

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MONICA P.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH Case No. 2013090421

DECISION

This matter came on regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on October 30, 2013, in Bakersfield, California.

Cherylle Mallinson, Interim Director, represented Kern Regional Center (Regional Center or Service Agency).

Claimant represented herself with the assistance of Valerie Carrizales (Carrizales), her supportive living services advocate.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

ISSUE

Should Regional Center continue to fund the counseling therapy services provided by Gary Creott, L.C.S.W. (Creott)?

FACTUAL FINDINGS

1. Claimant is a 25-year-old, non-conserved Service Agency consumer with a diagnosis of Mild Mental Retardation.

2. At the time of the hearing, Claimant resided with her mother, but expected to move to her own apartment on November 1, 2013. She is able to take care of her daily living tasks, but needs assistance to manage her grocery needs, meal planning, housekeeping, medical appointments, and medication. Claimant can be left alone. However, she has a history of substance abuse, sexually promiscuous behavior, and lying. Claimant has given birth to three children, but has lost parental rights to all three.

3. Service Agency has been purchasing the services of Creott since October 2010. Earlier Individualized Program Plans (IPPs) setting forth the reason(s) for such services were not submitted into evidence. The most recent IPP, prepared after a meeting on August 8, 2013, and post-dating the start of the instant dispute, does not directly refer to Creott's services. The IPP does contain goals (remain healthy, live independently, and go back to school to obtain a Graduation Equivalent Degree) and desired outcomes (living on her own, maintain optimal health, and measurably improve the quality of her daily living skills) that would encompass continued counseling services if otherwise appropriate to meet Claimant's needs.

4. The only evidence of Claimant's need for counseling was presented in an August 29, 2013 letter from Creott and through the testimony of Claimant and Carrizales, which is consistent with the letter. Creott writes that Claimant has received counseling to address drug/alcohol abuse and sexual activities. She had been free of drugs and alcohol from November 2012 through May 2013, when she suffered a relapse. She faced a variety of pressures, including the taking of her last child after birth and the court requirements to

maintain a relationship with the child. Once Claimant starts abusing drugs or alcohol, Creott notes, she tends to have sexual encounters with the men with whom she uses the substances. Living with her mother adds to the problem, as her mother's significant other uses Marijuana. In Creott's opinion, discontinuing treatment would be detrimental and counterproductive to Claimant's goals of abstinence and reunification with her child. Because of her decreased capacity and functional deficits, success is expected to take longer than it would for a person of average intelligence.

5. As part of the court proceedings involving her child, Claimant has been ordered to participate in mental health services provided by Ebony Counseling Services (Ebony), a generic mental health provider. Claimant has attended sessions with this agency. However, these services have not been very effective. As noted by Carrizales, who has sat in on some of the sessions, Ebony counselors treat Claimant as if she were one of the other, average intelligence, Clients and Claimant does not respond and does not seem to benefit from services. Claimant testified that Ebony did not help her and that she does not want to go to them again.

6. Claimant has suffered a similar experience at Narcotics' Anonymous meetings, where she has been unable to participate and her presence has been questioned by others given her lack of participation.

7. Creott, on the other hand, is able to get through to Claimant. As noted by Carrizales, he speaks at her level and is able to elicit responses and participation in counseling. Group counseling with Creott is similarly effective, as the other participants are also Regional Center consumers.

8. Claimant testified that Creott helps her with her problems and that she would like to continue going to him.

9. a. On September 9, 2013, Service Agency issued a notice of proposed

action denying continued funding for the services provided by Creott, effective October 19, 2013. As the reason for the action, Service Agency wrote: "W&I Code 4644(a); 4646(a); 4659(a)[;] Kern Regional Center Purchase of Service Standards and Guidelines." (Exh. A, at p.7.)

b. A letter dated September 27, 2013, written after an informal meeting provided additional explanation and quoted from the Regional Center's Purchase of Service Guidelines (POS). It was stated that counseling or psychotherapy services may be purchased, consistent with Welfare and Institutions Code¹ section 4646.4, subdivision (a)(1), when no other resources are available. Moreover, services were provided on a time-limited basis under the POS, as follows: "[t]he initial purchase will consist of an evaluation of up to three (3) hours that will include an assessment of the individual's psycho-social functioning and a recommended treatment plan, including objectives and target dates. An additional five sessions may be provided after PLANNING TEAM review. Any continuing authorizations after evaluation will not exceed three (3) months of a time in duration and will be based on written progress reports that justify additional counseling/psychotherapy." (Exh. A, at p. 8.) In Service Agency's opinion, Claimant has exceeded the time parameters of the POS guidelines for Creott's services and she can access counseling through Ebony.

c. Claimant filed a fair hearing request on September 9, 2013, and Creott's services have remained in place pending the outcome of the instant proceedings.

LEGAL CONCLUSIONS

1. In enacting the Lanterman Developmental Disabilities Services Act

¹ All further references are to the Welfare and Institutions Code.

(Lanterman Act), section 4500 et seq., the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (§ 4501.) "Services and supports should be available to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age. Consumers of services and supports, and where appropriate, their parents, legal guardian, or conservator, should be empowered to make choices in all life areas. These include promoting opportunities for individuals with developmental disabilities to be integrated into the mainstream of life in their home communities, including supported living and other appropriate community living arrangements. . . ." (*Id.*)

2. The Lanterman Act gives regional centers, such as Service Agency, a critical role in the coordination and delivery of services and supports for persons with disabilities. (§ 4620 et seq.) Regional centers are responsible for developing and implementing individual program plans, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (§§ 4646, 4646.5, 4647, and 4648.) Regional centers are also required to provide advocacy for, and protection of, the civil, legal, and service rights of consumers. (§ 4648, subd. (b).)

3. Section 4512, subdivision (b), defines "services and supports for persons with developmental disabilities" as "[s]pecialized 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. . . ." The services and supports can include mental health services and counseling for the consumer and her family. (*Id.*) Moreover, "[T]he

determination shall be made on the basis of the needs and preferences of the consumer, or where 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.*)

4. In *Williams v. Macomber* (1990) 226 Cal.App.3d 225, 232-233, the court rejected a regional center's refusal to fund day care services, which funding had been denied because it was prohibited by the regional center's policy. The court concluded that the Lanterman Act requires funding decisions to focus on individual needs and on services and supports designed to meet specific needs. Thus, while Service Agency's purchase of service policy may generally guide its funding actions, a decision in any specific case must be based on each individual consumer's particular needs, even if an exception must be made to the policy.

5. In this instance, for at least two years the parties have agreed, through the IPP process, that Claimant requires counseling services and supports to meet her developmental needs. No evidence was presented at the hearing to indicate that her needs have changed or that she no longer benefits from counseling services. On the contrary, the expert opinion Creott and Claimant's and Carrizales's testimony make clear that Claimant has benefitted from the counseling services and that she continues to need the services.

6. The provision of law on which Service Agency relies for its action do not preclude continued funding. Section 4646.4, subdivision (a), provides that preventative services "[s]hall, inasmuch as feasible, be provided by appropriate generic agencies, including, but not limited to, county departments of health, perinatal centers, and genetic centers." Section 4646.4, subdivision (a), requires regional centers to regularly review the

availability of other funding sources, including private insurance, Medi-Cal, and other generic resources consistent with its POS policies. Similarly, section 4659, subdivision (a), requires regional centers to “[i]dentify and pursue all possible sources of funding for consumers receiving regional center services. . . .” Section 4659, subdivision (c), prohibits the purchase of service “that would otherwise be available” from a generic source. However, none of these provisions alters the basic entitlement to cost-effective services as required by sections 4501, 4512, and 4646, subdivision (a). Nor do they require disregarding or ignoring individual needs or consumer choice. Rather, the statutory provisions relied upon by Service Agency direct regional centers to look for funding otherwise available or feasible.

7. At the hearing, Service Agency argued that Ebony, a generic provider of mental health services, should be responsible for Claimant’s counseling services. However, these services have proven ineffective to meet Claimant’s needs and do not constitute a viable alternative.

8. Service Agency POS guidelines actually allow for counseling services, if written progress reports justify continued services. In this case, the only clinical evidence or report regarding the continuing need for counseling services was offered by Creott and it supports such continuation.

9. Given Claimant’s established and continuing need for counseling services, and the present absence of a cost-effective generic alternative, Service Agency must continue to fund the counseling services provided by Creott. Funding shall continue for at least six months, unless Creott opines that the six-month continuation is not clinically warranted. As with any service provided by Service Agency under the Lanterman Act, its cost-effectiveness may be periodically reassessed after the six-month period.

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ORDER

Claimant's appeal is sustained and Regional Center shall continue to fund counseling services provided by Creott consistent with this Decision.

Dated: November 14, 2013

_____/s/_____

Samuel D. Reyes
Administrative Law Judge
Office of Administrative Hearings

NOTICE

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