

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018010990

DECISION

Kimberly J. Belvedere, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on May 9, 2018.

Stephanie Zermeño, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

There was no appearance on behalf of claimant.

The matter was submitted on May 9, 2018.

ISSUES

Should IRC fund claimant's requests for the following services: 1) an educational rights attorney to act as claimant's legal educational advocate; 2) legal representation services to help claimant with claims/appeals with California Children's Services (CCS); 3) legal representation services to help claimant with claims/appeals with the Social Security Administration (SSA); 4) reimbursement for out-of-pocket medical expenses associated with the purchase of a hearing aid; and 5) consumer services coordinator presence at Individualized Education Plan (IEP) meetings with claimant's school district.

FACTUAL FINDINGS

BACKGROUND

1. Claimant is eligible for regional center services based on a diagnosis of Intellectual Disability. Claimant's mother is her authorized representative.

2. On December 20, 2017, IRC served claimant, through her mother, with a Notice of Proposed Action denying claimant's request for 1) an educational rights attorney to act as claimant's legal educational advocate; 2) legal representation services to help claimant with claims/appeals with California Children's Services (CCS); 3) legal representation services to help claimant with claims/appeals with the Social Security Administration (SSA); 4) reimbursement for out-of-pocket medical expenses associated with the purchase of a hearing aid; and 5) consumer services coordinator presence at Individualized Education Plan (IEP) meetings with claimant's school district.¹

The Notice of Proposed Action noted the following:

Regarding the request for an educational rights attorney and legal representation services for claims/appeals with CCS and the SSA, IRC correctly stated that the provision of an attorney or other legal representation is not authorized under the Lanterman Act. Multiple other sources for legal assistance were identified in the letter to claimant's mother to assist her with finding legal services.

¹ The Notice of Proposed Action did not actually deny claimant's request for consumer services coordinator attendance at claimant's IEP meetings; rather, it sought clarification on why claimant's mother would like the consumer services coordinator to attend and wanted claimant's mother to give adequate notice, which she had not done in the past.

Regarding the request for reimbursement for claimant's medical expenses connected with acquiring hearing aids, IRC explained that Medi-Cal will fund hearing aids and although claimant's mother denied having Medi-Cal, IRC checked with Medi-Cal and claimant is covered. Therefore, Medi-Cal is a generic resource and claimant's mother must request funding through Medi-Cal, or CCS, as a generic resource.

Regarding the request for claimant's consumer services coordinator to attend claimant's IEP meetings, IRC noted that it was not denying her request, but that 30 days advanced notice would be required because in the past, claimant's mother had not given sufficient notice and when the consumer services coordinator did take time to attend the IEP, claimant's mother would not let her participate, speak, view documents, or otherwise take any meaningful part in the IEP.

3. On January 8, 2018, claimant's mother filed a Fair Hearing Request on claimant's behalf objecting to IRC's decision not to provide the above-referenced services. She wrote:

Services were requested [throughout] 2017 have been denied. Said denials are causing unnecessary duress, stress, hindering [*sic*] the consumer's access to educational services, community based programs, financial stability and require immediate attention as it is further hindering [*sic*] consumer's ability to exercise their rights.§

Mediation/Arbitration and/or Administrative hearing officer must hear request/reasoning and provide assistance in filing complaints (as requested) and warrant [*sic*] exceptions and acceptance of all requested services to be provided and/or

immediate resolution to alleviate duress, stress, and ensure consumer's denied rights.

4. OAH sent claimant's mother a Notice of Hearing on January 26, 2018, noticing a mediation date of February 15, 2018, and a hearing date of March 7, 2018. The notices were sent to the same address claimant's mother identified on the Fair Hearing Request, and where IRC had been corresponding with her.

5. Mediation was held on February 15, 2018, and did not result in settlement. The parties were advised the hearing would proceed on March 7, 2018.

6. Between the mediation and the March 7, 2018, hearing date, claimant's mother neither requested nor was granted a continuance. The ALJ opened the record and began the hearing. IRC advised the ALJ that it had received an e-mail correspondence from claimant's mother, one hour before the hearing was to begin, claiming multiple reasons why she could not appear. Among them were: childcare issues, personal struggles, poor health of claimant's mother's mother in law, poor health of claimant's father, appointments, transportation issues, financial issues, etc. The ALJ felt it constituted good cause to continue the hearing, and did so. He also consolidated this matter, and claimant's sister's matter (OAH No. 2018010985), for hearing but not decision, on his own motion.

7. On March 13, 2018, OAH sent a Notice of Continued Hearing and Order of Consolidation (Notice and Order) to IRC and claimant's mother, noticing the continued hearing for May 9, 2018. The Notice and Order was sent to the same address that had been previously used in connection with legal documents sent to claimant's mother.

8. Extensive e-mail communications provided by IRC show that claimant's mother is constantly in e-mail communication with IRC about both the proceedings and issues concerning claimant. In one rather terse e-mail to IRC dated May 2, 2018, claimant's mother mentions that she would like to reach an amicable resolution so that

the burden of hearing is eliminated. At no point during any e-mail communications did claimant's mother indicate that she was unaware of the impending hearing date.

9. On May 7, 2018, claimant's mother sent an e-mail to IRC stating the following:

please be reminded, as indicated at mediation on February 15, 2018, I am unable to attend a hearing. On February 15, 2018, I informed all parties that I was unavailable [to attend a hearing] because the children . . . attend a Riverside County Office of Education (RCOE) funded program and said program is released every Wednesday at 12 noon.

Claimant's mother further included in the e-mail a list of reasons why she claimed she could not attend the hearing two days from the date of her e-mail. As with her last request for continuance regarding the March 7, 2018, hearing, claimant's mother alleged illness of claimant's father that had occurred at least a month prior to the hearing, childcare issues, transportation problems, and financial problems. In this e-mail respondent **refused** to attend the hearing unless someone agreed to provide her with childcare both prior to the hearing in order to prepare for it and also demanded that the hearing be continued.

10. Program Manager Jennifer Cummings e-mailed claimant's mother on May 7, 2018, informing her that the hearing would proceed on May 9, 2018, and attached the Notice and Order. She also reminded claimant's mother that a continuance request may be made, but only granted for good cause.

11. On May 8, 2018, claimant's mother e-mailed Ms. Cummings that was rather unintelligible and difficult to follow. It did not mention anything about the hearing. However, claimant's mother did express an objection to one hearing date for

both this case and claimant's sister's case. Claimant's mother again informed IRC that she simply was not available for the May 9, 2018, hearing.

12. On May 8, 2018, claimant's mother called OAH and stated that she did not have time to attend the hearing and could not send documents through OAH's secure e-file server. OAH staff asked claimant's mother if she could attend a telephonic status conference and she stated she did not have time for that either. OAH staff informed claimant's mother that she would have to request a continuance in writing. At no point in her discussion with OAH nor in any communications with IRC did claimant indicate that she was unaware of the hearing date.

13. Claimant's mother waited until an hour before the May 9, 2018, hearing commenced, to file her request to continue the hearing. That request, received at the hearing, alleged a variety of reasons why she could not attend the hearing that were identical to the reasons she alleged as a basis for the first continuance, and in the e-mail communications she had with IRC in the two days prior to the hearing. Among them were medical appointments that occurred two days prior to the hearing and an appointment that occurred a day prior to the hearing. Claimant's mother also stated she did not have the time to prepare for a hearing. She stated she has had many In-Home Supportive Services (IHSS) appointments, social security appointments, and other matters to attend to. Nowhere did she allege an appointment that made her otherwise unavailable on May 9, 2018. As an addition, for the first time, claimant's mother alleged she did not receive notice of the hearing date.

14. Claimant's mother has made two requests for continuance utilizing the same bases for a continuance, and also stated in at least one e-mail that she simply does not have time to attend a hearing unless someone provides her with childcare so she can both prepare for a hearing and attend it. It is not IRC's responsibility to provide for childcare or any other services so claimant's mother can prepare for a hearing she

requested; the onus is on claimant's mother to make adequate arrangements to attend the hearing. It is also highly suspect that claimant's mother contacted OAH the day before the hearing, claimed not to know about the hearing, yet said nothing to either OAH or IRC in any communications in the two days prior to the hearing that she had not been served.

15. Based on the record, a determination was made that service of the Notice and Order was proper. Further, a determination was made that good cause did not exist to continue the hearing. Finally, a determination is made that claimant's mother's failure to attend the hearing, despite the lack of an order continuing the hearing, was not the product of mistake, surprise, or excusable neglect.

16. IRC elected to proceed with a prove-up hearing.

EVIDENCE PRESENTED BY IRC

17. Karina Peterson, claimant's former consumer services coordinator, testified at the hearing. Ms. Peterson's testimony corroborated what IRC wrote to claimant as its reasons for denial of claimant's requests in the Notice of Proposed Action. Ms. Peterson also noted that no changes have occurred with claimant to justify additional respite; that claimant had an educational advocate available who was unable to fulfill her role because of claimant's mother's unavailability (which was corroborated by supporting exhibits); and that claimant had 234 hours of IHSS hours available. The IHSS hours could be used to bring in a third party provider if claimant's mother wanted a break. Moreover, IHSS provides transportation to and from medical appointments and also provides protective services, if needed. Ms. Peterson stated that claimant's mother did not provide a reason for her increase in respite. Ms. Peterson stated that IRC does not provide legal services to help appeal or file claims with CCS, social security, or advocate at IEP meetings, but did refer claimant's mother to legal service organizations that may meet her needs.

Regarding the request for reimbursement for hearing aid expenses, Ms. Peterson explained that, despite claimant's mother alleging claimant did not have Medi-Cal, claimant does have Medi-Cal and must request funding through that generic resource first. Claimant's mother did not, and no denial of service letter has been provided, which would be needed before IRC could even consider funding hearing aids. Further, assistance with out-of-pocket medical expenses could also be requested through CCS and claimant's school district. Until all those generic resources are exhausted and denial letters are provided, IRC may not fund the requested service.

18. Program Manager Carmelita Florentino-Rodriguez testified at the hearing. Her testimony corroborated the testimony of Ms. Peterson. Ms. Florentino-Rodriguez testified that IRC never denied the request that claimant's consumer services coordinator attend claimant's IEP meetings, however, it serves no purpose for the consumer services coordinator to do so if claimant's mother will not let her view documents, ask questions, or otherwise participate in the IEP meeting. Typically, when a consumer services coordinator attends an IEP meeting, they are at least allowed to participate in order to help IRC better provide needed services.

Regarding the request for reimbursement of out-of-pocket medical expenses for the cost of hearing aids, Ms. Florentino-Rodriguez echoed Ms. Peterson's testimony with respect to the need to exhaust all generic resources, and also said IRC had not received any denials or bills for the requested service. Ms. Florentino-Rodriguez also testified that, to the extent claimant's mother may have already obtained the hearing aids, the Lanterman Act forbids retroactive reimbursement except in very limited circumstances, none of which apply in this case.

19. As claimant's mother did not appear, there was no evidence provided to meet claimant's burden.

20. All documents provided at the hearing were reviewed. They included the Notice of Proposed Action letter, a variety of e-mail communications between claimant's mother and IRC, claimant's Individualized Program Plan, a letter from the educational advocate funded by IRC regarding her inability to reach claimant's mother to provide services, and an e-mail from Program Manager Leigh-Ann Pierce referring claimant's mother to various legal service programs that may be able to provide the legal services she is requesting.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish by a preponderance of the evidence that IRC should fund the requested service. (Evid. Code, §§ 115, 500; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.)

THE LANTERMAN ACT

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme 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. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code

section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

3. Welfare and Institutions Code section 4512, subdivision (b) defines "services and supports" as:

[S]pecialized 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. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be 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 . . . Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.

4. The Department of Developmental Services (DDS) is the public agency in California responsible for carrying out the laws related to the care, custody and

treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.) In order to comply with its statutory mandate, DDS contracts with private non-profit community agencies, known as "regional centers," to provide the developmentally disabled with "access to the services and supports best suited to them throughout their lifetime." (Welf. & Inst. Code, § 4620.)

5. A regional center's responsibilities to its consumers are set forth in Welfare and Institutions Code sections 4640-4659.

6. Welfare and Institutions Code section 4646 requires that the Individual Program Plan and the provision of the services and supports be centered on the individual with developmental disabilities and take into account the needs and preferences of the individual and the family. Further, the provisions of services must be effective in meeting the IPP goals, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

7. 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.

8. 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.) 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).)

9. The regional center is required to consider all the following when selecting a provider of consumer services and supports: A provider's ability to deliver quality services or supports to accomplish all or part of the consumer's individual program plan; provider's success in achieving the objectives set forth in the individual program plan; the existence of licensing, accreditation, or professional certification; cost of providing services or supports of comparable quality by different providers; and the consumers, or, where appropriate, the parents, legal guardian, or conservative of a consumer's choice of providers. (Welf. & Inst. Code, § 4648, subd. (a)(6).)

10. The regional center is also required to 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.)

11. Welfare and Institutions Code section 4659, subdivision (c), prohibits IRC from purchasing services available from generic resources, including IHSS, "when a consumer or family meets the criteria of this coverage but chooses not to pursue this coverage. As the family is eligible for IHSS, but has not chosen to pursue it, IRC cannot fund the requested services.

12. A regional center may pay a copayment, coinsurance, or deductible associated with the health care service plan or health insurance policy for a service or support provided pursuant to a consumer's individual program plan or individualized family service plan if the family's or consumer's income exceeds 400 percent of the federal poverty level, the service or support is necessary to successfully maintain the child at home or the adult consumer in the least-restrictive setting, and certain conditions are met. (Welf. & Inst. Code, § 4659.1.)

13. In order to determine if a family's income is below 400 percent of the federal poverty level, Welfare and Institutions Code section 4659.1, subdivision (d), requires the following:

The parent, guardian, or caregiver of a consumer or an adult consumer with a health care service plan or health insurance policy shall self-certify the family's gross annual income to the regional center by providing copies of W-2 Wage Earners Statements, payroll stubs, a copy of the prior year's state income tax return, or other documents and proof of other income.

EVALUATION

12. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. Claimant had the burden of demonstrating the need for the requested service or supports, and claimant did not meet that burden.

It is not the responsibility of IRC to provide an attorney or legal services to assist a claimant with the filing of claims, or litigation of appeals, from denials of services from CCS or the SSA. Similarly, an educational rights attorney is not a service or support authorized under the Lanterman Act; legal services are typically the responsibility of the family. Moreover, there are many organizations that provide low or no cost legal services, so generic resources are available to assist claimant with filing claims and pursuing appeals with private entities and the SSA.

Regarding the request for reimbursement for out-of-pocket expenses for hearing aids, IRC is not permitted to provide reimbursement for out-of-pocket expenses already incurred. No evidence in this matter showed that the hearing aids were the result of an

emergency or any other condition that would permit retroactive reimbursement. There are also generic resources available to fund claimant's request for hearing aids (CCS, Medi-Cal, and claimant's school district), and claimant must exhaust those resources and obtain denial letters before IRC may consider funding any prospective medical services.

Finally, regarding the request for claimant's consumer services coordinator to be present at IEP meetings with claimant's school district, IRC explained that it did not deny the request. However, claimant's mother must give adequate notice and permit the consumer services coordinator to participate, or there is no basis for the consumer services coordinator to attend the IEP meeting.

ORDER

1. Claimant's appeal from Inland Regional Center's determination that it will not fund an educational rights attorney to act as claimant's legal educational advocate is denied;

2. Claimant's appeal from Inland Regional Center's determination that it will not fund legal representation services to help with claims/appeals with California Children's Services is denied;

3. Claimant's appeal from Inland Regional Center's determination that it will not fund legal representation services to help with claims/appeals with the Social Security Administration is denied;

4. Claimant's appeal from Inland Regional Center's determination that it will not provide retroactive reimbursement for out-of-pocket expenses for claimant's hearing aids is denied;

5. Claimant's request for her consumer services coordinator to attend IEP meetings with claimant's school district is granted, in part. Claimant's consumer services coordinator may attend claimant's IEP meetings. If claimant's mother wishes for claimant's consumer services coordinator to attend any of claimant's IEP meetings with

claimant's school district, however, claimant's mother shall provide a minimum of 30 days advanced notice to IRC, in writing, directly to claimant's consumer services coordinator. If claimant's consumer services coordinator attends claimant's IEP, he or she shall be able to meaningfully participate to the extent the consumer services coordinator determines is necessary to assist with the provision of services and supports under the Lanterman Act. If at any IEP meeting claimant's mother refuses to permit claimant's consumer services coordinator to meaningfully participate, IRC may, at its discretion, refuse to permit the consumer services coordinator to attend any future IEP meetings.

DATED: May 21, 2018

KIMBERLY J. BELVEDERE
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.