

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

CLAIMANT,

vs.

REGIONAL CENTER OF ORANGE COUNTY,

Service Agency.

OAH No. 2014090764

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on November 7, 2014, in Santa Ana.

Claimant, who was not present, was represented by his mother.¹

Paula Noden, Fair Hearings and Vendor Appeals Manager, represented the Regional Center of Orange County (Service Agency).

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

The record was held open after the hearing for the parties to submit written closing arguments, which were timely received and marked for identification as follows: Service Agency, exhibit 12; DDS, exhibit 13; and Claimant, exhibit C-13.

Claimant thereafter attempted to submit additional statements and evidence responding to the other parties' closing arguments. The Service Agency and DDS

¹ Names are omitted to protect the privacy of Claimant and his family.

submitted written objections. The ALJ issued an order rejecting Claimant's subsequent submissions. Those documents (except for Claimant's newly presented evidence attached to his statements) are collectively marked for identification as exhibit A.

The record was closed and the matter submitted for decision upon receipt of the last of the documents described above, which was November 21, 2014.

ISSUE

Shall the Service Agency provide funding for Claimant to be placed out-of-state at Heartsprings in Kansas?

EVIDENCE RELIED ON

In making this Decision, the ALJ relied on Claimant's exhibits C1-C12, the Service Agency's exhibits 1-7, and DDS's exhibits 8-12. The ALJ also relied on the testimony of School Psychologist Bill Thompson, Service Coordinator Jennifer Torres, Manager of Consumer & Community Services Jack Stanton and Claimant's mother. The parties' closing arguments were reviewed, but they are not considered to be evidence.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a 17-year-old male consumer of the Service Agency based on his eligible diagnosis of autism.
2. As described in more detail below, Claimant's mother and Service Agency staff have been in contact by telephone and e-mail about the out-of-state placement request in question for the past several months, beginning no later than October 2013.
3. In July 2014, the Service Agency made a written request to DDS seeking its approval of such out-of-state funding for Claimant. By a letter dated August 29, 2014, DDS denied the request, for reasons explained in more detail below.

4. By a letter dated September 4, 2014, Claimant's mother was advised by the Service Agency that her request for out-of-state placement funding was denied.

5. On September 18, 2014, a Fair Hearing Request on Claimant's behalf was submitted to the Service Agency, which appealed the Service Agency's denial.

CLAIMANT'S SITUATION AND HIS RESIDENTIAL NEEDS

6. Claimant is 5'8" tall and weighs 250 pounds. He is extremely strong. Claimant is prescribed multiple medications to address psychotic behaviors and disruptive mood swings, which are frequent and can be violent. During such events, it typically takes two to three strong individuals to maintain his safety; sometimes it has taken four or five adult men to stop Claimant from hurting himself or others. His outbursts have been known to include punching, head-banging on concrete, kicking, and biting his family, staff, or peers, self-injury, property destruction and running away.

7. Claimant has been placed outside of his family home since he was 10 years old due to the severity of his behaviors and challenges.

8. Claimant was initially placed in a Level 4-I children's home, South County Care, where he remained for six years. However, a 30-day notice was given by South County Care and Claimant's mother removed him. Claimant was then placed at the SAILS Children's Crisis Home (SAILS) in Costa Mesa from September 2011 through December 9, 2011. He briefly returned home with his mother; however, he returned to SAILS after just three days. He remained at SAILS until February 7, 2012, at which time he returned to his previous placement at South County Care. That placement lasted only seven days, at which point disagreements between mother and vendor, and the vendor's inability to safely control Claimant, led to Claimant being removed.

9. In February 2012, Claimant moved back home with his mother. The Service Agency began providing supports in the home at a 1:1 ratio to maintain his safety during most at-home hours. This setting continued for approximately 30 days, at which

point Claimant returned to SAILS on March 10, 2012. However, on April 20, 2012, Claimant went from SAILS to Children's Station, an alternate children's group home. He remained at that placement through July 3, 2012; however, the home was unable to meet his behavioral needs and emotional outbursts. He returned home with his mother, and the Service Agency again provided intensive levels of support in the home to maintain his safety as well as his family's safety. Claimant continued to display severe outbursts, placing himself, staff, and family members at risk. He moved back to SAILS on December 1, 2012, and stayed there until October 28, 2013. SAILS is a crisis home that is not intended to be a long-term residential placement. In late October 2013, Claimant returned home, where he has remained.

10. Including the above-described placements, as well as other briefer trial placements, Claimant moved 17 times from March 2006 through October 2013.

11. In the last several months, the Service Agency has continued to explore various other placement options. Several homes were identified, including Level 4-I programs, as well as more intensive negotiated rate programs. Claimant's mother declined some of the alternative placements offered, citing various concerns with location, proximity to traffic, training of staff, appropriateness of the overall programming, and other issues related to her thoughts on the overall effectiveness of the programs. Examples include SAILS Kids First in San Diego and Trinity in Oakland. It was not established that Claimant's mother acted in bad faith in rejecting these proposed placements. Several other homes discovered by the Service Agency rejected Claimant, either because they did not feel they could maintain Claimant safely or they did not want to work with Claimant's mother. These options included PACE in Santa Clara, Fred Finch Center in San Diego, Del Sol of San Bruno, Kids First Albondra Home in the Central Valley, Serenity Home, Cynco Childcare, Punzalan Home, and several homes in Orange County.

12. The Service Agency previously initiated referrals through the DDS statewide specialized resource system (SSRS) in an effort to locate alternative options within the state. To date, there have been no options identified through SSRS for Claimant.

13. Since Claimant returned home, the Service Agency has provided a range of services, including in-home crisis services, personal assistance, and psychiatric services. The majority of the supports in Claimant's home have been provided at a 2:1 ratio due to his high level of physical aggression and the need to maintain a safe environment for him and staff. The Service Agency is providing the following supports in the home: Best Helping Hands in-home respite, 64 hours per week at a 2:1 ratio (128 hours total), at a cost of \$2,320 per week; and No Ordinary Moments Crisis/Personal Assistance at a 1:1 ratio for 42.50 hours per week and a 2:1 ratio for 54.25 hours per week, at a cost of \$5,134 per week. The total cost of those services is approximately \$27,728 per month.

14. Claimant receives special education services from his local school district (District). The District has indicated that they are unable to safely meet Claimant's needs within their program. After a dispute with Claimant's family, the District authorized funding for out-of-state educational services. Under an agreement reached with Claimant's family, the District has agreed to fund a daily rate of \$599.59 for 223 school days and \$343.59 for the remaining 142 non-school days, with a maximum total of \$182,498.35 per calendar year.

THE HEARTSPRING PROGRAM

15. Claimant's mother would like her son placed at Heartspring, which is a non-profit residential day school program located in Wichita, Kansas. Heartspring serves children between the ages of 5-21 years and was developed to meet the needs of students with autism, speech and language impairments, and other developmental disabilities.

16. Heartspring is licensed through the Kansas Department of Health and Environment, which is the responsible entity to monitor the residential portion of this program. Heartspring is licensed through the Kansas Department of Education to oversee the school program, and it is also certified/accredited by the California Department of Education (CDE). The Service Agency verified Heartspring's licenses are active and in good standing.

17. Heartspring receives funding through a variety of resources. The main source of funding is through the Kansas Department of Education, but it also receives funds through out-of-state school districts (including some in California), private pay by families, insurance programs and health and human services programs. The Service Agency has verified that its main funding sources remain in place and that Heartspring remains in good standing.

18. Heartspring staff have evaluated Claimant's file and met his mother at the facility in Kansas. Heartspring staff believe they can safely serve Claimant and provide for his needs. Heartspring has a monthly residential cost of \$13,700. However, Heartspring believes an intensive staffing level is necessary to address Claimant's needs, which will result in an additional cost of \$4,000 per month. Thus, the cost of placing Claimant at Heartspring will be \$17,700 per month, which is approximately \$10,000 per month less than what the Service Agency is currently paying to keep Claimant in his home.

THE SERVICE AGENCY'S REQUEST TO DDS FOR FUNDING AUTHORITY

19. Based on the circumstances discussed above, in July 2014 the Service Agency made a written request to DDS for authorization to fund the out-of-state placement of Claimant at Heartspring. In that letter, RCOC explained that it had "exhausted all alternative placement options for him [Claimant] at this time." The Service Agency advised DDS that it had determined there were no appropriate options within

California to meet the needs of Claimant and his family, and that it agreed with the District's decision to provide services to Claimant in a residential and educational treatment setting. The Service Agency requested funding for an initial six month period, and indicated that continued authorization thereafter would be pursued, depending on Claimant's level of success.

20. In its letter of July 2014, the Service Agency advised DDS that it planned to monitor Claimant's out-of-state placement as follows:

- A. Service Agency staff will maintain face-to-face visitation with Claimant on a quarterly basis. A service coordinator will visit him at the program in person no less than quarterly, and may also do so in the event of a more urgent need. Those visits will be scheduled around his normal annual review dates. The Service Agency will also maintain regular phone contact with Heartspring and Claimant's mother in order to insure that he continues to benefit from this program. The Service Agency will also rely on input from Claimant's mother regarding Claimant's progress. If Heartspring makes arrangements for Claimant to return home during normal school breaks, the Service Agency will support Claimant at his family residence during such visits.
- B. The Service Agency assured DDS it will make every effort to insure that regulatory standards regarding special incident reporting (SIR) are followed. The Service Agency will work in partnership with the various agencies, including the CDE and Heartspring, to insure that any SIRs which require follow-up will be handled accordingly. If an SIR requires that Service Agency staff investigate in person, arrangements will be made.
- C. Claimant's educational needs will be funded by the District as described above. The Service Agency will work with the District to secure an appropriate school setting.

DDS'S DENIAL OF AUTHORIZATION

21. In its August 29, 2014 letter denying funding authorization, DDS stated that the Service Agency's request did not meet the requirements set forth in Welfare and Institutions Code section 4519 because the out-of-state placement had not been referenced in Claimant's operative individual program plan (IPP). DDS also noted that although the Service Agency stated that it had exhausted all alternative placement options for Claimant, the Service Agency had not provided an "explanation of why those options cannot meet [Claimant's] needs." Finally, DDS stated that the Service Agency "appears to have identified appropriate residential programs in California that can meet [Claimant's] needs if [his] mother chooses to pursue them."

22. During the hearing, and in closing argument, DDS shed no light on its contention that the operative IPP is deficient. A review of the operative IPP, signed in June 2014, describes the aforementioned placements and difficulties finding an appropriate in-state placement for Claimant. It does not reference out-of-state placement for Claimant. However, the Service Agency completed a Comprehensive Assessment document for Claimant, which is used in considering placement of a consumer in a "developmental center, MHRC, IMD (or) Out of State." The Comprehensive Assessment contains all the pertinent information for Claimant. In addition, the Service Agency's letter requesting funding authority from DDS contains the type of information one would expect to see in an IPP contemplating an out-of-state placement, including the aforementioned steps the Service Agency would take to monitor Claimant if he goes to Kansas.

23. In its letter seeking authorization from DDS, the Service Agency described, to an extent, the numerous prior placements and why they had been unsuccessful. The evidence presented at the hearing established why those placements had not been successful, as discussed above in Factual Findings 6-14.

24. The Service Agency's July 2014 letter seeking funding authorization from DDS mentioned that some possible placements had been referred to but rejected by Claimant's mother. As discussed above, Claimant's mother had reasons for doing so. In its letter, the Service Agency also intimated that its search for an in-state placement would continue, language which DDS apparently relied on to conclude that in-state placement was still possible. During the hearing, Service Agency Manager, Jack Stanton, testified that he believed Claimant could be placed in-state "if given a chance." However, the Service Agency has been searching for over one year with no success. In fact, in a letter written to Claimant's mother in October 2013, when this issue was first broached, Service Agency staff had assured her that Claimant could be placed in California, listing PACE and the Fred Finch Center as specific examples. Yet, as discussed above, both of those facilities later rejected Claimant. By October 28, 2014, Service Agency staff had developed a list of five potential homes for Claimant. Each one rejected Claimant. Most revealing is that the best prospect from that list was Del Sol of San Bruno. Despite a written notice of rejection from Del Sol's director, Service Agency staff still testified at the hearing that the director was reconsidering her rejection. No evidence was presented indicating that that director ever changed her mind.

25. Some of Claimant's behavioral problems may be related to his going through puberty and a change in his medication regimen. However, no evidence suggests that any person or facility has identified a way of dealing with those changes or improving Claimant's behavior. In addition, Claimant's extreme behaviors and out-of-home placement preceded these recent problems. The best explanation for Claimant's behavior was provided by his school psychologist, Bill Thompson, who testified that he worries about the safety of Claimant because he "is strong and has an unrelenting desire to injure himself." Mr. Thompson does not trace Claimant's desire to injure himself to puberty or an adjustment of his medications.

26. It is also clear that some of the group homes and facilities contacted have declined to accept Claimant because of past conflicts with his mother. Some of the evidence presented indicates that Claimant's mother can at times be challenging. Yet there was nothing presented indicating that Claimant's mother acted in bad faith or purposely thwarted placements for the sake of having Claimant placed at Heartspring. Many of the rejections came after she placed her son on a trial basis at the locations, which tends to show that Claimant's mother gave those homes a chance. The fact that Claimant had moved 17 times in seven years shows that Claimant's mother has tried to cooperate with the Service Agency. During the hearing, and in some of the documentary evidence, Claimant's mother articulated good reasons for rejecting the homes and facilities in question. Neither the Service Agency nor DDS presented any evidence from those sources refuting the claims of dissatisfaction from Claimant's mother.

CLAIMANT'S EVIDENCE

27. In addition to evidence which, in large part, established many of the findings above, Claimant's mother presented other helpful information. For example, School Psychologist Thompson described Claimant's behaviors as severe and life-threatening, and he testified that Claimant needs constant supervision by individuals strong enough to handle him physically. Mr. Thompson also corroborated that it once took four to five people to contain an extreme outburst Claimant had in 2012.

28. A letter from Claimant's psychiatrist, Dr. W. David Chu, was also presented. Dr. Chu confirms that Claimant is prone to severe violence, self-injurious behaviors, and aggression toward peers/family/staff. Claimant has been hospitalized several times related to such violent episodes. As he has aged, Claimant's violence has increased. His outbursts have required 911 services on several occasions and at times even three or four police officers have had difficulty subduing him. Dr. Chu opined that a

comprehensive, 24-hour residential program would be most effective in meeting Claimant's residential, educational, behavioral and psychological needs.

29. A report from Carol Shack-Lappin, LCSW, was also submitted. Ms. Shack-Lappin performed a mental health assessment of Claimant in February 2012 after a referral from the District. In her report, Ms. Shack-Lappin documents a discussion she had with Molly Sullivan, who was Claimant's Service Coordinator at that time. Ms. Sullivan reported that Claimant cannot continue to live at home long-term because his "mother is unable to provide [Claimant] with the highly structured environment that he needs." In this case, the parties agree that Claimant cannot continue to reside at home indefinitely.

LEGAL CONCLUSIONS

JURISDICTION AND BURDEN OF PROOF

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.²) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant timely requested a hearing upon receipt of the Service Agency's denial of the request for out-of-state placement funding and therefore jurisdiction for this appeal was established.

2. The standard of proof in this case is a preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

² All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

3. When one seeks government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) That general rule is consistent with cases decided under federal law relating to special education benefits, in which it has been concluded that the burden of persuasion to establish entitlement to a service not agreed upon by a school district is on a student's family. (*Schaffer v. Weast* (2005) 546 U.S. 49, 51.) In this case, Claimant has the burden of proving by a preponderance of the evidence that he is entitled to the out-of-state placement funding.

OUT-OF-STATE PLACEMENT

4. Out-of-state placement funding requests are governed by section 4519, subdivision (a), which provides:

The department [DDS] 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. . . .

5. On a facial level, Claimant's request meets the statutory requirements for an out-of-state placement. In its letter requesting DDS for funding authority, the Service Agency set forth a plan for Claimant's placement at Heartspring, including extensive monitoring. The Service Agency completed a comprehensive assessment of Claimant's situation and placement needs. Service Agency staff and Claimant's mother have frequently corresponded, by phone and e-mail, about this placement. Although Claimant's operative IPP does not reference out-of-state placement, and an IPP meeting per se was not specifically convened for this purpose, it is clear that the parties in the past year have engaged in the types of conversations and assessments that would be expected had they "sat" for an IPP meeting. Moreover, DDS did not argue in this case that the failure to formally convene an IPP or include out-of-state placement in Claimant's operative IPP is an infirmity to this request. Denying this request solely because the parties have not sat face-to-face in one IPP meeting and then included that

information in the operative IPP would raise form over substance. In its letter seeking authority from DDS, the Service Agency identified the options pursued for Claimant's in-state placement and an explanation why those options have not worked, including the DDS statewide specialized resource service. Whatever information was not supplied in the authorization letter was abundantly supplied during the hearing. (Factual Findings 1-29.)

6. On a deeper level, Claimant established by a preponderance of the evidence that he is entitled to an out-of-state placement. He is big, strong and physical. He frequently engages in violent outbursts and tantrums that endanger himself and others. The situation has worsened as he gets older and bigger, and it now takes more adults to control him. This problem has been longstanding, as Claimant was initially placed outside his home when he was 10 years old. As he approaches the age of 18, he has become so violent that he has been unable to remain at any placement found for him in this state. For this reason, he has moved 17 times in the seven years before he returned home, including a crisis home and several facilities with level 4-I security. All the parties agree that Claimant cannot remain at home, and yet the Service Agency has advised DDS that it has been unable to place Claimant in-state after exhausting all options, including an unsuccessful search of the SSRS. On the other hand, Heartspring will take Claimant. The Service Agency has verified that Heartspring has the necessary licensure and funding to be a viable option. Considering that Heartspring will charge \$10,000 per month less than what the Service Agency is paying to maintain Claimant at home, and the District has agreed to spend a substantial amount for Claimant's educational needs, the out-of-state placement appears to be cost-effective. (Factual Findings 1-29.)

7. The arguments made by DDS against the out-of-state placement are not persuasive, for the following reasons.

- A. As discussed above, although the initial DDS denial letter referenced the lack of IPP meetings or materials, DDS did not raise that issue in this case, so that argument is deemed abandoned. Even if it was not abandoned, the Service Agency has substantially complied with this requirement by way of the several communications with Claimant's mother and documentation generated that was discussed above.
- B. It was not established that Claimant's needs can be met by in-state resources. While it is true that he was able to reside at South County Care for six years, he no longer is able to do so. And since he left South County Care, Claimant has been on a journey which has seen him move in and out of several placements with little or no success. A search of the SSRS was not helpful. The Service Agency has been unable to find a suitable place for Claimant. This explains why the Service Agency asked DDS for funding authority after exhausting their resources. It is also true that some of the placements will not work because of past conflicts between staff and Claimant's mother. But that is a reality the parties will always have to confront. And it is not unexpected for a consumer's family to balk at some of the options offered by a regional center. The Lanterman Act requires that regional centers and families work as a team. Working as a team does not mean that a family will always accept every regional center suggestion or vice versa. Moreover, Claimant's mother apparently had good reasons for rejecting the facilities in question, a fact not controverted by DDS or the Service Agency. The fact that Claimant's mother tried so many placements over the past several years demonstrates that she has acted in good faith. The Service Agency has been trying to find an appropriate in-state placement for Claimant since October 2013 with no

success. Denying the instant request to give the Service Agency more time to find a suitable placement is not warranted.

- C. DDS argues that the settlement between Claimant's mother and the District relieves it of funding responsibility for an out-of-state placement. Yet there is nothing in the evidence suggesting that the settlement agreement with the District covers anything other than Claimant's special education needs. The District is not responsible for Claimant's residential and community needs. Thus, while the District's significant funding for Claimant's educational needs makes an out-of-state placement more cost-effective, the Service Agency and ultimately DDS are responsible for the residential portion of such a placement. While DDS may believe there are placements in other states that are more cost-effective than Heartspring, DDS presented no evidence establishing any exist or that anyone else will take Claimant as Heartspring has agreed to do.
- D. DDS argues that public policy mandates Claimant be placed in-state. While section 4519 gives clear intent that out-of-state placements are disfavored, that statute nonetheless requires funding for such placements in appropriate circumstances. Claimant met his burden of establishing that his case is one of those few that requires an out-of-state placement at this time. The fact that there may be only a few cases worthy of such special consideration does not disqualify Claimant under these circumstances.

8. The approval of the instant funding request is not indefinite. Section 4519 clearly limits out-of-state funding approval "for no more than six months." Any extension beyond six months "shall be based on a new and complete comprehensive assessment" of Claimant's needs, review of available options and a determination that Claimant's needs cannot be met in California. An extension shall not exceed six months. Thus, not only will Claimant's progress at Heartspring be constantly reviewed and

evaluated, but so too his need for out-of-state placement and the Service Agency's (and DDS's) ability to find an in-state placement. And those determinations shall be made no later than every six months.

ORDER

Claimant's appeal is granted. Funding for Claimant's out-of-state placement at Heartspring in Kansas shall be provided for an initial six month period. The parties shall thereafter re-evaluate the propriety of a further extension as required by Welfare and Institutions Code section 4519.

DATE: December 3, 2014

_____/s/_____

ERIC SAWYER

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.