

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

In the Matter of:

CLAIMANT,

vs.

SOUTH CENTRAL LOS ANGELES REGIONAL CENTER,

Service Agency.

OAH No. 2021100824

DECISION

Glynda B. Gomez, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on December 8, 2021, by videoconference.

Aaron Abramowitz, Attorney, represented the South Central Los Angeles Regional Center (Service Agency or SCLARC). Claimant was represented by his mother (Mother) (titles are used to protect confidentiality).

Claimant was permitted to file an updated Individualized Education Program and Behavior Intervention Plan at the conclusion of the hearing, which were marked and admitted as Exhibits G and H, over objection by the Service Agency. Oral and

documentary evidence was received. The record was closed and the matter was submitted for decision at the close of the business day on December 8, 2021.

ISSUE

Must the Service Agency include the cost of the Covid-19 additional personal assistant hours provided to Claimant in his new Self-Determination Program budget?

SUMMARY

Claimant seeks to have Service Agency include the one-time Covid-19 personal assistant hours that were provided to him last year when public schools were closed added to his Self-Determination Program (SDP) budget for the current year. The Service Agency has denied the request and contends that it is not required to consider the Covid-19 funding in its calculation of Claimant's SDP budget. For the reasons set forth below, Claimant's appeal is denied.

FACTUAL FINDINGS

1. Claimant is a 13-year-old boy eligible for Regional Center services under the category of Autism Spectrum Disorder (ASD). Claimant timely filed a Fair Hearing Request appealing the Service Agency's refusal to include funding for Covid-19 relief personal assistance hours in his current SDP budget as set out in its August 31, 2021 Notice of Proposed Action (revised September 20, 2021)(NOPA) to include funding for Covid-19 relief personal assistance hours in his current SDP budget. All jurisdictional requirements have been met.

2. Claimant has attention, behavior, sensory processing and social skills deficits consistent with his ASD diagnosis. Claimant also has speech/language and auditory processing deficits. Claimant is a special education student with an Individualized Education Program (IEP) and is entitled to a free appropriate public education (FAPE) under federal and state law. He is enrolled in public school and receives his education and related services virtually. Mother elected to keep him at home because of health and safety concerns and his inability to follow school rules including keeping his hands to himself and wearing a mask. Claimant has a Behavior Support Plan (BSP) at school which targets aggression, elopement and non-compliance. Remote learning was not recommended for Claimant in his IEP, except in emergency situations. The IEP did not define what circumstances constituted an emergency requiring remote learning. He has been offered a FAPE with placement in a special day class for mild to moderate disabilities, mainstreaming in a general education classroom for a portion of his day and related services and supports to address his unique needs.

3. Claimant requests that funding previously provided as Covid-19 relief (personal assistant hours when schools were closed and only remote instruction was offered) be part of the calculation of Claimant's current year SDP budget. In the NOPA, the Service Agency declined to include the funding in the calculation of Claimant's SDP budget because the service was intended to be for an emergency situation related to school closures and circumstances have changed since public schools have now re-opened, a vaccine is available, and generic resources responsible for the care, education and supervision of minor students during the school day are available through the school district.

4. The SDP Budget is crafted by the Individual Program Plan (IPP) team. The starting point for the SDP budget is generally the cost of the services and supports for the consumer over the prior 12-month period. The budget may be amended to accommodate additional needs or changed circumstances. In Claimant's case, the SDP budget includes funding for 28 hours per week of personal assistance, 2.5 hours per week of social skills training, and 10.6 hours per week of in-home respite. Claimant also received personal assistance hours for Extended School Year (ESY) in the summer of 2021. As additional generic resources, Claimant receives 279 hours per month of In-Home Support Services (IHSS) from the county with Mother as the provider and Applied Behavioral Analysis (ABA) services through his medical insurance.

5. Although Claimant's SDP budget is based upon his last 12 months of funded services, Service Agency did not agree to include the additional Covid-19 personal assistance hours from the previous year's budget because Service Agency maintained the funding was temporary for an emergency situation while schools were closed. Circumstances have since changed and students now have access to in-person classes provided by the school district, a generic resource. Claimant's determination to remain at home and utilize remote learning does not relieve the school district, a generic resource, from its responsibility for Claimant during the school day and providing him with all resources needed for his FAPE. Service Agency stepped in when generic resources were not available and provided limited-time emergency funding as the payer of last resort to fill an unprecedented gap. Circumstances changed when generic resources provided by the school district became available with school re-opening.

6. Based upon his safety concerns, Claimant has decided not to avail himself of the in-person classes provided by the school district. His remote learning and all

services and supports necessary for provision of his FAPE are to be included in his IEP and provided by the local school district.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, an administrative "fair hearing" is available to determine the rights and obligations of the parties. (Welfare and Institutions Code (Code), § 4710.5.)

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, as the party asserting a claim or making changes, he 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.) In this case, however, Service Agency bears the burden of proof regarding its denial of the funding request because the service had been previously funded.

3. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) 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.” (Code, § 4501.)

4. The Department of Developmental Services (DDS) is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Code, § 4416.) In order to comply with its statutory mandate, DDS contracts with private non-profit community agencies, known as regional centers, to provide the developmentally disabled with “access to the services and supports best suited to them throughout their lifetime.” (Code, § 4620.)

5. A consumer’s needs and goals, and the services and supports to address them determined through the IPP process, are described generally in Code section 4512, subdivision (b), which states in part:

“Services and supports for persons with developmental disabilities” means 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 an independent, productive, and normal life. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and

shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option.

6. Use of the IPP process to determine the services to meet the needs of a consumer is referenced in Code 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.

7. Several portions of the Lanterman Act address the need for regional centers to identify sources for funding and services, such as the language in Code section 4659, subdivision (a), that the regional center "shall identify and pursue all possible sources of funding," including governmental programs such as Medi-Cal and

school districts, and private entities such as insurance. (*Id.*, subdivision (a)(1) and (2).) Code section 4659, subdivision (c), states a regional center shall not purchase any service available from Medi-Cal, private insurance, or other identified sources and under Code section 4648, subdivision (a)(8):

Regional center funds shall not be used to supplant the budget of any agency which has the legal responsibility to serve all members of the general public and is receiving public funds for providing those services.

Further, Service Agency is mandated to ensure the effective and efficient use of public resources and detect and prevent waste and abuse in the utilization of public funds. (Code, § 4620.3, subdivision (b).)

8. When purchasing services and supports, regional centers shall (1) ensure they have conformed with their purchase of service policies; (2) utilize generic services when appropriate; and (3) utilize other sources of funding as listed in Code section 4659. (Code, § 4646.4, subd. (a).) Service Agency is also required to consider generic resources and the family's responsibility for providing services and supports when considering the purchase of regional center supports and services for its consumers. (Code, § 4646.4.)

9. Code section 4648 requires regional centers to ensure that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and to secure services and supports that meet the needs of the consumer, as determined by the IPP. Services and supports shall be flexible and individually tailored to the consumer. This section also requires regional centers to be fiscally responsible.

The Self-Determination Program

10. Code section 4685.8, subdivision (a), provides:

The department shall implement a statewide Self-Determination Program. The Self-Determination Program shall be available in every regional center catchment area to provide participants and their families, within an individual budget, increased flexibility and choice, and greater control over decisions, resources, and needed and desired services and supports to implement their IPP. . . .

11. Self-determination gives the participant greater control over which services and supports best meet their IPP needs, goals, and objectives. (Code, § 4685.8, subd. (b)(2)(B).) One goal of the SDP is to allow participants to innovate to achieve their goals more effectively. (Code, § 4685.8, subd. (b)(2)(F).)

12. The SDP specifically obligates the participant to “utilize the services and supports available within the Self-Determination Program only when generic services and supports are not available.” (Code, § 4685.8, subd. (d)(3)(B).)

13. The SDP requires participants to “only purchase services and supports necessary to implement his or her IPP” (Code, § 4685.8, subd. (d)(3)(C).)

14. When a consumer is in the SDP, the IPP team is to develop the plan, utilizing the person-centered planning process. (Code, § 4685.8, subd. (k).)

15. Code section 4685.8, subdivision (l) provides:

The participant shall implement their IPP, including choosing and purchasing the services and supports

allowable under this section necessary to implement the plan. A participant is exempt from the cost control restrictions regarding the purchases of services and supports pursuant to Section 4648.5.¹ A regional center shall not prohibit the purchase of any service or support that is otherwise allowable under this section.

16. Code Section 4685.8, subdivision (m) provides:

(1) Except as provided in paragraph (4), the IPP team shall determine the initial and any revised individual budget for the participant using the following methodology:

(A)(i) Except as specified in clause (ii), for a participant who is a current consumer of the regional center, their individual budget shall be the total amount of the most recently available 12 months of purchase of service expenditures for the participant.

(ii) An adjustment may be made to the amount specified in clause (i) if both of the following occur:

(I) The IPP team determines that an adjustment to this amount is necessary due to a change in the participant's

¹ Under Code section 4648.5, regional centers' ability to purchase certain services, such as camping, social recreation activities, and educational services, was suspended.

circumstances, needs, or resources that would result in an increase or decrease in purchase of service expenditures, or the IPP team identifies prior needs or resources that were unaddressed in the IPP, which would have resulted in an increase or decrease in purchase of service expenditures. When adjusting the budget, the IPP team shall document the specific reason for the adjustment in the IPP.

(II) The regional center certifies on the individual budget document that regional center expenditures for the individual budget, including any adjustment, would have occurred regardless of the individual's participation in the Self-Determination Program.

(iii) For purposes of clauses (i) and (ii), the amount of the individual budget shall not be increased to cover the cost of the independent facilitator or the financial management services.

(B) For a participant who is either newly eligible for regional center services or who does not have 12 months of purchase service expenditures, the participant's individual budget shall be calculated as follows:

(i) The IPP team shall identify the services and supports needed by the participant and available resources, as required by Section 4646.

(ii) The regional center shall calculate the cost of providing the services and supports to be purchased by the regional center by using the average cost paid by the regional center for each service or support unless the regional center determines that the consumer has a unique need that requires a higher or lower cost. The IPP team also shall document the specific reason for the adjustment in the IPP. The regional center shall certify on the individual budget document that this amount would have been expended using regional center purchase of service funds regardless of the individual's participation in the Self-Determination Program.

(iii) For purposes of clauses (i) and (ii), the amount of the individual budget shall not be increased to cover the cost of the independent facilitator or the financial management services.

(2) The amount of the individual budget shall be available to the participant each year for the purchase of program services and supports. An individual budget shall be calculated no more than once in a 12-month period, unless revised to reflect a change in circumstances, needs, or resources of the participant using the process specified in clause (ii) of subparagraph (A) of paragraph (1).

(3) The spending plan shall be assigned to uniform budget categories developed by the department in consultation

with stakeholders and distributed according to the timing of the anticipated expenditures in the IPP and in a manner that ensures that the participant has the financial resources to implement the IPP throughout the year.

(4) The department, in consultation with stakeholders, may develop alternative methodologies for individual budgets that are computed in a fair, transparent, and equitable manner and are based on consumer characteristics and needs, and that include a method for adjusting individual budgets to address a participant's change in circumstances or needs.

17. Code section 4685.8, subdivision (n), provides:

Annually, participants may transfer up to 10 percent of the funds originally distributed to any budget category set forth in paragraph (3) of subdivision (m) to another budget category or categories. Transfers in excess of 10 percent of the original amount allocated to any budget category may be made upon the approval of the regional center or the participant's IPP team.

(2) The amount of the individual budget shall be available to the participant each year for the purchase of program services and supports. An individual budget shall be calculated no more than once in a 12-month period, unless revised to reflect a change in circumstances, needs, or

resources of the participant using the process specified in clause (ii) of subparagraph (A) of paragraph (1).

18. Code section 4685.8, subdivision (o), provides:

Consistent with the implementation date of the IPP, the IPP team shall annually ascertain from the participant whether there are any circumstances or needs that require a change to the annual individual budget. Based on that review, the IPP team shall calculate a new individual budget consistent with the methodology identified in subdivision (m).

19. SDP participants and their families have the authority to make decisions about the services and support they need in their lives (Code, § 4685.8, subd. (z)(B)) and allow the participant to decide how they want to spend their time. (Code, § 4685.8, subd. (z)(3)(A).)

Disposition

20. Claimant is not entitled to include the funding for Covid-19 relief personal assistant hours previously provided to him because of school closures in his SDP budget. The funds were provided on an emergency basis as a result of a worldwide pandemic and the emergency closure of schools. Public schools are the generic resources generally responsible for the care, supervision and education of minor students during the school day. As a special education student, Claimant is entitled to a FAPE provided by the local school district. When the generic resources provided by public schools became suddenly unavailable due to emergency school closures, the Service Agency stepped in as the payor of last resort to address Claimant's needs. The emergency funding was never intended to create a new floor for

funding of his SDP budget and now, circumstances have changed with the reopening of schools, and the availability of generic resources to address Claimant's needs. There is no basis to include the funding for the extra personal assistant hours in Claimant's SDP budget at this time.

ORDER

Claimant's appeal is denied.

DATE:

GLYNDA B. GOMEZ
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.