

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Confidential .,

OAH No. 2011020752

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard by June R. Lehrman, Administrative Law Judge with the Office of Administrative Hearings, on June 16, 2011, in Culver City, California. **Confidential** (Claimant) was represented by her Mother.¹ Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (Service Agency or WRC).

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on June 16, 2011.

ISSUES

The issues to be decided are:

1. Should WRC be allowed to discontinue Claimant's "Specialized Supervision," which was previously authorized for 5 hours per day 5 days per week, after January 31, 2011?
2. Should WRC be allowed to deny Claimant "Specialized Supervision" for extended school year during winter break 2010-2011?

¹ Claimant and her Mother are identified by first name and last initial, or by title, to protect their privacy.

EVIDENCE RELIED UPON

Documentary: Service Agency Exhibits 1-12; Claimant's Exhibit A.

Testimonial for Claimant: Mother

Testimonial for Service Agency: Lisa Basiri

FACTUAL FINDINGS

1. Claimant is an eighteen-year-old young woman who qualifies for regional center services pursuant to the qualifying diagnosis of autism. She has been a consumer of WRC for at least 10 years. (Service Agency Exhibits 5, 6.)

2. Pursuant to individual program plans (IPP's) dated September 22, 2008, October 7, 2009, and December 6, 2010, WRC funded, in pertinent part, 105 hours per month of services delineated in the IPP's as "specialized supervision care." The IPP's described Claimant as a hard-working person who lives with her Mother, is helpful in the home, and hopes to work in fashion, theater or the performing arts. She is fully ambulatory, and independent with all self-care, requiring occasional prompts. She has fine-motor challenges that impact her handwriting and other tasks, and emotional challenges related to self-regulation. She is fully verbal and able to complete grade level schoolwork. The IPP's tracked Claimant's progress from 11th grade through her graduation from Confidential High School, and into her first year at Confidential College where she currently attends a full curriculum. The IPP's all reflected "desired outcomes" as follows: to continue to live at home with Mother; to attend school/college; to regulate emotional responses and participate in age-appropriate social activities; and to maintain excellent health. The IPP's did not vary significantly from one year to the next, either in the description of Claimant's abilities and status, nor her goals. (Service Agency Exhibits 9, 10, and 11.)

3. In 2009, Claimant requested that her "specialized supervision care" services, which WRC normally provides only during the school year, be extended over spring and summer break. WRC's terminology for such services is "extended school year" or ESY. WRC denied these requests, finding for the first time, as they do here, that Claimant did not meet WRC's Service Standards for "specialized supervision." The parties resolved that issue by Settlement Agreement dated August 3, 2009. That denial, and the settlement, related only to extended school year services during the 2009 school year breaks, and not to services provided during the school year. (Service Agency Exhibit 7.)

4. On December 2, 2010, Mother sent an email to WRC requesting ESY services for Claimant's winter school break from December 17, 2010-January 24, 2011. (Service Agency Exhibits 2, 5.)

5. On December 20, 2010, WRC issued two Notices of Proposed Action (NOPA's) and sent these to Mother, correctly addressed, via Certified Mail. One of these denied the request for ESY, stating the following reason: "Per Westside Regional Center Service Standards for Specialized Supervision, client does not qualify for service." (Service Agency Exhibit 2.)

6 The other NOPA proposed to discontinue, as of January 31, 2011, Claimant's "specialized supervision" services during the school year as well. It stated the following proposed action: "Specialized Supervision (5) hours per day five days per week re-authorized through 1/31/11 only. The stated reason was: Per Westside Regional Center Service Standards for Specialized Supervision." (Service Agency Exhibit 2.)

7. On January 18, 2011, the United States Postal Service reported that the certified mail package, that WRC had sent containing the NOPA's, had not been claimed by Mother, and was being returned to the sender. (Service Agency Exhibit 3.)

8. Sometime between January 18, 2011, and February 15, 2011, Mother received the NOPA's and, on February 15, 2011, filed a Fair Hearing Request. The reason stated was: "Non-receipt of notice and the child's needs have not changed nor was any reason given aside from "service standards" which are not outlined or stated on notices; EXY was requested before Notice date; Confidential still meets criteria 1-4 in service standards for WRC." (Service Agency Exhibit 2.)

9. On March 8, 2011, Mother and WRC representatives met. There, WRC learned that the specialized supervision hours it provided were being used to assist Claimant in accessing her college curriculum, which WRC did not consider to be a proper utilization of these resources. WRC thereafter wrote a letter reiterating its position that Claimant was not eligible for "specialized supervision" and that, because the hours were being used to provide support for Claimant in her college campus setting, the hours were being used for purposes other than "specialized supervision." While denying these services, WRC offered 20 hours per month of a different type of service which it called "personal assistant support." (Service Agency Exhibit 4.)

10. WRC also determined that "aid paid pending" this hearing did not apply, because Mother did not file her February 15, 2011, Fair Hearing Request until more than 10 days following the NOPA's; it rejected Mother's lack of notice argument, stating that numerous attempts were made to deliver the certified letter yet Mother did not pick it up from the Post Office. (Service Agency Exhibit 4.)

11. Thereafter, on March 24, 2011, WRC wrote a letter to Mother that further outlined its positions, stating, first, that per WRC Service Standards, "day care" services were available only to school-aged children. Second, WRC's letter stated that the regional center is required to ensure that prior to purchasing services and supports, any and all generic services and supports have been exhausted. It referred Mother to the In Home Support Services (IHHS) program, which it described as a state-administered, county-run program

that provides state, county and federal funding to hire a caregiver. Finally, based on the confusion over Mother's receipt of the NOPA's, it reversed its position with respect to "aid paid pending" this hearing. (Service Agency Exhibit 6.)

12. WRC Service Standards do not have a particular category of service called "specialized supervision." The pertinent service standards are located within WRC's Service Standard for "day care," which provides:

Day care services include after school supervision and supervision during school breaks (extended year services). Day care services are provided to school-aged children with a developmental disability while family caregivers are at work. . . .This service is designed to provide basic care and supervision only. It is provided to those whose health and/or safety would be in jeopardy without such care because of the nature of their disability or at risk status. Such services may be provided to persons over 22 years of age when the need is determined by the planning team.

Day care may be provided to those who meet all of the following criteria:

1. Alternative resources for supervision have been ruled out;
2. The individual resides in a single parent household with parent working or attending a vocational/educational program full-time . . . ;
3. The person is in need of constant supervision or total support due to severe physical and/or medical challenges; or
4. The individual has severe behavior challenges that constitute a threat to the health and safety of the individual, to the safety of others in the environment, or a threat to property;
5. Other circumstances which the IPP team and regional center management deem qualify the individual for these services. (Service Agency Exhibit 6.)

13. WRC service standards for extended school year services state:

Extended School Year Services are provided in accordance with the individual needs of persons attending school whose parents are unavailable to provide supervision because of their employment during customary school hours. . . . (Service Agency Exhibit 6.)

14. At hearing, Mother testified that she applied for IHHS in 2004, was denied and has not since reapplied. Mother works two jobs, and Claimant's caregiver therefore escorts Claimant home from college and stays with her in the evening until Mother arrives. In Mother's view, Claimant's services should remain in place until a change of circumstances, which has not occurred in Claimant's status or abilities, justifies altering them. She considers Claimant to be at risk due to innocence, and unawareness of danger. For these reasons, Claimant requires supervision. Claimant, for example, recently allowed a stranger into the family home because he said he was a process-server and informed her that she

needed to open the door, and she complied. (Testimony of Mother and Claimant’s Exhibit A.)

15. At hearing, Ms. Basiri for WRC testified that the services that WRC delineates as “day care” are generally reserved to people under 18, although the determination is individualized based on circumstances such as whether the consumer continues to attend high school after reaching the age of 18. Thus, as a general rule, 18 is considered an adult, and day care is not considered an adult service. (Testimony of Basiri.)

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.) An administrative “fair hearing” to determine the rights and obligations of the parties is available under the Lanterman Act. (Welf. & Inst. Code, §§ 4700-4716.) Claimant requested a fair hearing to appeal the Service Agency’s proposed reduction of her service hours. Jurisdiction in this case was thus established. (Factual Findings 5, 6 and 8.)

2. The Lanterman Act is a comprehensive statutory scheme to provide “[a]n array of services and supports . . . which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community.” (§ 4501.) The services and supports should “enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age.” (*Id.*)

3. In enacting the Lanterman Act, the Legislature codified the state’s 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. A regional center is required to provide services and supports for eligible consumers in accordance with the Lanterman Act. (Welf. & Inst. Code, § 4500 et seq.)

4. A regional center is required to secure services and supports that: meet the individual needs and preferences of consumers (Welf. & Inst. Code, §§ 4501 and 4646, subdivision (a)); support their integration into the mainstream life of the community (Welf. & Inst. Code, §§ 4501 and 4646, subdivision (a)); foster the developmental potential of the person (Welf. & Inst. Code, § 4502, subdivision (a)); and maximize opportunities and choices for living, working, learning and recreating in the community (Welf. & Inst. Code, § 4640.7, subdivision (a)).

5. Welfare and Institutions Code section 4512, subdivision (b) provides, in pertinent part:

[T]he 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. Welfare and Institutions Code section 4648 provides, in pertinent part:

In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities including, but not limited to, all of the following:

- (a) Securing needed services and supports.

- (1) . . . The regional center shall secure services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan

7. Welfare and Institutions Code section 4512, subdivision (b), contains a non-exhaustive list of services and supports that may be included in an individual program plan (IPP), including protective services. Section 4512, subdivision (b), defines "services and supports for persons with developmental disabilities," in pertinent part, as follows:

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 independent, productive, normal lives.

8. Welfare and Institutions Code section 4689, subdivision (c), provides:

The range of supported living services and supports available include, but are not limited to, assessment of consumer needs; assistance in finding, modifying and maintaining a home; facilitating circles of support to encourage the development of unpaid and natural supports in the community; advocacy and self-advocacy facilitation; development of employment goals; social, behavioral, and daily living skills training and support; development and provision of 24-hour emergency response systems; securing and maintaining adaptive equipment and supplies; recruiting, training,

and hiring individuals to provide personal care and other assistance, including in-home supportive services workers, paid neighbors, and paid roommates; providing respite and emergency relief for personal care attendants; and facilitating community participation.

9. However, prior to purchasing services and supports, a regional center is required to ensure that any and all generic services and supports, or other services and sources of funding, have been utilized. (Welf. & Inst. Code, §§ 4646.4 (a)(2); 4659.) The law specifically provides that a regional center shall not purchase supportive services, as defined in Welfare and Institutions Code section 12300, for a consumer who meets the criteria to receive, but declines to apply for, in-home supportive services (IHSS) benefits, except when the regional center finds that extraordinary circumstances warrant a waiver. A regional center shall not purchase supported living services for a consumer to supplant IHSS. (Welf. & Inst. Code, § 4689.05.) “Supportive services” include “protective supervision.” (Welf. & Inst. Code, § 12300, subd (b).)

10. For all active cases, IPP's shall be reviewed and modified by the planning team, through the process described in Welfare and Institutions Code section 4646, as necessary, in response to the person's achievement or changing needs, and no less than once every three years. (Welf. & Inst. Code, § 4646.5, subd. (b).)

11. Regional centers may generate written policies that are consistent with the Lanterman Act. (Welf. & Inst. Code, § 4434, subds. (a) & (d).) When developing an IPP, regional centers are required to ensure adherence to federal and state law, and conformance with such policies. (Welf. & Inst. Code, § 4646.4, subd. (a)(1).)

12. When a change in services is sought, the party seeking the change has the burden of proving that a change in services is necessary to meet the consumer's needs or that the consumer no longer needs the services. (See Evid. Code, §§ 115 and 500.) Thus, in proposing to reduce Claimant's previously-funded service hours, WRC bears the burden of proving by a preponderance of the evidence that the services are not necessary to meet Claimant's needs or are otherwise not legally required to be provided by the Service Agency.

13. Claimant's appeal of the Service Agency's proposal to discontinue Claimant's "Specialized Supervision," previously authorized for 5 hours per day 5 days per week, after January 31, 2011, is sustained. Claimant's appeal of Service Agency's denial of Claimant's "Specialized Supervision" for extended school year during winter break 2010-2011 is also sustained. WRC cites several different justifications for its decisions in this case. The reason stated in the NOPA's is that Claimant is ineligible for "Specialized Supervision," pursuant to WRC's Service Standards. Its correspondence with Mother explains that, now Claimant is of college age, she should instead use a different service that WRC calls a "personal assistant." There is no justification for these positions. "Specialized supervision"

and “personal assistant” are not terms that are located within WRC’s written Service Standards. WRC also argues that “day care is not an adult service,” and is generally reserved to people under 18. However, WRC’s Service Standards are explicitly to the contrary, stating as they do that such services may be provided to persons over 22 years of age when the need is determined by the planning team. Moreover, even if WRC were correct that its Service Standards justify a modification of Claimant’s services based on her age and school status, such standards cannot and do not supplant the Lanterman Act. Whether the Service Agency should fund a service is a question whose answer must be based on Claimant’s disability-related needs, her IPP, and the Lanterman Act. Since the services have been provided uninterrupted for at least the past three years, and since Claimant’s IPP’s show no changes in her status, abilities or goals, WRC has failed to meet its burden of proving that a change in services is necessary to meet the consumer’s needs or that the consumer no longer needs the services. (Factual Findings 1-15; Legal Conclusions 1-12.)

14. WRC’s correspondence also argued that Claimant has not exhausted the availability of protective supervision IHHS services. However, it failed to meet its burden of proof with respect to this justification for the denial. While the law provides that a regional center shall not purchase supportive services, including “protective supervision” for a consumer who meets the criteria to receive, but declines to apply for, IHSS benefits, WRC did not here establish that Claimant meets the criteria to receive, but declined to apply for such benefits. The evidence was to the contrary, that Mother did apply in 2004 and was denied. The evidence did not establish any change in Mother’s circumstances that would render her eligible at this time. (Factual Findings 1-15; Legal Conclusions 1-13.)

ORDERS

1. Claimant's appeal of the Service Agency's proposed discontinuance of Claimant's "Specialized Supervision," which was previously authorized for 5 hours per day 5 days per week, after January 31, 2011 is sustained.

2. Claimant's appeal of the Service Agency's proposed denial of "Specialized Supervision" for extended school year during winter break 2010-2011 is sustained.

3. The Service Agency shall continue to fund Claimant's "Specialized Supervision," for 5 hours per day 5 days per week, including ESY during school breaks at the same service level, until there is a change in circumstances, such as the services are no longer necessary to meet Claimant's needs or until the parties identify a more cost-effective, alternative program to meet Claimant's needs.

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.

DATED: June 27, 2011

JUNE R. LEHRMAN
Administrative Law Judge