

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

An Individual,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2016101074

DECISION

Laurie R. Pearlman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on March 14 and 16, 2017, in Culver City.

Aaron Abramowitz, Attorney-at-Law, represented Westside Regional Center (Service Agency or WRC).

Claimant's uncle, an Attorney-at-Law, represented claimant, who was not present.¹ Claimant's parents, who are her conservators, were present.

Oral and documentary evidence was received. The record was held open to allow briefing by the parties. Claimant filed a closing brief and a reply brief, which were marked for identification as Exhibits 46C and 47C, respectively. WRC filed a closing brief and a reply brief, which were marked for identification as Exhibits 18 and 19, respectively.

The record was closed and the matter was submitted for decision on May 12, 2017.

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¹ Family titles are used to protect the privacy of claimant and her family.

ISSUE

Whether WRC must seek funding from the Department of Developmental Services (“DDS”) beyond January 31, 2017, for claimant’s out-of-state residential and other services provided by the Chapel Haven Schleifer Adult Independent Living Program (SAIL) in New Haven, Connecticut.²

EVIDENCE RELIED UPON

Documents. Claimant’s exhibits 1C through 45C and WRC’s exhibits 1 through 17.

Testimony. Claimant’s mother, Gerard Dupree, William Feeman, Audrey Griesbach, M.D., Hillary Kessler, Lea Saxton, Ron Swanigan, and Chandra Talley.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a 26-year-old woman who is a consumer of WRC based upon a qualifying diagnosis of autism. She also has been diagnosed with intellectual disability, a mood disorder, and difficulty with self-regulation. Claimant receives regional center services under the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) (Lanterman Act).

2. In mid-August 2016, claimant’s mother received an email from claimant’s service coordinator at WRC containing a list of supported living services and work activity programs in Los Angeles for her to investigate (Exhibit 16C). Claimant’s parents were sent a

² A second issue, claimant’s entitlement to aid paid pending the outcome of her appeal, was raised at the hearing. However, this is no longer being contested by WRC. In its closing brief, WRC conceded that claimant is entitled to aid paid pending because she submitted her Fair Hearing Request within 10 days of receiving written notice that WRC was denying her request that the Service Agency seek funding from DDS for SAIL services beyond January 31, 2017.

Notice of Proposed Action (NOPA) dated July 29, 2016, which WRC later rescinded. (Exhibits 17C and 24C).

3. On October 5, 2016, Claimant's mother received a second NOPA (Exhibit 25C) stating that WRC must terminate funding for SAIL after January 31, 2017, because WRC and DDS are bound by California laws substantially limiting funding for out-of-state services. In the NOPA, WRC states that services and supports can be identified and secured in Southern California to meet claimant's individual needs. It also notes that claimant is living in Connecticut and DDS is only obligated to fund services for developmentally disabled California residents.

4. In the October 2016 NOPA, to meet claimant's individual needs for care and supervision, WRC offered funding for Supported Living Services (SLS) by a local vendor of claimant's choice which would provide supports to claimant in a home or apartment where she could live on her own or with a roommate and pay rent with her own funds. Among other things, the SLS vendor or another service provider funded by WRC could assist claimant in finding a job and meeting peers and non-disabled individuals with whom she can socialize.

5. Claimant timely submitted a Fair Hearing Request and this matter ensued. All jurisdictional requirements have been met. Claimant argues that as no complete and in-place list of services and supports in California meeting Claimant's needs has been located, claimant's appeal should be granted and continued out-of-state funding should be mandated.

EVENTS LEADING TO CLAIMANT'S OUT-OF-STATE PLACEMENT

6. Since early childhood, claimant has received services and supports from both WRC and the Los Angeles Unified School District (LAUSD). When claimant reached puberty, she developed erratic and violent behaviors. Her mood disorder worsened, she became physically violent, she was oppositional and defiant, and she experienced extreme mood swings.

7. When claimant was nearly 16 years old, LAUSD and the Los Angeles County Department of Mental Health (DMH) determined that there were no appropriate

residential placements for claimant in California, and she was placed out-of-state with funding from LAUSD and DMH.

8. Claimant was first placed in a school residential program in Utah, in 2006; the facility asked her to leave after six months because of her behavioral issues. She was then placed in a very restrictive environment in Florida, and then a less restrictive environment in Pennsylvania. The Pennsylvania facility closed after claimant was there for over two years. Claimant was next placed in a program in Hanover, Massachusetts. After a year, she was admitted to Chapel Haven's Residential Education at Chapel Haven (REACH) Program in Connecticut, a two-year program for 18 to 21 year olds preparing for greater independence. In July 2013, claimant graduated from the REACH program and entered SAIL in Connecticut.

2014 ADMINISTRATIVE DECISION

9. In July 2013, claimant's parents requested funding for out-of-state placement at SAIL from WRC because claimant had aged out of the LAUSD system. This request was denied by WRC and a fair hearing was held.

10. Pursuant to a decision dated August 22, 2014, in OAH Case No. 2013100025 (Exhibit 12C), WRC was ordered to submit a request to DDS for out-of-state funding for Claimant, based on WRC's failure to establish that there is a program in California, with space for claimant, suitable for addressing her needs as determined in the IPP process after a comprehensive assessment. Thereafter, WRC requested and received funding for claimant's out-of-state placement at SAIL from September 1, 2014 through August 31, 2016. WRC also requested funding for SAIL for the period from September 1, 2016 through January 31, 2017.

11. In the 2014 administrative decision, the ALJ noted that WRC must conduct a comprehensive assessment, convene an Individual Program Plan (IPP) meeting to determine appropriate services and supports, and request assistance from DDS's specialized resource service to identify available placements in California. After that, DDS's director must review and approve any out-of-state placement plan before funding such a placement.

SAIL

12. SAIL is a program designed for individuals who require independent living support with added structure. Participants in SAIL live in campus-owned apartments with roommates and may choose to access a Community Life Program, recreation program, vocational services, volunteer activities, adult education classes, and speech therapy, which emphasizes appropriate social skills via social communication. There is an assigned staff person who coordinates care, provides case management and oversees the person's daily schedule. SAIL's aim is to maximize consumers' independence in a safe environment.

13. At SAIL, claimant lives in a home with consistent supports available to her, she has a group of friends and a boyfriend, and she is able to explore her local community. Claimant takes local public transportation, goes to the bank, shops and enjoys local public services. With support, she has a janitorial job which she loves at Groton U.S. Naval Submarine Base. The parties stipulated that: "[Claimant] is happy at Chapel Haven and at this time prefers to remain in New Haven rather than return to California. Chapel Haven appears to offer a supported adult living program that meets [her] needs." (Ex. 10C). Claimant continues to make incremental but steady progress at SAIL. WRC concedes that claimant's situation at SAIL cannot be duplicated in California, and that providing services to claimant in California will be far more costly.³ The monthly cost for SAIL services and supports is approximately \$6,000. Supported living services for claimant in California would cost approximately \$10,000 to \$14,000. The cost of a day program, therapy, a behaviorist, a job coach and other supportive services are not included in that amount.

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³ WRC is required to "assist Claimant and her family in securing services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community. . . . Each regional center design shall reflect the maximum cost-effectiveness possible . . ." (W&I §4640.7) (Exhibit 44C).

CLAIMANT'S STATE OF RESIDENCY

14. WRC contends that it cannot be ordered to seek funding from DDS for claimant's out-of-state services because claimant no longer resides in its service catchment area or even in California. Claimant lives in Connecticut, has strong ties to Connecticut, and does not want to return to California. However, claimant is not currently living in California because WRC has been unable to provide appropriate services and supports.

15. Government Code section 244, subdivision (a) provides that residence is the place where an individual returns when not required to be elsewhere for employment or another special or temporary purpose. Claimant is in Connecticut temporarily, until WRC can locate appropriate services in California. She returns to California regularly for holidays, vacations and special occasions. Her parents/conservators are California residents and became her conservators by the actions of a California court, which deemed claimant to be a resident of this state.

16. Claimant qualifies for out-of-state services funded by WRC, pursuant to Welfare and Institutions Code section 4519. The Legislature carved out a statutory exception to allow funding for out-of-state services if no appropriate services could be found in California until the Service Agency has identified and developed those services needed to transition the consumer back to California. Until WRC has done so, claimant remains a California resident, despite the fact that her services are provided at SAIL in Connecticut.

FUNDING PROTOCOL

17. WRC has a protocol for requesting funding from DDS for out-of-state placements and a protocol for service coordinators to follow in order to submit a request for an out-of-state placement. It requires a comprehensive assessment, an IPP meeting, a placement search to identify potential placements in WRC's catchment area and, if none can be identified, a statewide search for potential placements, discussion with the service coordinator and the consumer's family of local placement options, completion and submission to DDS of a Statewide Specialized Resource Services (SSRS) form if no local placements are available or deemed appropriate, contact by the service coordinator with

any potential providers identified through the SSRS process, and reporting to DDS as to whether any of the identified options meets the consumer's needs. The service coordinator must also complete documentation that includes a description of the consumer's needs; a copy of an updated IPP reflecting the planning team's out-of-state service recommendation; a description of the out-of-state service provider; an explanation of how WRC determined that the out-of-state provider is appropriate for the consumer; a plan for quarterly monitoring of the consumer; and the proposed dates of the placement.

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CALIFORNIA SERVICES AND SUPPORTS

18. WRC contends that the Lanterman Act only allows for funding of out-of-state services if claimant's needs cannot be met in California. The parties agree that the Lanterman Act does not require that the in-state services be identical to the out-of-state services available to a consumer.

19. WRC asserted at hearing that there are appropriate placements for claimant available within Westside's catchment area. WRC's Program Manager Hillary Kessler and Chandra Talley, President of Golden Life Supported Living Agency, testified that a combination of different providers would be able to re-create a calendar substantially similar to that currently followed by claimant in Connecticut. The coordination of all of these services would either be performed by a service provider or by claimant's Service Coordinator at WRC.

20. Ms. Talley has never met claimant and her assessment was based only upon a referral packet she received from WRC and a brief conversation with claimant's mother. Ms. Talley has not evaluated claimant and was unable to recall claimant's challenges or which specific services would be needed for her care.

21. Ms. Kessler, Ms. Talley, and Lea Saxon, Chief Executive Officer of Partners of Change Supportive Living, asserted that the challenges faced by claimant were no greater than many of those adequately serviced by Ms. Talley's and Mr. Saxon's organizations or other service providers.

22. Ms. Kessler oversees the service coordination of approximately 1,000 WRC clients, many of whom are adequately served in California with care needs which are more complicated than Claimant's.

23. WRC failed to present sufficient evidence to establish that there is a program in California, with space for claimant, suitable for addressing her needs as determined in the IPP process after a comprehensive assessment. Mr. Saxton testified that it could take eight to 10 months to finalize suitable housing arrangements for claimant. Ms. Talley admitted that she knows of no housing currently available for claimant. In its closing brief, WRC suggested that claimant could live with her parents until suitable housing was located. However, no evidence was presented to establish that residing with her parents would be either safe or suitable to meet claimant's needs.

24. WRC failed to produce a valid and reliable comprehensive assessment to determine claimant's needs and failed to provide evidence of any program with space for claimant suitable to address her needs, as determined in her IPP. The assessment presented at the hearing was undated, incomplete, and contained numerous errors and omissions. (Exhibit 12). Ms. Kessler, claimant's current program manager, stated that the assessment was not comprehensive and that a new assessment needs to be done.

25. WRC did not provide evidence sufficient to support a conclusion that any California placement is currently appropriate and available. A statewide search initiated by WRC yielded no results. Claimant's mother has followed up on two un-vetted lists of vendor referrals provided to her by WRC, and added an additional vendor on her own initiative, with no success.

CLAIMANT'S REQUEST FOR RETROACTIVE FUNDING

26. In her closing brief, claimant for the first time makes a request for retroactive funding for SAIL from September 2013 through August 2014. Neither the NOPA nor the fair hearing request raises the issue of retroactive funding for SAIL. This request, therefore, is not properly before the Court and will not be addressed.

LEGAL CONCLUSIONS

1. Cause exists to grant claimant's appeal, as set forth in Factual Findings 1 through 25 and Legal Conclusions 3 through 9.

2. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.⁴) An administrative "fair hearing" to 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 an out-of-state placement. Jurisdiction was established. (Factual Findings 1-5.)

3. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) If a consumer is receiving a service and the Service Agency wants to reduce or terminate that service without agreement of the consumer, the Service Agency has the burden at Fair Hearing. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789 fn. 9.) The burden of proof is on the entity who seeks to change the status quo. (See Evidence Code section 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."]) WRC has the burden of proof in this matter.

4. 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.) 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.)

5. 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

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

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.)

6. 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).)

7. Funding for out of state placements 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.

8. WRC has not requested funding from DDS for claimant's placement after January 31, 2017. 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 an SSRS search to attempt to identify options within California and information concerning any alternative options considered and the reason they will not meet the consumer's needs.

9. WRC's refusal to submit a funding request to DDS for claimant's placement after January 31, 2017, despite the fact that no appropriate available placement in

California has been identified, 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 Lanterman Act "defines a basic right and a corresponding basic obligation: the right which it grants to the developmentally disabled person is to be provided with services that enable him to live a more independent and productive life in the community; the obligation which it imposes on the state is to provide such services." (*Association for Retarded Citizens v. Department of Development Services, supra*, 38 Cal.3d at p. 391.) The wisdom in requiring a broad construction is apparent here where, based on the evidence at hearing, an out-of-state placement for claimant is the only appropriate and available option identified at this time.

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ORDER

1. The appeal by claimant is granted.
2. Westside Regional Center must seek funding from the Department of Developmental Services beyond January 31, 2017, for claimant's out-of-state residential and other services provided by the Chapel Haven Schleifer Adult Independent Living Program (SAIL) in New Haven, Connecticut.
3. Westside Regional Center must continue to fund claimant's services at SAIL pending the Department of Developmental Services' response to the funding request.

DATED:

LAURIE R. PEARLMAN
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 of competent jurisdiction within 90 days.