

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2012090579

ALEXANDER A.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on November 30, 2012, in Bakersfield, California. Alexander A. (Claimant) was represented by his mother, Jenny A.¹ Kern Regional Center (Service Agency or KRC) was represented by its Special Projects Manager, Susan Hernandez.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on November 30, 2012.

¹ Claimant's and his mother's surnames are omitted throughout this Decision to protect their privacy.

ISSUE

The sole issue to be decided is as follows:

Should KRC be required to reimburse Claimant for legal service costs (retainer amount of \$2,250) following a request for emergency financial assistance?

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FACTUAL FINDINGS

1. Claimant is an 18-year-old Service Agency consumer with a diagnosis of Mental Retardation. He resides with his mother and younger brother.

2. Claimant's mother and father divorced in 2002. His mother has had custody of Claimant since the divorce.

3. Claimant's mother became concerned about his visits to his father's home after discovering that her ex-husband's stepchildren, who frequently visit him, are "registered narcotics offenders" and are "in and out of state prison." (Exhibit B; Testimony of Jenny A.) When Claimant is at his father's home, his phone is taken away and/or turned off, and he has no means to contact his mother. Additionally, Claimant's mother feared that Claimant would not tell her if he was frightened by anything at his father's house because he is unable to recognize potentially harmful situations and he is unwilling to report danger caused by those he loves.

(Testimony of Jenny A.)

4. Due to concerns about Claimant's health and safety, Claimant's mother and her sisters filed a petition for a limited conservatorship (petition) in July 2012. The petition forms they used were obtained from a legal assistance entity called "We the People."

5. On July 20, 2012, Claimant's mother received a letter from an attorney, Stephen H. Boyle (Boyle), retained by her ex-husband, stating:

[W]hile our client does not have an issue with the general concept of a conservatorship for Alex and/or you being the conservator, he wants to preserve: (i) his current visitation rights with Alex; and (ii) his right to file a Petition in the event of your untimely demise.

Enclosed with this letter is a draft stipulation for your review and consideration. This stipulation allows our client to maintain his current visitation rights with Alex, and in the event of your demise, our client would possess the option to file his own Petition for appointment as co-conservator of Alex (with your sisters).

We would like to informally resolve this by stipulation prior to the August 13, 2012 hearing. If we are successful, the stipulation would become part of the Order appointing you and your sisters as co-conservators. However, if we are unable to agree to the stipulation, please be advised that our client has authorized us to appear at the hearing and object to the Petition which will potentially result in our client being forced to file his own competing Petition and unnecessarily delay the Conservatorship. . . .

(Exhibit C.)

6. Claimant's mother opposed her ex-husband's continued visitation rights and his request for conservatorship. On August 2, 2012, Claimant's mother consulted with attorney, James Hulsy (Hulsy), who is a Regional Center vendor. At that point, she realized that the conservatorship process was more involved than she anticipated and believed she needed legal representation to respond to Boyle's letter.

7. On August 3, 2012, Claimant's mother paid Hulsy a retainer fee of \$2,250. She did not ask him if he could wait until she obtained pre-authorization from KRC for him to write the response to Boyle's letter.

8. On August 7, 2012, Hulsy sent a letter to Boyle, declining the proposed stipulation and expressing a hope that the matter could be mediated.

9. After the petition was filed, the court appointed an attorney, Leslie Greer (Greer), to represent Claimant and assigned a family law investigator to his case. At the time she hired Hulsy, Claimant's mother was attempting to get in contact with Greer to discuss the upcoming August 13, 2012 court date, but Greer did not respond.

10(b). Although Greer did not speak to Claimant's mother about Claimant's case, Greer did speak with Claimant and with Hulsy at a mediation on November 8, 2012. Following the mediation, Claimant's mother and her sisters obtained temporary co-conservatorship.

10(b). At the fair hearing, Claimant's mother admitted that whatever information Claimant provided Greer led to their obtaining temporary conservatorship; Claimant's mother did not know what information Claimant provided. She believed that the information Hulsy provided Greer "may have helped the situation" as well.

11. Claimant's mother is employed by KRC as a service coordinator. She works in the same building as Claimant's service coordinator, and they pass each other in the hallway regularly.

12. During the week following August 3, 2012, Claimant's mother mentioned to Claimant's service coordinator when they passed in the hallway that she had hired Hulsy and that she was going to request reimbursement of the retainer fee. At that point, the service coordinator did not tell her that she had 10 days to request reimbursement or that she should have obtained pre-approval for the attorney services.

13. On August 20, 2012, Claimant, his mother, and his service coordinator convened an Individualized Program Plan (IPP) meeting and annual review. After the IPP meeting, Claimant's mother called Claimant's service coordinator and left her a voicemail message asking if she had included in the IPP the fact that Claimant's mother would be requesting reimbursement for Hulsy's retainer fee. Claimant's service coordinator left a responsive voicemail for Claimant's mother stating:

[I] looked at . . . Alex's IPP and all I put in there was that you would continue working on conservatorship[.] I didn't put anything more specific than that because . . . regional center doesn't pay for conservatorship but when we were talking about it you were telling me that you were talking to [someone] about it and then I think you were going for a consultation . . . and then when you approached me again you had told me that you had already . . . retained [Hulsy] so . . . [what] should have happened was before you actually retained him we should have

sat down and amended the IPP . . . or I should have submitted ... your request to see if . . . KRC would reimburse you for that ...

(Exhibit D.)

14. Claimant's mother believed that she could obtain reimbursement because she viewed the attorney services as emergency services necessary to protect Claimant's health and safety. Although Claimant's mother did not request pre-approval of the \$2,250 retainer fee, she believed "that [KRC] reimbursed parents all the time" and that "there are guidelines, but they are not followed." She did not know about any 10-day deadline for requesting reimbursement.

15. Service Agency's policy on conservatorship provides, in pertinent part:

[I]n those instances where there is a documented difficulty in obtaining or receiving services for an adult with developmental disabilities and it appears that failure to establish a conservatorship will present a serious risk to the health, well-being or property of an adult client, KRC supports the principle of establishment of a limited conservatorship. When a family expresses a need to retain decision-making authority over certain aspects of life for an adult [consumer] who has a developmental disability, KRC may support in principle the establishment of a limited conservatorship.

The establishment of a conservatorship is considered a family responsibility and it is expected that the cost will be borne by the person(s) seeking conservatorship. In the event conservatorship is needed and no appropriate private individual or agency is available to institute conservatorship proceedings, immediate referral will be made to the Public Conservator's Office or the Director of the Department of Developmental Services may be nominated to become conservator. KRC will provide technical assistance to anyone who wishes to pursue conservatorship. Generally, KRC does not purchase legal services to establish a conservatorship.

In extreme circumstances when there are no alternatives available, KRC may fund for legal services to protect a client's rights and establish conservatorship. (Emphasis in original.)

(Exhibit E.)

16. The Service Agency's General Purchase of Service (POS) Guidelines require that all routine, non-emergency requests for services and supports be pre-authorized. The POS Guidelines provide for emergency service as follows:

Emergency POS usually consist of services and supports that protect life, health and safety of clients and/or others. These POS consist of acute

medical/dental services, acute behavioral services, emergency placement/replacement, emergency respite and immediate court ordered services. Emergency POS are to be submitted to the appropriate management staff prior to services being rendered or within 10 days after the Service Coordinator becomes aware that the service has been implemented.

A retroactive POS should be limited to client emergencies and/or situations that are beyond the Service Coordinator[']s control. . . .

(Exhibits 7 and E.)

17. The Service Agency's policy for Emergency Purchase of Services more specifically states:

KRC recognizes that client-related emergencies, which may require immediate response, can occur at any time.

The purpose of this emergency services category is to avoid the delays inherent in the standard requirement of authorizing service in advance of the provision of services. When this emergency procedure is used, the service can be initiated immediately upon oral request.

An emergency is defined as an unanticipated situation which, without immediate intervention of a KRC purchase of service would present an imminent danger with measurable long-term consequences to the physical or psychological health or safety of our client.

(Exhibits 7 and E.)

18. On September 6 and 11, 2012, Claimant's mother requested in writing that KRC provide reimbursement for the retainer fee.

19. On September 13, 2012, the Service Agency sent Claimant a Notice of Proposed Action, denying emergency POS for financial assistance with legal services. The stated reason for the denial was that "KRC did not receive verbal or written request for emergency assistance prior to services being rendered." (Exhibit 5.)

20. On September 14, 2012, Claimant's mother filed a Fair Hearing Request. (Exhibit 4.)

LEGAL CONCLUSIONS

1. Cause exists to deny Claimant's appeal of the Service Agency's refusal to reimburse legal service costs (retainer amount of \$2,250) following his request for emergency financial assistance. (Factual Findings 1 through 20.)

2. Where a change in services is sought, the party seeking the change has the burden of proving that a change in services is necessary. (See, Evid. Code, §§ 115 and 500.) In seeking cost reimbursement for a previously unauthorized service, Claimant bears the burden of proving by a preponderance of the evidence that the service, and thus the reimbursement, is necessary. (*Id.*) Claimant has not

met his burden of proof.

3. In enacting the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq., the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals and recognized that services and supports should be provided to meet the needs and choices of each person with developmental disabilities. (Welf. & Inst. Code, § 4501.) Regional centers are responsible for developing and implementing individual program plans to take into account consumer needs and preferences and to ensure service cost-effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.) Regional centers are also required to provide advocacy for, and protection of, the civil, legal, and service rights of consumers. (Welf. & Inst. Code, § 4648, subd. (b).)

4. A limitation on the type of services and supports that a regional center may fund is contained in section 4648, subdivision (a)(8), which provides: "Regional center funds shall not be used to supplant the budget of any agency which has legal responsibility to serve all members of the general public and is receiving funds for providing those services."

5(a). The Service Agency has policies in place regarding consumers' conservatorship and POS guidelines for emergency services. In this case, Claimant's mother did not establish that the letter from her ex-husband's attorney created an emergency which "presented an imminent danger with measurable long-term consequences to the physical or psychological health or safety of [Claimant]." Claimant already had a court-appointed attorney to represent his interests, including responding to Claimant's father's possible opposition to the petition or competing petition. Greer did represent Claimant at a mediation which resulted in an agreement acceptable to Claimant's mother. Thus, at the time Claimant's

mother hired Hulsy, Claimant was already receiving advocacy services from a generic resource, and the services of Hulsy were not needed to protect Claimant from imminent danger. The Service Agency is not required to fund the additional legal services of Hulsey (via reimbursement for payment of his retainer fee). This would constitute supplanting the funds of a public agency funded to provide such services, which is forbidden by section 4648, subdivision (a)(8).

5(b). Additionally, although she made an appointment to consult with Hulsy, Claimant's mother failed to obtain pre-authorization for funding of his services, and she did not seek reimbursement within 10 days after payment of the retainer fee.

6. Given the foregoing, the Service Agency's denial of reimbursement for legal service costs (retainer amount of \$2,250) following his request for emergency financial assistance was appropriate.

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ORDER

Kern Regional Center's denial of reimbursement for legal service costs (retainer amount of \$2,250) following Claimant's request for emergency financial assistance is upheld. Claimant's appeal is denied.

DATED: December 21, 2012

JULIE CABOS-OWEN

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.