

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

**In the Matter of:**

**CLAIMANT**

**vs.**

**DEPARTMENT OF DEVELOPMENTAL SERVICES  
and CENTRAL VALLEY REGIONAL CENTER, Service Agencies**

**OAH No. 2019100134**

**DECISION**

John E. DeCure, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on January 7, 2020, in Fresno, California.

Shelley Celaya, Program Manager, Legal Services, represented Central Valley Regional Center (CVRC; regional center).

Claimant's mother (mother) represented claimant, who was not present.<sup>1</sup>

Evidence was received, argument was heard, the record was closed, and the matter was submitted for decision on January 7, 2020.

On January 15, 2020, the ALJ, on his own motion, reopened the record, named the Department of Developmental Services (DDS) as a necessary party, and set an additional hearing date to take place on February 5, 2020. DDS Senior Staff Counsel, Meredith Nixon, moved to continue the hearing date to allow more time to prepare for hearing; the motion was granted, and the hearing was continued to February 20, 2020.

On February 20, 2020, the record was reopened for a second day of hearing. Ms. Celaya represented the regional center. Ms. Nixon represented DDS. Sarah Fairchild and Mark Wojciechowski, Attorneys at Law, represented claimant, who was not present.

Evidence was received, argument was heard, the record was closed and the matter was submitted for decision on February 20, 2020.

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<sup>1</sup> Initials and family titles are used to protect the privacy of claimant and his family.

## **ISSUE**

The issue is whether DDS must fund claimant's out-of-state residential placement at the Texas Hill Country School in Maxwell, Texas, currently and retroactively.

## **FACTUAL FINDINGS**

### **Jurisdiction and Principal Dispute**

1. Claimant is a ten-year-old boy who is a consumer of CVRC based on his qualifying diagnosis of seizure disorder. In December 2016, claimant was assessed and found eligible, and began receiving regional center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act).

2. On September 30, 2019, claimant's mother signed a Fair Hearing Request which stated that CVRC had conducted a statewide search for a California residential facility suitable for claimant but had not found an appropriate placement; therefore, mother requested claimant receive funding for the Texas Hill Country School (Texas Hill), an out-of-state residential placement in Texas.

3. By a letter dated November 1, 2019, CVRC's Executive Director, Heather Flores, wrote to DDS's Director, Nancy Bargmann, requesting that DDS consider out-of-state placement for claimant (CVRC letter). Ms. Flores described claimant as eligible for CVRC services due to seizure disorder, and documented his many other diagnoses by report, including autism spectrum disorder, conduct disorder, post-traumatic stress disorder (PTSD), attention deficit hyperactivity disorder (ADHD), enuresis, multiple skin conditions, and persistent motor vocal tic disorder. Claimant is also diagnosed with

thrombocytopenia and Factor VII deficiency, both blood disorders resulting in low blood platelets.

4. The CVRC letter described claimant as living with mother in the family home. Mother was requesting placement for claimant's and her own safety due to his numerous maladaptive behaviors including physical and verbal aggression, self-injurious behavior, and property destruction. Mother reported that claimant becomes extremely aggressive toward himself and her, causing injuries, and resulting in several "5150" hospitalizations,<sup>2</sup> the most recent of which occurred on October 16, 2019. Mother had been home-schooling claimant due to a traumatic incident at school (in which a teacher's aide allegedly abused claimant). Claimant was placed in an "emotionally disturbed" children's class four weeks before mother decided to home-school him. At that time mother agreed to a "diagnostic placement" in school to assess his current needs. Claimant was "beginning to show behaviors" at school.

5. The CVRC letter informed DDS that mother had "diligently researched various treatment facilities" both in California and out-of-state, and CVRC had been "actively engaging in pursuing placement options within California." According to CVRC, claimant's following medical diagnoses and needs "have made it difficult to find an appropriate placement for [claimant]:"

Due to [claimant's] seizures, he is prescribed a rectal Diastat gel for prolonged seizures. Community Care Licensing has

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<sup>2</sup> A "5150" refers to the Welfare and Institutions Code section 5150, which provides that a person considered a danger to himself or others may be put on an involuntary hold of up to 72 hours for psychiatric evaluation.

let us know that this would need to be administered by a nurse. He is also prescribed Amicar and Novo 7 for his Factor VII deficiency. Novo 7 is a medication that must be given intravenously. Should [claimant] have a bloody nose or a cut that cannot be controlled with Amicar, 911 must be called and Novo 7 must be administered by EMT's.

6. CVRC reiterated that "due to [claimant's] medical and behavioral needs, an appropriate placement has not been located in California." Mother had requested placement at Texas Hill, which was apprised of claimant's medical and behavioral issues and agreed to accept him. The CVRC letter contained a two-page, chronologic list of services CVRC had authorized, CVRC's communications and meetings with mother, the details of claimant's recent October 2019 in-home accident and resulting 5150 hold (discussed further below), the search results CVRC gathered regarding four potential placements located within its catchment area, and the search results for 10 potential placements located outside its catchment area.

7. The CVCR letter described mother's extensive research of Texas Hill, and CVRC's recommendation that DDS consider it as a placement for Claimant. The projected cost was \$1,200 per day, or \$37,200 per month. CVRC had advised mother that the out-of-state placement could not exceed six months, and that should an appropriate California placement become available, CVRC would endeavor to return claimant to California.

8. The CVRC letter included copies of claimant's most recent individualized placement plan (IPP), dated October 7, 2019, and Comprehensive Assessment. CVRC noted the October 2019 IPP's omission of rectal Diastat gel, and a new medication, Risperidone, that was added to IPP addenda following claimant's IPP meeting.

9. By a letter dated December 27, 2019, Brian Winfield, DDS's Chief Deputy Director, responded to the CVRC letter on behalf of DDS (DDS letter). Mr. Winfield stated the request for out-of-state placement "does not meet the statutory requirements for the purchase of services outside the state pursuant to Welfare and Institutions (W & I) Code section 4519(a), which reads, in relevant part:

The department shall not expend funds, and a regional center shall not expend funds allocated to it by the department, for the purchase of any service outside the state unless the Director of Developmental Services or the director's designee has received, reviewed, and approved a plan for out-of-state service in the client's individual program plan developed pursuant to Sections 4646 to 4648, inclusive."

(As quoted in DDS letter.)

The DDS letter further noted that Welfare and Institutions Code section 4519, subdivision (c), requires the regional center to identify "services and supports needed and the timeline for identifying or developing those services needed to transition the consumer back to California;" however, the October 2019 IPP did not include a plan for out-of-state service, but instead indicated claimant would "continue to live with his mother at home."

10. The DDS letter noted that CVRC had increased funding for behavioral respite, but that mother "'was not comfortable with the personal attendant that was sent to her home. It appears at this point that mother decided to tour the facility in Texas." DDS further noted mother requested assistance with airfare and hotel costs to

visit claimant in Texas once per month, but, per DDS, neither the California Code of Regulations nor the Lanterman Act provided the statutory authority to “expend taxpayer dollars for this purpose.”

11. Lastly, the DDS letter noted the request for out-of-state funding included the cost of claimant’s education; and that if a California school district recommends out-of-state placement in an Individualized Education Program (IEP) and the student is so placed, the district must pay for educational costs, including room and board. The DDS letter stated that the Central Unified School District (i.e., claimant’s California district) has identified an in-state education environment in claimant’s August 2019 IEP, but mother disagrees with the district’s recommendation. DDS contended regional centers may not expend funds for generic resources such as education.

12. In closing, DDS denied CVRC’s request for out-of-state placement “until CVRC submits additional documents to address the statutory deficiencies in the most recent IPP.” DDS noted that if an updated IEP identifies out-of-state placement as an appropriate placement for claimant, the school district – not DDS or the regional center – “is responsible for associated costs.”

13. A Notice of Proposed Action (NOPA) was not issued. As discussed further below, CVRC continued to seek an appropriate placement for claimant in California, but was unsuccessful. The matter went forward on the Fair Hearing Request and this hearing ensued.

### **Events Leading to Claimant’s Out-Of-State Placement**

14. Claimant has a long, troubled history of serious behavioral issues. Mother noticed that claimant, at 18 months, would bang his head against walls and act aggressively. She had him evaluated by a family therapist, who recommended

behavior modifications, including "time outs." An attention deficit hyperactive disorder (ADHD) medication trial, administered by Yvonne J. Brouard, M.D., yielded poor results. Dr. Brouard prescribed Zoloft in 2013, which was also ineffective. That year, claimant was placed on a 5150 hold after attempting to jump out of a window and "saw off" his penis with a nail file. Claimant was hospitalized for one week for psychiatric observation, with aggressive behaviors including excessive biting and kicking. However, no concrete plan of treatment was established.

15. Mother subsequently brought claimant to the Osher Center for Integrative Medicine at the University of California, San Francisco for a "more holistic" approach to treatment, which lasted approximately one year. Claimant was noted to have vitamin deficiencies and low iron, and his treating physicians recommended dietary changes and different medications. This treatment did not substantially resolve claimant's behavioral issues.

16. In April 2014, claimant was placed on another 5150 hold after screaming, hitting, kicking, and attempting to stab mother with scissors in a store. He was hospitalized for one week for psychiatric observation and care. Claimant was placed on two more 5150 holds in 2015 due to similar violent outbursts. By this point in time, he had been psychiatrically observed multiple times, yet his physicians had no real plan of treatment for him. During a March 2015 5150 hold, claimant was effectively stranded in a Valley Children's Hospital's emergency room ward for 12 days due to the facility's lack of a treatment plan. Mother searched vigorously for a residential treatment facility appropriate for claimant's needs but could not find a placement for him. By January 2016, claimant had been diagnosed with seizures. This diagnosis made it more difficult for psychiatric treatment facilities to consider claimant as a possible client. In October



2016, claimant was placed on another 5150 hold for similar extremely aggressive behavior.

17. By the time claimant became a CVRC client in 2017, mother had searched for years for an appropriate residential placement for him in California, to no avail. In December 2017, he was placed on another 5150 hold for similar extreme behavior, but Valley Children's Hospital had no real plan of treatment or placement recommendation for him. Mother spoke with claimant's assigned CVRC case worker, Jorge Diaz, about searching for an out-of-state placement for claimant, since she believed she had exhausted every placement possibility in California by then. Mr. Diaz advised her that out-of-state placement was not possible.

18. CVRC attempted to fund appropriate services for claimant after he became a regional center client. CVRC approved 125 hours per month of personal attendant services, but none of the personnel could meet claimant's needs, which were too demanding. Personal attendants routinely quit, and mother struggled constantly to find any replacements who would accept such demanding work. Claimant required a fully enclosed bed in the home for safety, and such a bed was installed. However, claimant destroyed the bed, tearing off its protective slats and using the slats as weapons against mother. KayserBetten, the bed's manufacturer, offered a bed with Plexiglas barriers and non-removable padding for \$7,000, but mother could not afford the cost and asked CVRC to fund the bed. CVRC could not provide funding because the bed was considered a form of restraint. Claimant's behavioral outbursts continued, making mother feel unsafe and vulnerable. In approximately November 2018, CVRC had a building contractor visit claimant's home to assess it for adding enhanced safety features. His cost estimate was \$30,000, which CVRC approved; but mother rents the home, and her landlord would not approve any physical modifications to the home.

During 2018, mother discussed with CVRC her attempts to find an appropriate placement for claimant outside of California, but was told CVRC could not fund out-of-state placements.

19. In March 2019, claimant was placed on another 5150 hold after another episode of extreme behavior, including kicking out a window and cutting his leg. He was taken by ambulance to Valley Children's Hospital, which could not provide appropriate treatment or refer him for residential placement.<sup>3</sup> CVRC funded replacement windows with tempered glass, which were effective. CVRC also funded respite care at a rate of \$11.57 per hour, but mother was funding the remaining balance of up to \$28 per hour, the cost for such qualified vendors, and could not consistently find adequate service providers due to claimant's highly demanding needs. In June 2019, mother's private insurance was terminated. In September 2019 she sought an assessment of claimant from Fresno County Behavior Health Services, which refused mother's request because claimant's behaviors were too severe. Mother was at her "most desperate" point, and spoke with CVRC again about possible out-of-state placement for claimant. CVRC informed her that out-of-state placement was rare but possible.

20. By the fall of 2019, CVRC had launched a statewide search for an appropriate placement. Mother's requests for placement were denied by approximately 45 facilities; CVRC did not find a single facility willing to accept

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<sup>3</sup> Mother testified that over time, the 5150 holds fell into a repetitive pattern in which treating facilities were at a loss as to what kind of care and treatment they could provide, or even recommend, to claimant. Ultimately, mother would return home with claimant no better off than before the 5150 episode began.

claimant. On September 19, 2019, Texas Hill notified mother that claimant was approved. Mother traveled to Texas and toured the Texas Hill facility.

21. In October 2019, claimant was put on another 5150 hold after behaving aggressively toward himself and mother, and damaging the home. Valley Children's Hospital knew claimant's history by then and recognized it could not provide adequate treatment for him. But after claimant stayed in the emergency room ward for six days without any specific treatment, mother refused to take him home and insisted she would call Child Protective Services (CPS) unless a safety plan was developed before claimant's discharge. On October 21, 2019, CPS held a meeting with mother and CVRC; approximately ten people attended. CPS recommended 24-hour care for claimant, but CPS admitted it could not provide such care because it could not physically intervene if claimant engaged in out-of-control behavior. CVRC provided for respite care, but the caregiver, a relative of the vendor, admitted she was inexperienced and was indifferent toward claimant.

22. On November 7, 2019, mother had claimant sedated and transported him to Texas for placement at Texas Hill. Mother testified that by this point, she was desperate for claimant to be in a residential placement that could meet both his medical and behavioral/psychological needs, and was fearful for her own safety and claimant's safety if he were to remain in the family home with her any longer. Despite CVRC searching for a statewide California placement appropriate for claimant, they had found none to date. Mother accessed funds from a Fresno County special needs trust for claimant to pay Texas Hill's fees.

## **CVRC's Attempts at Placement**

23. CVRC issued a Regional Center Statewide Placement Request (Statewide Request) to all California regional centers on September 23, 2019. Claimant was reported to be living at home with mother, who was "requesting a higher level of care" due to claimant's in-home behaviors. The Statewide Request described claimant's diagnosis as "Seizures," and listed claimant's disorders pursuant to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM IV) as including: conduct disorder, ADHD, PTSD, enuresis (i.e., involuntary urination), persistent motor vocal tic disorder, asthma, obesity, thrombocytopenic disorder (i.e., low blood platelets), and Factor VII blood disorder (causing blood clotting difficulty). The Statewide Request further described claimant's behaviors and emotional issues as involving verbal and physical aggression toward others, self-injurious behaviors, destruction of property, and threats to kill his mother, with frequency of up to several times weekly. CVRC further advised that claimant had required 5150 commitments on several occasions due to dangerous behavior. CVRC also described claimant's many medical issues, as detailed further below. Claimant was being home schooled over the past year due to an incident with a teacher aid. CVRC described the type of facility claimant was seeking as a "[h]igh level facility that could accommodate his serious behaviors as well as his medical issues."

24. Approximately two weeks after CVRC issued the Statewide Request, it conducted an IPP meeting to consider claimant's current status. CVRC's IPP for claimant, dated October 7, 2019 (October 2019 IPP), describes claimant's current "Living Option" as being "with his mother at home." CVRC lists supports and services necessary for in-home support as: case management services with CVRC; ongoing special education to provide Free Appropriate Public Education (FAPE); Applied

Behavior Analysis (ABA)/intensive behavioral intervention through BICC (Behavior, Intervention, Coaching and Consulting); medical specialists; and In-Home Support Services (IHSS) and Medi-Cal benefits. The stated "Desired Outcome" advises that claimant "will continue to live with his mother at home." Despite this stated objective, CVRC concludes that mother requested "CVRC to fund for placement in Texas at [Texas Hill]." CVRC explains:

CVRC has conducted a statewide search for placement options. A [Special Service Resource Search] referral has been made and at this time there are no appropriate placement options in California that have been located. CVRC continues to search for an appropriate placement in California.

25. The October 2019 IPP identifies 21 long range goals for claimant, including: increasing independence and self-care; improving communication; diminishing his medications; improving his health; improving his behavior to be more safe and socially appropriate; tolerating changes without acting out; expressing desires without losing control; learning coping skills for emotional regulation; improving academics; learning compliance, patience, and following directions without constant protest; better self-awareness and socialization skills; and having "a dramatic decrease in aggression, [self-injurious behaviors], property destruction and out of control tantrums."

26. The October 2019 IPP set forth seven "Plans" for claimant to continue living at home with mother, including: mother providing for claimant's emotional, physical and social well-being; Fresno County continuing to fund 283 hours per month for mother to act as claimant's IHSS provider; for mother to complete necessary IHSS

and Medi-Cal paperwork to ensure funding; and for CVRC to fund up to 240 hours of personal attendant services. CVRC also stated it would continue to “search for an appropriate placement [for claimant] in California.”

27. Claimant’s medical needs, and list of care and treatment providers, are extensive and are detailed in the October 2019 IPP. Claimant was seen by Isabelo Artacho, M.D., a child neurologist, for seizure disorder. Prescribed medications include: Levetiracetam 250mg, Divalproex SOD DR 250mg (for seizure), Diazepam 2mg, Oxcarbazepine 150mg, and Cyproheptadine 4mg. Fernando G. Miranda, M.D., a child neurologist, also saw claimant for a second opinion on May 30, 2019. Bradley Wajda, D.O., a child psychiatrist, saw claimant for disruptive behavior disorder not otherwise specified (NOS), conduct disorder NOS, genetic mutation of 5-MTHFR genetic disorder,<sup>4</sup> neurotransmitters imbalance, and PTSD. Prescribed medications include Clonidine HCL, 0.1mg. James Horspool, D.O., was claimant’s primary care physician at Valley Children’s Hospital. Jane Kardashian, M.D., a dermatologist, treated claimant’s various skin conditions with Desonide 0.05 percent and Calcipotriene 0.005 percent ointments for inverse psoriasis, Desonide 0.05 percent cream for skin irritation, Mupirocin ointment 2 percent for infected skin, Ketoconazole cream 2 percent antifungal, Betamethasone Dipropionate cream 0.05 percent for skin inflammation, zinc oxide for skin barrier, Cutivate 0.05 percent lotion for skin infection, Oxistate 1

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<sup>4</sup> MTHFR refers to the methylenetetrahydrofolate reductase gene, which contains the DNA code to produce the MTHFR enzyme. Genetic mutation of this gene results from poor metabolism of folate (also called vitamin B9), due to a lack of the MTHFR enzyme.

percent lotion antifungal, Clindamycin 1 percent for skin infection, Elidel cream 1 percent as an immunosuppressive drug, and Eucrisa Ointment 2 percent.

28. Claimant has been diagnosed with thrombocytopenic disorder, a condition involving a low blood platelet count. In particular, claimant suffers from a Factor VII Deficiency, a serious blood clotting disorder causing excessive or prolonged bleeding after an injury or surgery.<sup>5</sup> Vinoid Bilasa, M.D., treated claimant for hematology and oncology. Dr. Bilasa prescribed Amicar 250mg/ml 25 percent for nosebleeds, NovoSeven RT 1mg intravenous solution for prolonged bleeding or trauma not responding to treatment with Amicar, medications to be provided to emergency medical or hospital staff, and Factor VII medication PRN (i.e., "pro re nata" or as needed).

29. Tamie Smith, a CVRC Program Manager, testified that claimant's unique medical needs have created a "barrier" for his placement in a California facility. Specifically, claimant's prescription for Diazepam in the form of a rectal gel (brand name Diastat), prescribed by Dr. Miranda, requires a designated caregiver to perform a rectal injection of the medication. In addition, the Factor VII regimen of medications to be administered in the event of a bleeding episode is a complicated process. The California facilities CVRC has considered for placement lack the licensure (i.e., Community Care licensure through the Department of Social Services) and/or authority to meet claimant's unique medical challenges. In sum, no facility has indicated it can adequately meet claimant's needs.

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<sup>5</sup> Factor VII refers to a protein the liver produces that helps a patient's blood to clot.

30. Claimant's prospects for placement in California have yet to improve. Ms. Smith testified on the second day of hearing that to date, CVRC had located two prospective California residential placements; yet, on cross-examination she conceded that one provider, Shannon House, had merely said it was "considering" claimant and did not yet have sufficient licensure to deal with his medical needs, while the other provider has declined to offer placement.

31. CVRC agrees with mother's contention that claimant's many behavioral and medical needs require him to reside in an appropriate residential placement. The evidence established that CVRC, while searching for a suitable California placement, did not object to Texas Hill as a placement. In December 2019, CVRC dispatched Pamela Gruber, a CVRC staff person visiting Texas on other business, to also make a visit to Texas Hill. Ms. Gruber observed the facility and provided Texas Hill staff with Title 17 special incident reporting requirements. But despite CVRC's cooperation with mother, it maintains it cannot provide funding for claimant to reside at Texas Hill without DDS's approval.

## **Texas Hill**

32. Michelle Senesac has been the Director of Clinical Management at Texas Hill for four years and began communicating with mother in approximately October 2018 about placing claimant at Texas Hill. She authored a Master Treatment Plan Update dated January 7, 2020 (Texas Hill Update), which describes claimant's DSM IV diagnoses, psycho/social background and history, medications and medical/developmental history, educational history, and a "clinical formulation" describing his needs, challenges, and treatment objectives. Ms. Senesac testified about the contents of her report and her observations and impressions of claimant.



33. Texas Hill is a residential treatment center licensed by the state of Texas, which describes itself as emphasizing behavior modification, socialization and academic achievement. Residential clients and day-programming students range from age six to 22 with diagnoses of autism, a traumatic brain injury (TBI) or other developmental and neurobehavioral challenges. Fees for residential clients with behavior stabilization and/or medically complex requirements similar to those of claimant are \$1,000 to \$1,200 per day with a staffing ration of 2:1 minimum (often 1:1), intensive behavior modification programming or increased medical and/or nursing care needs, academics, community integration, and skilled therapies not to exceed six hours per week. Ms. Senesac stated the fee is "all-inclusive;" in claimant's case, he is receiving the maximum level of services Texas Hill provides.

34. Mother provided Texas Hill with extensive records and information detailing claimant's background and history prior to his acceptance. The Texas Hill Update incorporates much of that data and references claimant's 18 diagnoses, 22 medications, mental status notes, a lengthy narrative behavioral and medical history, and Texas Hill's treatment plan in response to claimant's specific issues and needs for improvement. The Texas Hill Update states that claimant requires "an intense level of care" due to his "severe deficits in self-control, lack of ability to adapt to changes involved in [his] everyday living environment and level of aggression." Texas Hill is also a residential licensed non-public school capable of providing academic instruction. Texas Hill is currently committing an "increased" level of staff-support to assist claimant in activities and assist him during "periods of emotional dysregulation."

35. Claimant's behavioral issues have continued since his arrival at Texas Hill on November 7, 2019. Claimant exhibited 10 incidents of aggressive behavior during December 2019, displaying aggression toward others four times, self-injurious

behavior four times, and engaging in property destruction twice. Ms. Senesac noted that claimant “makes up plans” regarding what others should be doing, but if others do not adhere to claimant’s plan, he will become aggressive and act without self-control. Teaching him “positive coping skills” is therefore a paramount goal. Claimant must learn how to communicate and interact effectively and be patient with others, and understand his own feelings. This is a substantial learning process requiring “Level 1” staff care, in which he is paired one-on-one at all times with a staff member who maintains observation of claimant and remains in close proximity. Claimant appears to be more agitated when in mother’s presence. Ms. Senesac opined that claimant knows mother loves him unconditionally and is therefore prone to “test” his boundaries with her more frequently.

36. The Texas Hill Update noted claimant’s prior educational evaluations and found him to be below average in oral expression and average in listening comprehension and language. In all areas of his educational setting he experienced some to significant difficulty. His reading ability was tested using the Fountas & Pinnell Assessment, which assigns letters of the alphabet to particular grade levels to indicate the reader’s reading grade level. In this testing, claimant’s level was A, or equivalent to kindergarten level. His history of education and academic functioning was noted to include a Fresno Unified School District 2016 first-grade evaluation which concluded claimant was eligible for special education services for emotional disturbance and other health impairment due to seizure disorder, but did not meet eligibility criteria for autism, specific learning disability, or speech/language disorder. Claimant was enrolled in an Emotionally Disturbed Special Day Classes (SDC) program in 2017 due to his behavioral issues in school. Mother reported claimant was placed on Home Hospital Instruction from May 17 to June 8, 2017, due to a classroom aid assaulting him on May 8, 2017. He subsequently received Extended School Year (ESY) services in the home at

his physician's request. In January 2018, his psychiatrist recommended Home Hospital Instruction due to claimant's emotional and behavioral dysregulation.

37. Texas Hill's plan was to enroll claimant in the San Marcos Consolidated Independent School District (SMCISD) on November 15, 2019, which it did, according to the Texas Hill Update. SMCISD enrolled claimant in the Travis Elementary School fourth grade class, which claimant apparently attends in the Home Hospital classroom at Texas Hill's facility. The nature, extent, and level of academic instruction Texas Hill, and/or SMCISD, provides claimant was not established in any significant detail at hearing. Currently, SMCISD does not fund any portion of claimant's services. No IEP from SMCISD was offered at hearing. Texas Hill's billing for services does not designate any portion of its costs as being for educational services.

38. Texas Hill reviewed claimant's various psychological diagnoses, including autism, bipolar disorder, oppositional defiant disorder (ODD), PTSD, conduct disorder, ADHD, and vocal tics and other non-psychotic mental disorder. Claimant previously received a Global Assessment of Functioning (GAF) score (measuring how much his psychological symptoms impact his daily life) of 40, indicating some impairment in communication and major impairment in school, family, relations, judgment, thinking and mood. Texas Hill currently treats claimant for autism, ADHD, and PTSD. Regarding treatment services, Texas Hill considers claimant to be eligible for ABA services, an IEP under his education criteria, speech therapy, occupational therapy, physical therapy, counseling services, a behavioral contingency program, recreational therapy (including drumming, equine therapy, and dance and movement therapy), and daily staff intervention. Claimant's "estimated" date of discharge from Texas Hill is October 2020.

## **DDS's Funding Objections**

39. DDS objected to claimant's treatment at Texas Hill for autism as a basis for funding out-of-state services because CVRC's initial evaluation of claimant to determine his eligibility for services, conducted by Pean Lai, Ph.D., in December 2016, did not establish a diagnosis of autism. Nor did the Fresno Unified School District find claimant to meet its eligibility criteria for autism in September 2016. However, in June 2015, Linda Copeland, M.D., B.C.B.A, evaluated claimant and diagnosed him with autism. DDS contended it should not be paying for services related to autism because it was not the basis for claimant's disability.

40. Other autism-related arguments reflected these divergent views of claimant's autism. For instance, in October 2019 CVRC criticized mother for not following through with an evaluation by "Dr. Sullivan" because mother "was pursuing a [residential] placement as [claimant] was deteriorating and [mother] is convinced that CVRC will place him." According to CVRC's case notes for claimant, the purpose of Dr. Sullivan's evaluation was "to clarify the diagnosis" of autism. At hearing, DDS submitted into evidence two ABA Services Reports, from July and November 2019, respectively, from BICC, both of which described claimant as making "significant improvement" in his maladaptive behavior, despite his receptive and expressive communication skills and coping skills being rated at the level of a two-year-old. Both BICC reports were delivered under the lone diagnosis of "Autism Spectrum Disorder."

41. The fair hearing did not include expert testimony as to whether claimant is autistic or should have been deemed eligible for regional center services based on a diagnosis of autism. It is undisputed that claimant established regional center eligibility based on seizure disorder. It is also undisputed that he grapples with a host of severe behavioral and developmental issues and challenges. The type of ABA

services Texas Hill is providing to claimant may be effective for individuals with autism, but they are not exclusive to persons diagnosed with autism. The sum of the evidence did not establish that the provision of such services makes it impossible for DDS to provide funding.

42. DDS, and CVRC, contended mother's failure to promptly supply signed medical releases of information (ROI) from October 16 until December 30, 2019, hampered CVRC's efforts to find a suitable residential placement for claimant in California. In particular, CVRC contended it needed further information from the prescriber, Dr. Miranda, on the administration of the rectal Diastat he prescribed, but that due to mother's failure to timely provide an ROI for Dr. Miranda's records, such information is lacking. This claim was not supported by any specific evidence that a provider, or providers, declined to accept claimant for placement due to this purported lack of medical input or records. The issue of administration of rectal Diastat, prescribed by Dr. Miranda, is not complicated. The medication is to be administered rectally in the event of a prolonged seizure; according to Ms. Smith, this may require a nurse or a facility properly licensed to administer the medication. Bausch Health Company (formerly Valeant Pharmaceuticals), the medication's manufacturer, offers comprehensive directions for use online. Mother testified that since Dr. Miranda issued the prescription, claimant has not had a seizure requiring the medication. Whether any California residential facility is qualified, and willing, to administer such a medication in the event of a prolonged seizure is up to each individual facility.

43. CVRC and DDS argue that claimant's request for out-of-state funding partly seeks costs for education, and Welfare and Institutions Code section 4648.5 prohibits regional centers from funding educational services for children. CVRC notes that "Texas Hill Country School" is, by name, a school and is providing claimant with an

educational component similar to that the Central Valley Unified School District (CVUSD) details in its August 2019 IEP. DDS contends CVUSD was meeting claimant's educational needs. However, the CVUSD's August 2019 IEP is insufficient as a basis for finding here that claimant's educational needs were being met.

As noted in Finding 37, few other specifics regarding the educational component of claimant's current services were established at hearing. DDS asserted, in a few brief sentences in its denial letter, that if an updated IEP identifies out-of-state placement, the district is responsible for the associated costs. Here, no such evidence was developed in any detail. The federal cases DDS cites as authorities in its denial letter indicate that significant evidence must inform the issue of whether a school district must fund out-of-state placement. This issue is discussed further below.

44. CVRC and DDS note that pursuant to Welfare and Institutions Code section 4648.5, DDS would be prohibited from funding such non-medical treatments as described in the Texas Hill Update, including dance therapy, yoga therapy, equine therapy, and drumming therapy. This argument further dovetails with CVRC's and DDS's complaint that Texas Hill offers no costs breakdown for its services, but instead charges only an all-inclusive daily rate. Both contentions are correct: Texas Hill offers dance, yoga, equine and drumming therapy, and its costs are not line-item specific. The issue is whether these deficiencies are so substantial as to call for denying funding altogether.

Claimant has profoundly serious behavioral issues which have resulted in multiple incidents involving dangerous, aggressive, and self-injurious acts. Texas Hill's primary objective is to help claimant reduce, and eliminate, those disturbing behaviors. While Texas Hill does offer clients recreational therapies, the evidence did not

establish whether, or to what extent, such services have been incorporated into claimant's care and treatment.

Similarly, the fact that Texas Hill's costs are not broken down into specific service categories should not be fatal to funding the placement altogether. Considering all the circumstances, such an outcome would be inequitable. Mother lives in California and is very much involved in claimant's care. Texas Hill is a temporary placement. The goal is to reduce the extreme behaviors that, by late 2019, were making it impossible, and unsafe, for mother to care for claimant in the family home. Texas Hill's primary focus is to meet claimant's very high behavioral and medical demands. Ms. Senesac credibly asserted that claimant is receiving a maximum level of care in this most important regard. To date, not a single California residential facility has been willing to do the same.

45. DDS's denial letter primarily objected to CVRC's request for out-of-state funding due to the request not meeting the statutory requirements of Welfare and Institutions Code section 4519, in its failure to provide the information necessary to establish claimant's need for those services and a plan for transitioning him back to California. Those objections are discussed below.

## **LEGAL CONCLUSIONS**

1. Cause exists to grant claimant's appeal, as set forth in the Factual Findings as a whole, and Legal Conclusions 2 through 16.

2. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.<sup>6</sup>) An administrative “fair hearing” to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal a denial of funding for an out-of-state placement. Jurisdiction was established.

3. The standard of proof in this case is the preponderance of the evidence, because no law or statute requires otherwise. (Evid. Code, § 115.) Claimant, who is seeking government benefits or services, has the burden of proof in this case. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits); compare *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789 fn. 9; Evid. Code, § 500.)

4. The Lanterman Act acknowledges the state’s responsibility to provide services and supports for developmentally disabled individuals and their families, and to “ensure that no gaps occur in communication or provision of services and supports.” (§ 4501.) DDS, the state agency charged with implementing the Lanterman Act, 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. (§ 4520.)

5. Regional centers are responsible for conducting a planning process that results in an IPP. The IPP is developed by an interdisciplinary team and must include participation by the consumer or his or her representative. Among other things, the

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<sup>6</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise stated.



IPP must set forth goals and objectives for the consumer, contain provisions for the acquisition of services based on the client's developmental needs and the effectiveness of the means selected to assist the consumer in achieving the agreed-upon goals, contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences. (§§ 4646.4, subd. (a)(1), (2), and (4), 4646.5, subd. (a), 4512, subd. (b), 4648, subd. (a)(6)(E).) "The right of individuals with developmental disabilities to make choices in their own lives requires that all public or private agencies receiving state funds for the purpose of serving persons with developmental disabilities . . . shall respect the choices made by consumers or, where appropriate, their parents . . . ." (§ 4502.1.)

6. Although regional centers are mandated to provide a wide range of services to facilitate implementation of the IPP, they must do so in a cost-effective manner. (§§ 4640.7, subd. (b), 4646, subd. (a).) A regional center is not required to provide all of the services that a client may require but is required to "find innovative and economical methods of achieving the objectives" of the IPP. (§ 4651.) Regional centers are specifically directed not to fund duplicate services that are available through another publicly funded agency or "generic resource." Regional centers are required to ". . . identify and pursue all possible sources of funding. . . ." (§ 4659, subd. (a).) But if a service specified in a client's IPP is not provided by a generic agency, the regional center must fund the service in order to meet the goals set forth in the IPP. (§ 4648, subd. (a)(1).)

7. A claimant has a right to an informal meeting after requesting a fair hearing. (§§ 4701.6 - 44710.7.) Where the subject of the fair hearing request is a service denial, the informal meeting is conducted to gather any new or additional information that was not presented before the decision to deny the service. The regional center

representative at the informal meeting may uphold the original decision to deny the service, modify the decision, or grant the claimant's request. (§ 4710.7.) In this case, CVRC initially indicated it would deny claimant's original funding request due to a lack of authority to grant funding for a possible out-of-state placement without DDS's approval.

8. On October 7, 2019, an IPP meeting was held between CVRC and mother to discuss mother's September 20, 2019 request for placement at Texas Hill Country School. After further information was gathered, CVRC wrote to DDS on November 1, 2019, seeking its approval to fund the out-of-state placement, at a rate of \$1,200 per day, or \$37,200 per month, pending DDS approval.

9. Funding for out-of-state placements is governed by section 4519 and related statutes. Section 4519 provides, in pertinent part:

(a) The department shall not expend funds, and a regional center shall not expend funds allocated to it by the department, for the purchase of any service outside the state unless the Director of Developmental Services or the director's designee has received, reviewed, and approved a plan for out-of-state service in the client's individual program plan developed pursuant to Sections 4646 to 4648, inclusive. Prior to submitting a request for out-of-state services, the regional center shall conduct a comprehensive assessment and convene an individual program plan meeting to determine the services and supports needed for the consumer to receive services in California and shall request assistance from the department's statewide

specialized resource service in identifying options to serve the consumer in California. The request shall include details regarding all options considered and an explanation of why these options cannot meet the consumer's needs. The department shall authorize for no more than six months the purchase of out-of-state services when the director determines the proposed service or an appropriate alternative, as determined by the director, is not available from resources and facilities within the state. Any extension beyond six months shall be based on a new and complete comprehensive assessment of the consumer's needs, review of available options, and determination that the consumer's needs cannot be met in California. An extension shall not exceed six months. For the purposes of this section, the department shall be considered a service agency under Chapter 7 (commencing with Section 4700).

[¶] . . . [¶]

(c) When a regional center places a client out of state pursuant to subdivision (a), it shall prepare a report for inclusion in the client's individual program plan. This report shall summarize the regional centers efforts to locate, develop, or adapt an appropriate program for the client within the state. This report shall be reviewed and updated every three months and a copy sent to the director. Each comprehensive assessment and report shall include

identification of the services and supports needed and the timeline for identifying or developing those services needed to transition the consumer back to California.

10. CVRC provided DDS with an October 7, 2019 IPP, and two IPP addendums dated October 7 and October 22, 2019. These were followed by a detailed CVRC letter to DDS dated November 1, 2019, describing its reasons for the out-of-state funding request. CVRC also provided DDS with a February 4, 2020 IPP, specifically to address deficiencies DDS noted in its denial of CVRC's funding request. CVRC has provided DDS with all the statutorily-mandated information necessary to make a decision to fund claimant's placement at Texas Hill. Section 4519 contemplates that a regional center will provide DDS not only with an IPP reflecting the IPP team's determination of services and supports needed, but also with information concerning an SSRS search to attempt to identify options within California and information concerning any alternative options considered and the reason they will not meet the consumer's needs. CVRC acted in compliance with section 4519 and responded to the additional informational requirements set forth in DDS's December 27, 2019 letter to CVRC. In sum, CVRC provided substantial details, not typically found in an IPP, in its funding request letter and accompanying documentation.

11. Claimant's IPP and addenda immediately preceding its funding request does omit information, but that is partly due to mother's decision to take claimant to Texas Hill and enroll him there on November 7, 2019. Those omissions were corrected in the February 2020 IPP. DDS expressed a valid concern that information provided in support of a funding request, but not included within the IPP, might not reflect that the request and the basis for the request was considered by the regional center's IPP team, which, along with the consumer, must participate in designing the services and

supports the regional center will provide to the consumer under section 4620, subdivision (a). But the documentation submitted establishes that the IPP team considered the matter, approved claimant's out-of-state placement, and despite CVRC's substantial efforts, CVRC found no appropriate and available in-state placements; thus, the IPP omissions were inconsequential. The regional center's director substantially complied with the statutory requirements for DDS approval by providing, in supplemental documentation, the information required to determine whether an out-of-state placement is warranted. DDS received the information necessary to support a funding decision.

12. DDS's narrow interpretation of section 4519, subdivision (a), is at cross purposes with the Lanterman Act's remedial thrust. (See *Association for Retarded Citizens v. Department of Development Services* (1985) 38 Cal.3d 384, 391, 392; see also *Lande v. Jurisich* (1943) 59 Cal.App.2d 613, 617.) By failing to consider all of the information CVRC and claimant provided, and insisting that a California residential placement was the only appropriate plan for claimant despite the lack of a single available placement, DDS did not fulfill its responsibilities, which have been delineated by the California Supreme Court:

First, the regional centers and DDS have distinct responsibilities in the statutory scheme: that of the regional centers is to provide each developmentally disabled person with the services to which he is entitled under the Act; that of DDS is to promote the cost-effectiveness of the operations of the regional centers, but not to control the manner in which they provide services. Second, the Act defines a basic right and a corresponding basic obligation:

the right which it grants to the developmentally disabled person is to be provided with services that enable him to live a more independent and productive life in the community; the obligation which it imposes on the state is to provide such services.

*(Association for Retarded Citizens v. Department of Development Services, supra, 38 Cal.3d at p. 391.)*

13. The Legislative protections embodied in a remedial statute such as the Lanterman Act cannot be frustrated or circumnavigated by narrow interpretation or insistence upon ministerial technicality. (*California State Restaurant Association v. Whitlow* (1981) 58 Cal.App.3d 340, 347; see also *Montessori Schoolhouse of Orange County, Inc. v. Department of Social Services* (1981) 120 Cal.App.3d 248, 256.) The wisdom in requiring a broad construction is apparent here, where for claimant an out-of-state placement is the only safe, appropriate and available option at present.

14. DDS, and CVRC, expressed valid concerns regarding monitoring specific costs and the difficulty of monitoring the quality of services claimant is receiving while in a facility outside California. Section 4519 reflects such concerns by not allowing regional centers to purchase out-of-state services or placements when equal or comparable services or placements are available within the state. But here, such budgetary concerns are outweighed by the demonstrated threat of harm claimant poses to himself, his mother, and others attempting to render care. It is undisputed that claimant exhibits aggressive, dangerous, destructive and self-injurious behaviors and has an unusually high demand for ongoing medical treatment, for which he needs an intense and involved treatment program. The evidence established that claimant's treatment requires the services offered by Texas Hill, as no appropriate treatment

program in California has been located. Hence, both concerns for cost-effectiveness and the remedial purposes of the Lanterman Act are served with the appropriate placement of claimant at Texas Hill.

15. Even if CVRC's initial request did not entirely meet a procedural requirement of the Lanterman Act, it would be inequitable and contrary to the purpose of the Lanterman Act to deprive claimant of the timely delivery of services and supports warranted. It is the regional center's responsibility to convey funding requests to DDS, not the consumer's, and a consumer whose service needs are of the nature of claimant's in this case should not be deprived of necessary services, including those received through an out-of-state placement, where DDS has been provided with sufficient documentation to support a funding decision in accordance with the informational requirements of the Lanterman Act.

16. The Lanterman Act places the burden of guarding against unfunded gaps in services with service agencies, not consumers. DDS's denial letter provides no suggestions for meeting claimant's needs for services and supports, as contemplated by section 4701. Claimant's long history of dangerous behaviors eventually forced his mother to attempt to act in concert with CVRC to locate an appropriate California residential placement, but when those efforts failed, she acted without DDS participation to place claimant out of state. Section 4646.4, which section 4519 invokes as a guideline for the appropriate development of IPPs, advises regional centers considering the appropriateness of an IPP to take into account the consumer's need for extraordinary care, services, supports, and supervision, and the need for timely access to care. CVRC did so, as evidenced by its detailed request to DDS for out-of-state funding and the additional supporting information it provided.

17. Although DDS and CVRC cast mother as having acted unreasonably, the sum of the evidence, and the exigent circumstances created by claimant's continued out-of-control behavior issues, established that she acted reasonably and in claimant's best interest.

18. DDS's assertion that it should not be required to fund mother's travel costs to and from Texas is correct. There is no statutory authority for such a claim for travel costs.

19. DDS's denial letter asserted that if a California school district recommended out-of-state placement in an IEP and the student was placed in an "out-of-state educational facility," the district must pay for the associated cost, including room and board. This contention has merit but was not supported by sufficient evidence. As noted above in Finding 37, there is a relative paucity of evidence in the record addressing education. The evidence does not reflect the terms of claimant's mother's agreement with claimant's California school district; the district's most recent IEP is of limited value, repeatedly noting that claimant was not present during the 2018 and 2019 school year. Also, Texas Hill's educational component for claimant was not established with specificity, nor did claimant provide an IEP from the Texas school district. Yet case law has established that school districts, a generic source of funding, must fund residential services attendant upon what is solely an educational placement. For instance, in a dispute between parents and their child's school district over who had responsibility for paying for residential services in connection with an educational placement under the federal Education For All Handicapped Children Act (20 U.S.C. § 1400 et seq.), the Court of Appeal concluded, "if private residential placement is necessary to provide a handicapped child with an appropriate education, such a program, including nonmedical care and room and board, shall be provided at no cost



to the parents of the child." (*In re John K.* (1985) 170 Cal.App.3d 783, 791; see also *Kruelle v. New Castle County School Dist.* (1981) 642 F.2d 687, 691 (*Kruelle*), *Christopher T. by Brogna v. San Francisco Unified School Dist.* (1982) 553 F.Supp. 1107, 1119 (*Brogna*).

20. In its denial letter, DDS cites to *Kruelle* and *Brogna* in support of its contention that if an updated IEP identifies an out-of-state placement, the district is responsible for the associated costs. No such identification was established in this case. Furthermore, in *Brogna*, the Court of Appeal acknowledged the great difficulty of assessing the school district's argument that the cost of a placement serving as a means of addressing social and emotional, rather than educational, problems should be borne by a service agency, rather than the district, stating:

"It may be possible in some situations to ascertain and determine whether the social, emotional, medical, or educational problems are dominant and then to assign responsibility for placement and treatment to the agency operating in the area of that problem. In this case, all of these needs are so intimately intertwined that realistically it is not possible for the Court to perform the Solomon-like task of separating them."

(*Brogna, supra*, at p. 1120 (quoting *North v. District of Columbia Board of Education*, 471 F.Supp. 136 (D.D.C.1979).) The Court of Appeals further noted that the court in *Kruelle*, which dealt with a similar issue of whether a district should fund a residential placement, found that emotional and social needs are in a particular child's case unseverable from that child's educational needs, which furthermore, "is the very basis for holding that the services are an essential prerequisite for learning." (*Id.*, at p.

1120 (citing *Kruelle, supra*, 642 F.2d at 692.) The *Brogna* court ultimately relied on substantial evidence in the record, finding that the school district must provide funding for two disabled children whose placement was at issue in the case, because the children:

require residential placement in order to benefit from special education, and the reports and recommendations of the psychologists and psychiatrists that have been presented to the Court amply support this finding.

((*Id.*, at p. 1120.)

21. In claimant's case, no such ample evidence regarding claimant's educational component has been established. No IEP addresses out-of-state placement. Claimant's very serious behavioral and developmental needs which led to his placement at Texas Hill, and Texas Hill's treatment plan for his ongoing behavioral challenges, make plain that Texas Hill is not, for claimant's needs and purposes, solely an educational placement. However, these most pressing behavioral issues are obviously intertwined with certain ongoing educational needs which are not presently clearly delineated.

22. For all these reasons, the evidence does not support a "Solomon-like" finding here that either a Texas or California school district should be obligated to fund claimant's placement at this time, rather than DDS. Yet, the Lanterman Act's mandate that service agencies be payors of last resort suggests that this issue should be revisited, with sufficient evidence provided, in the event claimant seeks further funding for Texas Hill or another out-of-state placement.

23. While the Lanterman Act does not specifically authorize retroactive reimbursement to families who prevail at fair hearing, it does not proscribe ALJs from awarding this remedy. In any event, in this case, retroactive funding is authorized under California Code of Regulations (CCR), title 17, section 50612, subdivision (b), which provides that authorization for funding shall be obtained in advance of providing the services, "except . . . [w]here the regional center determines that the services was necessary and appropriate." CVRC made this determination, as evidenced by its letter to DDS requesting out-of-state funding. The evidence was undisputed that claimant was in crisis at the time he was placed out of state, and no appropriate California residential placement could be located. DDS is required to reimburse claimant's parents for claimant's placement at Texas Hill retroactive to November 7, 2019, at a rate of \$1,200 per day, or \$32,000 per month. Mother testified that she has paid for Texas Hill to date via a Fresno County special needs trust for claimant. Those funds, when reimbursed to mother, must therefore be replaced.

## **ORDER**

The appeal by claimant is granted. DDS shall reimburse claimant's mother for the cost of claimant's placement at the Texas Hill Country School in Maxwell, Texas, retroactive to November 7, 2019, at the rate identified by CVRC as \$1,200 per day, or \$32,000 per month, for those costs not funded by claimant's school district. With this reimbursement, claimant's mother shall replace any funds previously removed from claimant's special needs trust to pay for Texas Hill Country School to date. DDS shall continue to fund that placement subject to any periodic review mandated under the Lanterman Act.

DATE: March 11, 2020

JOHN DeCURE

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.