

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:
CLAIMANT,

OAH No. 2013060605

vs.

DEPARTMENT OF DEVELOPMENTAL
SERVICES

and

WESTSIDE REGIONAL CENTER,

Service Agencies.

DECISION

Howard W. Cohen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on October 24, 2013, in Culver City.

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (Westside or WRC).

W. Jason Scott, Senior Staff Counsel, represented the California Department of Developmental Services (DDS or Department).

Valerie Vanaman, Attorney at Law, represented claimant, who was not present for the hearing.¹ Claimant's parents were present.

At the commencement of the hearing, the ALJ ruled that, with respect to this matter, DDS is a Service Agency and a necessary party.

¹ Initials and family titles are used to protect the privacy of claimant and his family.

Oral and documentary evidence was received. The record was held open to allow briefing by the parties. Westside filed a closing brief and a reply brief, marked as Exhibits W21 and W22, respectively. DDS filed a closing brief and a reply brief, marked as Exhibits D11 and D12, respectively. Claimant filed a closing brief and a reply brief, marked as Exhibits C11 and C12, respectively.

The record was closed and the matter was submitted for decision on December 30, 2013.

ISSUE

Whether DDS must fund claimant's out-of-state residential placement at the Monarch Center for Autism (Monarch), a division of Bellefaire Jewish Children's Bureau, in Cleveland, Ohio, currently and retroactively.

EVIDENCE RELIED UPON

Documents. Westside's exhibits W1 through W20; DDS's exhibits D4 and D9; claimant's exhibit C10.

Testimony. Shelton Dent.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a 12-year-old boy who is a consumer of Westside based on his qualifying diagnosis of autism. He began receiving regional center services under the Early Start Program² in 2002. In 2004, claimant was found eligible and began receiving regional

² The "Early Start Program" is a term commonly used to refer to the California Early Intervention Services Act (Gov. Code, § 95000 et seq.), which supplements the federal

center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act).

2. In July 2012, claimant's parents requested that claimant receive funding for an out-of-state residential placement. By a Notice of Proposed Action (NOPA) and a letter dated July 30, 2012, Westside denied the request on the grounds that Westside had not been afforded an opportunity to conduct an assessment and could not, therefore, provide DDS with information as to whether the proposed service or an alternative could be provided in California.

3. Claimant's parents filed a Fair Hearing Request on September 18, 2012. After obtaining additional information through discussions and correspondence with claimant's parents, Westside approved funding for claimant's out-of-state placement, subject to DDS approval. In a December 12, 2012 letter to claimant's parents, Westside wrote:

Based on the information you have provided; consultation and interdisciplinary staffing with WRC staff; review of [claimant's] case file; completion of a statewide search and review of all the information from [Monarch] I find that WRC will provide funding for residential services at the 4I rate (\$5,106.79). However this decision cannot be implemented until it is approved by DDS. WRC will submit the required paperwork to DDS but I would not expect a decision until

Individuals with Disabilities Education Act (20 U.S.C. § 1431 et seq.); the program provides services to meet the developmental needs of infants and toddlers under the age of three. (20 U.S.C. § 1432(4)(A); Cal. Code Regs., tit. 17, §§ 52000, subd. (b)(12), 52100 et seq.)

sometime in January. WRC will recommend funding be retroactive to your request of September 2012.

(Ex. W14.)

4. Westside's Executive Director, Mike Danneker, requested DDS approval for the placement by letter to Shelton Dent, Manager, DDS's Residential Services and Monitoring Branch, dated February 26, 2013. In his letter, Danneker wrote that "[p]arents have requested and have been granted through appeal for WRC to fund [claimant's] placement at a level 4I rate of \$5,106.79 per month from 5-22-2012 through 6-30-13, approximately 405 days." (Ex. W16.)

5. By letter from Dent to Danneker dated May 2, 2013, DDS denied the request for approval, on the grounds that, "[b]ased on the information provided with this request, and the lack of an up-to-date comprehensive assessment and [Individual Program Plan], the Department does not have the information required to determine that the proposed service or an appropriate alternative is not available from resources and facilities within the state" (Ex. W2.)

6. By NOPA and letter dated May 9, 2013, Westside notified claimant's parents of DDS's denial of their request for funding on the ground that the request "is not supported by [claimant's] Individual Program Plan; Consideration of Available Generic Resource ([claimant's school district]." (Ex. W2.) Westside included with the NOPA a copy of DDS's May 2 denial letter.

7. Claimant's parents filed a Fair Hearing Request on June 4, 2013. OAH set a fair hearing for July 12, 2013. By letter dated July 2, 2013, counsel for DDS requested that the hearing be continued to July 22, 2013. OAH continued the hearing to August 21, 2013.

8. By letter dated July 31, 2013, Westside's Executive Director Danneker again

asked DDS to approve funding for claimant's out-of-state placement and provided DDS with additional information to support the request. On August 16, 2013, counsel for DDS and counsel for claimant's parents filed a joint motion for continuance of the hearing to allow DDS to review the additional information. OAH continued the hearing to October 24, 2013.

9. By letter from Dent to Danneker dated October 9, 2013, which Westside forwarded to claimant's parents, DDS again denied the funding request. The stated grounds for the denial were that claimant's 2013 Individual Program Plan (IPP) did not reflect Westside approval of the funding request, that the IPP did not include a plan for out-of-state services funded by the regional center, that no plan had been developed for transitioning claimant back to California, and that there was no indication that either the behavior intervention program that claimant had been participating in before leaving California or a similar in-state program cannot meet claimant's needs.

10. Because the matters that were raised in the June 2013 Fair Hearing Request were not resolved, this hearing ensued.

EVENTS LEADING TO CLAIMANT'S OUT-OF-STATE PLACEMENT

11. Claimant presents with significant behavioral challenges, including physical aggression towards others, such as hitting, biting, and pushing, and self-injurious behavior. In February 2011, claimant's display of aggressive behavior increased, at school, at home, and in the community; he engaged in kicking, punching, biting, and hair-pulling on a daily basis. In March 2011, claimant was twice hospitalized, for a total of 22 days, to address his aggressive behaviors; on March 29, 2011, claimant was referred to the hospital's ongoing care program.

12. On more than one occasion after claimant's hospitalization, claimant's

parents asked Westside for assistance in placing claimant in a living situation outside the home, stating that claimant had attacked two nurses while hospitalized and that he “needs a structured environment.” (Exs. W18, W19.) Westside responded that finding suitable placement options would be “very challenging.” (Ex. W18.)

13. Claimant’s July 7, 2011 IPP stated that claimant needed intensive prompting for daily activities; that he was admitted to hospital inpatient care for 22 days only after he had a tantrum so intense that four staff members could not restrain him; and that his mother was worried about the safety of his siblings. The 2011 IPP stated that claimant’s mother informed Westside that, after seeing how well claimant did in a structured environment during his hospitalization, “she would like to explore placing him in a facility. Mother states that her heart breaks at the thought that [claimant] may not live with the family for a while but she knows it would be better for him.” (Ex. W19.) Inconsistent with that request, however, in a section titled, “Living Arrangement,” the 2011 IPP states that “[claimant] will continue to live with his family,” and sets forth a plan whereby “[p]arents will continue to provide a safe and supportive home environment for [claimant].” (*Id.*) Westside authorized 28 hours per month of in-home respite services and 31 hours per month of behavior intervention services.

14. The behavior intervention services funded by Westside proved ineffective in light of claimant’s strength and size and the threat to himself and others posed by the severity of his aggressive behaviors. Westside having been unable to identify an appropriate placement, claimant’s parents and claimant’s school district reached an agreement whereby the school district funded the cost of placing claimant in a residential facility in Devereux, Texas, beginning in January 2012. (Ex. W17.)

15. At an Individualized Education Program meeting in April 2012, claimant’s parents expressed concerns regarding the effectiveness of the facility as well as the safety

of their son, who had been physically injured at the Texas facility. Claimant's parents moved claimant to Monarch in Cleveland, Ohio, on May 22, 2012. Claimant's school district agreed to fund only the educational portion of the placement, not the residential portion. Claimant's parents used their private insurance coverage for 96 days from June 1, 2012, to September 5, 2012. Since the insurance was time-limited, claimant's parents requested assistance from Westside on July 25, 2012, to authorize funding for the residential portion of the placement.

16. Westside initially denied the request. Claimant's family then filed a request for a fair hearing to challenge that denial. Westside staff met with the family, reviewed assessment information provided by Monarch, and reviewed the resources available to meet claimant's needs within the State of California. Among other things, during October and November 2012, Westside staff conducted a statewide search for an appropriate placement in California. In December 2012, Westside decided to support claimant's placement at Monarch retroactive to September 2012. (See Factual Findings 2, 3.)

FIRST REQUEST TO DDS FOR FUNDING CLAIMANT'S PLACEMENT

17. In his February 26, 2013, letter to DDS requesting funding for claimant's placement at Monarch, Danneker described claimant's escalating behavior issues, the events that led to claimant's out-of-state placement, the history of claimant's placement in Texas before his transfer to Monarch, Westside's statewide search for an in-state placement, Westside's outstanding request for proposal to potential service providers in California, details about Monarch and its accreditation and licensure, Westside's contact with the State of Ohio to ensure that Monarch is a provider in good standing, the funding provided by claimant's school district, and the amount of funding sought from DDS from January 1, 2013 through June 30, 2013. Danneker's letter appears to have been designed

to satisfy the requirements for requesting authorization for purchasing out-of-state services set forth in an August 27, 2012, DDS memorandum directed to regional centers.³

18. With Westside's request to DDS, Danneker submitted claimant's 2011 IPP (see Factual Finding 13), an Annual IPP Report dated September 21, 2012 (2012 IPP) and a 16-page Assessment Service Report completed by Monarch, among other things.

19. The 2012 IPP, updating the 2011 IPP, stated:

Last year, [claimant] was hospitalized . . . twice. He did very well in a structured setting but he had difficulty as soon as he was discharged. At that point, parents requested placement through WRC and [claimant's school district]. Parents were informed that WRC did not have appropriate placements for [claimant]; therefore, they pursued a placement through [the school district]. . . . [The school district] agreed to a placement in Texas. According to parents [claimant's] Texas placement was not appropriate. Parents switch [*sic*] [claimant] to his current placement while trying to get [claimant's school district] to agree to the new placement.

³ No evidence was submitted to show that the memorandum has the force of law. Dent testified that to his knowledge the funding approval requirements set forth in the memorandum have not been adopted by DDS as a regulation under the Administrative Procedure Act.

Mother states that she has seen an improvement in [claimant's] behavior since he has been in placement. . . . Mother states that [claimant] does not have the same type of meltdowns and tantrums that he had while at home. [Claimant] is still engaging in self-injurious behaviors (bites his hands).

(Ex. W17.) The 2012 IPP noted that the IPP Planning Team determined that, because claimant had been placed out of state, no new services or supports were necessary. Monarch's Assessment Service Report, also included by Danneker, provided updated information on claimant's functioning and service needs and included detailed information regarding the services and supports being provided to claimant.

20. Pending its submission to DDS for approval of its decision, Westside continued to search for a placement in California through a Special Service Resource Search (SSRS) referral as well as continued statewide searches through the regional center system. No available resources within the State were identified.

21. Just over two months after Danneker sent Westside's written request for funding approval, DDS, by letter dated May 2, 2013, denied the request.⁴ (See Factual Finding 5.) In that letter, Dent advised Westside that, under section 4519, DDS needed additional information.

22. Among the information Dent requested was an updated IPP. In its closing

⁴ By this time, almost a year had passed since claimant's parents' July 2012 request for funding, and more than six months had passed since Westside agreed to provide support for the placement.

brief, DDS argued that the 2011 IPP made no reference to claimant's existing out-of-state placement and did not include a plan for out-of-state service. But while the 2011 IPP, which pre-dated the placement, included no placement plan, and while its living arrangement section contemplated claimant continuing to live at home, it did include an explicit reference to claimant's mother's request that Westside explore placing claimant outside the home. Also, the more recent 2012 IPP had been forwarded to DDS with Danneker's letter. It discussed the circumstances under which claimant had been placed in an out-of-state facility after Westside told his parents that there was no appropriate facility available in California. Dent's letter did not acknowledge the 2012 IPP at all; Dent admitted at hearing that he does not remember ever reviewing the 2012 IPP while considering claimant's request for funding.

23. Dent also asked for a comprehensive assessment and Westside's plan for quarterly monitoring of Monarch.⁵ Danneker replied by including the lengthy Monarch assessment and by stating that Westside would develop a plan for quarterly monitoring upon receiving funding approval from DDS.

SECOND REQUEST TO DDS FOR FUNDING CLAIMANT'S PLACEMENT

24. DDS and Westside met to discuss claimant's case. On July 31, 2013, Westside submitted a second request for funding claimant's out-of-state placement, accompanied by additional information and documentation. (See Factual Finding 8.)

⁵ DDS's contention that a full comprehensive assessment should have been submitted along with Danneker's letter and claimant's IPP contradicts DDS's claim that all relevant information must be found within the IPP itself. It is not common practice to include an entire comprehensive assessment report in the body of an IPP.

25. Danneker included with the renewed funding request a more recent IPP, dated July 2, 2013. The 2013 IPP stated that, based on reports from claimant's mother and Monarch,

it appears that this is the most appropriate placement for [claimant] at the present time. Mother reports that family will explore the possibility of [claimant] coming home once he is stable and would like to have ongoing discussions with WRC to explore appropriate supports. . . . A transition plan regarding the supports and services that may be needed will be developed and reviewed with the family and the WRC multi-disciplinary team in an effort to allow for a smooth transition.

. . . At the present time there is no facility within California that has been identified that can meet [claimant's] needs. For this reason, the IPP acknowledges that [claimant's] current placement at the Monarch Center in Ohio is appropriate.

(Ex. W8.) The IPP listed as a "desired outcome" that claimant "will continue to reside in his current residential facility until his [sic] able to safely adjust to home environment." (*Id.*) The "plan for WRC supports" for this "desired outcome" is that the "[s]ervice coordinator will remain available to provide information, resources and referrals as appropriate to meet [claimant's] needs.) (*Id.*)

26. Danneker also responded to DDS's May 2013 instruction to conduct a comprehensive assessment. He wrote that Westside did not do so because Monarch

completed a comprehensive assessment in June 2012, which had been enclosed with Westside's February request. Westside itself had planned to conduct its own comprehensive assessment in December 2012, when claimant would be home for a short visit, but,

[i]t was ultimately determined by WRC's clinical team, including the chief psychologist that attempting to complete an assessment during this time would be extremely disruptive. The information provided by Monarch Center, the current IEP, as well as the information contained in the reports from the agency that had been providing behavior intervention services from 2008 until [claimant] was placed in January 2012 was felt to be sufficient.

(Ex. W4.) Danneker reiterated Westside's intention to develop a plan for quarterly face-to-face visits to monitor claimant once DDS approves funding for the placement. (Ex. D4.)

27. A month after submitting Westside's second funding request, Danneker sent DDS the details of a transition plan, by letter dated August 27, 2013, contemplating claimant's return to his family home with services and supports, and alternatively claimant's possible placement outside the home. Danneker wrote that Westside "will continue to conduct a Statewide Placement search no less than quarterly, and submit an updated SSRS to DDS. As required, this plan will be reviewed and updated no less than every three months by the IPP team," claimant's parents, Monarch, and regional staff. (Ex. W8.)

28. In a letter dated October 9, 2013, from Dent, DDS again denied Westside's

funding request on several grounds, set forth at Factual Finding 9.⁶

29. Regarding alleged deficiencies in claimant's 2013 IPP, Dent wrote that Westside's original request for DDS funding was the result of an informal hearing decision resolving claimant's parents' fair hearing request (see Factual Findings 3, 4, 16-19), and that "[s]uch a hearing would indicate that WRC has not approved a request for funding in [claimant's] Individual Program Plan" (Ex. W9.) Dent wrote that the 2013 IPP did not contain "a plan for out-of-state service funded by the regional center." (*Id.*) At hearing, Dent testified, accurately, that the 2013 IPP did not explicitly state that Westside approved funding the placement pending approval of DDS.

30. But Westside communicated to claimant's parents its approval of an out-of-state placement, and it also informed them in writing that funding was contingent on DDS approval, which it would seek. Westside and claimant's parents actively participated in a process to obtain that approval. Danneker's February and July 2013 letters to DDS explicitly discussed the reasons for and requested funding for the Monarch placement, and included

⁶ Dent testified that the information on which DDS will base its decision must be found in the consumer's IPP. DDS's August 2012 memo (Factual Finding 17 and footnote 3) requires regional centers requesting out-of-state services to submit "plans" for out-of-state services, "signed by the director of the requesting regional center," that include a "description of the consumer, their service needs, and a copy of up-to-date IPP." (Ex. W3.) The memo solicited other supporting documentation as well. IPPs are not generally signed by the regional center director, so it is apparent that DDS contemplated receiving a plan, not set forth entirely in the IPP, signed by the regional center's director and addressing issues pertinent to DDS's consideration of whether to fund an out-of-state placement. That is what DDS received in this matter, both in February and in July 2013.

as supporting documentation claimant's various IPPs, which reflected the joint approval of the Monarch placement by Westside and claimant's parents. The SSRS Consumer Information forms used by Westside to seek alternative placements within California reflect the explicit approval of the placement by both the IPP team and claimant's parents until such time as claimant is able to safely live at home or an "appropriate residential program is available in California." (Ex. W8.) Not all the information DDS requested was in the IPPs themselves, but other documents containing the information accompanied the IPP that was sent to DDS, including Danneker's detailed funding request letters. That information had been considered and agreed upon by claimant's parents and Westside's IPP team as part of the process undertaken to provide services and supports to claimant.

31. DDS asserts that claimant's 2013 IPP contains no discussion of alternative placements in-home behavioral support. But claimant's 2013 IPP, in a section titled "Living Arrangement/home," included a discussion of those subjects that noted claimant's escalating behavior issues despite in-home behavioral support and the IPP team's inability to identify any facility in California to meet claimant's needs. (Ex. W5.)

32. At the hearing, all parties stipulated that there is currently no appropriate placement for claimant available in California, and that at no time relevant to this matter has such a placement been identified through the SSRS.

33. DDS asserts that Westside failed to specify the efforts it made to support claimant's needs within California, other than performing a "state-wide search" (Ex. W5), which does not necessarily indicate the use of the Statewide Specialized Resource Service (SSRS). But the 2011, 2012, and 2013 IPPs identify the inadequacies of the Westside-funded behavioral intervention services in addressing claimant's needs. And the materials Westside provided to DDS reflect Westside's efforts to identify an appropriate placement in California through the SSRS and other avenues, including an outstanding request for

proposal. Dent's October 2013 funding denial letter states that "based on the information provided with this request, there appears to be an alternative resource available within California to address [claimant's] needs." (Ex. W9.) This may be an oblique reference to Danneker's discussion of the possibility of a placement through another regional center identified through the SSRS process. Danneker wrote that, through Westside's SSRS requests for assistance in December 2012 and February 2013, "WRC received information regarding one option located in [Eastern Los Angeles Regional Center's (ELARC's)] area. WRC contacted ELARC and was informed that [claimant] was 5th on the waiting list for ANKA Home in ELARC's catchment area. An information packet was forwarded to ELARC and the ANKA Home for consideration. No determination has been made." (Ex. W4.) Emails produced by Westside indicate that ELARC was awaiting additional information before determining whether ANKA Home would be an appropriate placement for claimant in the event he was ever accepted from the waiting list. There is no evidence to support DDS's contention that there was ever a vacancy at ANKA Home during the relevant time period; there were no available beds when ANKA Home was identified. Nor does the evidence support DDS's contention that a failure to provide ELARC with information was not corrected or resulted in claimant losing a placement. Finally, in addition to the SSRS search and the request for proposal, Danneker wrote that Westside conducted a Statewide Community Placement Search in October 2012 and that 11 regional centers replied that they could not provide any options for claimant's placement.

34. The 2013 IPP also reflects Westside's unequivocal finding that claimant's placement at Monarch was appropriate. Westside and claimant's parents continue to support the placement. DDS did not support its suggestion that Monarch is inappropriate because claimant's mother's reported that claimant was physically restrained on at least three separate occasions in a single day and requires physical restraint at least three to four

times each week. In fact, Dent denied that DDS has expertise in determining appropriate services and relies on the expertise of regional centers.

35. In his letter denying funding, Dent also wrote that no plan had been developed for transitioning claimant back to California.

36. Westside submitted a Transition Plan, dated August 27, 2013, stating that claimant's parents "expressed their desire that [claimant] be able to return to the family home with supports and services." (Ex. W8.) Westside also submitted information concerning all of its efforts to provide a program appropriate for claimant's needs in California, including claimant's behavior intervention services, the search for a placement through the SSRS process, a request to all regional centers, and a request for proposal. (Exs. W4, W16).

37. At the hearing, Dent acknowledged that he did not know what claimant's parents should have done given the pressing need for immediate action to address claimant's escalating behaviors, other than to let Westside staff know that there was an emergency. As the record demonstrates, the family had been in conversations with Westside staff since at least March 2011 regarding the immediate need for claimant to be placed in a residential program, and Westside had been unable to locate any such placement within the State of California. DDS does not contest the severity of claimant's needs or the appropriateness of the program in which he has been placed.

CLAIMANT'S REQUEST FOR RETROACTIVE FUNDING

38. Claimant's parents seek reimbursement for the living expenses they incurred at Monarch for the period beginning September 5, 2012. Until that time, claimant's parents insurance covered their portion of the costs of the placement. In its letter of December 12, 2012, when it approved the out-of-state placement subject to DDS approval of funding,

Westside informed claimant's parents that it would recommend retroactive funding to September 2012.

39. Danneker's letter of February 26, 2013, requested DDS funding retroactive to May 22, 2012, the date of claimant's placement at Monarch, and continuing through July 30, 2013, at a specified rate. (Factual Findings 2-4.) In his July 31, 2013, letter, Danneker requested that funding be extended through July 31, 2014.

40. Given the ineffectiveness of the behavioral intervention services funded by Westside, the emergency posed by claimant's escalating and dangerous behaviors, and Westside's inability to find a placement in California when claimant's parents requested an out-of-home placement, as set forth in Factual Findings 11 through 16, it was reasonable for claimant's parents to place him at Monarch. Claimant's parents utilized their insurance to pay for the portion of costs not funded by claimant's school district and, in advance of insurance coverage limits being reached, requested assistance from Westside. Based on all the evidence, it is reasonable to require that the Service Agencies fund the costs claimant's parents incurred for claimant's placement at Monarch, at the rate specified by Westside, retroactive to September 5, 2012.

LEGAL CONCLUSIONS

1. Cause exists to grant claimant's appeal, as set forth in Factual Findings 1 through 40 and Legal Conclusions 2 through 19.

2. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.⁷) An administrative "fair hearing" to determine the rights and obligations of the parties is

⁷ All further statutory references are to the Welfare and Institutions Code, unless otherwise stated.

available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal a denial of funding for an out-of-state placement. Jurisdiction was established. (Factual Findings 1-10.)

3. The standard of proof in this case is the preponderance of the evidence, because no law or statute requires otherwise. (Evid. Code, § 115.) Claimant, who is seeking government benefits or services, has the burden of proof in this case. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits); compare *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789 fn. 9; Evid. Code, § 500.)

4. The Lanterman Act acknowledges the state's responsibility to provide services and supports for developmentally disabled individuals and their families, and to "ensure that no gaps occur in communication or provision of services and supports." (§ 4501.) DDS, the state agency charged with implementing the Lanterman Act, is authorized to contract with regional centers to provide developmentally disabled individuals with access to the services and supports best suited to them throughout their lifetime. (§ 4520.)

5. Regional centers are responsible for conducting a planning process that results in an IPP. The IPP is developed by an interdisciplinary team and must include participation by the consumer or his or her representative. Among other things, the IPP must set forth goals and objectives for the consumer, contain provisions for the acquisition of services based on the client's developmental needs and the effectiveness of the means selected to assist the consumer in achieving the agreed-upon goals, contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences. (§§ 4646, subd. (a)(1), (2), and (4), 4646.5, subd. (a), 4512, subd. (b), 4648, subd. (a)(6)(E).) "The right of individuals with developmental disabilities to make choices in their own lives requires that all public or private agencies receiving state funds

for the purpose of serving persons with developmental disabilities . . . shall respect the choices made by consumers or, where appropriate, their parents” (§ 4502.1.)

6. 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, subd. (b), 4646, subd. (a).) A regional center is not required to provide all of the services that a client may require but is required to “find innovative and economical methods of achieving the objectives” of the IPP. (§ 4651.) Regional centers are specifically directed not to fund duplicate services that are available through another publicly funded agency or “generic resource.” Regional centers are required to “. . . identify and pursue all possible sources of funding. . . .” (§ 4659, subd. (a).) But if a service specified in a client’s IPP is not provided by a generic agency, the regional center must fund the service in order to meet the goals set forth in the IPP. (§ 4648, subd. (a)(1).)

7. A claimant has a right to an informal meeting after requesting a fair hearing. (§§ 4701.6 - 44710.7.) Where the subject of the fair hearing request is a service denial, the informal meeting is conducted to gather any new or additional information that was not presented before the decision to deny the service. The regional center representative at the informal meeting may uphold the original decision to deny the service, modify the decision, or grant the claimant’s request. (§ 4710.7.) In this case, Westside initially denied claimant’s original funding request due to a lack of information concerning, among other things, possible in-state placements.

8. On December 12, 2012, after an informal meeting between Westside and claimant’s parents and after further information was gathered, Westside decided to grant the request and to fund the out-of-state placement, currently and retroactively, pending DDS approval. (Factual Findings 2, 3, 16.)

9. Funding for out of state placements is governed by section 4519 and related

statutes. Section 4519 provides, in pertinent part:

- (a) The department shall not expend funds, and a regional center shall not expend funds allocated to it by the department, for the purchase of any service outside the state unless the Director of Developmental Services or the director's designee has received, reviewed, and approved a plan for out-of-state service in the client's individual program plan developed pursuant to Sections 4646 to 4648, inclusive. Prior to submitting a request for out-of-state services, the regional center shall conduct a comprehensive assessment and convene an individual program plan meeting to determine the services and supports needed for the consumer to receive services in California and shall request assistance from the department's statewide specialized resource service in identifying options to serve the consumer in California. The request shall include details regarding all options considered and an explanation of why these options cannot meet the consumer's needs. The department shall authorize for no more than six months the purchase of out-of-state services when the director determines the proposed service or an appropriate alternative, as determined by the director, is not available from resources and facilities within the state. Any extension beyond six months shall be based on a new and complete comprehensive assessment of the consumer's needs, review of available options, and determination that the consumer's needs cannot be met in California. An extension shall not exceed six months. For the purposes of this section, the department shall be considered a service agency under Chapter 7 (commencing with Section 4700).

[¶] . . . [¶]

(c) When a regional center places a client out of state pursuant to subdivision (a), it shall prepare a report for inclusion in the client's individual program plan. This report shall summarize the regional centers efforts to locate, develop, or adapt an appropriate program for the client within the state. This report shall be reviewed and updated every three months and a copy sent to the director. Each comprehensive assessment and report shall include identification of the services and supports needed and the timeline for identifying or developing those services needed to transition the consumer back to California.

10. Westside has provided DDS with all the statutorily-mandated information necessary to make a decision to fund claimant's placement at Monarch. Section 4519 contemplates that a regional center will provide DDS not only with an IPP reflecting the IPP team's determination of services and supports needed, but also with information concerning an SSRS search to attempt to identify options within California and information concerning any alternative options considered and the reason they will not meet the consumer's needs. In compliance with section 4519 and with the informational requirements set forth in DDS's August 2012 memorandum, Danneker provided a good deal of detail, not typically found in an IPP, in his funding request letters and accompanying documentation.

11. Claimant's IPPs do omit certain information one would expect them to contain, but the omissions in the 2011 IPP were cured in the 2012 IPP and the 2013 IPP. The omission in the 2013 IPP of an explicit request for funding from DDS was immaterial in light of other information provided to DDS in that 2013 IPP and in the other documentation, including Westside's letter asking for such funding. (Factual Findings 18, 19, 25-34.) DDS expressed a valid concern that information provided in support of a funding request, but not included within the IPP, might not reflect that the request and the

basis for the request was considered by the regional center's IPP team, which, along with the consumer, must participate in designing the services and supports the regional center will provide to the consumer under section 4620, subdivision (a). Nevertheless, the documentation, including but not limited to the 2013 IPP, establishes that the IPP team considered the matter, explicitly approved claimant's out-of-state placement, and found no appropriate and available in-state placements, rendering the IPP omissions inconsequential. The regional center's director substantially complied with the statutory requirements for DDS approval by providing, in supplemental documentation, all of the information required to determine whether an out-of-state placement is warranted. DDS's concern about whether the IPP team participated in Westside's decision having, therefore, been satisfied, DDS's continued insistence that the IPP itself must contain all the information necessary to support a funding decision—including all assessments, findings regarding facility credentialing, documentation of SSRS searches and other actions taken to find in-state placements, and the other material set forth in section 4519, subdivision (a), and in DDS's August 2012 memo—is impracticable and contrary to usual practice.

12. DDS's narrow interpretation of section 4519, subdivision (a), is also at odds with the Lanterman Act's remedial purposes. (See *Association for Retarded Citizens v. Department of Development Services* (1985) 38 Cal.3d 384, 391, 392; see also *Lande v. Jurisich* (1943) 59 Cal.App.2d 613, 617.) In effect, in failing to consider all of the information Westside provided, DDS has overstepped the bounds of its responsibilities, which have been delineated by the California Supreme Court:

First, the regional centers and DDS have distinct responsibilities in the statutory scheme: that of the regional centers is to provide each developmentally disabled person

with the services to which he is entitled under the Act; that of DDS is to promote the cost-effectiveness of the operations of the regional centers, but not to control the manner in which they provide services. Second, the Act defines a basic right and a corresponding basic obligation: the right which it grants to the developmentally disabled person is to be provided with services that enable him to live a more independent and productive life in the community; the obligation which it imposes on the state is to provide such services.

(*Association for Retarded Citizens v. Department of Development Services*, *supra*, 38 Cal.3d at p. 391.)

13. The Legislative protections embodied in a remedial statute such as the Lanterman Act cannot be frustrated or circumnavigated by narrow interpretation or insistence upon ministerial technicality. (*California State Restaurant Association v. Whitlow* (1981) 58 Cal.App.3d 340, 347; see also *Montessori Schoolhouse of Orange County, Inc. v. Department of Social Services* (1981) 120 Cal.App.3d 248, 256.) The wisdom in requiring a broad construction is apparent here, where for claimant an out-of-state placement is the only safe and appropriate option at this time.⁸

⁸ This case is distinguished from the *Samantha S. v. DDS* case (OAH No. 2011110426) cited by DDS. Unlike that case, here the 2012 and 2013 IPPs contained a plan for out-of-state placement, recommended that placement, and determined that there were no appropriate placements available in California.

14. DDS expressed valid concerns regarding budgeting and the difficulty of monitoring the quality of services claimant is receiving while in a facility outside California. Section 4519, as amended in 2012, reflects such concerns; it does not allow regional centers to purchase out-of-state services or placements when equal or comparable services or placements are available within the state.

15. But in this case budgetary concerns are by the demonstrated threat of harm claimant poses to himself and others. The parties do not dispute that claimant exhibits maladaptive and dangerous behaviors for which he needs an effective treatment program. The evidence on this record demonstrates that claimant's treatment must include the services offered by Monarch. Thus, both cost-effectiveness and the remedial purposes of the Lanterman Act are served with the appropriate placement of claimant at Monarch.

16. In order to satisfy DDS's concerns about monitoring, Westside must develop plans both for on-site monitoring and for claimant's eventual transition back to California. The evidence on the record suggests that Westside intends to timely comply with those requirements upon DDS's approval of funding, as contemplated under section 4519.

17. Even if, technically, Westside's requests did not entirely meet a procedural requirement of the Lanterman Act, it would be inequitable and contrary to the purpose of the Lanterman Act to deprive claimant of the timely delivery of services and supports his IPP team appropriately determined was warranted. It is the regional center's responsibility to convey funding requests to DDS, not the consumer's, and a consumer whose service needs are of the nature of claimant's in this case should not be deprived of services approved by an IPP-team, including those received through an out-of-state placement, where DDS has been provided with sufficient documentation to support a funding decision in accordance with the informational requirements of the Lanterman Act and the DDS memo governing funding requests.

18. The Lanterman Act places the burden of guarding against unfunded gaps in services with service agencies, not consumers. (Legal Conclusion 4.) DDS's denial letters provide no information concerning or suggestions for meeting claimant's needs for services and supports, as contemplated by section 4701; Dent testified that DDS relies on regional centers for expertise in this area. The denials resulted in delay that forced claimant's parents to act in concert with claimant's school district but without DDS participation to place claimant out of state, first in Texas and then at Monarch. Section 4646.4, which section 4519 invokes as a guideline for the appropriate development of IPPs, advises regional centers considering the appropriateness of an IPP to take into account the consumer's need for extraordinary care, services, supports, and supervision, and the need for timely access to care.

19. While the Lanterman Act does not specifically authorize retroactive reimbursement to families who prevail at fair hearing, it does not proscribe ALJs from awarding this remedy. In any event, in this case, retroactive funding is authorized under California Code of Regulations (CCR), title 17, section 50612, subdivision (b), which provides that authorization for funding shall be obtained in advance of providing the services, "except . . . [w]here the regional center determines that the services was necessary and appropriate." Westside did so determine.⁹ The evidence supports a finding that claimant was in crisis at the time he was placed out of state, and that his prolonged hospitalization prior to the placement was effective in addressing that crisis only so long as he remained in the hospital. DDS argues that for Monarch to qualify to be paid retroactively, it must have been previously vendored by Westside. DDS, however, is not

⁹ Westside's initial denial of claimant's request is irrelevant in light of subsequent developments.

paying Monarch retroactively. DDS is hereby required to reimburse claimant's parents for claimant's placement at Monarch retroactive to September 5, 2012 at what Westside described as "the 4I rate (minus SSI)," for services other than those paid for by claimant's school district. It is claimant's parents who were forced to act to ensure that claimant timely received the services and supports that the IPP team determined were appropriate.

ORDER

The appeal by claimant is granted. DDS shall reimburse claimant's parents for the cost of claimant's placement at the Monarch Center for Autism in Cleveland, Ohio, retroactive to September 5, 2012, at the rate identified by Westside as the 4I rate, less SSI, for only those costs not funded by claimant's school district. DDS shall continue to fund that placement subject to any periodic review mandated under the Lanterman Act.

DATED: January 13, 2014

A handwritten signature in black ink, appearing to read "Howard W. Cohen", is written over a horizontal line.

HOWARD W. COHEN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision; all parties are bound by this decision. Any party may appeal this decision to a court of competent jurisdiction within 90 days.