering learning and explore job opportunities; and get more exercise. At that time, RCEB made the following plans as set forth below.

Work/Program/School/Daytime Activity/Transportation – Claimant continues to attend classes at Merritt College. She participates in day programming activities five days per week through Toolworks. Toolworks has been providing one to one support services for claimant at Merritt College and one day a week, at an adaptive yoga class.

With assistance from Toolworks staff, claimant will learn how to walk with increased independence by depending more on her white cane and less on verbal guidance and physical support. With assistance from Toolworks staff, claimant will learn how to find toilet paper, toilet set liners, and the light switch in public restrooms, as well as how to find a safe place for her belongings while toileting. Toolworks will submit to RCEB case manager a written copy of claimant's projected fall schedule including areas of requested one-to-one support.

Claimant's mother will submit claimant's 2012-2013 Merritt College schedule to RCEB's case manager. Claimant will attend classes at Merritt College. Claimant's parents will continue to assist claimant to navigate the Department of Rehabilitation (DOR) system.

RCEB case manager will request from claimant's DOR counselor, in writing, a status update on claimant's request for assistive technology devices by August 31, 2012. Claimant will take Braille class at East Bay Center for the Blind when it fits into her schedule.

Health – Claimant remains in good health. She expressed a desire to get more exercise and to eat fewer sweets. Claimant will continue to participate in her adaptive PE class at Merritt College, and her Yoga class through Ed Robert's Campus.

AUGUST 2011 IPP ADDENDUM

8. On August 25, 2011 an IPP addendum was issued identifying claimant's diagnosis of mild mental retardation and seizure disorder and blindness. For the past few years, claimant has attended Merritt College with the assistance of a one-to-one Toolworks support aide. While attending Merritt College, the Toolworks aide provides assistance to claimant so that she can successfully and safely attend college. The aide specifically assists [claimant] by meeting her at the Paratransit stop and guiding her to classes. The aide also assists her to use the restroom, provides prompts and assists with getting special instructions from claimant's teachers while in claimant's class. The Toolworks aide assists claimant with note taking, purchasing lunch from the cafeteria, and guiding claimant back to the Paratransit pick up point for the return home.

HOPES AND DREAMS (LONG RANGE GOALS) TO PARTICIPATE IN SOCIAL ACTIVITIES AND TO FURTHER CLAIMANT'S LEARNING

The objectives identified in this August 2011 addendum are that "given the 1:1 staff assistance, [claimant] will be able to take college classes successfully and safely. The plan is that RCEB will fund 48 hours per month of one to one support provided by Toolworks from September 21, 2011 through November 31, 2011, and [claimant] will fund college tuition using her [social security income] funds."

2011 FINAL MEDIATION AGREEMENT

9. On October 20, 2011, claimant and RCEB agreed that RCEB would continue to fund one to one staff at a volume of 48 hours per month beginning December 1, 2011, and continuing while claimant attends classes at the Peralta Community College District. This service was to be reviewed annually according to the IPP process.

MEDICAL RECORDS

10. Claimant's treating physician has diagnosed claimant's condition as mental retardation/developmental delay and blindness. Claimant has moderate to intermittent cognitive deficits and is severely impaired with respect to poor judgment that is limited by her cognitive ability. Claimant is blind and has epilepsy. Claimant's treating physician opines that based on the nature and extent of claimant's physical and cognitive disorders she requires 24-hour care.

Claimant's physician opines in a September 17, 2012 letter that claimant requires a one – to – one aide at all times to keep claimant safe while on Merritt College Campus and to assist her with activities of daily living regardless of how independent she becomes in physically navigating the campus with a cane or other form of transportation. Claimant is not able to travel by herself at anytime without having an aide to provide personal assistance and oversee claimant's safety.

DEPARTMENT OF REHABILITATION

11. Claimant sought services through the Department of Rehabilitation in 2003. On October 30, 2003, an Individualized Plan for Employment (IPE) was prepared by DOR with an expected completion date of December 31, 2009, with annual reviews of claimant's progress to occur on an annual basis thereafter. The employment goal identified in the 2003 IPE was "Semi-Skilled Employment." Claimant was assigned numerous counselors at the DOR from 2003. The evidence did not establish that the DOR provided an annual assessment of claimant's progress, prior to the expiration of her IPE Goal expiration in 2009. Moreover, claimant's current progress has not been assessed as of the date of the hearing. In 2009, claimant's DOR IPE plan expired and a new plan was not implemented by the DOR until January 9, 2012.

12. Sylvia Obertie, Senior Vocational Rehabilitation Counselor for the DOR was present and testified at hearing. Obertie was assigned claimant's DOR matter in approximately October 2011. On January 9, 2012, a document entitled "Amendment/Change to IPE" was signed, the purpose of which was to allow the DOR to work with claimant and assess a current individual plan for employment. Without further assessment, the DOR continued claimant's identified goal of semi-skilled employment until December 31, 2013.

13. Obertie opined that because the current employment goal identified for claimant is that of a "semi-skilled worker" this goal does not support an objective of college. A semi-skilled worker is defined by DOR as an occupation requiring simple tasks to be learned in 30 to 60 days. "Semi-skilled employment" does not require a college education.

To her credit, Obertie has commenced the process necessary to perform an analysis to determine if claimant's 2003 IPE assessment identifying claimant's goal as a semi-skilled worker still accurately characterizes claimant's current condition, or if

claimant's employment plan needs to be revised in order to more accurately reflect her current levels of abilities and functions, based on claimant's advances over the past nine years.

14. The evidence does not support the DOR conducted annual reviews of claimant's progress after 2003. The evidence did not establish that the DOR implemented an IPE plan after the 2009 expiration date and prior to January 9, 2012. The evidence did not establish that DOR conducted an assessment after 2003 that would restrict claimant's current employment goal to that the 2003 assessment of a "semi-skilled worker."

RCEB'S EVIDENCE

15. An August 21, 2012 letter to claimant from a RCEB Case Manager set forth the basis for RCEB's denial of claimant's requests for the purchase of assistive technology, the denial of one-to-one support while claimant attends Merritt College and the denial to fund the purchase of assistive technology services.¹

ASSISTIVE TECHNOLOGY REQUEST

16. Claimant requested RCEB fund the purchase of assistive technology. RCEB denied claimant's request for assistive technology on the basis that the DOR is a generic resource that is providing this service. DOR is continuing to evaluate claimant's request and has not completed their assessment. The basis of RCEB's denial is Welfare and Institution Code section 4646.5, subdivision (a), based on the need of an assessment to

¹ The day care issue is moot. The parties have reached a final agreement on the day care issue. Claimant withdrew her request for a Fair Hearing on the issue of day care.

determine the life goals, capabilities, and strengths, preferences, barriers and concerns or problems of the person with developmental disabilities. RCEB is waiting for an assessment from the DOR.

ONE-TO-ONE SUPPORT AT MERRITT COLLEGE

17. Claimant's request of RCEB to fund 78 hours per month (based on the Fall 2012 class schedule submitted by Toolworks) of one-to-one- support services to assist claimant while she takes classes at Merritt College, was denied by RCEB. The basis of RCEB's denial is Welfare and Institution Code section 4646.5, subdivision (a), based on the need of an assessment to determine the life goals, capabilities, and strengths, preferences, barriers and concerns or problems of the person with developmental disabilities. RCEB must obtain an assessment from a qualified agency servicing visually impaired individuals.

OTHER MATTERS

18. RCEB did not establish that it engaged in meaningful advocacy² for, and protection of, claimant's rights to supports and services under the Lanterman Act, when RCEB learned that the DOR failed to conduct the necessary assessments since 2003 to determine if a revision of the IPE was needed. Additionally, RCEB was aware that the

² Welfare and Institutions Code section 4648 provides, in part, "In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities, including, but not limited to . . . (b)(1) Advocacy for, and protection of, the civil, legal, and service rights of persons with developmental disabilities"

DOR failed to address claimant's need for assistive technology, and as a direct result her current enrollment at Merritt College is in jeopardy.

19. Further, RCEB did not request the area board to initiate action³ against the DOR when funding for claimant's one-to-one assistance and need for assistive technology was not acted on.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. The Lanterman 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." (Wel. & Inst. Code § 4501.) Regional centers are charged with the responsibility of carrying out the state's responsibilities to the developmentally disabled under the Lanterman Act. (Wel. & Inst. Code § 4620, subd. (a).) The Lanterman Act directs regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (Wel. & Inst. Code § 4646.) The IPP states the consumer's goals and objectives and delineates the services and supports needed by the consumer. (Wel. & Inst. Code §§ 4646, 4646.5, & 4648.)

2. While regional centers have a duty to provide a wide array of services to implement the goals and objectives of the IPP, they are directed by the Legislature to

³ Welfare and Institutions Code section 4648, subdivision (b)(2), establishes that: "Whenever the advocacy efforts of a regional center to secure or protect the civil, legal, or service rights of any of its consumers prove ineffective, the regional center may request the area board to initiate action"

provide services in a cost-effective manner. (Wel. & Inst. Code § 4646, subd. (a).) In addition, regional centers may not fund services that are “available” through another public agency. This prohibition, contained in Welfare and Institutions Code section 4648, subdivision (a)(8), provides:

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.

Toward this end, regional centers must “identify and pursue all possible sources of funding for consumers receiving regional center services.” (Wel. & Inst. Code § 4659, subd. (a).) In addition, Welfare and Institutions Code section 4646.4 requires regional centers when purchasing services and supports to ensure, among other things, the following:

- (1) Conformance with the regional center’s purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.
- (2) Utilization of generic services and supports when appropriate.

3. 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, subdivision (b), § 4646, subdivision (a)). A regional center is not required to provide all of the services which a client may require, but is required to “find innovative and economical methods of achieving the objectives” of the IPP (§ 4651). They are specifically directed not to fund duplicate services that are available through another publicly funded agency. This directive is often referred to as “supplanting generic resources.” Where a service is available elsewhere, the regional center is required to “. . . identify and pursue all possible sources of funding. . . .” (§ 4659,

subdivision (a)). However, if a service specified in a client's IPP is not provided by a generic agency, the regional center must fill the gap (i.e., fund the service) in order to meet the goals set forth in the IPP (section 4648, subdivision (a)(1); *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390). In general, a claimant must first attempt to utilize the generic resource (such as Medi-Cal, County Mental Health, private insurance) before seeking services from the Service Agency. Until such time as RCEB can establish that DOR is a generic resource and can not meet claimant's needs, RCEB is required to provide one –to-one support while claimant is on the campus of Merritt College.

ORDER

The appeal of claimant Ashley A. is granted. Regional Center of the East Bay shall provide one –to-one support while claimant is on the Campus of Merritt College and conduct an assistive technology assessment and facilitate claimant in obtaining the necessary technology to attend her classes at Merritt College.

DATED: _____

DIANNA L. ALBINI
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.