

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request
of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2014070590

DECISION

This matter came on for noticed hearing on August 21, 2014, at Culver City, California before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California. Claimant was represented by his father. (Titles are used to protect confidentiality.) Westside Regional Center (WRC) was represented by Lisa Basiri, Fair Hearing Coordinator, WRC.

Oral and documentary evidence was presented and the matter was submitted for decision on August 21, 2014.

ISSUE

The parties agreed to the following statement of the issue: Should the Service Agency reimburse Claimant's parents for the cost of Claimant's attendance at the Step By Step program five days per week from July 13 to August 22, 2014?

FACTUAL FINDINGS

The Administrative Law Judge finds the following facts:

1. Claimant is a four-year-old boy eligible for services from WRC based on his provisional diagnosis of Autism Spectrum Disorder and global developmental delays.

2. Due to Claimant's medical conditions and delays at birth, he has progressed slowly. Claimant began receiving services at Step by Step (SBS) at about seven months of age. He enjoys his services from SBS and has made much progress. WRC agrees that Claimant is benefitting from the service. As discussed in more detail below, Claimant's regular SBS program changes during the summer and his parents requested that WRC pay for Claimant to attend the SBS summer program.

3. On June 30, 2014, WRC sent a Notice of Proposed Action and a letter to Claimant's parents denying the request to fund the summer session at SBS because the service is coded under "camping/Summer services" and that WRC'S authority to authorize camping services was suspended as of July 1, 2009, under the provisions of Welfare and Institutions Code section 4648.5, subdivision (a).¹ (Ex. 2.) Claimant's father submitted a Fair Hearing Request dated July 1, 2014. (Ex. 2.)

4. Claimant's most recent Individual Program Plan (IPP) followed a meeting on October 18, 2013. (Ex. 3.) Among other things, it indicates that Claimant and his twin brother live at home with their parents and that their mother works full time. WRC was to continue funding for SBS to provide social skills training through September 30, 2014, pending a progress report from SBS. The IPP does not state the number of hours to be funded for SBS services. WRC also provided funds for seven hours per month of respite. These are the only services for Claimant funded by WRC. During the last school year

¹ All further statutory references are to the Welfare and Institutions Code except where noted.

Claimant attended a preschool special day class through the Santa Monica Malibu Unified School District and received speech and occupational therapy from the school district under an Individualized Education Plan (IEP).

5. The following relevant information was provided through documents and testimony. Claimant's father works part time, three days per week, 4.5 hours per day. (The IPP states incorrectly that the father does not have outside work.) Claimant began preschool at age three. Prior, his SBS services were Monday to Friday, 8:00 to 11:00 a.m. After school began, Claimant's SBS services have been provided every Saturday for 1.5 hours. The SBS progress report from February 2014 includes incorrect and inconsistent information. It incorrectly states that Claimant's services are provided three hours per day each weekday. The report later discusses Goal #3 and recommends that Claimant participate in the SBS social skills class one time per week. In the last section on recommendations, the report states that the SBS program consists of two sessions per week, two hours each, for six months, and recommends that funding be provided from March 1 through September 30, 2014.

6. In other words, the IPP has incorrect information about father's work, and other items discussed during the hearing, and the SBS progress report has inconsistent information about the number of hours and days of the week that Claimant receives services. Most accurate is father's testimony that, since starting preschool, Claimant receives SBS services for 1.5 hours every Saturday, funded by WRC. WRC's most recent funding for SBS is at the rate of ten hours per month from September 1, 2013, through September 30, 2014.

7. Based on father's testimony that Claimant attends SBS for 1.5 hours each Saturday while school is in session, it appears that not all of the hours of authorized services by SBS (10 hours per month) are used by Claimant.

8. During school breaks, Claimant's parents have paid for Claimant and his brother to attend SBS during weekdays. Claimant receives extended school year services from the school district, however the school district does not provide any services from July 13 to August 22, 2014, the period set forth in the Issue statement above. Claimant's parents paid for Claimant to attend SBS five days per week, four hours per day, from July 13 to August 22, 2014.

9. In the letter accompanying the Notice of Proposed Action, WRC contends that the SBS program during this period is coded under camping, however it submitted no current evidence supporting this contention. Ms. Basiri testified that she was more familiar with SBS programs five or six years ago than she is now, and that while the summer program was similar to the program the rest of the year, there were some differences, such as the summer program including swimming and other recreational activities not included in SBS's non-summer program. Ms. Basiri also recalled that the SBS summer program used some of the SBS faculty and personnel and that SBS did not run its regular program during the summer. SBS provides numerous types of services and is a valued vendor of WRC.

10. WRC contends that its ability to fund the SBS summer program is suspended by the operation of section 4648.5, subdivision (a), and that funding is not supported by its service policy for day care or extended school year services. (Ex. 8.) Under that policy, parents are required to pay for the type of day care or after school care as would normally be provided to care for a child without disabilities and WRC may pay for any excess cost. There was no evidence of these costs, so no determination can be made if the day care policy or extended school year policy applies to Claimant.

11. WRC is required to send "adequate notice" of the denial of a request for services, and that notice must include a reference to the specific statute or policy that supports the denial. (Sections 4701, subd. (d), and 4710, subd. (d).) Here, WRC's letter

and Notice of Proposed Action refer only to the statute suspending funding for camping, section 4648.5, subdivision (a), and make no reference to the service policy for day care or extended school year services. Therefore, WRC has not given proper notice relating to that policy and cannot rely on it at the hearing as a basis to deny funding.

12. Both the statutes and the service policy refer to an exemption that may be granted "in extraordinary circumstances" when "the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental needs, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs." (Service policy, ex. 8; see also summary of rights, ex. A, and section 4648.5, subd. (a).) Claimant's father contends this exemption should be applied. WRC does not believe an exemption should be granted for Claimant.

13. In his testimony, Claimant's father added his concern that Claimant's abilities will backslide when there are no services provided over the summer and that the staff at SBS is particularly capable in working with Claimant. Due to Claimant's condition and delays, and his progress to date, father believes that Claimant will take several years to catch up in his cognitive, social, physical and other life skills and abilities. Claimant is in need of structure during his playtime and needs to be challenged to demonstrate the skills he has acquired, and to acquire new skills. SBS provides a valuable service for Claimant, who functions well in the program and is making progress. WRC agrees that Claimant has benefited from SBS services and that the presently authorized services meet Claimant's needs.

14. There was insufficient evidence to establish that SBS summer services is a "critical means" for ameliorating the cognitive or psychosocial effects of Claimant's developmental needs, or that the SBS summer services are necessary to enable Claimant to remain in his home and no alternative service is available to meet Claimant's needs.

However, the exemption also applies if the SBS summer services are the “primary means” for ameliorating the cognitive or psychosocial effects of Claimant’s developmental needs. “Primary means” is not defined in the statute. By reference to standard resources (Black’s Law Dict. (rev. 4th ed. 1968, p. 1354) and Webster’s Seventh New Collegiate Dict. (1969, p. 675)), “primary” in this context refers to first in rank, importance or value, or principal.

15. During the period defined in the Issue, from July 13 to August 22, 2014, Claimant receives no services from his school district and is authorized to receive the regular SBS program and respite from WRC. During this period, SBS services are the primary – indeed, the only – means for ameliorating the cognitive or psychosocial effects of Claimant’s developmental needs. Further, the SBS summer services are based primarily on the services provided to Claimant in the SBS program he attends at other times of the year, which are funded by WRC. Claimant qualifies for the exemption from the suspension of funding in section 4648.5, subdivision (a). This is a cost efficient use of WRC funds because, in part, SBS was already authorized by WRC to provide more hours of services than it provided to Claimant during the period in issue.

16. Claimant’s father will be given 30 days to provide to WRC proof of the amounts that were paid for Claimant to attend the Step By Step program five days per week from July 13 to August 22, 2014. WRC shall have a reasonable time thereafter, not to exceed 45 days, to reimburse Claimant’s father.

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LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judges makes the following legal conclusions:

1. Proper jurisdiction was established by virtue of WRC's denial of the request for funding and the Fair Hearing Request on behalf of Claimant. (Factual Findings 1 and 3.)

2. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act²) requires otherwise. (Evid. Code, § 115.) The burden of proof is on the person whose request for government benefits or services has been denied. (*See, e.g., Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) Claimant has the burden of proof in this matter.

3. Portions of the Lanterman Act are referenced below relating to the family's role in designing and implementing the IPP, and the requirement that services be cost effective.

4. Section 4646 provides, in part:

"(a) 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."

5. Section 4647, subdivision (a), provides:

² Code section 4500 et seq. is known as the Lanterman Developmental Disabilities Services Act (Lanterman Act).

"Pursuant to Section 4640.7, service coordination shall include those activities necessary to implement an individual program plan, including, but not limited to, participation in the individual program plan process; assurance that the planning team considers all appropriate options for meeting each individual program plan objective; . . . and monitoring implementation of the plan to ascertain that objectives have been fulfilled and to assist in revising the plan as necessary."

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6. Services and supports provided by a regional center shall be flexible and individually tailored to the consumer and family. The regional centers must consider whether the consumer and his family are satisfied with the services being offered, and whether reasonable progress is being made. (Section 4648, subds. (a)(2) and (a)(7).)

7. It is the intent of the Legislature that regional centers provide family support services that respect and support the decision-making authority of the family, and are flexible and creative in meeting the unique and individual needs of families as they evolve over time. (Section 4685, subd. (b).)

8. The Lanterman Act also includes the direction to WRC to accomplish its goals in a cost-effective manner. (See, e.g., sections 4512, subd. (b), 4646, 4648, subd. (a)(11), 4651, subd. (a), 4659, 4697 and 4685.)

9. Funding for certain services was suspended, and an exemption was created, under section 4648.5, which states:

"(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional center's authority to purchase the following services shall be suspended pending implementation of the Individual Choice Budget and certification by the Director of Developmental Services that the Individual Choice Budget has been implemented and will result in state budget savings sufficient to offset the costs of providing the following services:

"(1) Camping services and associated travel expenses.

"(2) Social recreation activities, except for those activities vendored as community-based day programs.

"(3) Educational services for children three to 17, inclusive, years of age.

"(4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

"(b) For regional center consumers receiving services described in subdivision (a) as part of their individual program plan (IPP) or individualized family service plan (IFSP), the prohibition in subdivision (a) shall take effect on August 1, 2009.

"(c) An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs."

10. Under the language of section 4648.5, subdivision (a)(1), the summer services provided by SBS are the type of camping services for which funding can be suspended.

11. Claimant's father submitted sufficient evidence to qualify for the exemption under the language of section 4648.5, subdivision (c). It was established that the summer services of SBS is a primary means for ameliorating the cognitive or psychosocial effects of Claimant's disabilities.

12. Under all of the circumstances presented, WRC may not suspend funding for the summer services provided by SBS, and Claimant's father may submit evidence of the actual costs for reimbursement by WRC.

ORDER

WRC's decision to deny reimbursement to Claimant's parents for the cost of Claimant's attendance at the Step By Step program five days per week from July 13 to August 22, 2014, is overruled. Claimant's father has 30 days to provide to WRC proof of those costs. WRC shall have a reasonable time thereafter, not to exceed 45 days, to reimburse Claimant's father.

DATED: September 4, 2014.

_____/s/____

DAVID B. ROSENMAN

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.