

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

An Individual,

vs.

SAN GABRIEL POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2016081044

DECISION

Administrative Law Judge Chantal M. Sampogna of the Office of Administrative Hearings (OAH) heard this matter on December 19, 2016, in Pomona, California.

Daniela Santana, Fair Hearing Manager, represented San Gabriel Pomona Regional Center (SGPRC or Service Agency).

Claimant's mother (Mother) represented the claimant, who was not present.¹

Oral and documentary evidence was received and the matter was submitted for decision at the conclusion of the hearing.

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¹ Titles are used to protect the family's privacy.

ISSUE

Whether the Service Agency must fund respite Licensed Vocational Nurse (LVN) services for claimant while his educational placement is out-of-state.

EVIDENCE RELIED UPON

Documents. Claimant's exhibits A through E; Service Agency's exhibits 1 through 10.

Testimony. Daniela Santana, Mother.

FACTUAL FINDINGS

1. Claimant is an 11-year-old boy who resides with his mother, father, and four-year-old sister in California. Claimant is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.)² on the basis of his diagnoses of cerebral palsy, intellectual disability (unspecified), and seizure disorder. He has been a consumer of services funded by the Service Agency for over six years.

2. Claimant requires total care. He is non-ambulatory and non-verbal. His medical challenges include athetoid quadriplegic cerebral palsy, seizure disorder, gastroesophageal reflux disease (GERD), and sleep disturbance due to GERD. Claimant can move independently by scooting and crawling. He uses a wheelchair and walker with adult assistance for mobility and transportation. Claimant is dependent on his parents for bathing, dressing, toileting, feeding and overall hygiene needs. He communicates through vocalizations such as crying and yelling, and by using

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

augmentative communication devices; mother communicates with claimant by following body language and providing choices through pictures. Claimant has many medical needs due to his seizures (three to four per month, lasting five to seven minutes), sleep maintenance insomnia (requiring 24-hour care), and increased anxiety (exhibited through his behavior, e.g., teeth grinding, body jerking, and kicking).

3. On June 16, 2016, claimant's Service Coordinator at SGPRC requested a nurse consultation to determine claimant's respite needs. The June 22, 2016 nurse consultation determined that claimant's respite care requires an LVN to address his rectal suppository order and other medical needs including skin issues, seizure history, choking and aspiration concerns.

4. Claimant's November 25, 2015, annual Individual Program Plan (IPP) reflects an ongoing objective that respondent and his parents would continue to benefit from respite services. The November 2015 IPP modified an outcome relating to that objective, documenting that in January 2016 claimant's educational placement would be changing to HMS School for Children with Cerebral Palsy (HMS), in Philadelphia, Pennsylvania, a non-public school, and that claimant would continue to need respite services. The IPP provided funding for eight hours per month of behavior intervention services from December 1, 2015 to January 10, 2016; 90 hours quarterly of respite services from October 1, 2015 to December 31, 2015; and an additional 88 hours per month of respite services from October 1, 2015 to January 31, 2016.

5. After a trial educational placement at HMS in January 2016, claimant's school district placed him at HMS, in accordance with an Individualized Education Plan (IEP) team finding on March 15, 2016, that claimant could not receive a Free and

Appropriate Public Education (FAPE) in California.³ A May 19, 2016 IEP amendment states “[Claimant] has unique orthopedic needs that must be met for him to access his education. There is no appropriate program at his school of residence, or within the state at this time, that will appropriately meet his needs.” (Ex. 4, at p. 6.) The IEP identifies this placement as claimant’s offer of FAPE. It states that other placement options were exhausted and that the IEP team agreed to this placement; the placement was not simply a matter of parent choice. (Ex. 4; see also, e.g., Exs. 8, B, and D.)

6. On July 6, 2016, claimant’s parents submitted a written request to the Service Coordinator, Lizbeth Vasquez, requesting the Service Agency fund 372 hours per month of respite services, as well as extended day/extended year services, and behavior services.

7. In a Notice of Proposed Action (NOPA) letter dated July 15, 2016, the Service Agency denied claimant’s funding request and offered to fund a modified level of the requested services. The Service Agency authorized extended day/extended year services, but only for the month of August, at up to five hours per day, five days per week; a behavior intervention assessment upon completion of behavior workshops by parent; and 360 hours per quarter of LVN respite services for three months only (July-September 2016), citing the Lanterman Act’s limit on monthly respite services, set forth at section 4686.5. The Service Agency refused to fund services for claimant during the

³ Under federal law, eligible students with a disability are entitled to receive a free and appropriate public education (FAPE) – special education and related services provided at public expense that meet the standards of the State educational agency, include an appropriate school, and that are provided in conformity with the IEP. (20 U.S.C. § 1401(9).)

school year while he is in Philadelphia because it believed it lacked a signed IEP showing a school district finding that claimant could not receive a FAPE in California.

8. Understandably, but incorrectly, the Service Agency believed it did not have a signed IEP because the signatories to the IEP signed at different times between March and September 2016. However, at least by late August 2016, if not sooner, Mother did provide the Service Agency with the IEP signed by mother, the Director of Special Education for claimant's school district and the Local Education Agency Representative. Mother testified, and in an August 17, 2016 email to the Service Coordinator, Lizbeth Vazquez, and the Manager of Client Services, Edith Aburto, she described, that she had researched more than four California schools prior to turning to HMS, including The Bridge School in Burlingame, Speech and Language Development Center in Buena Park, Clea Harder in La Harbra, and Chime Charter School in Tarzana. On August 18, 2016, the Service Coordinator documented in a case note that Pam Ray, a Client's Rights Advocate at SGPRC, confirmed that claimant's out- of-state educational placement is the only appropriate educational placement for the claimant.

9. Claimant's parents filed a Fair Hearing Request on August 25, 2016. They asked for funding for eight hours of respite nursing care per day, seven days per week through a staffing agency, so that claimant's respite LVN services can continue while he attends his educational placement in Philadelphia. OAH set a fair hearing for October 6, 2016. On claimant's motion, the hearing was continued to December 19, 2016, in order to allow mother, who would at that time be at her family home in California on a break from claimant's out-of-state educational placement, to appear and testify.

10. As the Service Agency's case notes and the August 10, 2016 Draft Outcomes for Individual Program Plan (IPP) demonstrate, and as the Service Agency conceded at the hearing, the respite LVN services requested by claimant are necessary

services and supports under the Lanterman Act. The Service Agency acknowledges claimant's needs have not changed since September 30, 2016. (See Exs. A and 8.)

11. At the hearing, no evidence was introduced to demonstrate that there is currently an appropriate educational placement for claimant available in California, or that at any time relevant to this matter such a placement has been identified through a placement search. The Service Agency conceded at the hearing that it knew of no such educational placements.

12. The Service Agency has not submitted a request to the Department of Developmental Services (DDS) for funding the requested out-of-state services. The Service Agency decided it did not need to seek DDS approval for out-of-state services because it determined the out-of-state educational placement was due to parent choice. That determination was incorrect. (See Factual Findings 5 and 8.)

13. Based on the evidentiary record as a whole, the ALJ may, and hereby does, order the Service Agency to submit claimant's funding request to DDS forthwith, in proper form and with all the supporting documentation required by law. Further, OAH orders DDS to consider that request promptly upon receipt and, without any unwarranted delay, make a determination as to whether to fund claimant's placement.

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.)⁴ An administrative "fair hearing" to

⁴ All further statutory references are to the Welfare and Institutions Code, unless otherwise stated.

determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal a denial of funding for respite service while he attends his out-of-state educational placement. Jurisdiction was established. (Factual Findings 1-9.)

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, the Service Agency bears the burden of proving, by a preponderance of the evidence, that its decision to refuse to continue to fund claimant's respite services while he attends his out-of-state educational placement is correct. (Evid. Code, § 115.)

3. The Lanterman Act acknowledges the state's responsibility to provide services and supports for developmentally disabled individuals and their families, and to "ensure that no gaps occur in communication or provision of services and supports." (§ 4501.) The Department of Developmental Services (DDS), the state agency charged with implementing the Lanterman Act, is authorized to contract with regional centers to provide developmentally disabled individuals with access to the services and supports best suited to them throughout their lifetime. (§ 4520.)

4. The Lanterman Act sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. As the California Supreme Court explained in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, the purpose of the Lanterman Act is twofold: "to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community" and "to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community." Under the Lanterman Act, regional centers are "charged with providing developmentally disabled persons with

'access to the facilities and services best suited to them throughout their lifetime'" and with determining "the manner in which those services are to be rendered." (*Id.* at p. 389, quoting from § 4620.)

5. To comply with the Lanterman Act, a regional center must provide services and supports that "enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (§ 4501.) Regional centers provide "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).)

6. Regional centers are responsible for conducting a planning process that results in an IPP. The IPP is developed by an interdisciplinary team and must include participation by the consumer or his or her representative. Among other things, the IPP must set forth goals and objectives for the consumer, contain provisions for the acquisition of services based on the client's developmental needs and the effectiveness of the means selected to assist the consumer in achieving the agreed-upon goals, contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences. (§§ 4646, subd. (a)(1), (2), and (4), 4646.5, subd. (a), 4512, subd. (b), 4648, subd. (a)(6)(E).) "The right of individuals with developmental disabilities to make choices in their own lives requires that all public or private agencies receiving state funds for the purpose of serving persons with developmental disabilities . . . shall respect the choices made by consumers or, where appropriate, their parents" (§ 4502.1.)

7. Although regional centers are mandated to provide a wide range of services to implement the IPP, they must do so in a cost-effective manner. (§§ 4640.7, subd. (b), 4646, subd. (a).) A regional center is not required to provide all services that a client may

require but is required to “find innovative and economical methods of achieving the objectives” of the IPP. (§ 4651.) Regional centers are specifically directed not to fund duplicate services that are available through another publicly funded agency or “generic resource.” Regional centers are required to “identify and pursue all possible sources of funding. . . .” (§ 4659, subd. (a).) But if a service specified in a client’s IPP is not provided by a generic agency, the regional center must fund the service in order to meet the goals set forth in the IPP. (§ 4648, subd. (a)(1).)

8. The Service Agency also bears responsibility for coordinating services provided to its consumers. “[S]ervice coordination shall include those activities necessary to implement an individual program plan, including, but not limited to, . . . securing, through purchasing or by obtaining from generic agencies or other resources, services and supports specified in the person's individual program plan; coordination of service and support programs; . . . 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).)

9. 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 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.” (§ 4512, subd. (b).) As the California Supreme Court recognized in *Association for Retarded Citizens, supra*, 38 Cal.3d at p. 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.

10. One of the services under the Lanterman Act that is available to consumers is respite services. (§ 4686.5.) However, a regional center’s authority to purchase respite

services is not unlimited. "A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities." (§ 4686.5, subd. (a)(1).)

11. A regional center may not purchase "more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer." (§4686.5, subd. (a)(2).) "A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) if it is demonstrated that the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer." (§ 4686.5, subd. (a)(3)(A).) A family member is one who has a consumer residing with her, is responsible for 24- hour care and supervision of the consumer, and is not an unrelated licensed residential care facility or foster family service. (§ 4686.5, subd. (a)(3)(B).)

12. The Service Agency agrees there are sufficient grounds to find that an exception under section 4686.5, subdivision (a)(3)(A) exists and that claimant is eligible for 360 hours of LVN respite per month.

13. Regional centers must refer consumers to available generic sources of payment, and assist consumers in their attempts to obtain funding to which they are entitled, but regional centers must act as payers of last resort where such funding cannot be obtained. (§ 4659 et seq.; see also 4659.10 (regional centers "shall continue to be the payers of last resort" in cases involving third-party liability).) Failing to do so violates the central purpose of the Lanterman Act: to provide needed services to persons with developmental disabilities. (§§ 4502, subd. (a), 4646, subd. (a), & 4648, subd. (a).) 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 or where there are identified consumers for whom no provider will provide services and supports contained in [his] individual program plan.” (§ 4648, subd. (g).) Claimant’s educational placement at HMS is paid for by claimant’s school district, a generic source. (Factual Finding 5.)

14. Welfare and Institutions Code section 4648 states in pertinent part:

In order to achieve the stated objectives of a consumer’s individual program plan, the regional center shall conduct activities including, but not limited to, all of the following:

(a) Securing needed services and supports. [¶] . . . [¶]

(4) [A] regional center may contract or issue a voucher for services and supports provided to a consumer or family at a cost not to exceed the maximum rate of payment for that service or support established by the department. . . .⁵ [¶] . . . [¶]

(g) Where there are identified gaps in the system of services and supports or where there are identified consumers for whom no provider will provide services and supports

⁵ When developing IPPs for consumers, the regional center is to be guided by section 4685. (§ 4646.5, subd. (a)(3).) Under that section, regional centers are authorized to use “innovative service delivery mechanisms, including but not limited to, vouchers . . .” (§ 4685, subd. (c)(3); see also § 4651.)

contained in his or her individual program plan, the department may provide the services and supports directly.

15. Funding for an out-of-state service is governed by section 4519 and related statutes. Section 4519 provides, in pertinent part:

(a) The department 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. For the purposes of this section, the department shall be considered a service agency under Chapter 7 (commencing with Section 4700).

[¶] . . . [¶]

(c) When a regional center places a client out of state pursuant to subdivision (a), it shall prepare a report for inclusion in the client's individual program plan. This report shall summarize the regional centers efforts to locate, develop, or adapt an appropriate program for the client within the state. This report shall be reviewed and updated every three months and a copy sent to the director. Each comprehensive assessment and report shall include identification of the services and supports needed and the timeline for identifying or developing those services needed to transition the consumer back to California.

16. In this case, the Service Agency and Mother developed an IPP which identifies claimant's educational placement to be out-of-state, and which identifies claimant's respite needs. (Finding of Facts 4 through 6.) However, the Service Agency has not acted to implement the IPP.

17. The Service Agency has not requested funding from DDS for claimant's

respite services while he attends his out-of-state educational placement and has not provided DDS with the statutorily-mandated information necessary to make a decision as to whether to fund these services. Section 4519 contemplates that a regional center will provide DDS with an IPP reflecting the IPP team's determination of services and supports needed, and with information concerning attempt to identify options within California and information concerning any alternative options considered and the reason they will not meet the consumer's needs.

18. The Service Agency's refusal to submit a funding request to DDS for claimant's respite services despite documents confirming the school district's determination that claimant cannot receive a FAPE in California (Factual Finding 5), is at odds with the Lanterman Act's remedial purposes. (See *Association for Retarded Citizens v. Department of Development Services* (1985) 38 Cal.3d 384, 391, 392; see also *Lande v. Jurisich* (1943) 59 Cal.App.2d 613, 617.) The Legislative protections embodied in a remedial statute such as the Lanterman Act cannot be frustrated or circumnavigated by unwarranted delay. (*California State Restaurant Association v. Whitlow* (1981) 58 Cal.App.3d 340, 347; see also *Montessori Schoolhouse of Orange County, Inc. v. Department of Social Services* (1981) 120 Cal.App.3d 248, 256.) The wisdom in requiring a broad construction is apparent here where, based on the evidence at hearing, funding for out-of-state respite services for claimant is the only appropriate and available option at this time, given claimant's out-of-state educational placement.

19. The Service Agency must immediately submit to DDS a request for funding, with all documentation required under the Lanterman Act. DDS must then act expeditiously to determine the propriety of funding claimant's out-of-state respite services, in view of the undisputed absence of an available FAPE for claimant in California, and the Service Agency's uncontested determination that claimant requires 360 hour of respite services per quarter.

ORDER

The appeal by claimant is granted in part. The Service Agency shall promptly submit to DDS a request, supported by all statutorily-mandated documentation, to fund claimant's out-of-state respite services while claimant attends HMS. Upon receiving the request from the Service Agency, DDS shall without any unwarranted delay make a determination, in compliance with the Lanterman Act, as to whether to fund claimant's respite services.

DATED: December 29, 2016

CHANTAL M. SAMPOGNA
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; all parties are bound by this decision. Any party may appeal this decision to a court