

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

vs.

FRANK D. LANTERMAN REGIONAL
CENTER,

Service Agency.

OAH No. 2015061187

AMENDED DECISION

Howard W. Cohen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on June 13, 2016, in Los Angeles.

Julie A. Ocheltree, Attorney at Law, Enright & Ocheltree, represented Frank D. Lanterman Regional Center (FDLRC or Service Agency).

Claimant's mother, his authorized representative, represented claimant, who was present.¹

The original hearing in this matter concluded August 19, 2015. The record was reopened and, after both parties filed additional documents, the matter was submitted on September 25, 2015. A Decision issued on October 2, 2015, dismissing this action based on a finding that an action was then pending in the Superior Court of the State of California, Count of Los Angeles, Case No. BS156213, to enforce a previous Decision on the same or related issues, in OAH No. 2014120261. The October 2, 2015, Decision did

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

not decide the merits of the issue raised on August 19, 2015.

In a demurrer to claimant's Superior Court enforcement action, the Service Agency suggested that the October 2015 Decision be remanded to OAH. After a stipulation by the parties agreeing to a remand, the court ordered this matter remanded to OAH on April 5, 2016, for an amended Decision on the merits regarding the parties' rights and responsibilities.

The hearing in this matter was, therefore, reopened to allow the parties to introduce evidence relevant to the issue obtained since the hearing on August 19, 2015.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on June 13, 2016.

ISSUE

Must the Service Agency identify and procure the services of an appropriate psychotherapist for claimant and a supplemental parent training provider who will accept Medicare/Medi-Cal payment?²

EVIDENCE RELIED UPON

Documents. Service Agency's exhibits 1-12 (August 19, 2015), 13, and 14 (June 13, 2016); claimant's exhibits A-F (August 19, 2015).

Testimony. Da Vonna D. Jenkins (August 19, 2015, June 13, 2016); Margaret DeLage (August 19, 2015, only); claimant's mother (August 19, 2015, June 13, 2016).

² The issue to be considered has been modified due to changed factual circumstances since the Decisions issued on March 25, 2015, in OAH Case Number 2014120261, and on October 2, 2015, in this matter. (See Factual Findings 15 & 17.)

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a twenty-two-year-old man. He is an eligible consumer of FDLRC based on his diagnosis of Autism Spectrum Disorder (ASD). He has also been diagnosed with Obsessive Compulsive Disorder (OCD).

2. In a fair hearing held in a prior matter on March 20, 2015, claimant asserted that, since August 2014, he has fruitlessly requested that the Service Agency fund individual psychological counseling with supplemental parent training, as provided in claimant's Individual Program Plan (IPP). Claimant specifically sought funding for services to be provided by C. Enjey Lin, Ph.D., a licensed clinical psychologist and board-certified behavior analyst (BCBA) who provided social skills training services to claimant funded by the Service Agency. The Service Agency, by letter dated November 5, 2014, denied claimant's funding request on the ground that Dr. Lin's rate exceeded the amount the Service Agency could fund. In a Decision issued after that hearing, on March 25, 2015 (March 2015 Decision), the ALJ ordered that the Service Agency:

approve a cost-effective rate of pay, greater than the [Schedule of Maximum Allowances] rate for individual psychotherapy and supplemental parent training, to engage a therapist who will provide claimant with counseling appropriate to ameliorate the effects of his qualifying disability. In an IPP meeting to be held as soon as reasonably possible, claimant's planning team shall meet to decide on an appropriate provider, under [Welfare and Institutions Code] section 4648, subdivision (a)(6), and shall decide on an

appropriate provider no later than 30 days from the effective date of this Decision. (Ex. B.)

3. In response to the March 2015 Decision, the Service Agency held an IPP meeting on April 29, 2015. Nevertheless, since the March 2015 Decision issued, the Service Agency has not funded psychotherapy or counseling services and supports for claimant.

4. Claimant filed a request for this fair hearing on June 30, 2015, to enforce the March 2015 Decision. Claimant presented evidence to support his contention that the Service Agency violated the March 2015 Decision by failing to hold a proper IPP meeting and by failing to refer claimant to a qualified service provider. The Service Agency presented evidence to support its contention that it has complied with the March 2015 Decision, that an IPP was indeed held, and that the Service Agency referred claimant to several potential service providers.

5. On July 7, 2015, one week after filing his request for fair hearing, claimant also filed in the Superior Court of the State of California, County of Los Angeles, a petition to enforce the March 2015 Decision, in Case No. BS156213. A fair hearing was held in this matter on August 19, 2015; on October 2, 2015, a Decision issued dismissing the matter for want of jurisdiction. On April 5, 2016, after stipulation by the parties, the Superior Court remanded this matter to OAH for an Amended Decision on the merits.

PSYCHOLOGICAL SERVICES FOR CLAIMANT

6. Shortly after the March 25, 2015 Decision issued, Program Manager Da Vonna Jenkins telephoned over one dozen clinical psychologists vendored with FDLRC to find a therapist available to provide services to claimant.

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7. Claimant's mother desires a referral for claimant to a therapist who is both a clinical psychologist and a BCBA. At the April 2015 IPP meeting, claimant's mother told Jenkins that Dr. Lin, a clinical psychologist and a BCBA, does not accept insurance, is not interested in becoming a FDLRC vendor, and would not accept any hourly rate other than \$275. Jenkins told claimant's mother that she could not authorize that rate. Jenkins identified two psychologists who might be appropriate providers for claimant, and provided their contact information to claimant's mother. They were Andrea Davis, Ph.D., and James Woods, Ph.D.

8. After the IPP meeting, Jenkins provided claimant's mother with contact information for Paul Boyle, Ph.D. The Service Agency spoke with Nora J. Baladerian, Ph.D., a therapist in West Los Angeles, but did not mention Dr. Baladerian to claimant's mother.

9. All three therapists the Service Agency recommended to claimant's mother, as well as Dr. Baladerian, work with clients with ASD. Jenkins does not know whether they also treat clients with obsessive-compulsive disorder (OCD), with which claimant has also been diagnosed. At least one of these therapists recommended that claimant be assessed to determine whether the anxiety he experiences is primarily related to ASD or to OCD; if it is primarily OCD-related, the therapist recommended referring claimant to a psychiatrist to determine whether claimant should receive medication.

10. After the IPP meeting, claimant's mother contacted the recommended

psychologists. Dr. Woods informed her that he does not provide services for adults.³ Dr. Boyle informed claimant's mother that he has no experience treating clients with OCD. Claimant's mother objected to Dr. Davis because her office is in Pasadena, which would require claimant to travel approximately 35 miles round trip for each visit. Claimant's mother informed the Service Agency of her objections to these three therapists.

11. In a Notice of Proposed Action letter dated May 26, 2015, DeLage and Jenkins wrote to claimant's mother denying her request for individual therapeutic services with supplemental parent training for claimant. DeLage and Jenkins wrote they were denying the services because claimant's mother was unwilling to use the psychologists FDLRC had suggested and because she was "requesting counseling for a non-qualifying condition," i.e., OCD. Claimant's mother is requesting counseling for claimant, however, from someone who can address both claimant's ASD and his OCD, a co-morbid condition.

12. At the August 19, 2015 hearing, Jenkins informed claimant's mother for the first time that Dr. Baladerian, Myra Mendez, Ph.D., or Gabrielle Du Verglas, Ph.D., might be appropriate therapists for claimant. All are FDLRC vendors. Claimant's mother reasonably suggested that she could not agree to using any of them without first discussing claimant with them and determining whether they are willing and qualified to provide services to claimant. She would want to know that they are clinical psychologists and BCBA's with experience treating adults with ASD, anxiety, and OCD. If they are within a reasonable distance from claimant's home, she would allow them to assess claimant.⁴

³ If Dr. Woods does, in fact, treat adults, as the Service Agency believes, claimant's mother is willing to have claimant see him for an assessment.

⁴ No further evidence was presented regarding these three providers at the hearing on June 13, 2016.

13. When the Superior Court remanded this matter on April 5, 2016, Jenkins became active in the case, because DeLage, claimant's service coordinator, was, and at the time of this hearing is, on medical leave.

14. On April 22, 2016, Jenkins telephoned Tamar Apelian, Psy.D., a psychologist practicing in Encino whom DeLage had attempted to vendorize, and suggested a vendorized provider rate of \$100. Dr. Apelian expressed interest, and Jenkins sent Dr. Apelian an email profiling claimant and his services needs, providing her with claimant's mother's contact information and providing claimant's mother with Dr. Apelian's contact information. On May 2, 2016, Jenkins spoke with Dr. Apelian. Dr. Apelian, who informed Jenkins that she believed she could successfully treat claimant but believed, along with claimant's mother, that the distance claimant would have to travel to see her—30 miles round-trip from his home in West Hollywood or 50 miles round-trip from California State University, Los Angeles, where he is enrolled and taking classes—would be a barrier to her successful treatment of claimant. (See Ex. 13, p. 127.) On May 18, 2016, Jenkins proposed to claimant's mother FDLRC funding for reimbursement for transportation vouchers for claimant to use to see Dr. Apelian, or, in the alternative, for taxis or ACCESS coupons for transportation to Dr. Apelian. These transportation suggestions are inadequate; they would only add to the already-unreasonable travel time necessary for claimant to see Dr. Apelian. For example, if ACCESS were to accept claimant for transport to Dr. Apelian, claimant would have to be picked up two hours before his appointment, and would have to wait up to two hours to be picked up from Dr. Apelian's office after his session.

15. On May 2, 2016, Dr. Apelian mentioned to Jenkins that claimant's mother told her claimant is eligible for Medicare and Medi-Cal. Claimant's mother had not shared that information with FDLRC when asked at claimant's January 2015 IPP meeting about insurance and other coverage. Dr. Apelian suggested that claimant's mother find

a Medicare/Medi-Cal psychological services provider in FDLRC's catchment area.

16. Acting on Dr. Apelian's suggestion, Jenkins used the Psychology Today portal to try to identify therapists in FDLRC's catchment area. She called a few therapists and left messages but received no return phone calls.⁵ She has been unable to make a referral for claimant. Jenkins's efforts, however, do not establish the absence of appropriate providers in the Service Agency's catchment area.

17. Claimant obtained Medicare/Medi-Cal coverage in January 2016. Prior to that time, claimant had private medical insurance. Claimant's mother testified that she has looked for providers through Medicare/Medi-Cal, but has been unable to find anyone appropriate to address claimant's therapy needs. Claimant has been in therapy with Charlene Williams, Ph.D., a licensed psychologist, in Brentwood, for the past three months. Dr. Williams, who does not accept Medicare/Medi-Cal payments, charges \$130 per hour, which claimant's mother pays. Claimant attends one therapy session per week and is happy with the services.

18. At the hearing, claimant asked for the Service Agency to fund claimant's current therapy sessions or, in the alternative, for the Service Agency to identify another appropriate therapist in the Service Agency's catchment area who will accept Medicare/Medi-Cal. Claimant's mother testified that she has always tried to use private insurance for therapy for claimant, and then Medicare/Medi-Cal since claimant became eligible in January 2016, but very few therapists accept insurance or Medicare/Medi-Cal. She has been unable to identify therapists near claimant's West Hollywood home who accept Medicare/Medi-Cal. She agreed that, if Dr. Apelian were located in the Service Agency's catchment area, she might be an appropriate provider for claimant.

⁵ Jenkins also emailed Dr. Lin, who informed Jenkins that she would not accept Medicare/Medi-Cal payments.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)⁶

2. Under the Lanterman Act, issues concerning the rights of persons with developmental disabilities to receive services must be decided under the appeal and fair hearing procedures set forth in section 4700 et seq. (§ 4706, subd. (a).) As the party seeking services not agreed to by the Service Agency, claimant bears the burden of proving that the denial of services was improper and that he should receive funding for those services. (See § 4712, subd. (j); *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) Claimant must prove he is entitled to the funding by a preponderance of the evidence, because no law or statute requires otherwise. (Evid. Code, § 115.)

3. Cause exists to grant claimant's appeal, in part, as set forth in Factual Findings 1 through 18, and Legal Conclusions 4 through 8. The issue on appeal, due to claimant's present Medicare/Medi-Cal eligibility, is limited to requiring the Service Agency to actively assist claimant by identifying and procuring the services of an appropriate individual counseling service and supplemental parent training provider who will accept Medicare/Medi-Cal payment and who will provide those services in the Service Agency's catchment area.

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4. "It is the . . . 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." (§ 4646, subd. (a).)

⁶ All further statutory references are to the Welfare and Institutions Code.

5. Mental health services and parent training are among the services and supports to be funded by regional centers. (§ 4512, subd. (b).)

6. The regional center must identify and pursue all sources of public funding, such as Medicare and Medi-Cal, and all sources of private funding, such as private insurance, for consumers receiving regional center services. (§ 4659, subd. (a)(1) & (2); see also § 4648, subd. (a)(8) (“Regional center funds shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.”).)

7. Regional centers must coordinate services for their consumers in order to implement the consumers’ IPPs. (§ 4640.7.) Service coordination includes “securing, through purchasing *or by obtaining from generic agencies or other resources, services and supports specified in the person’s individual program plan . . .* and monitoring implementation of the plan to ascertain that objectives have been fulfilled and to assist in revising the plan as necessary.” (§ 4647, subd. (a) (italics added); see also § 4648, subd. (a)(1) (“In order to achieve the stated objectives of a consumer’s individual program plan, the regional center shall . . . [secure] needed services and supports.”).)

8. FDLRC’s sporadic and perfunctory attempts to assist claimant in procuring services do not satisfy the Lanterman Act’s requirements concerning coordination of services. The California Supreme Court has stated unequivocally that, “[w]hile it is true . . . that the regional centers have ‘wide discretion’ in determining *how* to implement the IPP [citations], they have no discretion at all in determining *whether* to implement it: they must do so [citation].” (*Assn. for Retarded Citizens v. DDS* (1985) 38 Cal.3d 384, 390, original italics.) Here also, the Service Agency must implement claimant’s IPP. The Legislature’s insistence on having the needs of persons with developmental disabilities met by the provision of services is so significant that the Legislature directs DDS itself to provide services directly to consumers in cases where there appear to be “gaps in the

system of services and supports" (§ 4648, subd. (g).) Claimant had no therapy services for an extended period of time despite an acknowledged need for such services, and is now dependent on his mother's funding the services.

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ORDER

Claimant's appeal, as modified by current circumstances, is granted. The Service Agency shall comply with its service coordination duties under the Lanterman Act by actively assisting claimant in identifying and procuring the services of an individual therapist (a) who is qualified to provide services appropriate to ameliorate the effects of claimant's qualifying disability, taking into account claimant's co-morbid conditions to the extent necessary to effectively provide those services, (b) who will accept Medicare/Medi-Cal payment for those services, and (c) who will provide those services within the Service Agency's catchment area. The Service Agency shall also assist claimant in identifying and procuring the services of a supplemental parent training provider, under the same conditions.

DATE: June 24, 2016

HOWARD W. COHEN
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.