

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

NORTH BAY REGIONAL CENTER,

Service Agency.

OAH No. 2014060686

DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on July 23, 2014, in Santa Rosa, California.

G. Jack Bengé, Attorney at Law, represented North Bay Regional Center (NBRC), the service agency.

Claimant was represented by his parents.

The matter was submitted for decision on July 23, 2014.

ISSUE

Has NBRC properly denied claimant's request to contract with Lifehouse for supported living services?

FACTUAL FINDINGS

1. Claimant is 23 years old and is eligible for regional center services based upon his diagnoses of autism and a seizure disorder. Claimant is non-verbal, has challenging behavioral issues, and is very resistant to changes in routine.

2. Claimant attended the Higashi School in Boston, Massachusetts from 2001 until December 2012. He has spent school breaks living with his parents. Because his parents live in the Golden Gate Regional Center (GGRC) catchment, he was a consumer of GGRC during those years. In August 2012, GGRC and claimant's family met to develop claimant's Individual Program Plan (IPP). The IPP was finalized on June 17, 2013. Claimant's IPP identified long range goals, which included living in a supportive environment where his needs and desires are respectfully met. Claimant's IPP is currently being revised.

3. Claimant has resided at Sweetwater Spectrum, a residential community built for adults with autism, since early 2013. Claimant's father is one of the founders of Sweetwater Spectrum, which is located in the NBRC catchment. Following claimant's move to the NBRC catchment area, his service coordination was transferred from GGRC to NBRC.

4. Regional center consumers who decide to live independently, rather than with family or in a facility, are entitled to supported living services. Supported living services are services and supports provided by a vendor, paid for by the regional center, that support consumers' efforts to live in their own homes, participate in community activities to the extent appropriate to each consumer's interests and capacity, and realize their individualized potential to live lives that are integrated, productive, and normal. (Cal. Code Regs., tit. 17, § 54302, subd. (a)(71).)

5. Before an agency may provide services to a regional center consumer, the agency must apply to be "vendorized." Vendors who are vendorized by one service agency may provide services to a consumer of another service agency through a process referred to as courtesy vendorization. Regional centers often provide services through courtesy vendorization when a consumer is being transferred from one catchment area to another, in order to ease the transition for the consumer.

In addition, when a service agency is unable to locate appropriate services in its catchment area, it might send its consumer to another catchment area to receive those services through a courtesy vendorization agreement with the vendoring service agency. For example, if no day program is available to provide services to a consumer, a service agency might transport its consumer to another area to receive appropriate services through a courtesy vendorization.

Some regional centers will allow another type of courtesy vendorization. If the service agency does not have a contract with a vendor for needed services, it allows an agency that has been vendorized by another regional center to enter its catchment area to provide services to one of its consumers.

6. Service providers must be vendorized by the regional center in whose catchment area the agency's business office is located, known as the vendoring regional center. Once vendorized, the service provider may be utilized by other regional centers known as "user" or "utilizing" regional centers, as well as by the vendoring regional center. California Code of Regulations, title 17, section 54302, subdivision (a)(77), defines "Vendoring Regional Center" as the regional center in whose service catchment area the vendor is located. California Code of Regulations, title 17, section 54302, subdivision (a)(73), defines "User Regional Center" or "Utilizing Regional Center" as any regional center which utilizes a service within the vendoring regional center's catchment area.

7. When claimant was preparing to move to Sweetwater Spectrum and NBRC was preparing to assume the role as his service agency, his parents requested that Lifehouse provide his supported living services. Lifehouse is a supported living services provider located in the GGRC catchment region and is vendorized by GGRC. Claimant's parents were familiar with Lifehouse because its executive director had assisted them in planning Sweetwater Spectrum, and because several other residents at Sweetwater

Spectrum receive supported living services from Lifehouse through a courtesy vendorization.

8. NBRC advised claimant's parents that it preferred that supported living services be provided by an agency located in its catchment area. When a vendor is located in its catchment area, the service agency has a contract directly with the vendor, which allows the service agency to better monitor the program, and issue a plan of correction if necessary. When a service agency provides services through courtesy vendorization, the user service agency does not have a contract with the vendor. In addition, the rates paid by the user service agency are not always the same as the rates paid by the vendoring agency.¹

9. After interviewing the supported living service providers vendorized in NBRC's catchment area, the family reluctantly agreed to try Bayberry, an agency that will provide services within NBRC's rates. Bayberry began to provide supported living services to claimant in January 2013.

10. Over the past 18 months, claimant's family has become dissatisfied with Bayberry's services. They report that claimant has not been provided with sufficient community activities, which he enjoyed while at the Boston Higashi School.

¹ For example, GGRC's maximum median rate for supported living service providers is \$17,000 per month, while NBRC's maximum median rate for supported living providers is \$7,300 per month. These monthly rates were frozen in 2008, and regional centers must apply to the Department of Developmental Services to request an exception in order to pay more than the rate assigned to that particular service agency. (Welf. & Inst. Code, § 4648.4.) An exception will be approved if the service agency demonstrates that the increase is necessary to protect the consumer's health or safety.

In addition, a Bayberry staff member has been investigated for committing theft by using claimant's debit card to withdraw cash. Criminal charges are currently being investigated against the staff member by the district attorney's office. Upon learning of these allegations, the staff member was terminated by Bayberry.

Claimant's parents report that on another occasion, a Bayberry staff member was verbally abusive to claimant. That employee was also terminated by Bayberry.

In addition, Bayberry has experienced a higher staff turnover rate than claimant's family is comfortable with, and they find the training of new staff members to be insufficient. Moreover, the staffing changes have been upsetting to claimant.

11. Bayberry has not filed any unusual incident reports involving claimant with NBRC. California Code of Regulations, title 17, section 54327 requires a vendor to report any incidents involving reasonable suspicions of physical, emotional or fiduciary abuse to the regional center.

12. Claimant's behavioral issues have worsened over the past year. Claimant is currently acting out by, for example, urinating in his bed, destroying property, committing self-injurious behaviors, and harming staff members. Claimant's parents attribute his deterioration to the lack of training of Bayberry staff members, the high staff turnover rate, and the lack of sufficient community activities provided to claimant.

13. NBRC is very concerned about the allegations involving Bayberry's staff, and the fact that the incidents were not reported. NBRC takes these matters seriously and plans to investigate the allegations. NBRC does not oppose changing supported living services from Bayberry to an appropriate agency that meets the needs and choices of claimant, his IPP and his health and safety.

14. Claimant's parents again requested that Lifehouse be hired as claimant's supported living services provider. Lifehouse has been in existence for more than 50 years, has a large, experienced staff, an in-house behavior trainer, many clients with

autism, significant fundraising ability, and is a non-profit. Based on his knowledge of Lifehouse, claimant's father determined that only Lifehouse could provide the level of care that claimant needs. In claimant's father's opinion, because claimant has such significant needs, it is not possible for a supported living services agency to provide appropriate services at the rate NBRC pays, especially if the agency is a for-profit business that does not engage in fundraising.

15. NBRC began to investigate the feasibility of using Lifehouse to provide claimant's supported living services through a courtesy vendorization. Lifehouse currently provides supported living services to a group of other residents at Sweetwater Spectrum. While it was looking into a courtesy vendorization, an NBRC supervisor discovered that some regional centers interpret courtesy vendorization differently. NBRC had been using agencies vendorized in other catchment areas in three different scenarios: 1) to provide services to consumers moving from one catchment area to another; 2) for services rendered to its consumers outside their area; and, 3) to provide its consumers with services within its catchment area. NBRC learned, however, that some regional centers do not allow outside vendors to provide services within their catchment area because they do not have a contract with the vendor and therefore cannot provide sufficient oversight for their consumers.

After careful consideration, the NBRC supervisory team determined that it agreed with this approach, and decided to decline to use vendors to provide services within its catchment area that are not vendorized by NBRC, unless the consumer is in the process of transitioning from one regional center to another. NBRC therefore asked Lifehouse to apply to be vendorized in its catchment area in order to provide services to claimant; however, Lifehouse declined.

16. NBRC then provided claimant's father with a list of approved vendors in the NBRC catchment area. NBRC also asked claimant's parents to sign releases enabling

claimant's service coordinator to contact its vendors to investigate their ability to provide appropriate services to claimant. Claimant's parents preferred to perform their own investigation. Claimant's father contacted all of the providers on NBRC's list. Of the list provided by NBRC, only several vendors provide supported living services in Sonoma, where claimant resides. Of those, claimant's father narrowed the list to two vendors based on his conversations with the vendors and claimant's needs. Claimant's father testified that he interviewed employees of these two agencies and found that they are for-profit companies and lack an autism training module. In addition, he found that they have only a small number of autism clients. For a variety of reasons, claimant's father determined that none of the vendors on the list was appropriate to serve claimant.

17. NBRC believes that it can provide appropriate supported living services for claimant performed by an agency vendorized in its catchment area. An NBRC supervisor testified that she has never been unable to provide appropriate services with the vendors available in the NBRC catchment. Sometimes a negotiated rate is required, and an exception is obtained. Other times NBRC provides additional services such as behavioral therapy or personal assistant hours, in order to meet the needs of the consumer. NBRC is requesting the opportunity to put services in place with its own vendors; it is willing to apply for a rate exception if necessary.

Claimant's family is requesting that Lifehouse be hired because the family believes that it is the only agency in the area capable of providing appropriate care for claimant.

LEGAL CONCLUSIONS

1. In the Lanterman Developmental Disabilities Services Act, the State of California accepts responsibilities for persons with developmental disabilities. (Welf. &

Inst. Code, § 4500 et seq.²) The Lanterman Act and the regulations adopted to implement the act govern this matter. A state level fair hearing is available to service agency consumers to determine the rights and obligations of the parties. Claimant properly and timely requested a fair hearing and therefore jurisdiction was established.

2. Where a claimant seeks to establish the propriety of a new service, the burden is on the claimant to demonstrate by a preponderance of the evidence that the service agency's denial of that service was incorrect. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) Here, claimant has the burden to establish by a preponderance of the evidence that NBRC has improperly denied the request to change supported living service providers to an appropriate agency that can meet his needs and choices, IPP, safety and health.

3. 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." (§ 4501.) The purpose of the scheme is twofold: (1) to prevent or minimize the institutionalization of persons with developmental disabilities and their dislocation from family and community and (2) to enable persons with developmental disabilities to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives. (§§ 4501 & 4685; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

4. The Department of Developmental Services is the state agency charged with implementing the Lanterman Act. It contracts with regional centers that are charged with the responsibility of providing developmentally disabled individuals with

² All subsequent statutory references are to the Welfare and Institutions Code.

access to services and supports best suited for them. (§ 4620, subd. (a).) To determine how a consumer is to be served, regional centers conduct a planning process that results in the development of an IPP. (§ 4646.) The IPP is developed by an interdisciplinary team with the participation by the consumer and/or his or her representative. Among other things, the IPP must set forth goals and objectives for the consumer, contain provision for the acquisition of services, and reflect the consumer's desires and preferences. (§§ 4646 & 4646.5.)

5. The types of services and supports that a regional center must provide are "specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives." (§ 4512, subd. (b).) Services and supports include supported living services. The determination of which services and supports the regional center shall provide is made "on the basis of the needs and preferences of the consumer . . . [and] shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option." (*Ibid.*) As the California Supreme Court recognized in *Association for Retarded Citizens, supra*, 38 Cal.3d at page 390, while a regional center has "no discretion at all in determining whether to implement" an individual program plan, it has "'wide discretion in determining how to implement" an individual program plan.

The Lanterman Act, thus, establishes that a consumer's preferences are to be given consideration in a regional center's decision-making processes in providing the consumer with required services. But other factors, such as cost effectiveness, are to be included in the regional center's ultimate determination.

6. In this matter, claimant's parents are extremely devoted to claimant's welfare and have demonstrated an extraordinary commitment to their son as well as other children and adults with autism. They are justifiably concerned with the issues that have arisen with claimant's current supported living services provider, and NBRC has made a commitment to investigate those issues and has agreed to a change in service providers. Claimant's parents understandably demand competent and appropriate supported living services for claimant. They have determined that Lifehouse is the only provider capable to rendering appropriate services, and point to language in the Lanterman Act allowing for a claimant's informed choice as authority to resolve this issue in favor of Lifehouse.

NBRC, however, has not been given authority by claimant's parents to arrange for appropriate supported living services. NBRC asserts that given the opportunity it will be able to provide appropriate services from one of its vendors at a cost-effective rate.

7. Claimant's individualized preferences cannot unreasonably hinder the ability of a service agency to provide supported living services in manner consistent with cost-effective use of public resources. (Welf. & Inst. Code, §§ 4689, 4512, subd. (b), 4646, subd. (a); Cal. Code Regs., tit. 17, §§ 58611, and 58617.) On the other hand, there is no authority for the proposition that a service agency can refuse to use a vendor outside of its catchment area if it is unable to provide appropriate services through vendors within its area. Indeed, the regulations provide for regional centers to use any agency that has been vendorized by a service agency. (Cal. Code Regs., tit. 17, § 54334, subds. (a), (b); § 54302, subds. (a)(73), (a)(77).) A courtesy vendorization arrangement may not be ideal because of the lack of a contract between the parties, and it may not be feasible because of a rate differential; however, at times it may be necessary.

In this matter, claimant's appeal is premature because NBRC has not been given the opportunity to arrange for appropriate services after learning about the problems

encountered with the current provider. For this reason, claimant's appeal must be denied.

ORDER

Claimant's appeal is denied.

DATED: August 1, 2014

JILL SCHLICHTMANN

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.