

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of CLAIMANT against:

NORTH LOS ANGELES COUNTY REGIONAL CENTER,

Service Agency

OAH No. 2019050892

DECISION

Administrative Law Judge Eileen Cohn, Office of Administrative Hearings, State of California, heard this matter on July 3, 2019, in Chatsworth, California.

Stella Dorian, Fair Hearing Coordinator, represented North Los Angeles County Regional Center (NLACRC or Service Agency).

Claimant's mother and authorized representative (mother) represented claimant¹, who was not present.

The record was closed and the matter submitted for decision on July 3, 2019.

¹ Titles are used to protect the family's privacy.

ISSUES

1. Whether claimant must participate in an Individual Program Plan (IPP) meeting with the Service Agency for day care² services to continue?
2. Whether Service Agency was required to serve claimant's authorized representative with the Notice of Proposed Action (NOPA) before terminating day care services and aid-paid-pending the fair hearing?

EVIDENCE RELIED UPON

Documents: Service Agency's Exhibits 1 through 14³; claimant's exhibits A and B.

Testimony: On behalf of Service Agency, Stella Dorian, Fair Hearing Representative; Eddie Bryant, Consumer Servicers Supervisor; and Caren Williams, Consumer Service Coordinator. On behalf of claimant, mother.

² Mother contends that the services referred to as day care services were by history coded as another type of personal assistant service. The coding of the service is irrelevant to this decision and contrary to the parties' understanding. The decision shall cover the service that has been by history referred to as day care in the IPP's and that the parties understood to be day care, whether or not the service was properly coded.

³ Exhibit 1 was admitted for jurisdictional purposes but also as evidence on the issue of notice to claimant's mother. Claimant's social security number was redacted from Exhibit 10. Exhibit 11A (portions of Service Agency Standards) and Exhibit 11B (the complete Service Agency Standards) were marked and admitted. Exhibits 12 and 13 were admitted as portions of the Lanterman Act under the doctrine of official notice.

SUMMARY

Claimant, an adult non-conserved consumer, has historically worked with Service Agency through his mother, who has acted as his authorized representative. Mother and Service Agency executed an agreement to convene an IPP on February 4, 2019 to review his continued need for day care services in person or by telephone. Claimant's mother notified Service Agency she could not appear on that day due to an accident she had while out-of-state. After that day it was difficult securing a date with mother for an IPP, and the Service Agency issued a Notice of Proposed Action (NOPA) terminating day care services.

Service Agency served the NOPA at claimant's address where it was picked up within a few days of service. Mother had a separate address from claimant. Service Agency did not notify mother separately. Historically, Service Agency had understood claimant's mother to be his authorized representative, notified mother in advance by e-mail exchange that a NOPA was about to be issued, and mother had been notified either because she lived with claimant or because she received the e-mail. Having received no objection to the NOPA within 10 days of service, Service Agency terminated claimant's day care services.

Based on the evidence, mother failed to fully cooperate and attend an IPP prior to the NOPA and filing of the fair hearing request, and a new IPP must be completed before the Service Agency is required to fund claimant's day care or similar service. However, Service Agency failed to properly notify mother of the NOPA as claimant's authorized representative, and as such, claimant is entitled to reimbursement for aid-paid-pending the decision, according to proof.

Background

1. Claimant is a 27-year-old non-conserved client of the Service Agency who has been eligible for services due to his diagnosis of Autism. Claimant has been receiving day care services from the Service Agency. As of August 7, 2015 IPP was modified to provide for daycare services between the hours of noon and 10 p.m. weekdays when mother is out of the home and working. (Ex. 2.) In the past, claimant has lived in the same home as his mother in Palmdale, California; his father and two siblings live together separately. In late 2018 and early 2019, he lived without his mother in his own residence located in Lancaster.

2. Claimant no longer resides in the catchment area of the Service Agency. On or about April 20, 2019, but no later than May 4, 2019, claimant became a resident of Apple Valley, the catchment area of the Inland Regional Center. At the time of the hearing, claimant had not transferred service agencies.⁴

Jurisdiction

3. On April 15, 2019, the Service Agency issued a NOPA to claimant providing him with a 30-day notice of termination of day care services on May 15, 2019. On May 14, 2019, mother, as claimant's authorized representative filed a fair

⁴ Mother insisted she provided written notification of claimant's move to Apple Valley but Service Agency found no record of her notification. Mother also testified that she historically used e-mail to communicate with Service Agency and relied upon them to communicate with her by that method. The absence of even a duplicative communication by e-mail, rendered her testimony unreliable and not credible on this point.

hearing request with the Service Agency. Her request was timely. All jurisdictional requirements have been met for this matter to proceed to fair hearing.⁵

Scheduling the IPP

4. In a previous dispute, claimant and mother, as his authorized representative, were served with a NOPA dated November 19, 2018 at mother's Palmdale residence. The inside address on the NOPA had claimant's name on the first line and "C/O [mother]" on the second line. (Ex. 5.) The NOPA form stated claimant's address as the recipient with the Palmdale address, and mother's name under the section entitled "name of authorized representative" at the same address. The NOPA provided a 30-day notice to terminate funding for day care services on the ground that mother failed to verify her employment to support the ongoing need for day care services. (Ex. 5.) The Service Agency defines day care services as appropriate non-medical care and supervision when a parent is engaged in employment outside the home or in educational activities leading to employment. It is the policy of Service Agency to support adult consumers who choose to live in the home of a family member, and who require care and supervision during the absence of their usual caregiver. (Exhs. 11A and 11B.)⁶ Service Agency needed to reassess claimant for day care services, particularly if mother was not employed or no longer living with claimant.

⁵ The parties also met in an informal meeting to discuss the fair hearing. (Ex. 9.)

⁶ Service Agency Service Standards, Adopted by the Board of Trustees, May 9, 2018, Approved by the Department of Developmental Services, November 16, 2018, pp. 24-25.

5. Mother timely appealed the NOPA within the timeframe to preserve aid-paid-pending day care services, and the hearing was set for January 24, 2019 as OAH Case. No. 2018120233. On the day of the hearing, instead of proceeding, the parties executed a final settlement agreement, which they agreed was "binding and enforceable," to fully resolve the dispute. The settlement agreement provided: (1) the Service Agency would convene a new IPP on February 4, 2019. "If Claimant's mother is not able to attend the meeting, the IPP meeting will proceed and Claimant's mother may choose to participate telephonically" and (2) "Day care services will continue to be provided to claimant until the February 4, 2019 IPP meeting. It will be decided through the IPP process which services will be provided taking into account claimant's current living situation." (Ex. 6.) On that day, mother also notified the Service Agency that she no longer lived with claimant. (Ex. 9.) It is disputed whether and when mother also told Service Agency she was living with him overnight. At some point, mother obtained a roommate for him, and she no longer lived with him at night.

6. At 3:00 a.m., the morning of February 4, 2019, mother notified the Service Agency by e-mail that she had an accident in Idaho and claimant was flying up, with his brother, to be with her. There were many e-mail communications that day between mother and the Service Agency's Service Coordinator, Caren Williams that can be described only as conciliatory and cooperative in tone. However, at no time did mother offer to participate in an IPP telephonically when her son arrived in Idaho; she described herself as medicated. (Ex. 7.) By agreement, day care services were suspended until mother and claimant returned from Idaho. On February 13, 2019, mother notified Williams by e-mail at 9:37 p.m. that she returned and requested a new date. Day care services resumed. On February 14, 2019, at 9:10 a.m., Williams responded offering, on behalf of Service Agency, February 22 or February 23, 2019 as IPP dates. On February 22, 2019, at 2:38 p.m. mother responded her earlier e-mail got

"stuck in my outbox" (but did not send the earlier e-mail), and requested "anytime next week." (*Id.*) Williams responded on February 25, 2019 at 8:26 a.m. requesting mother confirm her availability on March 4, 2019; however, before receiving a response from mother, Williams e-mailed again at 3:08 p.m. that day to request March 8, 2019 at 3 p.m. instead because her supervisor was not available on March 4, 2019.

7. After Williams last e-mail on February 25, 2019, there were no further documented communications between mother and Service Agency about scheduling an IPP prior to the Service Agency's issuance of a NOPA. On March 5, 2019, Williams advised Edie Bryant, Consumer Services Coordinator, she was unable to confirm an IPP with mother. Mother insisted during her testimony she left a voice-mail with the Service Agency informing its staff she was unavailable on March 8, 2019 due to a conflict with her medical appointment for an MRI that day. However, there is no record in the Service Agency's notes of her call, and her testimony conflicts with her stated preferred practice of communicating with the Service Agency by e-mail and, as such, was not credible. Further, during the hearing mother admitted she made no further attempt to schedule an appointment prior to the issuance of the NOPA, nor is there any evidence that she followed up by e-mail, when she did not hear back from Service Agency by March 8, 2019.

8. On April 3, 2019, Williams contacted claimant at his phone number and left a voice mail in an attempt to schedule the IPP. Williams conceded at hearing that she had never contacted claimant before and all her communications, outside of the IPP, were with mother. She acknowledged claimant's limited verbal ability. Bryant also did not recall why claimant was contacted. Both Bryant and Williams acknowledged that mother had always been claimant's authorized representative and all their communications were with her. Service Agency communications, including the

NOPAs and fair hearing forms confirm Service Agency's historical recognition and treatment of mother as claimant's authorized representative for all purposes.

9. Prior to the fair hearing, the parties met at an informal meeting to discuss the hearing issues and agreed to participate in an IPP on June 10, 2019. Service Agency would not agree to continue day care services pending the hearing. The parties did participate in the IPP, but at the time of the hearing, Service Agency has not completed its assessment of claimant's support services. (Ex. 9; Testimony of mother and Bryant.)

Notice and Aid-Paid-Pending

10. On April 15, 2019, over a month and a half after the Service Agency's last communication with mother, it issued a NOPA informing claimant of its intent to terminate day care services on the ground that the Service Agency has been unable to conduct an IPP meeting to assess the family's needs. The Service Agency informed claimant services would be terminated on May 15, 2019.

11. The letter accompanying the NOPA was directed to mother. The Service Agency explained in its letter that an IPP was important because of the "reported change in your living situation and the fact that you no longer reside with claimant, the supports currently identified in [claimant's] IPP needs to be reviewed to ensure that they are still appropriately and effectively meeting his needs. Absent the ability to meet with you and [claimant] to conduct the IPP planning as agreed upon on January 24, 2019, we are unable to fully assess [claimant's] current needs for care and supervision. Therefore, the Center is proposing to terminate day care services effective May 15, 2019." (Ex. 1.)

12. The proof of service for Service Agency's April 15, 2019 NOPA, was addressed to claimant c/o mother at his Lancaster address, and not also to mother at her Palmdale address. (Ex. 8.). As set forth in Factual Finding 8, by history the Service Agency always communicated with mother, not claimant, acknowledged mother as claimant's authorized representative, and always provided notice to mother as well as claimant.

13. The NOPA was picked up at a postal facility in Lancaster at 3:49 p.m. on April 18, 2019. (Ex. 8.) There is no record of who picked up the NOPA, but mother testified that it was not her, and probably was claimant. Mother provided testimony that it was the practice of the Service Agency to notify her by e-mail when a NOPA was being issued. Williams, who had been her long-term service coordinator, did not dispute mother on this point. Mother did not receive any e-mail communication regarding the NOPA, and she only discovered the NOPA when she was going through claimant's boxes during his move to Apple Valley. Given mother's past understanding of the need to preserve services by responding within ten days, it is unlikely that she would have missed the deadline if she was properly served. Evidence demonstrated Service Agency's acknowledgement of mother's position as claimant's authorized representative, its historical practice of communicating with mother, and its understanding that claimant no longer lived with mother. As such, mother's testimony was credible on this issue.

14. Mother claimed she privately paid claimant's day care service provider \$13.00 an hour for approximately 24 hours a week because of limited funds. Mother testified that she employed his long-term day care service provider privately because she could not afford the fee charged by the vendor. However, the exact amount of funds expended and hours of service provided, the method of payment and

documentary support for the payment, is unknown and without sufficient support. Mother will have to provide sufficient documentary support as a condition of reimbursement from May 16, 2019 through ten days after the decision. A statement of payment in cash, without more, will not be considered sufficient documentation. Invoices, bank statements, cancelled checks, credit card or similar statements, which are close in time to the service provided, shall be considered.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act is contained in the Welfare and Institutions Code. (Welf. & Inst. Code, § 4500 et. seq.)⁷ Under the Lanterman Act, an administrative “fair hearing” is available to determine the rights and obligations of the parties. (§ 4710.5 subd. (a).) Claimant timely requested a fair hearing to appeal the Service Agency’s NOPA to terminate day care services on May 15, 2019 because an IPP meeting was not held; and to contest the Service Agency’s termination of services without aid-paid-pending. (§§ 4710 and 4710.5.) Jurisdiction in this case was established. (Factual Finding 3.)

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, § 115.) A consumer seeking to obtain funding for a new service has the burden to demonstrate that the funding should be provided, because the party asserting a claim or making changes generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.)

⁷ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

In this case, Service Agency bears the burden of proof because it is responsible for convening the IPP and for properly serving the NOPA, and it terminated an ongoing service. By reason of Factual Findings 4 through 9, Service Agency has met its burden of proof claimant, through his authorized representative, failed to cooperate in participating in the IPP such that it is not required to fund day care services pending the completion of the IPP. However, by reason of Factual Findings 1, 8, and 10 through 14, Service Agency has not met its burden of proof it properly served claimant's authorized representative such that aid-paid-pending the decision is justified according to proof.

3. The purpose of the Lanterman Act is 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." (§ 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.) Such services include assessing the needs of each developmentally disabled person, and on an individual basis, selecting and providing services to meet those needs. (§§ 4642-4643; 4646-4647; *Association of Retarded Citizens, supra*, 38 Cal.3d at 388.)

Participation in the IPP Process is a Condition of Services

4. 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).)

5. The Lanterman Act contemplates that the provision of services shall be a mutual effort by and between regional centers and the consumer and/or her family. The foundation of this mutual effort is the formulation of a consumer's individual program plan (IPP). A consumer's IPP "shall be reviewed and modified by the planning team . . . as necessary, in response to the person's achievement or changing needs, . . ." (§ 4646.5, subd. (b).) The planning process relative to an IPP shall include, among other things, "[g]athering information and conducting assessments to determine the . . . concerns or problems of the person with developmental disabilities." (§ 4646.5, subd. (a).) The creation of an IPP is a collaborative process. (§ 4646.) The IPP is created after a conference consisting of the consumer or her representatives, regional center representatives and other appropriate participants. (§§ 4646 and 4648.) Thus, the Lanterman Act contemplates cooperation between the parties and the sharing of information in determining services and supports for a consumer and her family. The preferences of the consumer or her family are an important factor, but not the only factor, to be considered in the IPP process.

6. When providing services, Service Agency through the IPP must serve competing objectives. Service Agency must ensure consumers get the services they need. At the same time, Service Agency must secure services that are effective, cost effective, and to the extent possible, reflect the preferences of the consumer and her parents. (§§ 4512, subd. (b); 4646.) A consumer who is dissatisfied with "any decision or action of the service agency" which she believes is not in her best interests may request a fair hearing. (§ 4710.5, subd. (a).)

7. By reason of Factual Findings 4 through 9, and Legal Conclusions 4 through 6, claimant through his authorized representative, mother, failed to participate in good faith in the IPP process which was required to determine whether claimant still

required day care services, or some other similar service, now that he no longer lived with mother. Mother failed to cooperate in good faith to set an IPP date and to participate in the IPP process. Mother agreed to meet on February 4, 2019, and when she could not meet, for a reason Service Agency accepted, she initially appeared conciliatory in her communication, but failed to follow-up to ensure a mutually agreeable date was secured. Having failed to abide by the agreed-upon date of February 4, 2019, it was mother's responsibility to make her and claimant available and to be diligent in her communication with Service Agency. Service Agency is responsible under the Lanterman Act for not only collaborating with the family to provide necessary and effective services, but to meet the compatible goal of providing cost-effective services. Service Agency cannot do so without meeting with claimant periodically to assess his needs, and the record was clear that claimant's day care services needed to be reassessed. Mother never responded to Service Agency's last communication of February 25, 2019, and it was Service Agency's right and obligation to issue the NOPA. Mother's eventual participation in an IPP, only after the fair hearing was set, does not change this analysis.

The Service Agency Failed to Properly Serve Claimant's Authorized Representative and Claimant is Entitled to Aid-Paid-Pending According to Proof

8. Authorized representatives have the right to stand in place of the claimant in requesting fair hearings (§ 4703), and the right to receive adequate notice (§ 4701). The position of authorized representative applies to parents of minor children, conservators, or an individual appointed pursuant to section 4705 and authorized in writing, in this case, by the claimant to act for or represent him. (§4701.6, subd. (a). The term also applies to responsible adults for minor wards of the county, or in foster care,

(§ 4701.6, subd. (b), a position inapplicable to claimant. Claimant is a non-conserved adult, who has by custom and practice appointed his mother as his authorized representative, and, without exception, the Service Agency has treated her as his authorized representative. Aside from his presence at IPP meetings alongside his mother, for the purpose of assessing his needs, goals and services, Service Agency has dealt exclusively with his mother. Section 4705, subdivision (e) provides for the formal appointment of an authorized representative by the State Council of Disabilities when it is clear that the claimant cannot be protected to represent his own needs in a fair hearing. Under the unique circumstances of this case, the Service Agency by its conduct has recognized that claimant cannot be properly protected without an authorized representative and has treated mother as his authorized representative for all purposes in the place of a formal appointment by the State Council of Disabilities.

9. The Service Agency is required to serve the NOPA on the claimant and the authorized representative, if any, by certified mail, at least 30 days prior to the termination of services. (§ 4710.) If a request for a hearing is postmarked or received by the service agency no later than 10 days after receipt of the NOPA mailed pursuant to section 4710, subdivision (a) services provided pursuant to the IPP shall be continued during the appeal procedure up to and including the 10th day after receipt by the claimant of the final decision of the hearing officer. (§ 4715, subds. (a)(3).) The parties represented that they have initiated IPP process prior to the hearing, but have not completed the IPP. This decision does not prevent the parties from modifying claimant's day care services by agreement of the interdisciplinary and IPP team. (§ 4715, subd. (b).)

10. Service Agency failed to meet its burden of proof that mother was properly notified of the NOPA. Claimant is entitled to reimbursement for aid-paid-pending the fair hearing and decision by reason of Factual Findings 1, 4, 8, and 10

through 14, and Legal Conclusions 8 and 9. The Lanterman Act does not specifically authorize retroactive reimbursement of costs to families in the fair hearing context. The statutes detailing the IPP process suggest that reimbursement is generally not available, particularly where the development of the IPP is supposed to be a collaborative process between the parties and the process necessarily requires prior consideration and approval of any service or support provided to an individual client. Nevertheless, the absence of statutory authority is not necessarily dispositive of the issue of reimbursement because general principles of equity may require reimbursement in particular cases in order to fulfill the purposes and intent of the Lanterman Act. (See *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Service Agency failed to properly serve mother, claimant's authorized representative, so that she could file her request for hearing within 10 days and obtain aid-paid-pending of day care services for claimant according to the most recent agreed-upon IPP in effect prior to the fair hearing.

11. Aid-paid-pending shall be terminated 10 days after claimant's, through his authorized representative, receipt by certified mail of this decision, unless the claimant seeks a stay of enforcement from a court of competent jurisdiction pending an appeal. (§4715, subd. (c).) Mother's most recent address shall be the Palmdale address, and claimant shall be notified of this decision c/o mother at her Palmdale address, unless and until written notice is given to Service Agency of mother's new address.

ORDER

1. Claimant's appeal is denied in part, and granted in part.

2. Claimant is not entitled to continued day care until the IPP process is completed and services are authorized.

3. Claimant is entitled to aid-paid-pending this fair hearing. Service Agency shall reimburse mother for aid-paid pending beginning March 16, 2019, at a rate of \$13.00 an hour for day care services for no more than the hours authorized in the most recent agreed-upon IPP. Reimbursement shall only be made if mother produces to the Service Agency documentation in the form of cancelled checks, bank, credit card or wire statements, accompanied by an invoice and affidavits signed before the notary under penalty of perjury by mother and the service provider, establishing the identity of the service provider, dates and hours of service, and payment for services. Proof of payment must show payment was made close in time to the service, either on a daily or weekly basis.

4. Claimant and Service Agency shall cooperate to complete the IPP no later than seven business days from the date of this decision. Service Agency shall issue a NOPA, if necessary, no later than five business days from the completion of the final IPP.

5. Service of this decision on mother shall be considered service on both claimant and mother. Mother's Palmdale address is her current address, unless and until written notice is given to Service Agency of mother's new address.

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6. Within seven business days of this decision, mother shall provide the Service Agency with written notice of her current address and claimant's current address.

DATE:

EILEEN COHN

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 90 days.