

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

In the Matter of:

CLAIMANT,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH No. 2020040678

DECISION

Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on June 2, 2020, in Los Angeles, California.

Claimant's mother represented claimant,¹ who did not appear at the hearing.

¹ Names are omitted and family titles are used throughout this Decision to protect the privacy of claimant and his family.

Matthew F. Bahr, Attorney at Law, represented Kern County Regional Center (KRC or Service Agency).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on June 2, 2020.

ISSUE

Should KRC reimburse claimant for his daycare tuition during the period when Kern County's Stay at Home Order was in effect?

EVIDENCE

Documentary: Exhibits 1 to 4.

Testimonial: Claimant's mother.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a three-year-old boy with Down Syndrome. He qualifies for regional center services based on either a diagnosis of intellectual disability, or a condition closely related to intellectual disability, or a condition that requires treatment similar to that required for individuals with intellectual disability (commonly known as the "Fifth Category"). Claimant lives at home with his parents.

2. On April 9, 2020, Service Agency sent claimant a Notice of Proposed Action letter denying his request for reimbursement of daycare tuition for the period when Kern County's Stay at Home Order was in effect. (Ex. 1, p.1.) Citing to Welfare and Institutions Code² section 4646.4, subdivision (a)(4), KRC determined that claimant's parents are responsible for payment of claimant's daycare tuition because it is the kind of service typically provided by the family of a child without disabilities.

3. On April 20, 2020, claimant filed a request for a fair hearing appealing the denial. This hearing ensued.

Claimant's Request for Reimbursement of Daycare Tuition

4. From August 2018 until March 17, 2020, claimant attended Heaven-Sent Preschool and Daycare (Heaven-Sent), a daycare facility with approximately 13 students. Claimant stopped attending Heaven-Sent on March 17, 2020, because Kern County had issued a Stay at Home Order due to the COVID-19 pandemic. As a result of his Down Syndrome, claimant suffers from underlying medical conditions that place him at greater risk of developing severe COVID-19 symptoms.

5. Since March 17, 2020, claimant's mother has cared for claimant at their home. However, claimant's parents have continued to pay \$500 per month in tuition to Heaven-Sent to secure claimant's spot at the daycare facility. Without the continued payment of this tuition, Heaven-Sent would not guarantee that claimant could return to the facility once he receives clearance from his physician to attend daycare.

² All further references are to the Welfare and Institutions Code, unless otherwise designated.

6. Recently, Kern County has modified its Stay at Home Order, such that the county is now in the more advanced Stage 2³ of its reopening. Claimant is requesting for KRC to reimburse his daycare tuition from March 17, 2020, until the date that Kern County had modified its Stay at Home Order from Stage 1 to Stage 2.

7. Although claimant's most recent individual program plan, which contains the services and supports KRC provides to claimant, was not submitted as evidence, claimant's mother confirmed that KRC currently funds several services for claimant, including early intervention services, physical therapy, and occupational therapy. However, KRC does not currently fund for claimant's tuition at Heaven-Sent, and claimant has never requested funding for daycare services previously.

Testimony of Claimant's Mother

8. At the hearing, claimant's mother testified in an open and sincere manner. According to claimant's mother, her son's placement at Heaven-Sent plays a significant role in alleviating his condition as it provides opportunities for him to interact with his same-age peers. Claimant's mother recounted the many difficulties she encountered in her attempts to enroll her son in several different daycare facilities. These daycare facilities, with the exception of Heaven-Sent, refused to enroll claimant

³ California's reopening plan consists of four different stages. Stage 1 was a strict stay-at-home phase during which only essential activities were permitted. Stage 2 is the first reopening phase during which retail, related logistics and manufacturing, office workplaces, limited personal services, outdoor museums, child care, and essential businesses can open with modifications.

due to his disability. Consequently, claimant's mother does not believe that claimant will be able to enroll in a comparable daycare should he lose his spot at Heaven-Sent.

9. In addition, claimant's mother is requesting reimbursement of tuition fees at Heaven-Sent because her family is facing financial uncertainty due to the pandemic. Claimant's family relies on the single income generated by claimant's father, who works for a university that is considering pay cuts. Paying for claimant's full tuition at Heaven-Sent at this time would place the family under greater financial strain.

10. In support of her request for KRC to fund claimant's tuition at his daycare facility, claimant's mother cited to a provision of section 4646.4, subdivision (a)(4), that requires "the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care" to be taken into consideration. She contends that maintaining claimant's spot at his daycare during a global pandemic constitutes "extraordinary care, services, supports and supervision" under the statute.

11. Furthermore, claimant's mother noted that on March 30, 2020, the Director of the Department of Developmental Services issued Directive 01-033020 (Directive) regarding additional participant directed services. The Directive states, "The Department recognizes that to ensure the health, welfare and safety of regional center consumers and the general population, there may be instances where consumers, regional centers, and service providers will need flexibility to receive and provide services and supports." (Ex. 4, p. 16.) Claimant's mother asserts that her son's need to maintain a spot at his daycare is one of the instances in which KRC needs to show flexibility in providing such service to him.

LEGAL CONCLUSIONS

Standard and Burden of Proof

1. The burden of proof is on the party seeking government benefits or services. (See, e.g., *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that Service Agency is required to reimburse him for his daycare tuition during the period when Kern County's Stay at Home Order was in effect. (Evid. Code, § 115.) Claimant has not met his burden.

Statutory Framework

2. The Lanterman Developmental Disabilities Services Act (Lanterman Act) (§ 4500 et seq.) sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. As the California Supreme Court explained in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, the purpose of the Lanterman Act 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." Under the Lanterman Act, regional centers are "charged with providing developmentally disabled persons with 'access to the facilities and services best suited to them throughout their lifetime'" and with determining "the manner in which those services are to be rendered." (*Id.* at p. 389, quoting from § 4620.)

3. 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." (§ 4501.) These types of services are "specialized 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." (§ 4512, subd. (b).) The determination of which services and supports the regional center shall provide is 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." (*Ibid.*) However, regional centers have wide discretion in determining how to implement an IPP. (*Association for Retarded Citizens, supra*, 38 Cal.3d at p. 390.)

4. As set forth in section 4646, subdivision (a):

It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and

healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

Section 4646.4

5. Section 4646.4, subdivision (a), provides, in relevant part:

Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

[¶] . . . [¶]

(4) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting. In this determination, regional centers shall take into account the consumer's need for

extraordinary care, services, supports and supervision, and the need for timely access to this care.

6. Claimant's mother contends that the COVID-19 pandemic constitutes extraordinary circumstances under which claimant's need for maintaining a spot in his daycare should be taken into account. This contention is not persuasive. The mandate to "take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care" under section 4646.4, subdivision (a)(4), applies where the consumer requires extraordinary services, such as one-on-one aides or specialized lessons, due to his or her developmental disability. In those instances, the regional center would be required to provide additional support to the consumer by way of paying for the one-on-one aide or the difference between the cost of specialized lessons and the cost of ordinary lessons available to non-disabled children.

7. In this case, claimant is not seeking an extraordinary service. Claimant's parents are responsible for paying for their son's daycare tuition because daycare is a service typically provided by the family of a child without disabilities. Consequently, KRC has never funded claimant's daycare tuition before the COVID-19 pandemic. It is undisputed that the global pandemic constitutes extraordinary circumstances and that claimant faces heightened risk of developing a severe form of COVID-19 due to his underlying medical conditions. However, parents of any child, disabled or not, are expected to bear the costs of daycare tuition to maintain a spot for their child while daycare facilities are not operational under the Stay-at-Home orders.

The Directive

8. Claimant's mother further contends that the Directive requires KRC to be flexible in providing services and supports, including the reimbursement of daycare tuition, to consumers during the COVID-19 pandemic. This assertion misreads the Directive, which states, in relevant part:

To increase access and flexibility in service delivery, the Department hereby modifies any requirements of the Lanterman Act or Title 17 [of the California Code of Regulations] specifying the services that may be participant-directed. In addition to the services currently available through participant direction, consumers may also choose to direct the following services:

- Personal assistance
- Independent living skills
- Supported employment

(Ex. 4, p. 16.)

9. The Directive provides consumers the option to access certain services, such as personal assistance and independent living skills, through participant direction. That is, under the Directive, consumers have the ability to choose friends and some family members, rather than regional center approved vendors, as providers of these services. Thus, while the Directive requires regional centers to be flexible in allowing

consumers to choose their own service provider, it does not supersede the statutory authority of section 4646.4, subdivision (a)(4), which requires consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities.

Disposition

10. Under these circumstances, KRC shall not be required to reimburse claimant for his daycare tuition during the period when Kern County's Stay at Home Order was in effect, pursuant to section 4646.4, subdivision (a)(4).

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ORDER

Claimant's appeal is denied. KRC shall not be required to reimburse claimant for his daycare tuition during the period when Kern County's Stay at Home Order was in effect.

DATE:

JI-LAN ZANG

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.