

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of :

CLAIMANT,

Claimant,

vs.

NORTH LOS ANGELES COUNTY
REGIONAL CENTER,

Service Agency.

OAH No. 2017050061

DECISION

Matthew Goldsby, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on October 3, 2017, at Chatsworth, California.

Aaron Abramowitz, Attorney at Law, appeared and represented the North Los Angeles County Regional Center (Service Agency).

Mark Woodsmall and Kelly Cheung, Attorneys at Law, appeared and represented claimant.

The record was held open to October 27, 2017, for the parties to submit closing briefs. Both parties filed timely briefs. The Service Agency's brief was marked for identification as Exhibit 34 and claimant's brief was marked for identification as Exhibit 35.

The record was closed and the matter was submitted for decision on October 27, 2017.

STATEMENT OF ISSUES

The issue in this matter is whether the Service Agency should be required to fund claimant's attendance at Exceptional Minds and reimburse his family for out-of-pocket expenses incurred since April 3, 2015.

EVIDENCE CONSIDERED

Documents: Exhibits 3-7, 9-12, 14-31.¹

Official Notice: Exhibits 1-2, 8, 13, 33

Testimony: Anna Polin, Resource Developer for the Service Agency; Ernie Merlan, Executive Director of Exceptional Minds; and claimant and his mother and father.

FACTUAL FINDINGS

JURISDICTIONAL AND BACKGROUND FACTS

1. On February 1, 2017, the Service Agency issued a Notice of Proposed Action, proposing to deny claimant's request to fund his attendance at Exceptional Minds. Claimant filed a Fair Hearing Request.

2. Claimant has been a Service Agency consumer since December 16, 2015. His eligibility was based on a diagnosis of autism. He has demonstrated difficulties in self-care, adaptive behavior, and social and emotional skills, including anxiety, coping with changes in routines, pragmatic communication skills and social engagement.

3. Claimant graduated from a vocational high school in New York, with a certificate in digital media. His parents decided to relocate from New York to California

¹ Claimant's exhibits included duplicates of all exhibits that the Service Agency intended to present. Accordingly, all exhibits were marked numerically and admitted as jointly offered.

to support and encourage claimant in the development of his special talent in animation.

4. On January 20, 2015, before the family moved, claimant's mother filed an application with the Service Agency for regional center services. The Service Agency informed her that claimant must be physically present in the state of California to be assessed and evaluated for regional center services.

5. In July 2015, claimant established residency in California. Claimant is currently 20 years old and lives with his mother and father in Van Nuys, California.

6. On September 8, 2015, claimant filed another application with the Service Agency for regional center services. The Service Agency obtained a social assessment report, scheduled a psychological evaluation, and marshalled medical and school records. The Service Agency determined that claimant was eligible for services on December 9, 2015, mailing notice to claimant on December 17, 2015.

EXCEPTIONAL MINDS

7. Exceptional Minds is a non-profit organization in Sherman Oaks, California. According to its promotional materials, the organization is a "vocational school and working studio that prepares young adults on the autism spectrum for careers in digital animation and visual effects." (Ex. 26.) The organization offers a "full-time, three-year vocational program [that] offers a crucial bridge between high school and meaningful employment by building on the strengths of these individuals." (Ex. 26.)

8. On April 3, 2015, claimant's parents made an initial deposit of \$1,000, enrolling claimant in the "Fall 2015" school term at Exceptional Minds. (Ex. 29.) On May 20, 2015, they paid \$1,100 for claimant to attend the organization's summer workshop in 2015. He has been actively attending the full-time program ever since. To date, claimant's parents have paid Exceptional Minds \$59,900 for claimant's participation in the training program.

9. According to his progress reports, claimant has excelled academically over the course of the first two years of programming. As stipulated by the parties, "Portions of Exceptional Minds' programming may be approximated by various Service Agency service providers; however, the program as a whole cannot be." Also, "Exceptional Minds appears to be providing claimant with appropriate planning and services as a whole to meet his needs and preferences." (Ex. 32.)

10. Ernie Merlan is the Executive Director of Exceptional Minds. He testified that Exceptional Minds is in its seventh year of operation, admitting approximately 10 students per year. Accordingly, approximately 70 students have enrolled in the program over the course of the past seven years. He estimated that 8-of-10 students are consumers of a regional center, that some have withdrawn before graduating, and that 27 students have successfully completed the program.

VENDORIZATION

11. The Legislature has created a statutory scheme for vendoring direct service providers, for rate-setting, and to monitor the services and supports purchased by regional centers for its consumers.² The Department of Developmental Services (DDS) was delegated the authority "to adopt regulations governing the vendorization process to be utilized by the department, regional centers, vendors, and the individual or agency requesting vendorization."³ Pursuant to that delegation of authority, DDS has adopted regulations applicable to the vendorization process and the contractual provisions required to be included in all service provider agreements with regional centers.⁴

² Welf. & Inst. Code, §§ 4648, subd. (a)(3)-(5), 4648.1.

³ Welf. & Inst. Code, § 4648, subd. (a)(3)(B).

⁴ Cal. Code Regs., tit. 17, § 50607-50610.

12. Exceptional Minds is not a vendor of any regional center, and is not under contract to provide services to Service Agency consumers. Anna Polin, Resources Director with the Service Agency, testified about efforts over the past several years to vendorize Exceptional Minds. Ms. Polin testified that a service provider must become a vendor and be assigned a service code, according to the Service Agency's interpretation of the regulations.⁵ She proposed to Exceptional Minds various service codes with rates established by the regulations adopted by DDS.

13. Mr. Merlan testified that the organization is willing to become a vendor, to be subject to audit and review, to cooperate in all monitoring and quality control provisions, and to allow the Service Agency to evaluate its staff. However, none of the proposed service codes offered rates that were acceptable to the organization.

14. Exceptional Minds includes training on social skills, stressing the importance of personal hygiene and physical presentation in the workplace of film and television production. However, the established rate for day care providers of social or adaptive skills services is unacceptably low to Exceptional Minds.

15. For Exceptional Minds to be paid its usual and customary rate, the regulations provide that at least 30 percent of its students must be non-consumers of a

⁵ A "service provider" is defined in the regulations as a person, program, or entity "vended to provide services to regional center consumers." (Cal. Code Regs., tit. 17, § 50602, subd. (o).) A "vendor" is defined in the regulations as "an applicant which has been given a vendor identification number and has completed the vendorization process." (Cal. Code Regs., tit. 17, § 54302, subd. (a)(74).) The regulations further provide, "The vendoring regional center shall assign a service code to the vendor based upon the program design and/or the services provided." (Cal. Code Regs., tit. 17, § 54340, subd. (c).)

regional center.⁶ Anticipating that more than 70 percent of its students may be consumers of a regional center, the organization is unwilling to apply for vendorization under these terms and conditions.

16. Because Exceptional Minds is a vocational program, the Service Agency has suggested applying under a "dual code" in conjunction with the Department of Rehabilitation, the state agency providing employment and independent living resources for people with disabilities. Mr. Merlan testified that he will "need more information" before acting on this suggestion. He further testified that the Service Agency has not sent him an application or a proposed contract, and that he "would need to know the terms before knowing what we would agree to." The organization has not consulted with an attorney about legal procedures to establish a relationship with regional centers to provide funding for its students.

17. Claimant presented two decisions made in other administrative hearings, in which administrative law judges ordered the Service Agency and another regional center to pay Exceptional Minds for two students, notwithstanding the organization's status as a non-vendor.⁷ The inference is drawn from the evidence that the remaining 60 or more students who have enrolled at Exceptional Minds over the course of seven years were privately funded, in spite of approximately 80 percent of them being regional center consumers.

⁶ Cal. Code Regs., tit. 17, § 57210, subd. (a)(19).

⁷ In OAH case numbers 2015040270 and 201602673, the consumers' appeals were granted. The Service Agency presented the decision authored by this administrative law judge in OAH case number 2016020644, in which the consumer's appeal was denied on facts similar to, but not the same as the facts established in this case.

INDIVIDUAL PROGRAM PLAN PROCESS

18. The determination of which services and supports are necessary for claimant is made through the Individual Program Plan (IPP) process.⁸ On February 18, 2016, claimant and his parents attended the initial IPP meeting. The IPP report is devoid of any goals or desired outcomes that were agreed to by the IPP participants. (Ex. 11.) The consumer I.D. notes reflect that claimant's mother requested independent living services (ILS) during the meeting and that an assessment was submitted. (Ex. 22, C-148.)

19. On October 11, 2016, claimant's mother made telephone contact with the service coordinator assigned to claimant's case and requested funding for claimant's attendance at Exceptional Minds. The service coordinator informed the mother that Exceptional Minds is "not vendored with us," to which the mother responded, "other consumers from other regional centers are funding services." (Ex. 22, C-149.) Based on the weight of the evidence presented at hearing, the finding is made that this communication was the first request made by claimant for the Service Agency to purchase services from Exceptional Minds.

20. On November 17, 2016, claimant's mother again requested funding for Exceptional Minds. The service coordinator noted, "I explained to her numerous times that there is no issue with us [funding] the service, we just need to vendor them." (Ex. 22, C-149.)

21. On January 18, 2017, claimant and his parents attended another IPP

⁸ Welf. & Inst. Code, § 4646. The determination of services and supports must be based on the needs and preferences of the consumer or his family, considering a range of service options proposed by the IPP participants, the effectiveness of each option in meeting the goals stated in the IPP, and the cost-effectiveness of each option. (Welf. & Inst. Code, § 4646, subd. (a).)

meeting. It was noted that claimant has a "great talent when it comes to art," that he is "a very creative individual," that he is "a quick learner and knows how to advocate for himself." (Ex. 20.) Claimant is able to independently dress himself, complete his personal hygiene, prepare food in the microwave, and perform household chores.

22. The IPP team considered claimant's attendance at Exceptional Minds and that he is "working on getting a certificate related to animation and digital technology." (Ex. 20, C-136.) During the IPP meeting, claimant's parents requested the Service Agency to fund claimant's attendance at Exceptional Minds. Claimant's mother declined to sign the IPP Agreement presented at the conclusion of the meeting, writing on the form, "will sign after receiving IPP." (Ex. 20, C-129.)

23. The service coordinator who prepared the IPP report identified the following desired outcome: "[Claimant's] parents will fund all his expenses at it relates to Exceptional Minds" and "[The Service Agency] will not be able to fund Exceptional Minds School nor reimburse family because it is not a vendor with [the Service Agency]." (Ex. 20, - C-137-138.) Otherwise, the IPP identifies adaptive living skills training and maintenance of good health as desired outcomes of services and supports.

24. On February 1, 2017, the Service Agency sent claimant a letter declining the parents' request for funding the services provided by Exceptional Minds. The Service Agency proposed alternate programming options, including the NEXUS program at Tierra del Sol Foundation and the Media Arts program at New Horizons. The Service Agency also proposed the following additional options to implement the programming objectives of the IPP:

- (A) Ventura County Community College District was recommended because it has a curriculum in digital film and video production and students receive hands-on experience creating digital video.

(B) The West Valley Occupational Center was recommended because it has a Video Production Department with courses in video production and animation media and techniques.

(C) Valley College was recommended because it offers programing through its Media Arts Department.

25. Claimant's father inquired with all proposed alternatives. He determined that the NEXUS program was unsuitable because it is a college program, and claimant is not prepared to attend a full liberal arts program. New Horizons was deemed unsuitable because the program does not offer animation, claimant's area of interest and talent. Claimant's father also considered Pierce College, but found that the college offered only one course in animation. Similarly, West Valley College offers courses in video production, but nothing specific to animation.

26. On February 13, 2017, and again on February 22, 2017, claimant's attorney wrote a letter to the Service Agency, demanding the production of all records relating to claimant. (Ex. 16-17.)

27. On April 3, 2017, claimant's attorney sent the Service Agency a detailed letter, making another demand on behalf of claimant and his parent for reimbursement for the costs associated with claimant's attendance at Exceptional Minds. The Service Agency did not reply to the letter.

LEGAL CONCLUSIONS

STANDARD OF PROOF

1. Claimant, as the party seeking government benefits or services, bears the burden of proof. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156.)

2. 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,

STATUTORY FRAMEWORK

3. The Lanterman Developmental Disabilities Services Act (Lanterman Act) sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. (Welf. & Inst. Code, § 4500 et seq.) 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." (Welf. & Inst. Code, § 4501.)

4. Following intake and within 60 days of a completed assessment, regional centers are required to develop an IPP for any person found to be eligible for regional center services. (Welf. & Inst. Code, § 4646, subd. (c).) The legislative intent of the Lanterman Act is to ensure that "the provision of services to consumers⁹ 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." (Welf. & Inst. Code, § 4646, subd. (a).) An IPP must be prepared jointly by the planning team, and must identify the consumer's goals, objectives, and services and supports that will be included in the consumer's IPP. (Welf. & Inst. Code, § 4646, subd. (d).)

5. A regional center may, "pursuant to vendorization or a contract," purchase services or supports for a consumer from any individual or agency that the IPP participants determine will best accomplish any part of the consumer's IPP. (Welf. & Inst. Code, § 4648, subd. (a)(3).) Also, a regional center may contract or issue a voucher for

⁹ "Consumer" means a person who has a disability that meets the definition of a developmental disability under the Lanterman Act. (Welf. & Inst. Code, § 4512, subd. (d).)

services and supports provided to a consumer at a cost not to exceed the maximum rate of payment for that service established by DDS. (Welf. & Inst. Code, § 4648, subd. (a)(4).)

6. A purchase of service authorization must be obtained in advance from the regional center for all services purchased out of center funds. (Cal. Code Regs., tit. 17, § 50612.) A retroactive authorization is allowed for emergency services "if services are rendered by a vendored service provider: (A) At a time when authorized personnel of the regional center cannot be reached by the service provider either by telephone or in person (e.g., during the night or on weekends or holidays); (B) Where the service provider, consumer, or the consumer's parent, guardian or conservator, notifies the regional center within five working days following the provision of service; and (C) Where the regional center determines that the service was necessary and appropriate." (Cal. Code Regs., tit. 17, § 50612, subd. (b)(1).)

LEGAL GROUNDS FOR FUNDING SERVICES

7. In this case, claimant's family and the planning team participated in the IPP process, and claimant and his family expressed their preference of Exceptional Minds as a service provider. The parties stipulated that Exceptional Minds provides appropriate programming and services as a whole to meet claimant's needs and preferences as stated in his IPP. However, as a matter of law and under the applicable regulations, claimant has failed to prove by a preponderance of the evidence that he is entitled to the requested funding for those services because the purchase of service from Exceptional Minds cannot be made pursuant to vendorization or a contract.

8. There is no dispute that Exceptional Minds is not a vendor of any regional center. After a series of inquiries about the terms of vendorization, the organization has yet to file an application or consult with an attorney about the procedure.

9. Claimant argued that the statute provides an alternative mechanism for

funding, specifically that the purchase of service may be made pursuant to contract. The Service Agency argued that contracting with a service provider requires vendorization because the regulations define "service provider" as a person, program, or entity "vendored to provide services to regional center consumers." (Cal. Code Regs., tit. 17, § 50602, subd. (o).) However, the regulations contemplate the provision of services by non-vendored persons or entities. Specifically, a regional center may offer vouchers to family members or adult consumers to allow them to procure their own diaper or nutritional supplements, day care, nursing, respite, or transportation service. (Cal. Code Regs., tit. 17, § 54355.)

10. Nonetheless, claimant is unable to establish by a preponderance of evidence that the purchase of service from Exceptional Minds may be made pursuant to contract. The evidence fails to show any meeting of the minds between Exceptional Minds and the Service Agency. An essential element of a contract is consent. (Civ. Code, § 1550.) Although Exceptional Minds is willing to be subject to audit and review, and to cooperate in all monitoring and quality control provisions that would be required in a contract with a regional center, it has not consented to provide services at the rates established by the regulations for adaptive or social skills services offered by day care providers, or on the terms necessary to charge its usual and customary rates.

11. Even if Exceptional Minds were excused from the regulation defining a "service provider" as a vendor, there are no grounds to excuse the organization from the dozens of other contractual provisions required by the regulations, including "a contract provision stating that the terms of the contract shall not be construed to excuse compliance with existing statutes or regulations." (Cal. Code Regs., tit. 17, § 50607, subd. (i).) If Exceptional Minds is unwilling to provide service at the rates or on the terms required by the regulations, then the Service Agency is under no obligation to pay for the service, in spite of the evident benefit conferred to claimant.

12. The regulations governing the vendorization process and service provider contracts conform to the legislative intent of the Lanterman Act by enabling regional centers to verify that service providers meet the requirements and standards of the regulations. (*Morris v. Williams* (1967) 67 Cal.2d 733.) These regulations are not arbitrary or capricious and have a reasonable and rational basis to assure oversight of state resources. (*Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal.3d 86.) Funding the requested services in this case would violate the applicable regulations applicable not only to vendorization, but also to contracting with regional centers. These regulations were validly adopted pursuant to a delegation of authority under a special statute and carry the full force of law. (*Canteen Corp. v. State Bd. of Equalization* (1985) 174 Cal.App.3d 952, 960.) Because the Service Agency is contractually bound to render services in accordance with the regulations, its denial of services in this case was proper. (Welf. & Inst. Code, § 4629, subd. (b).)

13. Cause was not shown to authorize funding under Welfare and Institutions Code section 4648, subdivision (a)(3), because the purchase of services at Exceptional Minds cannot be made pursuant to vendorization or contract. (Factual Finding 0.)

14. Cause was not shown to reimburse claimant's family for out-of-pocket expenses incurred since April 3, 2015. Claimant satisfied none of the criteria set forth at California Code of Regulations, title 17, section 50612, subdivision (b)(1), including the requirement that emergency services were provided by a vendor.

EQUITABLE GROUNDS FOR FUNDING SERVICE

15. Claimant argues that "the equities weigh in favor of reimbursing his parents for the Exceptional Minds tuition paid thus far." (Ex. 35, p. 14.) Indeed, equitable relief may be asserted against government agencies in administrative hearings "where justice and right require it." (*City of Los Angeles v. Cohn* (1894) 101 Cal. 373.)

16. To apply equitable principles and estop the Service Agency from denying reimbursement to the family for its out-of-pocket expenses, four elements must be established: (1) The party to be estopped must be apprised of the facts; (2) The party must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) The other party must be ignorant of the true state of facts; and (4) The party must rely upon the conduct to his injury. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462.) A vital principle of equitable relief is detrimental reliance, or as put by the California Supreme Court in the case *Seymour v. Oelrichs* (1909) 156 Cal. 782, 795: "He who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted."

17. There is no evidence to show that, by enrolling claimant in the Exceptional Minds program, the family acted in reliance on any conduct or advice given by the Service Agency or that the Service Agency made any representation to suggest that the family would have the right to reimbursement for out-of-pocket expenses relating to his enrollment.

18. On the contrary, claimant's family independently decided to move to California to support claimant's special talent in animation. Nothing in the record could be interpreted to suggest that the Service Agency would pay for such a specialized vocational education if claimant was found eligible for services. Claimant's family was aware of the expense involved in the Exceptional Mind program, discovered as a result of their own research and not on any recommendation of the Service Agency. There is no evidence that the family made any inquiry or was given any misleading advice by the Service Agency before acting on their own to enroll claimant at Exceptional Minds in April 2015, eight months before claimant was eligible for regional center services.

19. Claimant presented evidence about the Service Agency's failure to

complete the IPP process in a timely fashion, including testimony that the Service Agency failed to return phone calls or reply to letters. The testimony otherwise expressed dissatisfaction with case management after claimant was determined to be eligible for services. Indeed, the initial IPP was devoid of any goals or objectives, and the second IPP report was issued more than a year after claimant's determination of eligibility.

20. However, negligence or delay in case management is not grounds for equitable relief, but more appropriately addressed or corrected through other administrative procedures.¹⁰ To equitably estop an agency from taking administrative action on the grounds of negligence is appropriate only when the negligence causes a claimant to fail to comply with a procedural precondition to eligibility, and the failure to invoke estoppel would cause great hardship to the claimant. (*Lentz v. McMahon* (1989) 49 Cal.3d 393.) A public agency may be estopped to assert a statutory basis to deny benefits if it "acted in an unconscionable manner or otherwise set out to, or did take unfair advantage of a party"; however, a public agency is not estopped in instances of errors or omissions that cause a claimant to fail to act diligently on his claim. (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297.)

21. The fair hearing in this matter addresses a specific decision by the Service Agency to deny funding of a requested service. (Welf. & Inst. Code, §§ 4710.5, 4710.6, and 4712.) The Service Agency was slow to formally confirm the denial of claimant's request for funding by administrative action, and may have failed to comply with the

¹⁰ Any consumer who believes that any of his or her rights have been "abused, punitively withheld, or improperly or unreasonably denied by a regional center" may file a complaint with the director of the regional center. (Welf. & Inst. Code, § 4731, subd. (a).)

time requirements of the IPP process. However, the Service Agency's conduct was not unconscionable or designed to take advantage of claimant, and a more efficient management of claimant's case would not have yielded a different result. The Service Agency consistently informed claimant's mother in all its verbal communications with her that funding depended on the vendorization of Exceptional Minds. (Factual Findings 19-22.) The Service Agency has offered innovative service code options to Exceptional Minds, but the organization has not taken action to qualify as an approved service provider. Accordingly, any negligence or delay on the Service Agency's part did not cause claimant to fail to comply with a procedural precondition to eligibility.

22. Cause does not exist to equitably estop the Service Agency from denying the request for funding and reimbursement under the facts and circumstances of this case.

CONCLUSION

23. The prior fair hearing decisions in OAH case numbers 2015040270 and 2016020673 are advisory only, and not persuasive in this hearing. The evidence presented before this administrative law judge during the fair hearing was sufficient to establish different facts than the evidence presented in OAH case number 2016020644, but insufficient to support a different outcome.

24. Moreover, the case of *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, is not controlling in this matter. The case clarified that regional centers have wide discretion in determining how to implement an IPP, which may not be infringed by DDS. The court acknowledged that DDS has the authority "to promote uniformity and cost-effectiveness in the operations of the regional centers," including "setting rates for out-of-home care." (*Id.* at p. 390.) No reasonable interpretation of the case leads to the conclusion that a program that

provides a benefit to a consumer may be excused from compliance with the regulations applicable to vendorization or contracting with a regional center simply because the service provider will not consent to the terms and conditions of the regulations.

25. Exceptional Minds has little incentive to change its manner of operation. Over the course of seven years, Exceptional Minds has accepted into its program approximately 70 students, most of whom were or have been consumers of a regional center; and yet, the evidence shows that only two students have been funded by a regional center, against the agency's determination of funding in each case.

26. Exceptional Minds has not taken the action necessary to become a vendor or to comply with the regulations applicable to contracts with regional centers. Claimant's family chose to enroll claimant in the unique program at Exceptional Minds based on their own initiative, and not in reliance on any conduct or representations made by the Service Agency. Accordingly, the Service Agency is not obligated to provide funding, as a matter of law or equity, or to reimburse claimant's parents for his attendance at Exceptional Minds.

ORDER

Claimant's appeal is denied.

The Service Agency is not required to fund claimant's tuition at Exceptional Minds or to reimburse his family's out-of-pocket expenses incurred since April 1, 2015.

DATED:

MATTHEW GOLDSBY

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. This decision binds both parties. Either party may appeal this decision to a court of competent jurisdiction within 90 days.