

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

In the Matter of:

CLAIMANT,

vs.

NORTH LOS ANGELES COUNTY REGIONAL CENTER,

Service Agency.

OAH No. 2019080605

DECISION

Irina Tentser, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on January 27 and February 6, 2020, in Chatsworth, California.

Claimant was not present, but was represented by her attorney, Valerie Vanaman, of Newman Aaronson Vanaman LLP. Claimant's father/conservator (Father) was present on both hearing days, and testified.¹

¹ Claimant and her family members are identified by titles to protect their privacy. This case and OAH Case No. 2019080605 (involving a denial by Service Agency to pay for Claimant's out-of-state placement pending resolution of issue of Claimant's

Dana Lawrence, Fair Hearing and Administrative Procedures Manager, and Jimmy Alamillo, Attorney, Contract Officer, Contract Administration Department, represented NLACRC (Service Agency or NLACRC).

Oral and documentary evidence was received. The record was left open for:

1) Service Agency's submission, by February 7, 2020, of NLACRC witness Dr. Arpi Arabian's handwritten notes, which were timely submitted, marked, and admitted as Exhibit 39, and

2) submission of parties' written closing briefs no later than February 28, 2020. Complainant and Service Agency filed their closing briefs on February 28, 2020, which were marked respectively as Exhibits 40 and S-24.

The matter was submitted for decision on February 28, 2020.

ISSUE

Whether NLACRC is required to pay Aid Pay Pending while underlying issue of Claimant's placement is resolved through the Lanterman Developmental Disabilities Services Act's (Lanterman Act's) fair hearing appeal process for the period beginning July 1, 2019 to the date the decision is issued by OAH?

placement through fair hearing process) were consolidated for hearing, but a separate decision has been issued in each matter.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-12, 14-22, and 24-41; Claimant's exhibits S1-S25.

Testimonial: Lilliana Windover, NLACRC Executive Assistant; Engrid Smith, NLACRC Consumer Services Supervisor; Maria Bosch, NLACRC Consumer Services Director; Dr. Arpi Arabian, NLACRC Behavioral Services Supervisor; Father; Dr. Gwennyth Palafox, Ph.D., Licensed Psychologist.

FACTIAL FINDINGS

Background Facts

1. Claimant is a 28-year-old regional center client based on a diagnosis of Moderate Intellectual Disability. She is also diagnosed with Borderline Intellectual Functioning, Pervasive Developmental Disorder NOS, Schizoaffective Disorder, Tourette's Disorder, and Oppositional Defiant Disorder. In addition to the diagnoses, Claimant has complicated and severe behavioral needs. Claimant displays non-compliance, resistiveness, emotional outbursts, defiance to authority, sexualized behavior, sexual aggression, physical aggression, and verbal aggression. Father is Claimant's conservator. Claimant's significant family members include Father, Mother and her childhood nanny.

2. Claimant resides at Devereux Adult Community (Devereux) in Victoria, Texas, an out-of-state 24-hour residential treatment program. Claimant was placed in the Devereux School Program through Los Angeles Unified School District (LAUSD) in February 2013. Claimant has a history of living outside of her home. Prior to her

placement at Devereux, she was placed at Excelsior Center in Colorado from 2006 through February 2013. Claimant was transferred to Devereux by LAUSD to continue her education based on the belief that she required a residential level of care.

3. NLACRC requests funding from the California Department of Developmental Services (DDS) every six months to pay for Claimant's out-of-state placement at Devereux, based on Service Agency's ongoing representation that no suitable place for Claimant to live had been identified in California. DDS continued to fund Claimant's out of state placement at Devereux with the expectation that NLACRC would continue to search for all potential resources within the state. NLACRC followed DDS's directive and continued to track Claimant's progress at Devereux, assess Claimant and her needs, and develop a suitable California residential placement and support for Claimant.

4. In late 2018, with the ongoing goal of developing an appropriate in-state placement of Claimant and moving her back to California from Devereux, NLACRC arranged for a Whole Person Assessment to be conducted by Stephanie Young Consultants to assess Claimant's program needs. (Exhibit 12.) Young, a Licensed Family and Marriage Therapist (LMFT), recommended further assessment of Claimant to develop an appropriate program. (*Id.* at p. 27.) Most relevant to this matter, Young recommended that the IPP and services developed for Claimant be highly structured and consist of a "step down" program from the Devereux program. Young stressed the need for the program to be in place well before Claimant transitioned to the program and for the transition to take place only after careful planning.

5. In December 2018, NLACRC held a meeting to assess Claimant's support needs to transition Claimant back to California. By that time, NLACRC had identified a Community Placement Plan (CPP) home (CPES; Antelope Valley area) and a day

program (California Spectrum/ETHOS) to serve Claimant. CPES was not a vendor and was waiting for Community Care Licensing (CCL) to approve the home. NLACRC intended the date of occupancy for Claimant to be within one to two months based on the anticipated wait time for CPES to be vendorized. (Exhibit 17.) However, CPES was not vendorized until late April 2019.

NLACRC's 2019 Proposed Action Denying of Aid Paid Pending While Issue of Claimant's Placement Is Resolved Through Fair Hearing Process

6. Between late December 2018 and May 2019, NLACRC and Father engaged in a planning process based on Service Agency's goal of transitioning Claimant from Devereux to California. On May 21, 2019, Father, Tiki Thomson, CPES Associate Vice President, and Engrid Smith toured the Palmdale/Lancaster group home that NLACRC proposed as an appropriate placement instead of Devereux. At the time of the tour, the home was empty. There were no residents and no staff at the proposed group home. Father expressed reservations that no plan details regarding programs and services was in place at the time of the tour and he could not agree to Claimant's relocation back to California until a detailed IPP with proposed services and programs was finalized. There was discussion of Father meeting with potential SLS providers in the near future. Based on their discussions, Father believed that he and NLACRC were still in the transitional planning stages of moving Claimant back to California and intended to continue to engage in the planning process with NLACRC. Service Agency, on the other hand, was in the process of drafting the May 22, 2019 Notice of Proposed Action (NOPA) at the time of the May 21, 2019 visit despite the fact that recommended assessments had yet to be completed and no specifics were in

place regarding the program and services Claimant would be provided at her proposed California placement.²

7. By letter dated May 22, 2019 (May 22 NOPA), NLACRC notified Father that "After reviewing [Claimant's] current treatment and placement needs, NLACRC has determined that there are available placement options for [Claimant] in California and as such, the Center no longer has statutory authority to purchase out-of-state services for [Claimant] and will be terminating these services effective 6/30/19." (Exhibit S-5.)

8. On June 7, 2019, Father filed a Fair Hearing Request (June 7 FHR) appealing NLACRC's proposed action and requesting continuing funding by Service Agency of Claimant's Devereux placement. The June 7 FHR was hand delivered and received by Service Agency on June 7, 2019.

9. At a date uncertain after the June 7 FHR was received, NLACRC informed Father that it would not continue to pay for Claimant's placement pending resolution of the fair hearing (Aid Paid Pending) because the June 7 FHR was received by Service Agency after 10 calendar days following Father's receipt of the NOPA that was mailed to Claimant. No NOPA was provided by Service Agency to Father memorializing the discontinuation of Aid Paid Pending. Accordingly, NLACRC did not provide proper

² Ms. Smith's testimony that the May 22 NOPA was drafted in its entirety on May 21, 2019 is not credited as it is contradicted by the credible testimony of Ms. Bosch and Dr. Arabian that NLACRC had been in the process of drafting the NOPA prior to the May 21, 2019 meeting.

notice to Claimant regarding the denial of the Aid Paid Pending as required by the Lanterman Act. (Welf. & Inst. Code, § 4701.)³

10. On August 15, 2019, Father filed a Fair Hearing Request (August 15 FHR) appealing NLACRC's appealing Service Agency's refusal to provide Aid Paid Pending while the underlying issues related to Claimant's placement is resolved. The August 15 FHR asserts that Service Agency has "no legal basis" to deny Aid Paid Pending.⁴

Service of the May 22 NOPA Was Not Effective

11. Father provided NLACRC with "[Father], 15442 Ventura Blvd., Sherman Oaks, California 91403" as Claimant's mailing address (Mailing Address). He did not provide the suite number where his office, The Rodin Company, was located at the mailing address, which contains multiple suites. In addition, he did not designate any agent to receive his mail from Service Agency. As a result, NLACRC sent the May 22 NOPA, accompanying letter and Proof of Service (collectively, May 22 NOPA) to the address provided by Father without specifying the suite number for delivery.

12. The May 22 NOPA was sent to the Mailing Address on May 22, 2019 by United States Postal Service (USPS), Certified Mail with Return Receipt, which included an identifying Article Number 7016 0750 0000 2123 2327. (Exhibit 3.) It was delivered

³ Neither party asserted the lack of proper notice was at issue in this matter.

⁴ Neither party submitted the August 15 FHR into evidence during hearing. However, there is no dispute between the parties that the August 15 FHR was filed with OAH and Service Agency. Accordingly, the August 15 FHR filed with OAH on August 15, 2019 is incorporated by reference herein.

on May 24, 2019. The NOPA was prematurely served, in part, because the parties did not have a second meeting within 15 days of their May 21 meeting to discuss the Individual Program Plan (IPP) prospective services disagreement regarding Claimant's placement. ((Welf. & Inst. Code, § 4646, subd. (f).)

13. Assuming the May 22 NOPA was timely, as NLACRC argues, service was ineffective. Accordingly, application of the 10-day appeal deadline is improper. Specifically, in denying Aid Paid Pending, NLACRC relies on the May 22 NOPA's USPS tracking history which states that it was delivered on May 24, 2019 at the "Front Desk/Reception/Mail Room" as the effective date of the NOPA's service on Claimant. (Exhibit 3.) NLACRC starts the 10 calendar day Aid Paid Pending deadline on the date following delivery of the NOPA; in this case, May 25, 2019. As a result, because the total number of calendar days that elapsed between May 25, 2019 and June 7, 2019 was 13 calendar days (excluding the Memorial Day holiday), Service Agency asserts Claimant's appeal is untimely and that it is not obligated to paid for Claimant's Devereux residence pending the resolution of the placement issue through the appeal process. (Welf. & Inst. Code, § 4715.)

14. The May 22 NOPA was not delivered to Claimant's conservator, Father. (Exhibits 3 and S-7.) Neither Father nor his employees signed the return receipt. Instead, the return receipt bears the signature "A SHACK," an individual who is not authorized to accept mail on Father's behalf and is unfamiliar to both Father and the employee who is responsible for collecting the mail and signing for mail and/or packages, Lizette Bermudez. (Exhibit S-7.)

15. The date on the return receipt is a matter of dispute between the parties, with Service Agency asserting that the date is "5/20/19," and Claimant asserting that the date is "5/28/19." (Exhibit 3.) Based on the lack of clarity of the handwriting, it is

impossible to determine what the actual date is. However, Service Agency's argument that the date is "5/20/19" is logically inconsistent with its argument that the May 22 NOPA was delivered on May 24, 2019.

16. Regardless of the date on the return receipt, service was ineffective, through no fault of NLACRC, because the May 22 NOPA was not delivered to Father as Claimant's conservator, as set forth in Factual Finding 14.

17. Father ultimately received the May 22 NOPA on June 4, 2019⁵ and filed the June 7 FHR three days after its receipt.

18. Under the foregoing circumstances, because service of the May 22 NOPA was not effective, the application of the 10-day appeal requirement under the Lanterman Act is legally and factually incorrect.⁶ Accordingly, NLACRC did not establish that its denial of Aid Paid Pending from July 1, 2019 was proper.

⁵ Father's hearing testimony and closing argument that he only became aware of the May 22 NOPA on June 7, 2019 after Ms. Smith inquired by email if he was planning to appeal the NOPA is not credited because it contradicts his prior declaration's statement that he received it on June 4, 2019. (Exhibits S-7, p. 38, S-22, and S-41.)

⁶ Claimant's argument that the California Code of Civil Procedure (CCP), section 1010, subdivision (a), applies in this case to extend the time period to appeal the NOPA by five days is rejected. (Exhibit S-41.) Claimant's counsel provides no legal authority to support the argument. Further, the CCP does not apply to this administrative proceeding. (Exhibits 30 and 32.)

19. Further, denying Aid Paid Pending in this matter is contrary to equity requirements based on the findings in the concurrently issued case, OAH Case No. 2019080605, that issuance of the May 22 NOPA was premature in the absence of a written IPP between the parties regarding Claimant's prospective California placement.

LEGAL CONCLUSIONS

Standard of Proof

1. Service Agency, as the party seeking to terminate 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, § 115.)

Statutory Framework

3. The 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.) The state agency charged with implementing the Lanterman Act, the Department of Developmental Services (DDS), is authorized to contract with regional centers to provide developmentally

disabled individuals with access to the services and supports best suited to them throughout their lifetime. (Welf. & Inst. Code, § 4520.)

4. The right to services is an entitlement and the services and supports to be provided under the Lanterman Act are identified in the consumer's IPP. (Welf. & Inst. Code, §§ 4500.5 and 4500.3, subd. (d).) Regional centers are required to conduct a planning process and develop an IPP for any person found to be eligible for regional center services. (Welf. & Inst. Code, § 4646.) The legislative intent of the Lanterman Act is to ensure that "the provision of services to consumers and their families be effective in meeting the goals stated in the [IPP], reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources." (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. In addition to reflecting the client's particular desires and preferences, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services based upon the client's developmental needs and the effectiveness of the services selected to assist the consumer in achieving the agreed-upon goals, and contain a statement of time-limited objectives for improving the client's situation. (Welf. & Inst. Code, §§ 4646, subd. (a)(1), (2), and (4), 4646.5, subd. (a), 4512, subd. (b), 4648, subd. (a)(6)(E).)

6. The elements of the IPP planning process include, among other things, the gathering of information and conducting assessments, development of specific goals, and a schedule of the type and amount of services and supports to be purchased by the regional center. (Welf. & Inst. Code, § 4646.5.) Modification and

changing of the IPP based on the consumer's changing needs must be done through the IPP process. (Welf. & Inst. Code, §§ 4646, 4646.6, subd. (b).)

7. Welfare and Institutions Code section 4715, subdivision (a), provides for Aid Paid Pending, in relevant part, as follows:

Except as otherwise provided in this section, if a request for a hearing is postmarked or received by the service agency no later than 10 days after receipt of the notice of the proposed action mailed pursuant to subdivision (a) of Section 4710, services that are being provided pursuant to a recipient's individual program plan shall be continued during the appeal procedure

8. Here, there was no receipt of the May 22 NOPA because service was ineffective. In fact, the NOPA did not reach Claimant until June 4, 2019. (Factual Findings 11-18.) The appeal was promptly filed three days after receipt of the May 22 NOPA on June 7, 2019. (*Id.*) NLACRC has not established through a preponderance of the evidence that Claimant is ineligible for Aid Paid Pending because the June 7 FHR was untimely based on Factual Findings 1-18 and Legal Conclusions 1-7.

9. In addition, Claimant's equity argument is well-taken. 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.) In this case, as of their May 21, 2019 meeting, Father was under the reasonable impression that he and NLACRC were still engaged in transition planning because no IPP had been drafted regarding Claimant's prospective California placement. (Factual Finding 19.) NLACRC did not provide notice to Father during their prospective group home meeting on May 21, 2019 that it intended to terminate services to Claimant and issue the May 22 NOPA the next day. As the May 22 NOPA was prematurely issued under the Lanterman Act

because the IPP process was improperly conducted, it would be contrary to equity to deny Aid Paid Pending.

ORDER

1. Claimant's appeal is granted.
2. NLACRC shall pay Aid Pay Pending while underlying issue of Claimant's placement is resolved through the Lanterman Act's fair hearing appeal process for the period beginning July 1, 2019 to the date the decision is issued by OAH in the concurrently issued case, OAH Case No. 2019080605.
3. Within 14 days of this decision being issued by OAH, Father shall provide NLACRC with a corrected mailing address for service which includes the suite number for The Rodin Company.

DATE:

IRINA TENTSER

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.