

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ELIZABETH M.,

Claimant,

vs.

CENTRAL VALLEY REGIONAL CENTER,

Service Agency.

OAH No. 2013040924

DECISION

This matter was heard before Administrative Law Judge Elaine H. Talley, Office of Administrative Hearings, State of California, in Visalia, California, on November 4, 2013.

James Hurlbutt, Attorney, represented claimant. Claimant's parents, who serve as her conservators, attended the hearing.

Shelley Celaya, Client Appeals Specialist, represented the service agency, Central Valley Regional Center (CVRC). Oral and documentary evidence was received. At the conclusion of the hearing, the record was closed and the matter was submitted for decision.

ISSUE

Shall claimant be discharged from Porterville Developmental Center (PDC) to a community-based placement?

FACTUAL FINDINGS

1. Claimant is a 48-year-old woman eligible for services from CVRC due to a diagnosis of profound intellectual disability.

2. Claimant was admitted to PDC in February 1979 at the age of 13 and has continued to reside there since that time. She has been receiving services from CVRC pursuant to the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code Section 4500 et seq.¹).

3. Prior to being admitted to PDC, claimant lived with her family from the time she was born until August 1978, when she was voluntarily placed at Good Shepard Lutheran Home, in Visalia. She remained in that placement for approximately six months and then was placed at PDC. Claimant's parents have continued to be very involved in her life, and her mother visits her weekly at PDC.

4. Claimant requires 24-hour supervision. She is nonverbal and blind. She became blind as the result of self-injurious behavior. While a resident at PDC, claimant struck her head on objects repeatedly resulting in detached retinas. Although she is nonverbal, she will vocalize, make gestures, and point to express her wants and needs. She smiles and laughs when she is happy. She appears to understand simple words and phrases, and responds well to praise. She needs assistance with bathing and dressing herself. She is incontinent and wears disposable incontinent briefs. She can feed herself at a slow rate with some spilling. She lacks general safety awareness and skills, and needs assistance with mobility due to her blindness and unsteady gait.

¹ Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

5. In January 2013 a Client Assessment Profile on claimant was completed by Shannon Dicks, Developmental Center Liaison for CVRC. The profile described claimant's current needs and concludes:

[Claimant] is medically stable and there are no open behavior plans at this time. She is young and enjoys individual attention and going on community outings. She appears to be an excellent candidate for placement in a specialized CCP home that is being developed for persons with developmental delay and sensory needs. While her parents/conservators have expressed opposition to community placement in the past, they are open to exploring possible placements in the identified specialized home. Therefore it is the recommendation of this DCL to initiate pre-placement procedures, i.e. CCF staff visitation at PDC, pre-placement transition meeting, etc.

6. CVRC issued a Notice of Proposed Action (NPA) to parents/conservators proposing to "discharge [claimant] from PDC to a less restrictive community based care facility. The NPA gave an effective date of March 25, 2013.

7. On April 19, 2013, claimant's parents/conservators submitted a Fair Hearing Request to CVRC appealing the decision to discharge claimant from PDC.

8. Diane Kraus, Program Manager at CVRC is responsible for overseeing CVRC's Annual Community Placement Plan. The State Department of Developmental Service requires regional centers to identify individuals who are currently placed at developmental centers whose needs can be met in a community-based setting. She testified to the major changes to the State of California's developmental center's qualification of consumers

since 1979, when claimant was placed at PDC. The mandate to regional centers, especially in light of “California People First,” has been on severely limiting consumer placement in developmental centers and striving to relocate all consumers for whom community placement is appropriate.² She testified that claimant could not be admitted to PDC today, and that the community supports available for claimant today were not available in 1979.

Ms. Kraus described the setting at PDC. Because it is a large institution, the lights are left on all night, and it is noisy at night. She suggested it might be easier to get a full night of sleep in a smaller setting. The cooking is all done in a central kitchen at PDC, so consumers do not smell cookies baking, for example, as they would in a smaller community-based facility.

Currently, the only people being admitted to PDC are people with developmental disabilities who have been accused of criminal activity but have been found incompetent to stand trial due to their disabilities.

Regional centers are responsible for the cost-effective use of public funds. Ms. Kraus testified that the approximate cost of serving a person in a developmental center is \$280,000 to \$320,000 per year, while the cost of serving the same person in a community-based facility is approximately \$100,000 per year, or less.

² On April 24, 2009, Judge Robert Freedman, Alameda Superior Court, granted final approval of a class action settlement agreement in *Capitol People First, et. al. v. Department of Developmental Services, et al.* The settlement agreement set forth agency responsibilities addressing access to services necessary for Californians with developmental disabilities to live in and participate in their communities and avoid unnecessary institutionalization. It also examined the use of state taxpayer dollars to continue to institutionalize individuals who could live successfully in community placements.

Ms. Kraus explained why she thought claimant could safely be transitioned to a community-based placement. The community-based placement the regional center is proposing for claimant would have approximately four to six consumers living in a home in a community, and claimant would either have her own room or share a room with one other consumer. Currently, claimant lives on a ward with up to 36 people, and shares her room with three other people. Ms. Kraus testified that claimant's ward at PDC has a staffing ratio of one staff member to eight consumers, and of one staff member to 16 consumers at night. The community-based placement would have a staffing ratio of one staff member to three consumers during waking hours, and one staff member to six consumers at night. She also testified that, if claimant needed more support, the regional center would increase staffing at the community-based facility.

9. Ron Marconi, M.D., conducted a Medical Assessment for Community Placement dated August 18, 2012. He concluded as follows:

[Claimant] would be an excellent candidate for movement into the community in a less restricted environment in one of the newer homes developed specifically for individuals who are sensory deprived. A communication between the receiving facility and transfer facility would be important for understanding of behaviors and activities of the sensory deprived individual prior to placement in the community.

Dr. Marconi testified that claimant is medically stable at this time and it is likely that she could continue to have the same doctors treat her if she were to move to a community-based setting.

10. Shannon Dicks, M.S., is a Developmental Center Liaison at CVRC. She is responsible for monitoring CVRC consumers who live in developmental centers. One of her

responsibilities is to find appropriate service providers in the community, and, when consumers are transitioned from the developmental center to community-based placements, she stays involved in the transition for one to two years. She is familiar with claimant and believes claimant can successfully transition to a community-based facility. Ms. Dicks testified regarding a Leisure Evaluation Update dated August 5, 2012, which described claimant's participation in community outings in the last year as follows:

During this past year, [claimant] has been taken on a number of community outings to places such as Foster Freeze, Bartlett Park and Starbucks. At Starbucks, according to the record, [claimant] was calm and relaxed and appeared to enjoy drinking her Mango Smoothie as she laughed and smiled. During the trip to Bartlett Park, [claimant] appeared to enjoy the outing as she smiled the entire time. At Foster Freeze, [claimant] smiled while eating her ice cream.

Claimant's success on community outings leads Ms. Dicks to believe claimant will do well living in a community-based setting.

Ms. Dicks described the process for transitioning from the developmental center to a community-based placement. A transition plan is developed over time. The developmental center staff and the staff of the new placement work together to ensure claimant's needs are understood and a plan is in place to meet those needs. Typically, a consumer would visit the proposed placement several times prior to the complete transition to the new placement.

11. Oludolapo Olubeko is a licensed vendor for CVRC. He owns one community-based residential care facility and plans to open another soon. He testified regarding the process for becoming a vendor for CVRC and the support he receives from CVRC to ensure

the consumers' needs are met. The staff is trained in first aid and CPR; they have all passed criminal background checks. In addition, based upon the needs of the consumers they serve, they receive additional training in behavior management, medical care, and nutrition. The homes are subject to unannounced visits and well as regular licensing inspections. Mr. Olubeko testified that consumers in his home had successfully transitioned from PDC.

12. Joan M. is claimant's mother and one of her co-conservators. It was evident that Mrs. M. loves her daughter and has been an important part of her life since birth. She visits claimant weekly. She testified that the decision to place her daughter at PDC was a difficult one to make, but that her behaviors at home made it unsafe for her to continue living with her family at the time.

Mrs. M. wants her daughter to be safe and is concerned that the transition to a community-based facility will be very difficult for claimant. Claimant has a history of self-injurious behavior, disrobing and masturbating in public, and Mrs. M. is very concerned about claimant being vulnerable in a community-based setting. She testified that claimant is "doing well at the moment," but fears a new placement would disrupt her. She also testified that people in the community "say nasty things" about claimant, which is extremely painful for Mrs. M. Her concerns are heartfelt. She clearly has deep love and compassion for her daughter, and wants her daughter to remain safe.

13. Ron Pekarek, M.S., is a Board Certified Behavior Analyst and the Program Director of the Bright Future Program operated by the Tulare County Office of Education. Mr. Pekarek conducted a Functional Behavior Assessment of claimant dated August 19, 2013. He identified two challenging behaviors, self-injurious behavior, and removal of clothing. He defined self-injurious behaviors as "grimacing, making vocalizations, yelling, attempts at pinching or pulling at her own hair, scratching her arms or face, and hitting self

in the face or head with the side or back of hand." He defined removal of clothing as "placing hands and arms inside of shirt and attempting to pull shirt off or to the side."

The recommendations section of Mr. Pekarek's report says in part:

Based on the results of this assessment it is recommended that [claimant's] current and potential future caregivers consider the following:

Antecedent Strategies

- Establish a consistent functional communication modality...in order to communicate "no" or "stop" and "private time." Utilize functional communication training in order to teach these critical communication skills/replacement behaviors and to reduce the need for engaging in challenging behavior.
- Create specific areas to utilize during solitary times and private times. Incorporate specific auditory or olfactory cue in these areas in order to establish a link between the activity and behavioral expectations in designated area.
- Increase noncontingent access to solitary/private time by incorporating additional opportunities to engage in these behaviors into [claimant's] daily schedule...
- Extend times when...challenging behavior does not occur...
- When work tasks are required, limit the duration of teaching sessions to less than 2 minutes and provide breaks...
- Maintain a consistent daily schedule...
- All staff members should consistently address [claimant] using a positive, calm, and caring tone of voice...

- Limit [claimant's] exposure to loud noises... It was reported that her challenging behavior has improved significantly as a result of the less chaotic/quieter environment of her current unit.
- To ensure [claimant's] safety, continue to maintain recommended staff supervision ratios indicated in her 2012 IPP (i.e. a minimum of 1:4 while indoors with familiar staff and a ratio of 1:2 during off-site activities) at all times.

Mr. Pekarek recommends many strategies that will most likely be helpful for the staff assigned to work with claimant to use, under the supervision of a behaviorist. However, his recommendations do not require that claimant continue to live at PDC in order to work on her behavior. In fact, one of his recommendations seems to favor moving claimant to a smaller living community, as he suggests limiting claimant's exposure to loud noises and chaotic environments. Mr. Pekarek testified there is some risk of an increase in self-injurious behavior if claimant moved, but it was unclear that this was a significant risk that could not be minimized with the support of a behaviorist.

LEGAL CONCLUSIONS

1. The Lanterman Act sets forth the regional center's responsibility for providing services to persons with developmental disabilities. An "array of services and supports should be established...to meet the needs and choices of each person with developmental disabilities...to support their integration into the mainstream life of the community...and to prevent dislocation of persons with developmental disabilities from their home communities." (§4501). The Lanterman Act requires regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§4646). The IPP includes the consumer's goals and objectives as well as required services and supports. (§§4646.5 & 4648).

2. Section 4646, subdivision (a) provides:

It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

3. Section 4648, subdivision (a)(1), specifies:

In order to achieve the stated objectives of the consumer's individual program plan, the regional center shall conduct activities including, but not limited to, all of the following:

(a) Securing needed services and supports

- (1) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. The regional center shall secure services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan, the planning team shall give highest preferences to those services and supports which would allow minors with

developmental disabilities to live as independently as possible in the community, and that allow consumers to interact with persons without disabilities in positive, meaningful ways.

4. Section 4500.5, subdivision (a) provides:

The Legislature makes the following findings regarding the State of California's responsibility to provide services to persons with developmental disabilities, and the right of those individuals to receive services, pursuant to this division:

- (a) Since the enactment of this division in 1977, the number of consumers receiving services under this division has substantially increased and the nature, variety, and types of services necessary to meet the needs of the consumers and their families have also changed. Over the years the concept of service delivery has undergone numerous revisions. Services that were once deemed desirable by consumers and families may now no longer be appropriate, or the means of service delivery may be outdated.

5. Section 4418.3, subdivision (a) states:

- (a) It is the intent of the Legislature to ensure that the transition process from a developmental center to a community living arrangement is based upon the individual's needs, developed through the individual program plan process, and ensures that needed services and supports will be in place at the time the individual moves. It is further the intent of the Legislature that regional centers, developmental centers, and regional resource development projects coordinate with each other for the benefit of their activities in assessment, in the development of individual program plans, and in planning, transition, and deflection, and for the benefit of consumers.

6. It is clear that the decision to change claimant's placement to a community-based placement is a difficult one for the family to accept. They have appreciated the care their daughter has received at PDC for more than 30 years. Claimant has been known to have inappropriate and self-injurious behaviors in the past, but the evidence was persuasive that, with proper support, those behaviors could be managed in a community-based setting.

7. At the time claimant was placed at PDC, it was likely the only appropriate placement for her. However, many changes have occurred in the delivery of services to the developmentally disabled since 1979. The evidence was persuasive that a developmental center placement is no longer appropriate for claimant. With continuing changes to the developmental center population, the placement at PDC becomes more inappropriate.

8. The evidence was also persuasive that claimant's needs can be met in a community-based placement, with appropriate planning. A transition plan will need to be developed taking into account all of claimant's unique needs. Finally, the regional center's mandate to provide services that reflect the cost-effective use of public funds must be considered. That mandate also supports the decision to pursue community-based placement.

ORDER

Claimant's appeal is DENIED. CVRC shall develop an appropriate transition plan to discharge claimant from PDC to a less restrictive community-based care facility placement.

DATED: November 18, 2013

ELAINE H. TALLEY

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of this decision. (Welf. & Inst. Code, § 4712.5, subd.(a).)