

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

and

SAN DIEGO REGIONAL CENTER,

Service Agency.

OAH No. 2017040059

DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Carlsbad, California, on July 18, 2017.

Wendy Dumlao, Attorney at Law, represented claimant, who was present at the hearing.

Ronald House, Attorney at Law, represented San Diego Regional Center (SDRC).

The matter was submitted on July 18, 2017.

ISSUE

Is SDRC required to pay full or partial tuition for claimant's enrollment in the Pathway Program?

FACTUAL FINDINGS

1. Claimant is a 19-year-old woman and has been diagnosed with Mild Intellectual Disability, Down Syndrome, moderate hearing loss and mild vision loss. She receives Supplemental Security Income and Medi-Cal. In June 2016, she obtained a

certificate of completion from Torrey Pines High School and is presently attending a two year program at the Pathway Program (Pathway) at the University of California Los Angeles (UCLA) Extension.

2. On March 29, 2017, claimant requested a fair hearing to contest SDRC's Notice of Proposed Action dated March 14, 2017. In its proposed action SDRC denied claimant's request to fund tuition at Pathway.<sup>1</sup>

3. Pathway is a UCLA Extension program with two components: one is academic with a curriculum, and the other is supportive living. SDRC funds the supportive living component of this program through Level-Up Solutions. The Pathway program is designed for students with disabilities and provides an independent living environment with a curriculum focused on the development of practical skills of daily living and practical career skills. The tuition for the program is approximately \$33,400 per year.

Pathway is not a vendored regional center provider and does not seek to become a vendor of the regional center. Gabrielle Olumsteade, LCSW, a Program Manager at SDRC, had several conversations, including a conversation on April 26, 2017, with Pathway's Associate Director, Eric Latham, to explore the possibility of Pathway becoming a regional center vendor. Mr. Latham said that Pathway is not willing to accept regional center's payment rates and, further, is not willing to comply with the

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<sup>1</sup> SDRC in its proposed action denied claimant's request to fund tuition at Pathway because under Welfare and Institutions Code section 4648.55, claimant is between 18 and 22 years of age, and she did not have a certificate of completion. In fact, claimant received her certificate of completion in June 2016 and SDRC did not dispute this. Accordingly, this is not a basis to deny claimant's request and it is not addressed further in this decision.

reporting requirements a regional center would require. These requirements include regular progress reports in order to identify goals and the achievement of these goals.

Ms. Olumsteade added that Pathway has for a number of years declined to become a regional center vendor. She cited a letter dated August 19, 2009 which Lee Weinstein, Director of Client Services at Westside Regional Center (Westside), sent to SDRC in response to SDRC's inquiry whether Pathway was a regional center vendor or interested in becoming a vendor.<sup>2</sup> In this letter Mr. Weinstein stated that Westside had authorized Pathway but stopped doing so because Pathway "does not wish to become vendored or meet many of the requirements that are expected of providers of services to our constituency." Pathway, Mr. Weinstein noted, did not provide baselines or progress reports to indicate the effectiveness of the program. He added that students are not integrated with mainstream UCLA students and do not have the same extracurricular benefits.

4. Claimant did not dispute that Pathway does not wish to become a regional center vendor. Claimant did dispute, however, that claimant is not integrated with UCLA mainstream students. She testified that she has participated in events at UCLA, with persons with and without disabilities, including a fund-raising event to fight breast cancer. Claimant added that she enjoys the program. Claimant also added that the best part of the program is being part of the community.

5. According to her most recent Individual Program Plan (IPP), dated February 10, 2016, claimant did not identify Pathway as a program she planned to attend. She expressed an "interest" in attending Pathway, or another program. As a

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<sup>2</sup> Ms. Olumstead testified that SDRC sent this letter to Westside because Pathway was within Westside's catchment area and the vendorization process for Pathway proceeded through Westside.

result, the IPP did not identify her participation at Pathway as a goal, and the IPP team did not make a determination regarding the appropriateness of the program for claimant to meet her educational and/or vocational goals. In the IPP, SDRC stated only that it will help claimant with referrals as appropriate to college or other programs.

6. Case notes confirm that claimant did not ask SDRC to authorize tuition for Pathway before she decided to enroll in the program. In a note from June 9, 2016, claimant's mother informed Ramona Brennan, claimant's service coordinator, that claimant was accepted into Pathway and was planning to attend starting August 2016. Her mother discussed with Ms. Brennan SDRC funding the supportive living component of the program. On June 15, 2016, claimant's mother reported that claimant exited the adult transition program (ATP) through the San Dieguito Union High School District (District) and was going to attend Pathway in August. Subsequently, after she was enrolled in Pathway, claimant's mother asked SDRC to fund the tuition component of the program.<sup>3</sup>

7. Notwithstanding her mother's comment that claimant intended to exit the ATP program, claimant remains eligible to receive ATP until she reaches 21 under Education Code section 56026. Claimant's mother testified that she felt that the District services available to claimant were inadequate and she brought an administrative due process action against the District on claimant's behalf. In a settlement agreement dated

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<sup>3</sup> The first case note that recorded claimant's interest in SDRC possibly paying tuition at Pathway was dated October 6, 2016. On this date, Level -Up's Director called Ms. Brennan to relay a conversation he had with claimant and her parents in which he told them that SDRC does not pay tuition for Pathway. After this, on March 10, 2017, claimant's mother called Ms. Brennan and asked that SDRC fund part of the tuition for Pathway and requested that the issue be addressed through the fair hearing process.

February 6, 2017, between claimant, her parents, and the District, the District agreed to reimburse claimant's parents in the total amount "not to exceed" \$18,500 for "educational services provided to claimant at her parent's expense from July 1, 2016, through December 7, 2018." Claimant and her parents agreed that the reimbursement constitutes claimant's full and complete educational program through December 7, 2018, at which time she will age out of special education under applicable state and federal laws.

8. As a resource to meet her educational and occupational goals claimant has accessed the Department of Rehabilitation (DOR). DOR initially approved claimant as a client but closed her case for reasons that claimant is presently disputing with the assistance of a Disability Rights California advocate, Ivan Guillen. Related to her request to reopen her DOR case, Mr. Guillen in a letter dated June 2, 2017, asked DOR to fund the Pathway program as part of claimant's individual plan of employment as a student with a disability under the Workforce Innovation Opportunity Act (WIOA).<sup>4</sup> Claimant's attorney represented that claimant and Mr. Guillen and DOR are presently in discussions to resolve the matter.

#### CLAIMANT'S ARGUMENT

9. Claimant argued that SDRC is required to fund Pathway, even as a non-vendored or non-contracted program, under Welfare and Institutions Code section 4688.21, subdivision (c)(1), as a vouchered community-based training service. Claimant argued that claimant's mother has agreed to report to SDRC to document respondent's

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<sup>4</sup> WIOA was signed into law in 2014. The law is designed "to help job seekers access employment, education, training, and support services to succeed in the labor market and to match employers with the skilled workers they need to compete in the global economy." (<https://www.doleta.gov/wioa/Overview.cfm>.)

progress in order to meet the vendorization requirements set forth under the Welfare and Institutions Code. As required under Section 4688.21, subdivision (c)(2), claimant represented that the Centers for Medicare and Medicaid Services (CMS) has approved the vouchered community-based program, under the Home and Community-Based Services Waiver §1915(c) program. However, the materials claimant presented in this regard are not clear regarding whether CMS has approved the program. But even if CMS has approved the vouchered community- based training service, for the reasons detailed later in this decision, claimant's appeal must still be denied.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF AND THE GOALS AND PURPOSES OF THE LANTERMAN ACT

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)<sup>5</sup> An administrative "fair hearing" to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal SDRC's decision to deny claimant's request for SDRC to pay tuition for the Pathway program.

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.) When one seeks government benefits or services, the burden of proof is on him or her. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) Claimant has the burden to prove that she is entitled to the relief she requests.

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<sup>5</sup> All further statutory references are to the Welfare and Institutions Code, unless noted otherwise.

The purpose of the Lanterman Act is to prevent or minimize the institutionalization of developmentally disabled persons and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more productive and independent lives in the community. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.) In enacting the Lanterman Act, the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (Welf. & Inst. Code, § 4501.) The Lanterman Act gives regional centers, such as SDRC, a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4520 et. seq.)

#### THE REGIONAL CENTER'S OBLIGATION TO FUND SERVICES BY VENDORIZATION AND CONTRACT

2. Welfare and Institutions Code section 4646, subdivision (a), provides in part:

It is the intent of the Legislature to ensure that the [IPP] and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provisions of services to consumers and their families be effective in meeting the

goals stated in the [IPP], reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

3. Welfare and Institutions Code section 4648 requires regional centers to ensure that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and to secure services and supports that meet the needs of the consumer, as determined by the IPP. This section also requires regional centers to be fiscally responsible.

4. In implementing Individual Program Plans, regional centers are required to first consider services and supports in natural community, home, work, and recreational settings. (Welf. & Inst. Code, § 4648, subd. (a)(2).) Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family.

*(Ibid.)*

5. A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer in order to best accomplish all or any part of the Individual Program Plan. (Welf. & Inst. Code, § 4648, subd. (a)(3).) Vendorization or contracting is the process for identification, selection, and utilization of service vendors or contractors, based on the qualifications and other requirements necessary in order to provide the service. (Welf. & Inst. Code, § 4648, subd. (a)(3)(A).)

6. Section 4648 makes clear that if the contract process is utilized, the service provider must still be subject to regional center oversight. 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. If a rate has not been established by the department, the regional center may, for an interim period, contract for a specified service or support with, and establish a rate of payment for, any provider of the service or support



necessary to implement a consumer's individual program plan. Contracts may be negotiated for a period of up to three years, with annual review and subject to the availability of funds. (Welf. & Inst. Code, § 4648, subd. (a)(4).)

7. The regional center must also consider generic resources and the family's responsibility for providing services and supports when considering the purchase of regional center supports and services for its consumers. (Welf. & Inst. Code, § 4646.4.)

#### STATUTE GOVERNING VOUCHERED COMMUNITY-BASED TRAINING SERVICE

8. Welfare and Institutions Code section 4688.21<sup>6</sup> reads as follows, in pertinent part:

- (a) The Legislature places a high priority on opportunities for adults with developmental disabilities to choose and customize day services to meet their individualized needs; have opportunities to further the development or maintenance of employment and volunteer activities; direct their services; pursue postsecondary education; and increase their ability to lead integrated and inclusive lives. To further these goals, a consumer may choose a tailored day service or voucher community-based training service, in lieu of any other regional center vendored day program, look-alike day program, supported employment program, or work activity program.

[¶] . . . [¶]

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<sup>6</sup> The legislation authorizing the community-based training service was first enacted in 2011. Effective June 27, 2017, the rate of pay for voucher community-based training services was increased to \$14.99 per hour. (Subdivision (c) (7).)

- (c) (1) A vouchered community-based training service is defined as a consumer-directed service that assists the consumer in the development of skills required for community integrated employment or participation in volunteer activities, or both, and the assistance necessary for the consumer to secure employment or volunteer positions or pursue secondary education.
- (2) Implementation of vouchered community-based training service is contingent upon the approval of the federal Centers for Medicare and Medicaid Services.
- (3) Vouchered community-based training service shall be provided in natural environments in the community, separate from the consumer's residence.
- (4) A consumer, parent, or conservator vendored as a vouchered community-based training service shall utilize the services of a financial management services (FMS) entity. The regional center shall provide information about available financial management services and shall assist the consumer in selecting a FMS vendor to act as coemployer.
- (5) A parent or conservator shall not be the direct support worker employed by the vouchered community-based training service vendor.
- (6) If the direct support worker is required to transport the consumer, the vouchered community-based training service vendor shall verify that the direct support worker can transport the consumer safely and has a valid California driver's license and proof of insurance.
- (7) The rate for vouchered community-based training service shall not exceed fourteen dollars and ninety-nine cents (\$14.99) per hour. The rate includes employer-related taxes and all transportation needed to implement the service, except as described in paragraph (8). The rate does not include the cost of the FMS.

- (8) A consumer vendored as a vouchered community-based training service shall also be eligible for a regional center- funded bus pass, if appropriate and needed.
- (9) Vouchered community-based training service shall be limited to a maximum of 150 hours per quarter. The services to be provided and the service hours shall be documented in the consumer's IPP.
- (10) A direct support worker of vouchered community-based training service shall be an adult who possesses the skill, training, and experience necessary to provide services in accordance with the IPP.

[¶] . . . [¶]

- (12) The type and amount of vouchered community-based training service shall be determined through the IPP process pursuant to Section 4646. The IPP shall contain, but not be limited to, the following:
  - (A) A detailed description of the consumer's individualized choices and needs and how these choices and needs will be met.
  - (B) The type and amount of services and staffing needed to meet the consumer's individualized choices and unique health and safety and other needs.
  - (d) The department may adopt emergency regulations for tailored day service or vouchered community-based training service. The adoption, amendment, repeal, or readoption of a regulation authorized by this subdivision is deemed to be necessary for the immediate preservation of the public peace, health and safety, or general welfare, for purposes of Sections 11346.1 and 11349.6 of the Government Code, and the department is hereby exempted from the requirement that it describe specific facts showing the need for immediate action. A certificate of compliance for these implementing regulations shall be

filed within 24 months following the adoption of the first emergency regulations filed pursuant to this subdivision.

#### APPLICABLE EDUCATION CODE SECTION

9. Education Code section 56026 reads as follows:

“Individuals with exceptional needs” means those persons who satisfy all the following:

- (a) Identified by an individualized education program team as a child with a disability, as that phrase is defined in Section 1401(3)(A) of Title 20 of the United States Code.
- (b) Their impairment, as described by subdivision (a), requires instruction and services which cannot be provided with modification of the regular school program in order to ensure that the individual is provided a free appropriate public education pursuant to Section 1401(9) of Title 20 of the United States Code.
- (c) Come within one of the following age categories:  
  
[¶] . . . [¶]
- (4) Between the ages of 19 and 21 years, inclusive; enrolled in or eligible for a program under this part or other special education program prior to his or her 19th birthday; and has not yet completed his or her prescribed course of study or who has not met proficiency standards or has not graduated from high school with a regular high school diploma. . . .

#### EVALUATION AND DISPOSITION

10. Claimant’s appeal is denied for the following reasons:

Section 4648, subdivision (a)(3), requires SDRC, through vendorization or contract, to purchase services or supports for claimant that meet the goals detailed in her IPP. These mechanisms are required in order to ensure that SDRC provides appropriate services in a fiscally responsible and effective manner for claimant as it is required to do under Section 4646. For whatever reason, Pathway has elected to not become a vendor or contracted regional center provider and would be under no requirement to report to SDRC. Thus, SDRC would have no ability to measure whether claimant receives services to meet her needs and, moreover, whether the tuition claimant has asked SDRC to fund for these services are a cost-effective use of public resources.

Notwithstanding the lack of information available to SDRC to assess the value of Pathway to claimant, claimant argues that SDRC is still required to fund Pathway under Section 4688.21 as a "vouchered community-based training service." Contrary to claimant's argument, based on requirements under Section 4688.21, claimant failed to demonstrate by the weight of the evidence that SDRC must fund tuition for Pathway under this section.

Section 4688.21 defines "vouchered community-based- training service" as a consumer-directed service that assists the consumer in the development of skills required for employment. (Welf. & Inst. Code, § 4688.21, subd. (c)(1).) The section imposes a number of requirements for this community-based training service to qualify as a vouchered program. Among these requirements, the type and amount of the vouchered community based training service must be determined through the IPP process that includes the consumer's individual choices and needs and how these choices and needs will be met. (Welf. & Inst. Code, § 4688.21, subd. (c)(12).) The rate for the service shall not exceed \$14.99 per hour and shall be limited to 150 hours per quarter. (Welf. & Inst. Code, § 4688.21, subds. (c)(7) and (9).) The consumer must also

have a "direct support worker" who "possesses the skill, training, and experience necessary to provide services in accordance with the IPP." (Welf. & Inst. Code, § 4688.21, subd. (c)(10).)

Claimant did not demonstrate that Pathway meets these requirements to qualify as a vouchered community-based training service. The type and amount of training provided by Pathway were not determined through the IPP process and did not include an assessment of claimant's choices and needs. Claimant simply informed SDRC that she will be attending Pathway. In addition, claimant did not present evidence that claimant has a "direct support worker" at Pathway, let alone a worker with "the skills, training and experience necessary to provide services" to claimant consistent with the IPP. Further, Pathway's tuition of \$33,400 per year well exceeds the statutory rate of \$14.99 per hour at 150 hours per quarter. Apparently, Pathway is unwilling to accept this rate.

As a further reason claimant's appeal must be denied, SDRC is not required to fund Pathway because claimant remains eligible to receive ATP services until she reaches 21 years of age under Education Code section 56026 and, thus, these services are available to her as a generic resource under Section 4646.4.

This conclusion is reached even considering the February 6, 2017, settlement agreement between claimant and the District. Under this agreement, claimant and the District stipulated that claimant remains eligible to receive ATP services until she turns 21, when she will age out on December 7, 2018, from special education services under Education Code section 56026. To fund these services, the District agreed to pay "up to" \$18,500 for "educational services provided to claimant at her parent's expense from July 1, 2016 through December 7, 2018." The fact that the \$18,500 sum is less than Pathway's tuition does not mean that claimant is not eligible to receive services until December 7, 2018. The \$18,500 sum represents the value claimant and the District placed on these

services through December 7, 2018, and further represents claimant's decision to not receive services through the District in return for accepting this sum.

## ORDER

Claimant's appeal is denied.

DATED: July 25, 2017

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ABRAHAM M. LEVY

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 ninety days.**