

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Case No. 2011100156

MOHAMMED A. G.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

DECISION

The hearing in the above-captioned matter was held on March 22, 2012, at Bakersfield, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. Kern Regional Center (KRC or Service Agency) was represented by Tamara Harney, Program Manager. Claimant Mohammed A. G. (Claimant) was present at the hearing and was assisted by his brother, Mohammed P. G. and his sisters, Nasim G. and Taslim G.¹

Evidence was received, argument was heard, and the case was submitted for decision on March 22, 2012.

ISSUE PRESENTED

Must the Service Agency pay for an attorney to file a conservatorship action in the Superior Court so that Claimant, an adult afflicted with Severe Mental Retardation, can be conserved by his family members?

¹ Initials are used for the family surname to protect Claimant's privacy.

EVIDENCE RELIED ON IN MAKING THIS DECISION

In reaching the decision that follows the ALJ relied upon the Service Agency's exhibits, numbers 1 through 10, and statements and testimony of Ms. Harney, and Claimant's siblings.

FACTUAL FINDINGS

1. Claimant is eligible for services from the Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.,² based on a diagnosis of Severe Mental Retardation. By definition, his IQ must be 40 or below.³ Claimant is ambulatory, but he is non-verbal.

2. (A) On September 19, 2011, the Service Agency issued a Notice of Proposed Action (NOPA) that denied a request for services made on Claimant's behalf. Specifically, the NOPA stated that KRC was denying a request for assistance with funding for Claimant's conservatorship.

(B) The denial was based on a Purchase of Services (POS) policy, which provides, essentially, that KRC does not believe that a developmental disability alone justifies the establishment of a conservatorship. However, the POS policy also provides that where it appears that there is documented difficulty in obtaining services for an adult consumer, and where it appears that a failure to establish a conservatorship "will present a serious risk to the health, welfare or property of an adult client, [KRC] supports the principle of establishment of limited conservatorship" (Ex. 5.)

3. Claimant requested a hearing, and this matter ensued. It appears from the record that a potential resolution was reached at an informal meeting, but a communication breakdown prevented that resolution from coming to fruition.

4. During the hearing, Claimant's brother stated that they have had increasing problems obtaining prompt medical care for Claimant, as health care providers want documentation that they are authorized to give or withhold consent for treatment. While Claimant's family, including his parents, have been able to work around the lack of a conservatorship, they fear that their ability to, essentially, finesse the issue will soon be foreclosed. Furthermore, although Claimant's brother is payee on Claimant's SSI benefits

² All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

³ The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, a standard reference text published by the American Psychiatric Association provides at page 40 thereof that IQ scores of 20 to 40 define Severe Mental Retardation.

checks, he noted that taking any action other than depositing the checks is very difficult, especially in terms of dealing with the Social Security Administration.

5. Claimant's family has investigated the cost of hiring an attorney to file for and obtain a conservatorship order, which filing would have to be supported by evidence, including, most likely, a psychological evaluation. The estimated cost, according to more than one lawyer in the Bakersfield area, is \$3,000 to \$4,000. Claimant, who receives SSI benefits, would be hard pressed to pay such a bill, and his family would also have difficulty paying such a fee.

6. The Service Agency does not fund for a lawyer to obtain a conservatorship in cases of this type. It does, however, have a vendor who will assist families such as Claimant's in filing papers with the court to obtain a conservator. It appears from the statements and testimony of Ms. Harney that this vendor acts as a paralegal. He will even go to court with family members, though he can not appear in the hearing as would an attorney. Instead, the family member or members filing the petition would have to appear on their own behalf.

7. (A) Ms. Harney pointed out the Service Agency can provide assistance in obtaining medical care, through a physician who is on the KRC staff. She cited section 4655 in support of her contention.

(B) Section 4655, states, in pertinent part:

The director of a regional center or his designee may give consent to medical, dental, and surgical treatment of a regional center client and provide for such treatment to be given to the person under the following conditions:

...

(b) If the developmentally disabled person has no parent, guardian, or conservator legally authorized to consent to medical, dental, or surgical treatment on behalf of the person, the director of a regional center or his designee may consent to such treatment on behalf of the person and provide for such treatment to be given to the person. The director of a regional center or his designee may thereupon also initiate, or cause to be initiated, proceedings for the appointment of a guardian or conservator legally authorized to consent to medical, dental, or surgical services.

8. Ms. Harney indicated that the staff physician stands ready to review Claimant's file on short notice, and to assist in obtaining necessary treatment in a prompt manner. Claimant's family indicated that they believe it would be best if they could obtain the authority to make the decisions, as the decision-making process would be easier.

9. It was very clear from both the conduct of the hearing and the statements made during it that Claimant's family are devoted to caring for him. Establishment of a conservatorship over Claimant would likely be in his best interest, and would aid his family in their day-to-day care efforts on Claimant's behalf. As one of the purposes of the Lanterman Act is to keep disabled persons in the care of their families when possible, it appears that establishment of a conservatorship would further that statutory goal.

10. At the time of the hearing, neither party was in a position to state whether some generic low-cost resource might be available to assist the Claimant's family. That is, the county bar association had not been contracted to see if some pro bono services might be obtained from it, nor had either party investigated whether there might be some other source of free or low-cost legal services available to help Claimant and his family, or other similarly situated consumers in the future.⁴

LEGAL CONCLUSIONS

Jurisdiction

1. Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 4.

Rules of General Application

2. Services are to be provided in conformity with the Individual Program Plan (IPP), per section 4646, subdivision (d), and section 4512, subdivision (b). Consumer choice is to play a part in the construction of the IPP. Where the parties can not agree on the terms and conditions of the IPP, a Fair Hearing may establish such terms. (See § 4710.5, subd. (a).)

3. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each client's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d); 4501; 4502; 4502.1; 4512, subd. (b); 4640.7, subd. (a); 4646, subds. (a) & (b); 4648, subds. (a)(1) & (a)(2).) Otherwise, no IPP would have to be undertaken; the regional centers could simply provide the same services for all consumers. The Lanterman Act assigns a priority to

⁴ The ALJ's independent research led to the website of the Greater Bakersfield Legal Assistance, Inc., which provides legal aid to persons who meet eligibility requirements for income and assets. It appears from the firm's website that it might be able to assist with conservatorships; it seeks the help of attorneys experienced in those areas, and it assists the elderly, who often need a conservatorship. Claimant might obtain further assistance there. At the same time, the ALJ would encourage the Service Agency to investigate whether that entity might be of assistance to other similarly-situated consumers.

maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subds. (a)(1) & (a)(2).)

4. Services provided must be cost effective (§ 4512, subd. (b), *supra*), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, *e.g.*, §§ 4640.7, subd. (b); 4651, subd. (a); 4659; and 4697.) To be sure, the regional centers' obligations to other consumers are not controlling in the individual decision-making process, but a fair reading of the law is that a regional center is not required to meet a consumer's every possible need or desire, in part because it is obligated to meet the needs of many consumers and their families.

5. (A) Section 4512, subdivision (b), of the Lanterman Act provides, in pertinent part, that

“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 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's family, and shall include consideration of . . . 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, . . . physical, occupational, and speech therapy, . . . habilitation, . . . recreation, . . . *protective and other social and sociolegal services, information and referral services, . . . advocacy assistance, . . . community integration services, . . . respite, . . . social skills training . . . supported living arrangements, . . .*

(Emphasis added.)

6. Services are to be chosen through the IPP process. (§ 4512, subd. (b).) The regional center is also to utilize the service coordination model in which each consumer shall have a designated service coordinator “who is responsible for providing or ensuring that needed services and supports are available to the consumer.” (§ 4640.7, subd. (b).)

7. The IPP is to be prepared jointly by the planning team, and services purchased or otherwise obtained by agreement between the regional center representative and the

consumer or his or her parents or guardian. (§ 4646, subd. (d).) The planning team, which is to determine the content of the IPP and the services to be purchased is made up of the disabled individual, or their parents, guardian or representative, one or more regional center representatives, including the designated service coordinator, and any person, including service providers, invited by the consumer. (§ 4512, subd. (j).)

8. Pursuant to section 4646, subdivision (a), the planning process is to take into account the needs and preferences of the consumer and his or her family, “where appropriate.” Further, services and supports are to assist disabled consumers in achieving the greatest amount of self-sufficiency possible; the planning team is to give the highest preference to services and supports that will enable a minor child with developmental disabilities to remain with his or her family. (§ 4648, subd. (a)(1).)

Legal Conclusions Specific to This Case

9. (A) The Lanterman Act, at section 4512, subdivision (b), does not clearly provide that legal services are available to consumers of regional center services. On the other hand, it appears from section 4546, subdivision (b), quoted in Factual Finding 7(B), that regional centers can, in appropriate situations, take steps to obtain a conservatorship, which by its nature would require the use of an attorney’s services.⁵ Generally, a statute of specific application controls over one of more general application, which may place section 4546 in the ascendency.

(B) However, it should also be noted that the more specific statute—section 4546, subdivision (b)—refers to the director of the regional center initiating or causing the initiation of the conservatorship proceeding, which may not be the same thing as doing it for the consumer or his or her family. From this point of view the service policy may be consistent with the statute, calling for KRC’s direct involvement only in extraordinary circumstances.

10. In this case, KRC has a vendor available to assist Claimant and his family, even if that vendor is not an attorney. In the circumstances of the case, this appears to be a reasonable and cost-effective way of solving the problem at hand. It will require some help from the family, in preparing the paperwork and appearing in court, but such would likely be necessary if they hired a private attorney, as someone must assist the attorney in preparing affidavits, obtaining essential reports, marshalling evidence to support the conservatorship request, and appearing with the attorney at court as an interested party or witness. Thus, it does not appear that a significantly greater burden is placed on the family by utilizing the current vendor.

11. An order will issue to the effect that KRC will fund its vendor to assist the family in preparing for and obtaining a conservatorship. If that attempt is not successful,

⁵ While the Director of the regional center might appear in the Superior Court in propria persona, that seems an unlikely scenario.

then the parties will convene an IPP meeting, with an eye toward obtaining such further help from generic sources or from qualified attorneys as may be necessary to obtain a conservatorship.

ORDER

Claimant's appeal is denied. The Service Agency shall fund its vendor to assist Claimant's family in preparing a conservatorship application and will assist the family in filing that application in Superior Court, and in obtaining an order of conservatorship.

March __, 2012

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

NOTICE:

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.