

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the matter of:

B.P.,

Claimant,

vs.

NORTH LOS ANGELES COUNTY REGIONAL
CENTER,

Service Agency.

OAH No. 2018090010

DECISION

The hearing in this matter took place on April 10, 2019, at Santa Clarita, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. This matter was consolidated for hearing with two other cases, each involving one of Claimant's brothers, and each having the same central issue. The other cases are entitled *O.P., Claimant, vs. North Los Angeles County Regional Center, Service Agency*, OAH case number 2018090062, and *J.W., Claimant, vs. North Los Angeles County Regional Center, Service Agency*, OAH case number 2018090071. Separate decisions are issuing for each case. One set of joint exhibits was received in evidence, which will be held under case number 2018090071.

Claimant B.P. (Claimant) was represented by his mother (Mom),¹ who appeared on Claimant's behalf.

The regional center was represented by Stella Dorian, Contract Officer.

Evidence was received, the case was argued, and the matter submitted for decision on the hearing date. The ALJ hereby makes his factual findings, legal conclusions, and order.

ISSUE PRESENTED AND SUMMARY OF THE CASE

As noted above, this is one of three consolidated cases heard to determine if the Service Agency could terminate personal assistant services in Claimant's home.

Claimant is one of three children substantially disabled by autism and other conditions, all three housed and cared for by Mom, a divorcee. The other two children are Claimant's twin brother, and Claimant's half-brother. The Service Agency has been providing personal assistant services to assist Mom, along with respite care. The Service Agency asserts that In-Home Supportive Services (IHSS) is a generic service that could provide support to Mom. The Service Agency seeks termination of the personal assistant services, because it appears that the generic service is available, and it appears the Service Agency has concerns that Mom has not made a real effort to obtain the IHSS services.

Mom adduced evidence that she has tried to obtain the services, but has met with problems in the application process. Further, Mom asserts that if she obtains the

¹ Titles are used in the place of names to preserve confidentiality. While initials are not typically used for a Claimant's identity, they are used here and in the related decisions at times to establish clarity.

services, she must become an employer of those who would provide supports, and that in her situation she cannot be an employer.

The record establishes that Mom has made efforts to obtain IHSS services, and that she has been stymied by a difficult bureaucracy. While the Service Agency is correct that the law requires Mom to obtain IHSS services if Claimant is eligible, the personal assistant service shall not be terminated at this time.

THE PARTIES AND JURISDICTION

1. Claimant is a 10-year-old boy. He is eligible to receive services from the Service Agency pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.² Claimant is eligible due to Autism Spectrum Disorder (ASD).³ (Ex. 8, p. 4.)

2. On June 20, 2018, the Service Agency issued a Notice of Proposed Action (NOPA) to Claimant. (Ex. 1, pp. 13-15.) The NOPA provided that effective July 31, 2018, personal assistance hours would terminate. The NOPA was accompanied by a letter setting out the Service Agency's position as to why the services were being terminated.

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3. On August 24, 2018 the Service Agency received Claimant's Fair Hearing Request (FHR), executed by Mom. In her FHR Mom stated that continued personal assistant services were necessary for the health and safety of her three children,

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

³ It is inferred that Claimant was diagnosed with autism before the changes to the diagnostic criteria that brought about the new diagnostic criteria Autism Spectrum Disorder.

especially as she was a single mother. She stated she had applied for IHSS countless times, and that she can't be an employer. (Ex. 1, p. 23.)

4. Thereafter, the matter was set for hearing, but continued at Claimant's request. All jurisdictional requirements have been met.

BACKGROUND INFORMATION

5. According to Claimant's Individual Program Plan (IPP) dated September 27, 2016, Claimant has substantial disabilities and he needs support. He lives with his mother, twin brother and older brother in an apartment in the Service Agency's catchment area. His mother is divorced from his father. He and his twin brother go to their father's home in Orange County for approximately 24 hours on the weekend, on a periodic basis.

6. Claimant was a few days from his eighth birthday at the time of the 2016 IPP. He was "almost" toilet trained at that time, occasionally having accidents. (Ex. 8, p. 2.) He needed assistance in a number of daily activities. He needed some help in personal care. He would tantrum up to 15 times per day, some requiring significant intervention to prevent aggression towards others, and to avoid self-injury or property damage.

7. Claimant has no safety awareness. Thus, safety is an issue in the community. He requires constant supervision during waking hours.

8. Claimant attends school, receiving special education services, including transportation, occupational therapy, language and speech therapy, and placement in an autism special day class. (Ex. 8, p. 3.)

9. Mom manages the apartment building where she lives. In exchange for that, she has free rent. She needs, at least, a few hours per day to devote to her job.

SERVICES

10. At the heart of this case is the provision by the Service Agency of personal assistants for Mom, to help her manage and care for Claimant and his brothers. Claimant was authorized to receive 16 hours per week of personal assistant hours. (Ex. 13, p. 1.)

11. Mom also receives respite care, though the actual hours are not clear from the evidence. During the hearing, she testified that the respite hours are often used to perform necessary tasks, such as grocery shopping, and it is inferred that she is getting less than optimal respite time.

12. The IPP indicates that a vendor had been providing 15 hours per week of direct ABA therapy, but that the Service Agency was no longer funding it; MediCal had taken over the funding. (Ex. 8, p. 3.)

IHSS SERVICES

13. IHSS is a program administered by the counties, with oversight by the California Department of Social Services. It can provide services to various people who need assistance, including those suffering from developmental disabilities. It is funded with state, county, or federal monies depending on the particular program within IHSS. A number of services are available, including housecleaning, meal preparation, personal care, which can include bathing, grooming, toileting, and protective supervision of mentally impaired persons. (Ex. 20.)

14. In this case, Mom must take steps for Claimant to become eligible for IHSS services, which means filing an application, having an interview at her home with a social worker employed by county, submitting a Health Care Certification, and awaiting approval. At that point Mom must find someone to do the work, that person referred to as a "provider." (Ex. 20, p. 7.) Mom then is deemed the employer, and would be

responsible for hiring, training, supervising, and if need be, terminating the individual.
(*Id.*)

15. Mom does not want to be, and does not believe she can be, an employer. A matter not clear at the hearing is that she would not have to take on one of the more troublesome tasks of employing people, in that she would not have to withhold taxes and so forth. Instead, the provider turns in timesheets, which are signed by the employer, and the state issues the checks to the provider, and it will withhold taxes and disability insurance. (Ex. 20, p. 7.) Thus, it appears that one burden of being the employer will not be thrust upon Mom.

16. Marybeth DeCanio, the service coordinator for all three boys, provided testimony about the IHSS application process in Los Angeles. She described that one must first put in a phone call to the county to start the process. Then the matter is assigned to a local office that sends out the application packet. After the application packet is completed, a “face to face” was to be scheduled. Ms. DeCanio perceived that getting to the meeting was a problem.

MOM’S EFFORTS TO APPLY FOR IHSS SERVICES

17. Mom, in her testimony, described a frustrating effort to obtain IHSS services, over a period of months. It is difficult to connect to the call center, and once connected the process does not easily lead to fruition. Three to four weeks can pass before the application packet is received. Mom described forwarding the health certification for one of the boys more than once, to have it summarily rejected because one box was not filled out properly. When that happened, the application was deemed denied; she was not told to fix the certification and to bring it back; she had to go back to square one with the phone call. She needs to do this while saddled with her employment obligations and the care of three autistic boys.

18. In her testimony, Ms. DeCanio recalled one occasion when the social worker was to meet Mom (at the family's prior residence) and DeCanio was with Mom waiting for the social worker. The application was rejected, because the social worker claimed that nobody came to the door of the family's apartment, but it was the social worker who did not come to the door. On another occasion, DeCanio was on the phone with Mom, calling the call center. They could not get any assistance because the operator who took the call started crying; it is inferred that working the call center is not an easy job.

19. In an effort to assist Mom, the Service Agency obtained the assistance of social workers who are part of the Family Empowerment Team in Action (FETA), part of the Family Focus Resource Center at California State University Northridge (CSUN). FETA is a partnership between the CSUN and the Service Agency, and consists of seven social work students to help Service Agency families. (See ex. 24.)

20. Nichole Piatt is a social work student who is near to obtaining her Masters in Social Work from CSUN. She has recently assisted Mom with IHSS applications by making the phone calls, handing in the paperwork, and receiving a verbal denial because of some issue with the paperwork. It appears that she has assisted in the process of obtaining benefits for this Claimant, but not the twins. Piatt's ability to continue her assistance to Mom in the future is questionable because it appears that the Service Agency is not going to maintain the relationship with CSUN.

OTHER MATTERS

21. Mom's job complicates the task of obtaining and managing the services that may be obtained from IHSS, just as it complicates her efforts to provide care for her boys. She must be at the apartment building for much of the day, as it is an on-site job. Hence, a drive to the doctor's office for another version of the health certificate can be a problem. The owner of the building has several apartments, and had provided her the

opportunity to secure a residence for her family. Plainly, if she loses her residence, her ability to care for any of her children would be threatened. By maintaining her residence, she is avoiding the need to place her children in a facility of some type, which would plainly be very costly to the Service Agency, if a placement could be provided.⁴

22. Mom described her living situation where there is constant pressure, with the threat of injury to one or more of the three boys. Thus, when she is in one room, she must be concerned with what any one of the boys is up to. The older boy is readily set off by the behavior of Claimant or his twin, with the older boy engaging in an angry and dangerous tantrum. He might get into something in the bathroom, or break something in another room. Claimant's twin is not toilet trained, tantrums, and has no safety awareness, and he gets up in the night and plays and makes noise. The older boy is not fully toilet trained, has no safety awareness, and a tendency to elope, so that Mom had to put special locks on the doors. All three boys tantrum and act out.

23. Mom raised the concern of how she would obtain providers to employ to assist her; she has no background in such business, and a vendor provides the current assistants. She also pointed out that she has more than one personal assistant available now, and if one cannot come to work, the vendor can find another. She is concerned about finding herself in such a bind, but with nowhere to turn. Ms. Dorian pointed out that planning might be done that would create backstops for the problem of last-minute cancellations; the current vendor might be able to provide assistants, paid for by the Service Agency. This flexible thinking may provide a solution to Mom's concerns if

⁴ The ALJ is aware, from recent proceedings involving the Service Agency, that facilities of the type that would be needed to care for Claimant and his brothers are, at best, scarce in the San Fernando Valley.

and when IHSS can be obtained, and the idea should be examined carefully in the planning process.

24. The testimony of DeCanio and Piatt indicates that Mom has been trying to obtain eligibility for IHSS services, and that it is a trying process. Plainly it is made worse in the context of this case, where there are three consumers, all with significant disabilities. Indeed, in June 2017, the Service Agency took steps to terminate the personal assistance services. In a letter accompanying a NOPA, DeCanio stated she was aware that in October 2015, February 2016, June 2016, and February 2017, Mom had completed the telephonic application without any further action by IHSS social workers. (Ex. 15, p. 2.)

LEGAL CONCLUSIONS

JURISDICTION

1. Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 4.

GENERAL RULES APPLICABLE TO RESOLVING SERVICE DISPUTES:

2. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act mandates that an "array of services and supports should be established ... to meet the needs and choices of each person with developmental disabilities ... and to support their integration into the mainstream life of the community." (§ 4501.) These services and supports are provided by the state's regional centers. (§ 4620, subd. (a).)

3. The California Legislature enacted the Lanterman Act "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." (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, hereafter, *ARC v. DDS*.)

4. Services provided under the Lanterman Act are to be provided in conformity with the IPP, per section 4646, subdivision (d). Consumer choice is to play a part in the construction of the IPP. Where the parties cannot agree on the terms and conditions of the IPP, a Fair Hearing decision may, in essence, establish such terms. (See § 4710.5, subd. (a).)

5. Regional centers must develop and implement IPP's, which shall identify services and supports "on the basis of the needs and preferences of the consumer, or where appropriate, the consumer's family, and shall include consideration of ... the cost-effectiveness of each option" (§ 4512, subd. (b); see also §§ 4646, 4646.5, 4647, and 4648.) The Lanterman Act assigns a priority to services that will maximize the consumer's participation in the community. (§§ 4646.5, subd. (a)(2); 4648, subd. (a)(1), (2).)

6. In order to determine how an individual consumer is to be served, regional centers are directed to conduct a planning process that results in an IPP designed to promote as normal a life as possible. (§ 4646; *ARC v. DDS, supra*, 38 Cal.3d at 389.) Among other things, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services (which must be provided based upon the client's developmental needs), contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences. (Code §§ 4646; 4646.5, subd. (a)(1), (2) and (4); 4512, subd. (b); and 4648, subd. (a)(6)(E).)

7. Section 4512, subdivision (b), of the Lanterman Act states in part:

"Services and supports for person with developmental disabilities" means specialized services and supports or special adaptations of generic services and support 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 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's family, and shall include consideration of ... the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, ... physical, occupational, and speech therapy, ... education, ... behavior training and behavior modification programs, ... respite, ... social skills training, ... transportation services necessary to ensure delivery of services to persons with developmental disabilities.

8. Services provided under the Lanterman Act must be cost effective (§ 4512, subd. (b)), and the Lanterman Act requires the regional centers to control costs so far as possible, and to otherwise conserve resources that must be shared by many consumers. (See, e.g., §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) To be sure, the obligations to other consumers are not controlling in the decision-making process, but a fair reading of the law is that a regional center is not required to meet a disabled

person's every possible need or desire, in part because it is obligated to meet the needs of many children and families.

9. The IPP is to be prepared jointly by the planning team, and any services purchased or otherwise obtained by agreement between the regional center representative and the consumer or his or her parents or guardian. (§ 4646, subd. (d).) The planning team, which is to determine the content of the IPP and the services to be utilized, is made up of the disabled individual or their parents, guardian or representative, one or more regional center representatives, including the designated service coordinator, and any person, including service providers, invited by the consumer. (§ 4512, subd. (j).)

10. Pursuant to section 4646, subdivision (a), the planning process is to take into account the needs and preferences of the consumer and his or her family, "where appropriate." Further, services and supports are to assist disabled consumers in "achieving the greatest amount of self-sufficiency possible " In the planning process, the planning team is to give the highest preference to services and supports that will enable a minor to live with his or her family, and an adult person with developmental disabilities to live as independently in the community as possible. Planning is to have a general goal of allowing all consumers to interact with persons without disabilities in positive and meaningful ways. (§ 4648, subd. (a)(1).)

11. The planning process includes the gathering of information about the consumer and "conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. ... Assessments shall be conducted by qualified individuals Information shall be taken from the consumer, his or her parents and other family members, his or her friends, advocates, providers of services and supports, and other agencies." (§ 4646.5, subd. (a)(1).) Given that services must be cost effective and

designed to meet the consumer's needs, it is plain that assessments must be made so that services can be properly provided in a cost-efficient manner.

12. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each consumer's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a) & (b), 4648, subd. (a)(1) & (a)(2).) The Lanterman Act assigns a priority to services that will maximize the consumer's participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).) Under section 4640.7, each regional center is to assist consumers and families with services and supports that "maximize opportunities and choices for living, working, learning, and recreating in the community."

13. Reliance on a fixed policy "is inconsistent with the Act's stated purpose of providing services 'sufficiently complete to meet the needs of each person with developmental disabilities.' (§ 4501.)" (*Williams v. Macomber* (1990) 226 Cal.App.3d 225, 232-233.) The services to be provided to each consumer will be selected on an individual basis. (*ARC v. DDS, supra*, 38 Cal.3d at 388.)

14. One important mandate included within the statutory scheme is the flexibility necessary to meet unusual or unique circumstances, which is expressed in many different ways in the Lanterman Act. Regional centers are encouraged to employ innovative programs and techniques (§ 4630, subd. (b)); to find innovative and economical ways to achieve the goals in an IPP (Code § 4651); and to utilize innovative service-delivery mechanisms (§§ 4685, subd. (c)(3), and 4791).

15. (A) Under section 4502, persons with developmental disabilities have certain rights, including the right to treatment services and supports in the least restrictive environment. Those services and supports should foster "the developmental potential of the person and be directed toward the achievement of the most

independent, productive and normal lives possible.” (Subd. (b)(1).) There is also a right to dignity, privacy and humane care. (Subd. (b)(2).) The person also has the right to make choices, including where and with whom they live, and the pursuit of their personal future. (Subd. (b)(10).)

(B) The Act favors supporting minor children in their family home. (§ 4689.)

16. Section 4648, subdivision (a)(3), provides that a regional center may purchase services pursuant to vendorization *or* contract. Subdivision (a)(3)(A) provides that vendorization or contracting is the process of identifying, selecting, or utilizing vendors or contractors, based on qualifications and other factors. The Department of Developmental Services has enacted regulations governing the establishment of persons or firms as vendors. (See California Code of Regulations (CCR), title 17, §54300, et. seq.)⁵ Other regulations control the purchase of services by contract. (CCR §§ 50607 through 50611.) All of these provisions plainly exist to not only control costs, but to assure the quality of services.

PERSONAL ASSISTANT SERVICES

17. Personal assistant services are not explicitly listed in section 4512, subdivision (b), but that list of services, quoted above, is not exclusive. The services are recognized by the Service Agency and other regional centers, and appear to fall into the class of services known as “family support services,” defined in section 4512, subdivision (h). The Service Agency, in its service standards, classifies both respite care and personal assistant services as family services. (Ex. 22.)

18. (A) According to the Service Agency’s Service Standards, pertinent portions of which are found in exhibit 21, personal assistants for children do things such

⁵ Further citations to the CCR shall be to title 17.

as assist in bathing, grooming, dressing, toileting and providing protective supervision. They are provided on an exception basis when more than one person is needed to provide care, or where the severity or intensity of the disability may severely impact the family, and threaten the availability to maintain the child in the home. "Eligibility and/or use of generic services such as In-Home Support Services will be explored and accessed where possible prior to NLARC funding and exception." (Ex. 21, p. 26.)

(B) It is plain that any one of the three claimants have needs that could justify personal assistants. Given the situation here—a single parent with three substantially disabled children—personal assistants are a necessity. As noted by DeCanio in an earlier NOPA letter, sent in June 2017, his personal assistance support "is crucial to maintaining [Claimant] in the family home . . ." (Ex. 5, p. 2.) The issue remains as to whether IHSS should provide the assistants, or the Service Agency.

THE OBLIGATION TO UTILIZE GENERIC RESOURCES

19. The Lanterman Act has long required that consumers and their families, when possible, utilize generic resources, rather than the resources of the regional centers. The most obvious example of this has been the obligation to use the resources of the public schools if the consumer is a school aged child. Thus, while section 4512, subdivision (b) has provided that "education" is a service that may be provided by the regional centers, consumers must first look to the local school system for education and related services.

20. To be sure, the regional centers have long been deemed the payors of last resort; if services are not available from a generic resource, then the regional centers will provide the services; this has been deemed to be the case where there is a generic resource, but that resource fails to do its duty. In such cases, the regional centers would fill the gap, and were authorized to take direct action against the generic source. (§ 4659.)

21. In the NOPA, the Service Agency relied on section 4646.4, subdivision (a)(2), which, in essence, provides that in the planning process a regional center such as the Service Agency must, during the IPP process, ensure that a number of steps are taken, including the utilization of generic services and supports “when appropriate.” It could be argued that in the exceptional situation raised in this case, given the three disabled children and a single mother tied to the place of her residence, that the utilization of generic services—IHSS—is not “appropriate.”

22. However, that does not end the analysis. Amendments to section 4659 left little room for deviation from the basic concept that generic resources must be looked to before a regional center would use its resources. Effective July 1, 2009, “regional centers shall not purchase any service that would otherwise be available from ... In-Home Support Services, ... insurance ... when a family meets the criteria for this coverage but chooses not to pursue that coverage.” (§ 4659 subdivision (c).)

23. On this record, section 4659 does not bar provision of the personal assistant services. It appears that the children can qualify for some assistance; other similarly disabled children with similar disabilities and needs meet the criteria and receive IHSS. However, the record establishes that Mom has in fact pursued the coverage of the generic resource, and has met with much frustration. (Factual Findings 17-20.) It cannot be established, at this time, that the family has chosen not to pursue coverage. Therefore, section 4659 is not a bar to the provision of the personal assistant services due to a failure to pursue the generic resource

24. Notwithstanding this Conclusion, Mom is obligated to continue her pursuit of IHSS services. She will be ordered to document her efforts to obtain IHSS. The Service Agency should stand ready to support her efforts, as it has recently through the FETA program. The Service Agency shall continue to provide the personal assistants, for at least six months. Meanwhile, further planning should take place so that the parties can

determine how Mom can be assisted in finding and staffing care providers, and how they can be backed up, perhaps in the manner suggested by Ms. Dorian during the hearing.

ORDER

1. Claimant's appeal is granted, and personal assistant services shall not be terminated at this time. The services shall continue for at least six months.

2. Claimant's mother shall continue the efforts to obtain IHSS services for Claimant, and shall document those efforts with her service coordinator on a routine basis.

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3. The parties shall meet in the next 45 days to plan for the eventuality that IHSS services shall be obtained, to look for ways to assist Mom in locating staff, and to create a means, perhaps with the current vendor, to fill in for providers on an as-needed basis.

DATED:

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter, and both parties are bound by it. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days of this decision.