

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

CLAIMANT,

and

TRI-COUNTIES REGIONAL CENTER,

Service Agency.

Case No. 2014090391

DECISION

Administrative Law Judge (ALJ) David B. Rosenman heard this matter on November 12, 2014, in Santa Barbara, California.

Donald R. Wood, Esq., represented Tri-Counties Regional Center (TCRC or Service Agency). Claimant was represented by Rick Seward, personal representative. Claimant's mother was also present. (Titles are used to protect confidentiality.)

Evidence was received and the matter argued. The record remained open for receipt of briefs, which were filed on December 9, 2014, and marked for identification as follows: TCRC brief, exhibit L; and Claimant's brief, exhibit 10. The record was closed and the matter was submitted for decision on December 9, 2014.

ISSUE PRESENTED

Claimant presently is in a program in Kansas funded by the Santa Barbara Unified School District, which has determined that Claimant has met her goals there. Claimant would like to enter The Help Group--Project Six unit in the Los Angeles area.

Is TCRC obligated to pay for Claimant to receive residential services?

FACTUAL FINDINGS

1. Claimant is a 15 year old female who has a qualifying diagnosis of "fifth category," i.e., someone who needs services similar to someone with mental retardation.¹ She has additional diagnoses including, but not limited to, Pervasive Developmental Disorder, NOS; Tourette's syndrome; Attention Deficit Hyperactivity Disorder, combined type; and mild Intellectual Disability.

2. The present dispute relates to the circumstances surrounding Claimant's special education services, her readiness to be transferred from an out-of-state placement, the search for a program to meet her needs, and the residential placement to meet her non-education needs.

3. Claimant and her mother moved to California in 2006. Claimant received special education services from the Montecito Union School District, where she attended grades 2 through 6. Although there was much evidence related to Claimant's behaviors and challenges during her schooling from grade 2 to present, only a summary is necessary to decide the issue presented in this matter. After completing sixth grade, Claimant had an out-of-home placement through TCRC at Turning Point of Central California in its Crisis House in August 2011. While she was there, Claimant's educational services were the responsibility of the Atascadero Unified School District. Services were provided in the form of Home/Hospital services (one-to-one at home with a teacher) of

¹ Eligibility criteria for services from regional centers are found in the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq. All further statutory references are to the Welfare and Institutions Code unless otherwise noted. Four specific conditions allow for eligibility, as well as another, less specific category, referred to generally as the "fifth category." In May 2014, "mental retardation" was re-named "intellectual disability."

five hours per week. By October 2011 Claimant moved into Turning Point's step-down facility, Prairie House group home. At that time her educational services became the responsibility of the Paso Robles Joint Unified School District (Paso Robles USD).

Claimant's Home/Hospital services continued. On January 2, 2012, Claimant began as a 7th grade student at Daniel Lewis Middle School, receiving special education services. She progressed to the 8th grade. However, her problem behaviors were such that she was suspended at least twice and, after a suspension on February 20, 2013, she again received Home/Hospital services.

4. Paso Robles USD determined that it was unable to offer its own special education services to Claimant. A non-public school program was approved and Claimant was enrolled at Lakemary Center in Kansas as of August 19, 2013. Lakemary provides both educational and residential service in a restrictive environment. Claimant's mother resided temporarily in Kansas to assist. Claimant responded well to the program and, around March 2014, it was agreed that she could transition to a less restrictive environment.

5. Although it was anticipated that Claimant would eventually reside again with her mother in Santa Barbara, it was determined that she should first obtain transitional residential services. At a time not established by the evidence, educational services became the responsibility of the Santa Barbara Unified School District (SBUSD), which funds Claimant's services at Lakemary. Claimant continues to receive services at Lakemary while other arrangements can be identified and established. There is no evidence of how long this arrangement will continue.

6. SBUSD determined that it could provide special education services through its program at San Marcos High School, along with other services and supports. SBUSD made an offer to provide this program and services, in what is referred to under the applicable education laws as a free appropriate public education (FAPE). Claimant's

mother is considering whether to accept the offer of FAPE, but is concerned over the placement of Claimant in an appropriate residential setting until it is safe for Claimant to return to her mother's home.

7. For the reasons discussed in more detail below, there are no residential placements presently available that TCRC would fund. Claimant's mother continues to negotiate with SBUSD, but has not filed the papers that would appeal the SBUSD offer of FAPE and lead to a hearing, if necessary. Although Claimant's mother stated that SBUSD has offered to fund for Claimant to be placed at The Help Group, discussed in more detail below, for a period of six months, she was not sure if that offer included residential services as well as special education services through a non-public school.

8. Much evidence was introduced concerning efforts by TCRC to identify an appropriate residential placement for Claimant. Again, for purposes of deciding the issue presented in this matter, only a summary is necessary. Numerous placements were considered but were unavailable, for one reason or another. Only one placement was available, at the Cabales Small Family Home, which initially indicated it could take Claimant. Claimant's mother was reasonably concerned about whether the Cabales Home was an appropriate placement, and asked TCRC for more information. TCRC suggested that she speak to the administrator, Cynthia Cabales.

9. Claimant's mother had a telephone conversation with Cynthia Cabales and asked about the other residents of the home and the nature of the behavioral and mental health supports available at the home. Although Claimant's mother had reasonable concerns about these elements, Cynthia Cabales believed that Claimant's mother was inquiring into confidential information about the conditions of the other residents, and wanted to participate in services and supports for Claimant at a level that Cabales would not accept. Cynthia Cabales informed TCRC in a letter (Exh. D) that she was interested in serving Claimant but believed that Claimant's mother was asking

improper questions and was going to potentially interfere with services. Cabales Home then declined to consider Claimant as a possible resident. TCRC did not tell Claimant's mother the reason that Cabales Home declined to accept Claimant. Rather, TCRC allowed Claimant's mother to believe that the rejection was due to a problem with paperwork relating to Claimant's educational services. The Cabales Home no longer has a vacancy.

10. Claimant's Individual Program Plan (IPP) includes, among other things, elements of parent involvement and family reunification, stating "It is important that [Claimant's mother] be an important part of this [residential] team. She . . . should be involved in important decisions regarding [Claimant]." (Exh. I.) Based on the letter from Cynthia Cabales, it appears that TCRC and Cynthia Cabales did not communicate or work together with Claimant's mother to try to implement these goals in a manner that would not alienate Cynthia Cabales and would have maximized the potential that Claimant could be placed at the Cabales Home.

11. Much evidence was introduced concerning the nature of Claimant's behaviors and the underlying causes or conditions. Again, it is not necessary to go into detail for purposes of deciding the issue presented in this matter. Claimant's behaviors and underlying causes are complex and unique, and it takes time and effort to effectively deal with her. A Comprehensive Assessment prepared by TCRC dated June 6, 2014 (Exh. 6, H) indicates that a current barrier to community placement is that Claimant needs residential placement close to Santa Barbara "with a skilled program to support behavioral and social/emotional needs. . . . The staff should be well trained in positive behavior supports and understanding the complexities of an atypical young adolescent. The program should include a strong mental health component." (*Id.*, at pp. 9-10.)

12. Claimant's mother identified The Help Group as a possible resource for services. The evidence includes written materials (Exh. 8) related to The Commons, a

therapeutic residential program operated by The Help Group. The Commons is located in Van Nuys, California. The materials state that, during the admissions process, the resident will be assessed for one of four academic programs which are non-public schools operated by The Help Group. Claimant's mother testified that The Help Group operates nine non-public schools. One attractive feature to Claimant's mother is that the educational placement can be adjusted depending on Claimant's needs and her reaction to any particular educational placement. Exhibit 8 also includes information about Project Six/The Commons (Project Six). Claimant's mother stated Project Six has agreed to accept Claimant, and she would like Claimant to receive residential services from Project Six. The Help Group will not accept Claimant unless she utilizes both its non-public educational services and its residential services, in the form of Project Six. Project Six is a "24-hour residential treatment program that incorporates special education, mental health support, family support, specialized groups and recreational programming into the residential treatment milieu." (Exh. 8.) From the totality of the evidence, Project Six is apparently a specific residential program operated by The Help Group. Claimant's mother testified that the non-public school was a fifteen minute bus ride from the Project Six residence, but it is unclear to the ALJ where the Project Six residential program is located or which particular school was being referenced.

13. Based on its location, The Help Group is within the catchment area of the North Los Angeles County Regional Center (NLACRC). The Help Group has not been approved by NLACRC as a vendor for the Project Six program. There was testimony about Project Six's efforts to obtain approval as a vendor, NLACRC's response, and Project Six's attempts to receive a waiver of certain requirements. However, this evidence is at least second-hand hearsay and suffers from lack of specificity and foundation. Again, the details are not as important as the evidence that established that Project Six has not been approved by NLACRC as a vendor. Project Six is licensed

through the Department of Social Services as a group home with a capacity of 17 residents.

14. The cost for Claimant to attend Project Six is over \$8,500 per month. Under the present rates, TCRC pays a Level 4D group home, like Cabales Home, about \$3,800 per month, and Level 4I group homes about \$5,000 per month. Level 4I is the type of group home that has the highest level of services for placement of a regional center consumer in a group home.

15. The parties raise several contentions, only some of which require comment. Claimant makes two contentions that are supported by the facts: TCRC has been unable to identify a residential program, other than Cabales Home, that can meet Claimant's needs, has availability for Claimant, and which TCRC is willing to fund; and Claimant's IPP goals and her rights under the Lanterman Act to be placed in the least restrictive setting are not being addressed under the current circumstances. Claimant also contends that other provisions of the Lanterman Act should override section 4648 and require placement of Claimant at Project Six to be funded by TCRC.

16. Among other things, TCRC contends that it cannot approve placing Claimant at Project Six because Project Six is precluded under the language of section 4648, subdivision (a)(9)(B), discussed in more detail below. In the alternative, TCRC contends that the "emergency circumstances" portion of that subdivision should not apply, as the emergency is of the making of Claimant's mother due to the reaction of the Cabales Home to mother's inquiries.

17. TCRC contends Project Six is not a less restrictive setting and that it is not cost effective. Claimant contends that Project Six is a less restrictive setting and that, as there are no other residential options ready to accept Claimant, no cost comparison can be made. Claimant is correct as to the cost effectiveness issue. Whether Project Six is a "less restrictive" setting cannot be determined on the limited evidence presented at the

hearing. While there was some evidence comparing aspects of the two, such as the type of locks, the size and nature of the dormitory setting of the residents, the inclusion of the school on the grounds (Lakemary) as opposed to a short bus ride away (The Help Group), many other important aspects should be examined for such a determination to be competently made. There was insufficient evidence for a competent comparison to be made. Further, it is not necessary to make such a comparison to determine the issue in this matter.

18. TCRC's contention that SBUSD should fund the residential placement is beyond the scope of the issues and jurisdiction in this matter. SBUSD would be a necessary party for that determination to be included here. Similarly, the issue of whether San Marcos High School is an appropriate setting is beyond the scope of the issues and jurisdiction in this matter.

LEGAL CONCLUSIONS

1. Code section 4501 states the purpose of the Lanterman Act.

"The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. [¶] An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities."

2. Several sections of the Lanterman Act are instructive here, relating to services and the process whereby a consumer's Individual Program Plan (IPP) is developed and implemented. Section 4512, subdivision (b), defines "services and supports" as:

"[S]pecialized 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. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, 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"

3. Section 4646, subdivision (a), provides in part:

"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."

4. A regional center's responsibilities to its consumers are set forth in sections 4640 through 4659. The process for identifying the need for services and for providing funding for services by regional centers is generally set forth in sections 4646 and 4648.

5. Several sections of the Lanterman Act address the requirement that regional centers must rely upon generic resources to fund for services before the regional center becomes obligated to do so. See, for example, sections 4659, subdivision (a)(1), 4648, subdivision (a)(8), and 4646.4, subdivision (a)(1). More specifically, section 4648, subdivision (a)(8) provides that, in securing the services needed to achieve the goals in an IPP, a regional center's "funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." As amended in 2009, section 4659, subdivision (a)(1), directs regional centers to "identify and pursue all possible sources of funding," including school districts.

6. Services provided must be cost effective (§ 4512, subd. (b)), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, e.g., §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) Under section 4685, a regional center is to provide services in the "most cost-effective and beneficial manner" and any expenditure should be accomplished in the "most cost-effective" way.

7. TCRC relies upon the limitations in section 4648, subdivision (a)(9)(B), in support of its decision that it cannot fund for services by Project Six. The specific language is set forth below. In summary, the subdivision provides that a regional center cannot purchase residential services from certain facilities licensed by the Department of Social Services if the facility has a licensed capacity of 16 or more. Numerous exceptions are listed. The evidence did not establish that Project Six is entitled to be treated under any of the exceptions.

8. Section 4648, subdivision (a)(9)(B) states:

"Effective July 1, 2012, notwithstanding any other law or regulation to the contrary, a regional center shall not purchase residential services from a State

Department of Social Services licensed 24-hour residential care facility with a licensed capacity of 16 or more beds. This prohibition on regional center purchase of residential services shall not apply to any of the following:

- “(i) A residential facility with a licensed capacity of 16 or more beds that has been approved to participate in the department’s Home and Community Based Services Waiver or another existing waiver program or certified to participate in the Medi-Cal program.
- “(ii) A residential facility service provider that has a written agreement and specific plan prior to July 1, 2012, with the vendoring regional center to downsize the existing facility by transitioning its residential services to living arrangements of 15 beds or less or restructure the large facility to meet federal Medicaid eligibility requirements on or before June 30, 2013.
- “(iii) A residential facility licensed as a mental health rehabilitation center by the State Department of Mental Health or successor agency under any of the following circumstances:
 - “(I) The facility is eligible for Medicaid reimbursement.
 - “(II) The facility has a department-approved plan in place by June 30, 2013, to transition to a program structure eligible for federal Medicaid funding, and this transition will be completed by June 30, 2014. The department may grant an extension for the date by which the transition will be completed if the facility demonstrates that it has made significant progress toward transition, and states with specificity the timeframe by which the transition will be completed and the specified steps that will be taken to accomplish the transition. A regional center may pay for the costs of care and treatment of a consumer residing in the facility on June 30, 2012, until June 30, 2013, inclusive, and, if the facility has a department-approved plan in place by June

30, 2013, may continue to pay the costs under this subparagraph until June 30, 2014, or until the end of any period during which the department has granted an extension.

“(III) There is an emergency circumstance in which the regional center determines that it cannot locate alternate federally eligible services to meet the consumer’s needs. Under such an emergency circumstance, an assessment shall be completed by the regional center as soon as possible and within 30 days of admission. An individual program plan meeting shall be convened immediately following the assessment to determine the services and supports needed for stabilization and to develop a plan to transition the consumer from the facility into the community. If transition is not expected within 90 days of admission, an individual program plan meeting shall be held to discuss the status of transition and to determine if the consumer is still in need of placement in the facility. Commencing October 1, 2012, this determination shall be made after also considering resource options identified by the statewide specialized resource service. If it is determined that emergency services continue to be necessary, the regional center shall submit an updated transition plan that can cover a period of up to 90 days. In no event shall placements under these emergency circumstances exceed 180 days.”

9. Claimant contends that other provisions of the Lanterman Act establish a broad entitlement to services for eligible individuals and that Claimant requires the residential services of Project Six. However, a general statutory entitlement does not prevail over a specific statutory restriction. The same legislation that establishes broad rights for Claimant, i.e., the Lanterman Act, includes restrictions that prevent Project Six from providing residential services to Claimant. The restriction applies here and cannot

be ignored. No matter how sympathetic the circumstances are in favor of Claimant attending Project Six, TCRC cannot legally fund the residential services portion of that placement.

10. There is an "emergency circumstances" provision in section 4648, subdivision (a)(9)(B)(iii)(III), that applies if a regional center cannot locate certain services. To get to this provision, there must be evidence that Project Six is licensed as a mental health rehabilitation center. This requirement, in section 4648, subdivision (a)(9)(B)(iii), must be met before examining the "emergency circumstances" provision in subdivision (a)(9)(B)(iii)(III). There was no evidence that Project Six is licensed as a mental health rehabilitation center. Nor was there evidence that the other requirements of section 4648, subdivision (a)(9)(B)(iii), have been met.

ORDER

Claimant's fair hearing request is denied. TCRC is not required to fund for Claimant to reside at The Help Group--Project Six.

DATED: December 15, 2014.



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.