

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

JASON C.

Claimant,

vs.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2011070522

DECISION

Administrative Law Judge Robert Walker, State of California, Office of Administrative Hearings, heard this matter in San Bernardino, California, on August 23, 2011.

Leighann Pierce, Consumer Services Representative for Inland Regional Center, represented the regional center.

Sandra C., claimant's mother, represented the claimant, Jason C.

The matter was submitted on August 23, 2011.

SUMMARY

Is claimant entitled to have personal attendant services continue?

In this decision, it is determined that claimant is not entitled to have personal attendant services continue.

FACTUAL FINDINGS

1. Claimant is an eight-year-old boy. He has been diagnosed with mild mental retardation with an etiology of downs syndrome. He has also been diagnosed with attention deficit/hyperactivity disorder not otherwise specified, oppositional defiant disorder, congenital hypothyroidism, ostium secundum type atrial septal defect, Stevens-Johnson syndrome, and Kawasaki disease. He functions as an 18 month old child. Claimant has difficulty controlling mucus in his upper respiratory system and, as a consequence, has difficulty breathing. Claimant is a regional center consumer.

2. Claimant lives with his adoptive mother, Ms. C., and six adoptive siblings. All of the children are mentally retarded. Six of the seven children are regional center consumers. Ms. C. testified that six of the children need constant care. One child, a 16-year-old girl, is psychotic and has serious behavior problems.

3. Ms. C. is 62 years old and has suffered a back injury.

4. Claimant is fully ambulatory. He, however, requires assistance with all activities of daily living – including all aspects of personal hygiene. Claimant has behavior problems. He throws and smears feces. He attempts to run away from home. He pulls his mother down to the ground. He throws things; at school, he picked up a microwave oven and threw it. When claimant is awake, someone must shadow him, i.e., be with him at all times, to insure his safety. When he is asleep, someone must be available to guard against his waking up and running away.

5. Claimant has been hospitalized several times. Because of his behavior problems, he is physically restrained with a five point restraint when he is in a hospital.

6. Claimant takes a number of medications, which Ms. C. administers. Claimant needs oxygen from time to time. Ms. C. administers oxygen and sometimes uses an oxygen concentrator. She also cares for claimant by using a suction machine to remove mucus and a nebulizer to administer medication. While Ms. C. has reported using these devices, she now contends that claimant does not need this sort of care very often and that, when he does need it, she is able to provide it and needs no assistance in doing that. Ms. C. testified that what she does need is help with managing claimant physically.

7. In September of 2010, Ms. C. and her children moved to Murrieta. Inland Regional Center serves residents of Murrieta. Before September of 2010, Ms. C. and her children lived in Orange County, and the Regional Center of Orange County provided services for claimant. Regional Center of Orange County provided 160 hours per month of personal attendant services. On November 1, 2010, Inland Regional Center began providing that service. Also, Inland Regional Center offered to provide behavior modification services for claimant, but Ms. C. declined that offer. Claimant had behavior modification services in the past, and Ms. C. concluded that they did not have any effect on his behavior.

8. Vanessa Herrera worked as claimant's personal attendant. Ms. Herrera did an excellent job of caring for claimant, and most of the time, she was able to control him. When Ms. Herrera was not able to control claimant, Ms. C. intervened. Ms. Herrera came to work at 3:00 p.m. and worked until 11:00 p.m. During that time, Ms. C. would be able to sleep for four hours. Ms. C. was very pleased with Ms. Herrera's performance.

9. Claimant attends a school for children with behavioral problems. He leaves for school at approximately 7:30 a.m. and returns home at approximately 3:30 p.m. Claimant's school provides a one-on-one aid while claimant is at school and while he is traveling to and from school.

10. Regional centers are prohibited from providing a service that is available to a consumer through some other, generic resource. "Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." (Welf. & Inst. Code § 4648(a)(8).) Regional centers must identify and pursue all possible sources of funding for consumers receiving regional center services. (Welf. & Inst. Code § 4659.)

11. The Inland Regional Center staff set about to obtain the services of a licensed vocational nurse (LVN) for claimant, funded through Medi-Cal, and they were successful. Nursefinders of San Bernardino agreed to provide 182 hours per month of LVN care to be funded by Medi-Cal. A Nursefinders report provides that services would start on July 12, 2011. The report further provides:

Jason is an 8 year old male client with a primary [diagnosis] of downs syndrome. Requires total assist for all ADLS. Requires close monitoring due to potential for respiratory distress/ falls/ injury to self/ aspiration. Requires monitoring of respiratory status to assess for supplemental [oxygen] need. Client will need LVN skill care services of 182 hours per month.

[[¶]] . . . [[¶]]

Discharge plan: Client will be discharged from agency when no longer in need for skilled care services.

12. Inland Regional Center sent Ms. C. a notice of proposed action dated July 5, 2011, telling her that the regional center would stop providing the personal attendant service at the end of July.

13. Ms. C. appealed, i.e., she filed a request for fair hearing. Her appeal is the subject of the present proceeding.

14. Ms. C. opposed the change from a personal attendant to an LVN in spite of the fact that the hours would be increased by 22 hours per month. She opposed the change because she was very satisfied Ms. Herrera and did not want a change.

15. At the end of July the regional center stopped providing a personal attendant. On August 1, 2011, Nursefinders provided an LVN to care for claimant. Ms. C. was very dissatisfied with the LVN, who “did not know how to handle Jason.” The LVN worked only two days. Nursefinders sent a second LVN. After 30 minutes, Ms. C. told her, “You might as well go home.”

16. Nursefinders called Ms. C. and asked, “What are we going to do?” Ms. C. said, “If you can find a nurse who can handle him and who is willing to work with a child who smears feces on the walls, let’s try that nurse.” Ms. C. said, further, “I sent the nurse home because she could not do the job, so we may as well close the case.” Nursefinders has not sent other nurses.

17. Nursefinders LVNs must write reports about the services they perform. Ms. C. testified that one of the nurses told her that, after she turned in her report, she expected Nursefinders to determine that claimant was not eligible for nursing services because nursing is not what claimant needs. Ms. C. agrees that that is not what claimant needs. She testified that she can provide the medically related services. She said she needs help managing claimant physically.

18. Ms. C. contends that LVN services are not an appropriate substitute for personal attendant services because nurses cannot handle claimant physically and because Nursefinders is likely to discontinue the service. The answer to the first contention is that a nurse is just as likely as anyone else to be able to learn to manage claimant physically. The answer to the second contention is that Nursefinders has not discontinued the service.

19. The regional center stipulated that, because Ms. C. appealed from the notice of proposed action, the regional center should have provided aid paid pending. That is, the regional center stipulated that it should have continued to provide a personal attendant until a decision was rendered on Ms. C.’s appeal. The regional center stipulated that, as compensation to claimant, the regional center should be ordered to provide a personal attendant for an appropriate period. Pursuant to that stipulation, the regional center will be ordered to provide a personal attendant for five weeks.

20. Ms. C.’s devotion to special needs children is highly commendable. She adopted these children because other people did not want them. She was concerned that, if she did to take them, they would be placed in institutions where they would not have the love and joy she could give them. Ms. C.’s back injury combined with claimant’s growing older and stronger make it difficult for Ms. C. to control claimant. Moreover, Ms. C. does not merely provide for the children, she puts a great deal of effort into trying to make their lives meaningful and joyful. She has miniature horses for them to play with and ride. She has dance parties to which she invites other children. She goes out of her way to make them

happy. There is no question about her needing help with claimant. Ms. C. is particularly concerned about claimant's being placed in an institution. For one thing, she loves him, but also, she worries that, in an institution, he might be kept in restraints a good deal of the time. It may take some time and some training, but an LVN, ultimately, should prove to be a good fit.

THE LAW REGARDING ENTITLEMENT

1. The Lanterman Disabilities and Services Act, beginning at section 4500 of the Welfare and Institutions Code, contains a number of provisions relevant to entitlement to services and supports.

2. The State has accepted a responsibility for persons with developmental disabilities and an obligation to them.

4501 The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge.

[¶] . . . [¶]

An array of services and supports should be established 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.

[¶] . . . [¶]

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.... In providing these services, consumers and their families, when appropriate, should participate in decisions affecting their own lives, including, but not limited to, where and with whom they live, their relationships with people in their community, the way in which they spend their time, including education, employment, and leisure, the pursuit of their own personal future, and program planning and implementation.

[¶] . . . [¶]

It is the intent of the Legislature that agencies serving persons with developmental disabilities shall produce evidence that their services have resulted in consumer or family empowerment and in more independent, productive, and normal lives for the persons served.¹

3. The Lanterman Act is replete with provisions that elaborate on the nature of the services and supports to which developmentally disabled persons are entitled.

4502 Persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals . . .

[¶] . . . [¶]

It is the intent of the Legislature that persons with developmental disabilities shall have rights including, but not limited to, the following:

(a) A right to treatment and habilitation services and supports in the least restrictive environment. Treatment and habilitation services and supports should foster the developmental potential of the person and be directed toward the achievement of the most independent, productive, and normal lives possible. Such services shall protect the personal liberty of the individual and shall be provided with the least restrictive conditions necessary to achieve the purposes of the treatment, services, or supports.

(b) A right to dignity, privacy, and humane care. To the maximum extent possible, treatment, services, and supports shall be provided in natural community settings.

(c) A right to participate in an appropriate program of publicly supported education, regardless of degree of disability.

(d) A right to prompt medical care and treatment.

(e) A right to religious freedom and practice.

¹ Welf. & Inst. Code, § 4501.

(f) A right to social interaction and participation in community activities.

(g) A right to physical exercise and recreational opportunities.

(h) A right to be free from harm, including unnecessary physical restraint, or isolation, excessive medication, abuse, or neglect.

(i) A right to be free from hazardous procedures.

(j) A right to make choices in their own lives, including, but not limited to, where and with whom they live, their relationships with people in their community, the way they spend their time, including education, employment, and leisure, the pursuit of their personal future, and program planning and implementation.²

4502.1 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, including, but not limited to, regional centers, shall respect the choices made by consumers or, where appropriate, their parents, legal guardian, or conservator. Those public or private agencies shall provide consumers with opportunities to exercise decision-making skills in any aspect of day-to-day living³

4512. (b) “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. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the

² *Id.* at § 4502.

³ *Id.* at § 4502.1.

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. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, physical, occupational, and speech therapy, training, education, supported and sheltered employment, mental health services, recreation, counseling of the individual with a developmental disability and of his or her family, protective and other social and sociolegal services, information and referral services, follow-along services, adaptive equipment and supplies; advocacy assistance, including self-advocacy training, facilitation and peer advocates; assessment; assistance in locating a home; child care; behavior training and behavior modification programs; camping; community integration services; community support; daily living skills training; emergency and crisis intervention; facilitating circles of support; habilitation; homemaker services; infant stimulation programs; paid roommates; paid neighbors; respite; short-term out-of-home care; social skills training; specialized medical and dental care; supported living arrangements; technical and financial assistance; travel training; training for parents of children with developmental disabilities; training for parents with developmental disabilities; vouchers; and transportation services necessary to ensure delivery of services to persons with developmental disabilities. Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.⁴

4620. (a) In order for the state to carry out many of its responsibilities as established in this division, the state shall contract with appropriate agencies to provide fixed points of contact in the community for persons with developmental disabilities and their families, to the end that these persons may have access to the services and supports best suited to them throughout their lifetime.

[¶] . . . [¶]

⁴ *Id.* at § 4512, subd. (b).

(b) The Legislature finds that the service provided to individuals and their families by regional centers is of such a special and unique nature that it cannot be satisfactorily provided by state agencies. Therefore, private nonprofit community agencies shall be utilized by the state for the purpose of operating regional centers.⁵

4640.6(a) In approving regional center contracts, DDS shall ensure that regional center staffing patterns demonstrate that direct service coordination are the highest priority.

[¶] . . . [¶]

(d) For purposes of this section, “service coordinator” means a regional center employee whose primary responsibility includes preparing, implementing, and monitoring consumers' individual program plans, securing and coordinating consumer services and supports, and providing placement and monitoring activities.⁶

[¶] . . . [¶]

4640.7(a) It is the intent of the Legislature that regional centers assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community.⁷

4646 (a) It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further

⁵ *Id.* at § 4620.

⁶ *Id.* at § 4640.6.

⁷ *Id.* at § 4640.7, subd. (a)

intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.⁸

4648 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) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. Regional centers shall secure services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan

(2) In implementing individual program plans, regional centers, through the planning team, shall first consider services and supports in natural community, home, work, and recreational settings. Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family.

(3) A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer from any individual or agency which regional center and consumer or, where appropriate, his or her parents, legal guardian, or conservator, or authorized representatives, determines will best accomplish all or any part of that consumer's program plan.⁹

4685. (a) Consistant with state and federal law, the Legislature finds and declares that children with developmental disabilities most often have greater opportunities for educational and social growth when they live with their families. The Legislature further finds and declares that the cost of providing necessary services and supports which enable a child with

⁸ *Id.* at § 4646, subd. (a).

⁹ *Id.* at § 4648, subd. (a).

developmental disabilities to live at home is typically equal to or lower than the cost of providing out-of-home placement.¹⁰

[¶] . . . [¶]

(b) It is the intent of the Legislature that regional centers provide or secure family support services that . . . [are] flexible and creative in meeting the unique and individual needs of families as they evolve over time.¹¹

(c)(2) When children with developmental disabilities live with their families, the individual program plan shall include a family plan component which describes those services and supports necessary to successfully maintain the child at home. Regional centers shall consider every possible way to assist families in maintaining their children at home, when living at home will be in the best interest of the child, before considering out-of-home placement alternatives.¹²

4. The Lanterman Act is an entitlement act. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The people who qualify under it are entitled to services and supports. Services and supports should be available to enable them to approximate the pattern of everyday living available to people without disabilities. Services and supports should be directed toward helping them achieve the most independent and normal lives possible. People have a right to dignity and privacy. Services and supports, when possible, should be provided in natural settings. People have a right to make choices in their own lives concerning where they live. Regional centers should assist people in securing those services and supports that maximize choices for living. Services and supports should assist people in achieving the greatest self-sufficiency possible and in exercising personal choices

5. In *Williams v. Macomber*¹³ the court of appeal addressed the Lanterman Act and said:

“In order for the state to carry out many of its responsibilities as established in this division,” the Act directs the State

¹⁰ *Id.* at § 4685, subd. (a).

¹¹ *Id.* at § 4685, subd. (b)(2).

¹² *Id.* at § 4685, subd. (c)(2).

¹³ (1990) 226 Cal.App.3d 225.

Department of Developmental Services to contract with “appropriate private nonprofit corporations for the establishment of a “network of regional centers.” (§§ 4620, 4621.) Regional centers are authorized to “[p]urchase ... needed services ... which regional center determines will best” satisfy the consumer's needs. (§ 4648.) The Act declares: “It is the intent of the Legislature to encourage regional centers to find innovative and economical methods” of serving their consumers. (§ 4651.) The Act directs that: "A regional center shall investigate every appropriate and economically feasible alternative for care of a developmentally disabled person available within the region. (§ 4652.)

[¶] . . . [¶]

[T]he Regional Center’s reliance on a fixed policy is inconsistent with the Act's stated purpose of providing services “sufficiently complete to meet the needs of each person with developmental disabilities.” (§ 4501.) The Act clearly contemplates that the services to be provided each consumer will be selected “on an individual basis.” (Association for Retarded Citizens v. DDS of Developmental Services, supra, 38 Cal.3d 384, 388.)

A primary purpose of the Act is “to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family.” (Association for Retarded Citizens v. DDS of Developmental Services, supra, 38 Cal.3d 384, 388.) In strong terms, the Act declares: “The Legislature places a high priority on providing opportunities for children with developmental disabilities to live with their families” requiring the state to “give a very high priority to the development and expansion of programs designed to assist families in caring for their children at home.” (§ 4685, subd. (a).) In language directly applicable to the present case, section 4685, subdivision (b), states that “regional centers shall consider every possible way to assist families in maintaining their children at home, when living at home will be in the best interest of the child” (§ 4685, subd. (b).)

The Lanterman Act “grants the developmentally disabled person the right to be provided at state expense with only such services as are consistent with its purpose.” (Association for Retarded Citizens v. DDS of Developmental Services, supra, 38 Cal.3d 384, 393.) As noted previously, a primary purpose of the Act is

to “minimize the institutionalization of developmentally disabled persons and their dislocation from family.”¹⁴

6. The Lanterman Act provides that, “[R]egional centers shall give a very high priority to the development and expansion of services and supports designed to assist families that are caring for their children at home”¹⁵

7. The Lanterman Act, however, also requires regional centers to be cost conscious.

[I]t is the . . . intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and *reflect the cost-effective use of public resources.*¹⁶ (Italics added.)

8. When selecting a provider of consumer services and supports, regional center, the consumer, or where appropriate, his or her parents, legal guardian, conservator, or authorized representative shall consider, “the cost of providing services or supports of comparable quality by different providers, if available.”¹⁷

9. The Lanterman Act requires regional centers to do a number of things to conserve state resources. For example, it requires regional centers to “recognize and build on . . . existing community resources.”¹⁸

10. With certain exceptions, the Lanterman Act requires regional centers to:

Identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following: (1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medical, the Civilian Health and Medical Program for Uniform

¹⁴ *Id.* at pp. 232-233.

¹⁵ Welf. & Inst. Code, § 4685, subd. (b)(1).

¹⁶ *Id.* at §§ 4646, subd. (a).

¹⁷ *Id.* at § 4648, subd. (a)(6)(D).

¹⁸ *Id.* at § 4685, subd. (b)(3).

Services, school districts, and federal supplemental security income, and the state supplementary program. (2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer.¹⁹

11. The Lanterman Act prohibits the use of regional center funds to pay for services another agency is obligated to provide. The act states:

Regional center funds shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.²⁰

12. None of these provisions concerning cost-effectiveness detracts from the fact that eligible consumers are entitled to the services and supports provided for in the Lanterman Act. These provisions concerning cost-effectiveness do teach us, however, that cost-effectiveness is an appropriate concern in choosing how services and supports will be provided.

LEGAL CONCLUSIONS

1. By reason of the matters set forth in Findings 11 through 16, it is determined that claimant has an LVN available to him and does not need a personal attendant. Moreover, if the regional center provided a personal attendant in spite of the fact that claimant has an LVN available to him, the regional center would be in violation of those provisions of the Lanterman Act that require regional centers to be cost conscious.

2. By reason of the matters set forth in Finding 19, the regional center should provide claimant with a personal attendant for five weeks.

3. A word is in order regarding Ms. C.'s rejection of behavior modification services. Perhaps someone from the regional center could meet with Ms. C. a few times to help her understand more about behavior modification. A discussion might include the character, limitations, and potential benefits of behavior modification. It might include a discussion of the fact that behavior modification usually requires professionals and parents to work together over an extended period. It also might include descriptions of techniques behaviorists use and the training they have. It may be that claimant will need behavior modification, and it would be a pity for him not to have it simply because Ms. C. was unsympathetic with the proposition that he might benefit from it.

¹⁹ *Id.* at § 4659, subd. (a).

²⁰ *Id.* at § 4648, subd. (a)(8).

ORDER

1. Claimant's appeal is denied.
2. The regional center, as compensation for failing to provide aid paid pending, shall provide claimant with 40 hours per week of personal attendant services for five weeks.

DATED: September 2, 2011

ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. If a party chooses to appeal, an appeal from this decision must be made to a court of competent jurisdiction within 90 days of receipt of this decision. (Welf.& Inst. Code, § 4712.5, subd. (a).)