

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

I.P.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH Case No. 2013060390

DECISION

This matter came on regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on August 6, 2013, in Bakersfield, California.

Susan Hernandez, Interim Director of Client Services, represented Kern Regional Center (Regional Center or Service Agency).

Jani P.,¹ Claimant's mother and conservator, represented Claimant.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

ISSUE

May Regional Center fund the services of home care nurses to provide care for Claimant during hospitalizations? Claimant's representative seeks reimbursement for care provided by the nurses during a hospital stay from May 29 to June 5, 2013.

¹ Initials have been used instead of family surnames to protect Claimant's and her family's privacy.

FACTUAL FINDINGS

1. Claimant is a 32-year-old Service Agency consumer with qualifying diagnoses of profound mental retardation, cerebral palsy and epilepsy. She resides in her own apartment next to her mother's apartment.

2. Claimant is medically fragile and requires supervision 24 hours, seven days per week. Claimant is blind, non-verbal and cannot move her arms or legs. She has a tracheostomy to facilitate airway clearance, and oxygen/mist is administered on a continuous basis. She requires regular oxygen monitoring and frequent suctioning to maintain an open airway. Failure to attend to these needs can result in seizures. Claimant has a device installed under her skin and connected to a blood vessel, a med port, to facilitate emergency access to her circulatory system. She requires a special liquid diet that must be gravity-administered through a gastrostomy tube every four hours, a process that can take up to 20 minutes at a time. Claimant is incontinent, and must have diapers changed in a timely manner to prevent skin breakdown and bladder infection. She requires a special mattress and frequent repositioning to maintain pulmonary, circulatory and skin health. She requires multiple medications on a regular basis, which must be administered with minimum variability. For instance, she uses four anti-seizure medications, two of which have been approved by the Federal Drug Administration for other uses.

3. In recognition of Claimant's needs, Service Agency has been funding 297 hours per month of licensed vocational nurse (LVN) care and 197 hours per month of certified nursing assistant (CNA) nurse care. Part of the care is being provided by CNAs due to the lack of LVNs in Kern County. Claimant also receives additional funding as part of a Medicare waiver program to achieve nursing coverage for 24 hours, seven days per week.

4. Up until age 22, Claimant's hospitalizations took place at the Valley Children's Hospital in Fresno, California, a hospital staffed by specialists, with special equipment, and with lower nurse-patient ratios. For instance, medically fragile patients like a Claimant

received care by nurses assigned to a single room, which was typically occupied by one or two patients.

5. On June 29, 2013, Claimant was admitted to Mercy Hospital (Hospital) in Bakersfield for pneumonia. The Hospital did not have the staff to provide care consistent with Claimant's needs. Nurses assigned to provide care to five to six patients could not devote the time required to properly suction Claimant's airway or to monitor her oxygen levels. The nurses did not have the time to gravity-feed Claimant's special diet –in fact, their attempt to pump-feed the fluids provided by the family could have reversed Claimant's fundoplication, a gastric procedure performed to prevent Claimant from vomiting. The Hospital did not have some of the specialized equipment Claimant requires, such as the ABI Vest used to assist in maintaining airway flow.

6. Claimant's mother requested Service Agency to allow Claimant's regular home care nurses to provide care for her while at the Hospital. Service Agency declined, stating that Claimant had a generic resource, Medicare, to pay for nursing services at the Hospital. Fearing for Claimant's safety and well-being, her mother requested Claimant's home care nurses to provide care to Claimant during her hospital stay. The home care nurses provided care to Claimant during her Hospital stay.

7. Claimant's mother is familiar with local hospitals, and none can provide the specialized care Claimant requires. In a prior hospitalization at a different hospital to which Claimant has not returned, Claimant's seizure activity increased due the nurses' apparent failure to properly follow Claimant's medication regimen. Failure to provide the required care can have tragic consequences for Claimant.

8. Claimant's mother filed a fair hearing request on June 6, 2013, seeking reimbursement for the home nurses' services during the Hospital stay as well as ensuring future funding should future hospitalization be required.

LEGAL CONCLUSIONS

1. In enacting the Lanterman Developmental Disabilities Act, Welfare and Institutions Code² 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 established to meet the needs and choices of each person with developmental disabilities. (§ 4501.) "Services and supports should be available to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age. Consumers of services and supports, and where appropriate, their parents, legal guardian, or conservator, should be empowered to make choices in all life areas. These include promoting opportunities for individuals with developmental disabilities to be integrated into the mainstream of life in their home communities, including supported living and other appropriate community living arrangements " (*Id.*)

2. The Lanterman Act gives regional centers, such as Service Agency, a critical role in the coordination and delivery of services and supports for persons with disabilities. (§ 4620 et seq.) Thus, regional centers are responsible for developing and implementing individualized program plans (IPPs), for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (§§ 4646, 4646.5, 4647, and 4648.)

3. Section 4512, subdivision (b), defines the services and supports that may be funded, and sets forth the process through which such are identified, namely, the IPP process, a collaborative process involving consumers and service agency representatives. Through this process, Claimant and Service Agency have determined that Claimant requires nursing care on a 24-hour, seven-day basis to cost-effectively address Claimant's

² Unless otherwise stated, all further references are to the Welfare and Institutions Code.

developmental disability needs. Service Agency funds such services, typically provided at the home, which are not otherwise funded through the Medicare waiver.

4. Section 4649, on which Service Agency relies, provides, in pertinent part: "[[c)] Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional centers shall not purchase any service that would **otherwise be available** from Medi- Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, In-Home Support Services, California Children's Services, private insurance, or a health care service plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage. If, on July 1, 2009, a regional center is purchasing that service as part of a consumer's individual program plan (IPP), the prohibition shall take effect on October 1, 2009. " (Emphasis added.)³

5. Claimant is medically fragile and has multiple requirements for her well-being, indeed her survival. Service Agency has recognized these needs and has agreed to fund around- the-clock skilled nursing services at Claimant's home. (Factual Findings 1 through 5.) Service Agency argues that medical services were available at the Hospital and are expected to be available during future hospitalizations, and that it cannot fund the home care nurses while Claimant is at the Hospital. Unfortunately, because of its staffing ratios and other resource limitations the Hospital was unable to adequately meet Claimant's needs. (Factual Finding 5.) Hospitals in Kern County are presently unable to provide the admittedly high level of care required by Claimant (Factual Finding 7), and Valley Children's

³ Another, more general, provision not cited by Regional Center, but which deals with the subject of generic funding, section 4648, subdivision (a)(8), 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."

Hospital is no longer an option (Factual Finding 4). Accordingly, hospital care that meets Claimant's needs is not "otherwise available" from a generic source, and funding for her regular home care nurses may not be denied pursuant to sections 4648, subdivision (a)(8), or 4659. Allowing nurses that would otherwise have been at Claimant's home to provide needed care in a different setting, a hospital, constitutes a cost-effective service to meet Claimant's considerable medical needs and is consistent with the requirements of the Lanterman Act.

ORDER

1. Claimant's appeal is granted.
2. Service Agency shall reimburse the cost of nursing services provided by Claimant's home nurses during Claimant's stay at the Hospital.
3. Should Claimant be hospitalized in the future, Service Agency shall fund nursing services provided by Claimant's home care nurses in the hospital, unless Claimant's needs change, the law changes, or hospital services are actually available that can adequately meet Claimant's nursing care needs consistent with this Decision.

Dated: August 7, 2013

_____/s/_____
SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.