

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SAMANTHA S.,

Claimant,

and

DEPARTMENT OF DEVELOPMENTAL
SERVICES

and

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agencies.

OAH No. 2011110426

DECISION

Ralph B. Dash, Administrative Law Judge, Office of Administrative Hearings, heard this matter on December 20, 2011, at Alhambra, California.

Judy Castañeda, Fair Hearings Coordinator, represented Eastern Los Angeles Regional Center (Regional Center or Service Agency).

Bruce Beland, Attorney at Law, represented the Department of Developmental Services (DDS).

Claimant's grandmother/guardian represented Claimant during the hearing and the immediate post-hearing briefing period. Thereafter, Chad Carlock, Attorney at Law, assumed Claimant's representation and filed a closing brief on her behalf.

After the matter was submitted for decision, the Administrative Law Judge determined that DDS was a necessary party in that the services sought by the fair hearing request are to be provided outside the state of California.¹ By letter dated December 23, 2011 (Exhibit 19), he

¹ Section 4519, subdivision (a) provides:

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

notified Mr. Beland that DDS was joined as a necessary party under the provisions of Welfare and Institutions Code section 4519, subdivision (a).² It elected to appear in this proceeding by way of brief only. The Administrative Law Judge issued the order of joinder and briefing schedule on February 9, 2011, after telephonic conference with all parties. During that telephonic conference, in which Mr. Beland participated on behalf of DDS, an attorney specially appearing for Regional Center stated the parties had talked and DDS did not want to stipulate to being joined as a party, but that it would agree to be joined if an order of joinder was issued. The February 9, 2011 order inadvertently referenced DDS as the Department of Social Services. Despite taking part in the telephonic conversation, Mr. Beland, in his brief filed February 27, 2012 (Exhibit 20), stated that DDS was not a party to

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. The department shall authorize 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. **For the purposes of this section, the department shall be considered a service agency under Chapter 7** (commencing with Section 4700). (Emphasis added.)

Section 4704 provides: “‘Service agency’ means any developmental center or regional center that receives state funds to provide services to persons with developmental disabilities.”

Section 4705, subdivision (a) provides, in part: “Every service agency shall, as a condition of continued receipt of state funds, have an agency fair hearing procedure for resolving conflicts between the service agency and recipients of, or applicants for, service.”

Section 4706, subdivision (a) provides, in part: “all issues concerning the rights of persons with developmental disabilities to receive services under this division shall be decided under this chapter [7].”

Section 4710.5, subdivision (a) provides, in part: “Any applicant for or recipient of services, or authorized representative of the applicant or recipient, who is dissatisfied with any decision or action of the service agency which he or she believes to be illegal, discriminatory, or not in the recipient's or applicant's best interests, shall, upon filing a request within 30 days after notification of the decision or action complained of, be afforded an opportunity for a fair hearing.”

² In the letter, which was copied to all parties, the Administrative Law Judge advised Mr. Beland that this matter could move forward in different ways, and offered him the following options: 1. Add another day of hearing to allow DDS to present additional evidence; 2. Have DDS adopt Regional Center's evidence as its own; or, 3. file a brief and/or a combination of the other options. The Administrative Law Judge specifically stated that DDS “should offer a brief dealing with code section 4682 and its applicability to the facts of this case.” The significance of this code section is discussed below.

this proceeding but filed its brief as “an explanation of the Department’s procedures when faced with an out-of-state institutional placement.” However, on that same date, Mr. Beland, on behalf of DDS, made a general appearance in this matter by filing an objection to certain evidence proffered by Respondent (Exhibit 21).³

In order to avoid any confusion as to whether DDS was taking the position that it was not properly joined as a party to this proceeding, the Administrative Law Judge issued an amended order of joinder on March 13, 2012, as part of an order reopening the record at Regional Center’s request to consider additional evidence. As part of the amended order, the Administrative Law Judge specified March 30, 2012, as the date by which DDS was to “clarify its position as to whether or not it is a party to this action and/or that it cannot be bound” by the final decision in this matter. DDS chose not to file any response, even though it was given an extension of time, until April 20, 2012, in which to do so. Accordingly, as the original order of joinder was issued after consultation with all parties, including DDS, and after DDS had made a general appearance by way of filing objections to evidence, and after the amended order specifically joined DDS as a party, and after DDS filed no response to the order for clarification of its position as to whether or not it was a party herein, it is found DDS was properly joined as a party to this proceeding and is bound by this Decision.

Only Claimant and Regional Center appeared at the hearing.

On March 1, 2012, Regional Center requested that the record be reopened for the Administrative Law Judge to consider the declaration of Rhoda Tong. The motion was granted and the declaration was marked and admitted as Exhibit 22. The Administrative Law Judge set April 20, 2012, as the time by which the parties could respond to Exhibit 22, and also for DDS to file its response to the Amended Notice of Joinder. Respondent filed her brief on April 20, 2012, which was marked Exhibit WW for identification. Neither DDS nor Regional Center filed any further brief. The matter was deemed submitted on April 20, 2012.

ISSUE

Whether the Department of Developmental Services (DDS) should fund an assessment and treatment plan for Claimant at the Kennedy Krieger Institute (KKI) Neurobehavioral Unit in Baltimore, Maryland.

FINDINGS OF FACT

1. Claimant will soon be 19 years old (date of birth June 13, 1993) and is a client of Regional Center based on a diagnosis of autism. She currently resides at a children’s

³ DDS and Regional Center objected to the consideration of an article by Ryan Gabrielson (Exhibit VV) which Claimant submitted without leave. The objections were sustained and the article was not considered.

crisis home called Independent Options. However, since Claimant has reached the maximum age for this home, Regional Center initiated a search to find a suitable alternative placement. Respondent is petite and attractive. Consequently, she has been victimized during her stays in various institutions and living facilities. At various times she has suffered a broken femur, a broken clavicle and a broken finger due to assaults in these placements. She used the cast on her arm to injure herself and others. She remains at Independent Options under an "age waiver" until suitable living arrangements can be found for her.

2. Claimant presents with many psychiatric as well as developmental issues. In her most recent Individual Program Plan (IPP), dated June 28, 2011 (Exhibit 5), Claimant's current adaptive functioning is described as follows:

Samantha requires verbal prompting, supervision, and physical assistance to thoroughly complete most of her self-help tasks. In regards to eating, Samantha utilizes a fork and spoon with some spillage noted. Samantha requires verbal prompts and physical assistance to use the toilet and restroom. Because she wears and refuses to take off her gloves [which help prevent self-injurious behavior], she cannot properly tend to the necessities of using the toilet. She requires physical assistance to ensure she wipes herself thoroughly and verbal prompts to ensure that she washes her hands. Samantha currently utilizes pull ups and at times exhibits bladder incontinence at night. In regards to personal hygiene, Samantha requires verbal prompts to apply toothpaste to her toothbrush. She then requires hand over hand assistance to brush all surfaces of her teeth. Samantha requires verbal prompts to ensure that she washes her hands regularly. She can brush her teeth and comb her hair with reminders. In regards to bathing, Samantha requires verbal prompts to wash/rinse her hair/body thoroughly. She then requires verbal prompts to dry herself with a towel. Staff must provide physical assistance to regulate the water temperature. For dressing, Samantha requires verbal prompts to put on her clothes correctly and to fasten all buttons and/or zippers accordingly. Staff provide supervision when Samantha is selecting her clothes to ensure that clothing is appropriate for specific weather conditions and/or activities. Samantha is verbal and communicates with simple 3-4 word sentences. Her speech is easily understood by strangers. Samantha is fully ambulatory and does not require any assistance to move about her environment.

3. As limited as Claimant's adaptive functioning may be, it is her emotional issues that have proved the major stumbling block to finding a suitable living arrangement for her. Claimant exhibits severe self-injurious behavior. As noted in Exhibit 5:

She has a history of displaying extensive maladaptive behaviors which include: self-abuse in the form of hitting her face with a closed fist (especially around the eyes), legs, and shoulders, pulling her hair, banging her head, neck and stomach area. Historically, this behavior occurred at all times unless prevented. The severity of the behavior led to bruises and scratches, especially

around her eyes. In addition, she has a permanent knot on the left side of her head from SIB (head banging). Samantha is also known to be physically aggressive toward others. She will pull hair, bite, grab and/or kick others. According to previous documentation, Samantha was especially aggressive toward her grandmother. When out in the community, Samantha needed to be supervised closely because she would AWOL. Due to the degree and extent of Samantha's behaviors, she also required hand restraints. This action was necessary to ensure Samantha's health and safety as well as the safety of others.

[¶] . . . [¶]

Mostly [Samantha] hits herself with a closed, fist. Samantha has caused significant bruising and injurious (*sic*) when she hits herself. Counts are taken as episodes, when 10 minutes passes between episodes. She is currently averaging 47 times per month. Self injurious behavior is mostly exhibited when it is loud and or noisy, during transition and when staff are not sitting next to her and holding her hand. This behavior too is used to express her anxiety and a way to communicate her need for staff to sit next to her or hold her hand.

Samantha has a long history of severe and frequent self-abuse, such as screaming, yelling, or doing physical injury to herself like biting hands/arms, scratching self with fingernails, striking her stomach with an open hand/fist, slapping the back of her neck with an open hand, pinching herself, banging her body against solid objects, pulling her own hair, banging her head against solid objects/walls, kicking herself, and striking her chin/cheeks with a closed fist. [She] also has a long history of exhibiting tantrums, physical aggression, and verbal threats. In addition, she has caused severe injury to staff at Independent Options. These injuries have been so severe that she has caused staff to black out. Samantha generally seeks out staff, she is usually never aggressive purposefully toward her peers.⁴

4. Since 2002, Claimant has had the following placements: November 17, 2010 to the present at Independent Options CCS Home; September 17, 2010 to November 17, 2010 at UCLA NPI Unit; August 22, 2007 to September 17, 2010 at Anka Behavioral Health Barbara Lane; May 22, 2007 to August 22, 2007 at the Anka Behavioral Health/Cottontail Home; May 4, 2006 to May 22, 2007 at the Anka Behavioral Health Robin Lane Home; March 1, 2005 to May 4, 2006 at her grandparents' home; November 24, 2003 to March 1, 2005 at the Candlelight/Montebello Home; December 2, 2002 to November 23, 2003 at the Deveraux Foundation in Santa Barbara. Prior to these placements, Claimant lived with her grandparents and had not been in residential placement. As of the date of the hearing of this

⁴ Claimant displayed this aggressive behavior at the hearing of this matter. During a recess, Claimant head-butted her attendant.

matter, Regional Center has not been able to find suitable living arrangements for Claimant. It conducted a Community Living Arrangement Review for the quarter ending September 2011 (Exhibit 6). The Review offered the following bleak assessment:

Samantha is currently living at Independent Options/Children's Critical Support Home. This is a specialized residential facility for children 6-18 years of age with extremely challenging behaviors and are in a state of crisis. Because of her age, Independent Options has initiated an age waiver with community care licensing. This was granted on 6/21/11, and will remain in effect until 12/31/11 or until another living option has been found. Samantha moved to Independent Options after a two month hospitalization at UCLA medical center NPI unit Since her admission to Independent Options, Samantha has continued to engage in self abusive behavior.

Currently, her placement is considered appropriate. However, because of her age, as indicated above, an age waiver is in place until 12/31/11. Thus, planning for an alternate placement was initiated shortly after her placement at Independent Options. Previous attempts for placement were made, including a state wide search and a WIC 4418 Assessment. According to the other 20 regional centers in the state, there are no viable options at this time. State wide searches will be initiated every couple of months to see if there are any possible resources. The last state wide search was made in August 2011. There continues to be no viable resources in any of the regional centers catchment areas.

5. In the Declaration of Rhoda Tong (Exhibit 22), Regional Center stated it has found what may be an appropriate placement for Respondent but that the facility is under construction and will not be available until June/July 2012. However, even though the proposed facility may ultimately be able to house Claimant, the real issue is whether any treatment is available to help Claimant control her self-injurious behavior so that she would be able to remain in that facility on a long-term basis. Without such treatment, it is unlikely that any facility (other than a state developmental center) would be able to house her for even a short while, let alone house her for the rest of her life. The evidence established that there is no treatment facility in California that can help Respondent ameliorate her self-injurious behavior.⁵

⁵ At the hearing, Claimant offered the expert testimony of Kelly Ternent, a board-certified behavioral analyst who has a Master's degree in training and performance improvement and a graduate certificate in applied behavioral analysis. He has treated Claimant. He also has clients who are residents in developmental centers and knows the treatments offered there. In addition to offering his expert opinions, he testified that no treatment was available in the developmental centers to help Claimant overcome, or at least ameliorate, her self-injurious behavior. His testimony regarding the appropriate place of treatment, as more fully described in Findings 7 and 8, was buttressed by the report of a pediatric neurologist. Regional Center offered no evidence to rebut any of the expert

6. Margaret L. Bauman is a pediatric neurologist. She evaluated Respondent on April 13, 2011, and prepared a report. She also wrote a letter on Respondent's behalf. (Both documents are part of Exhibit D.) As part of her report, Dr. Bauman wrote:

Sam is also being followed by Dr. Derek Ott, Psycho pharmacologist [and the director of the UCLA Pediatric Neuropsychiatry Clinic.] Dr. Ott has strongly recommended that Samantha be admitted to an inpatient service to work specifically on her [self-injurious] behavior and to try to adjust her medications accordingly. A recommendation has been made for an admission to the Kennedy Krieger Institute in Baltimore, Maryland. The family, and the physicians in question have investigated this possibility and the Kennedy Krieger Institute has agreed to accept her. The only hurdle is acceptance by her insurance company to fund this much needed hospitalization. Sam is now living in a new house and has a new psychotherapist. All concerned believe that Sam continues to require a supervised living arrangement. She continues to have agitation and has lost weight. . . .She shows a number of self injurious behaviors as well as aggression towards others and in fact, has injured a number of staff. She continues to hold her hands inside her sleeves in order to prevent herself from striking out at others. . . . She has been followed by Dr. Derek Ott, Psycho pharmacologist, who feels very strongly that a number of local interventions had been attempted without success. It is his strong recommendation that an inpatient evaluation and treatment program such as offered by the Kennedy Krieger Institute in Baltimore, Maryland is a necessity at this time.

It should be noted in summary that Sam has been in a variety of facilities, including at UCLA, Bradley Hospital in Rhode Island, a number of special schools, a private school in New York, the Keystone program and the like, none of which have resulted in long-term positive outcomes. Thus, a much more intensive behavioral management program seems indicated at this time.

This examiner fully supports a referral to the Kennedy Krieger Institute of Baltimore, Maryland. This Institute has a very strong, highly respected, inpatient behavioral program, which can take on some of the most difficult behaviors that young people can exhibit. This examiner fully supports this referral and will write a letter supporting this recommendation.

opinions offered on Respondent's behalf. It did, however, offer Exhibit 18, a document published by DDS which describes, among other things, Program 3, the "behavioral and psychiatric support services" available at the Fairview Developmental Center. According to DDS, Program 3 "focuses on improving communication skills, group participation and appropriate interactions, learning new/replacement behaviors, and coping/anger management skills." No mention is made of helping individuals whose most immediate need is to stop or lessen self-injurious behavior.

7. As she said she would in her report, Dr. Bauman wrote a letter in support of Respondent being admitted to KKI. Her letter states, in part:

I am writing this letter regarding Samantha [S.]. I saw Samantha on April 13, 2011. Samantha presented with a hematoma on her forehead and bruising and abrasions on both cheeks along with bruising on her torso [and] whatever else you might add. She came to the appointment supervised by three adults. She wore layers of neoprene clothing and two pairs of gloves for her own protection. One attendant reported that Samantha had “knocked her out cold” recently.

Samantha has had hospitalizations since age 6, due to self injurious behavior. That behavior has continued to escalate despite numerous and continual behavioral programs and interventions facilitated by psychologists, Board-Certified Behavioral Specialists, school personnel, and most recently UCLA Adolescent Psychiatric Unit where Samantha spent two months with no significant behavioral improvement. She has been terminated from each program due to her dangerous behavior.

Samantha's family has faithfully followed through with all recommendations, treatments and medications recommended. They have exhausted all the local resources and many nationally.

Samantha is a young woman who has a great deal of life ahead of her. With her current level of dangerous behavior, her prognosis is guarded. She requires a level of expertise and experience, not locally available. It is my recommendation that Samantha be referred to the Kennedy Krieger Neurobehavioral Unit in Baltimore, Maryland. For more information regarding their programs go to: www.kennedykrieger.org.

Kennedy Krieger serves individuals up to age 19, who are a danger to themselves and others and at risk for long term placement. They specialize in severe and highly treatment resistant behaviors. Their outcome data suggests 80% improvement in problem behaviors with 80% of the patients they serve. A critical component of their program is to train family members, caregivers and educators in prescribed behavioral treatments.

Samantha would be well served in this program.

8. KKI is neither an acute care hospital, nor is it a residential facility. Rather, it is licensed in Maryland as a “pediatric specialty hospital.” (Regional Center’s Exhibit 12.) It has particular expertise in dealing with autistics who exhibit self-injurious behavior

(sometimes referred to as SIB).⁶ KKI's treatment program dealing with SIB is unique and successful. In fact, the uncontradicted evidence was that it is the only facility in the United States that offers a treatment regimen specifically geared to dealing with SIB and has done so with great success.⁷ The website referenced by Dr. Bauman contains a description of KKI. That website provides the following information, information which is also contained, in large part, in Regional Center's Exhibit 13:

Criteria for admission are that behavior is of such a severity and/or intensity that the individual is a danger to him or herself and is at risk for long-term residential placement. Admission length typically varies from three to six months.

The Neurobehavioral Unit (NBU) provides services for individuals with developmental disabilities who are self-injurious, aggressive and display other severe behaviors.

The [NBU] is a 16-bed inpatient unit dedicated to the assessment and treatment of severe problem behavior displayed by individuals with autism and intellectual disabilities. This is a unique program that specializes in the treatment of severe and highly treatment resistant problems, provides intensive behavioral assessment and treatment services not available elsewhere, offers integrated and targeted application of behavioral and pharmacological interventions and espouses a data-based approach.

The program has been in existence since the early 1980's, and over the past five years alone has served patients from 20 states and several countries. The

⁶ SIB displayed by individuals with autism and intellectual disabilities involves the occurrence of behavior that results in physical injury to one's own body. Common forms of SIB include, but are not limited to, head-hitting, head-banging and hand-biting. In the most severe cases, SIB can result in retinal detachment, blindness, broken bones, bleeding or death. SIB is displayed by 10 to 15 percent of individuals with autism and intellectual disabilities. These estimates are higher among individuals living in institutions and among those with greater cognitive impairments.

Individuals may engage in SIB for a variety of reasons. In some cases, SIB may occur because it results in favorable outcomes, such as attention from caregivers or the termination of academic or instructional demands. SIB may also be biologically based. For example, some research has suggested that SIB may result in the release of chemicals in the brain that produce pleasurable effects. Although there is considerable evidence to support of all of these explanations, current thought indicates that SIB is a highly complex, heterogeneous phenomenon that is often attributable to a combination of factors.

⁷ Outcome data collected over the past eight years indicate that at KKI the primary treatment goal of reducing problem behavior by at least 80 percent is achieved for more than 80 percent of patients.

NBU is recognized as one of the leading programs in the nation for providing intensive behavioral treatment to individuals with severe behavior disorders and developmental disabilities as well as for offering advanced training in applied behavior analysis. Individuals' ages 2-19 years admitted to the NBU present with a variety of severe and sometimes life-threatening behavioral problems, as well as complex medical issues.

The NBU has a long history of developing new and innovative procedures for the assessment and treatment of severe behavior disorders. In fact, over the past decade, there have been over 150 publications by NBU faculty related to behavioral assessments, communication training, behavior analysis, reinforcer identification, treatment development, pharmacological interventions and behavioral medicine. NBU faculty are also federally-funded research scientists, with several ongoing research grants sponsored by the National Institutes Health related to the study of autism, early intervention for problem behavior and basic behavioral processes.

9. On a date not specifically established by the evidence, based on the recommendation of her treating doctors, Claimant contacted KKI to determine the cost for a four-month inpatient admission to the KKI Neurobehavioral Unit. On November 12, 2010, KKI replied (Exhibit 1):

Thank you for your interest in our inpatient Neurobehavioral Unit. Per your request, the following is an estimate of cost for admission into the NBU.

The inpatient Per Diem rate is \$3245.00. This fee is all-inclusive with the exception of radiology, and any consultations that may be ordered by the attending physician. Also excluded is any service rendered at Johns Hopkins Hospital.

Inpatient professional fees are \$512.00 for the admission date. Each subsequent day could range from \$163.00, \$220.00, or \$283.00 dependent upon the level of care provided. The discharge day management charge is \$342.00. The estimated total cost of a four-month stay is \$409,488.

10. Thereafter, Claimant requested that her private insurance fund this hospitalization. It declined to do so. On March 21, 2011, Claimant requested that Regional Center fund the treatment plan for her at KKI. On August 16, 2011, Regional Center requested approval from DDS to fund this out-of-state placement. It furnished DDS with copies of Exhibits 15 and 16 in support of this request. Exhibit 15 includes a letter from Gina Esparza, Regional Center's State Developmental Liaison, describing Claimant's behaviors and needs, the June 28, 2011 IPP, a Client Development Evaluation Report dated July 14, 2011 which documents Claimant's behaviors, Dr. Bauman's letter, a letter from Anthem Blue Cross refusing payment for KKI, the KKI letter set forth in Finding 9, and general information about KKI. Exhibit 16 is an assessment of Claimant by the Lanterman

Regional Project regarding possible living arrangements for Claimant once she turned 18. That assessment notes that if “an appropriate community living option that meets all of Samantha’s needs [could not be found] then investigating the services of a state operated facility would be warranted due to Samantha’s long time severe behavioral reputation.” On October 11, 2011, DDS notified Regional Center that it had denied the request (Exhibit 2). In the denial letter, Shelton Dent, Branch Manager, Residential Services Monitoring Branch, Community Services Division, did not dispute that KKI was an appropriate treatment venue for Claimant. Rather, he based the denial solely on the cost of the KKI program. He stated:

Welfare and Institutions code section 4682 states, “under no circumstances shall the rate of a state payment to any provider of **out-of-home** care exceed the average amount charged to private clients residing in the same facility, nor shall the monthly rate of state payment to any such facility, with the exception of a licensed acute care or emergency hospital, exceed the average monthly cost of services for all persons with developmental disabilities who reside in state hospitals.” Currently, the state hospital rate is \$307,000 per year. The request for placement of Samantha . . . at Kennedy Krieger states the cost is \$102,372 per month. This amount exceeds the average amount charged to private clients residing in state hospitals. Statute prohibits Department approval of this request. (Emphasis added.)

11. On October 19, 2011, in a Notice of Proposed Action (NOPA), Regional Center notified Claimant that her funding request had been denied (Exhibit 3). In the NOPA, Regional Center stated, wrongly referencing the information it received from DDS:

The monthly rate of **out of state** placement shall not exceed the monthly average cost of a state hospital. The current average amount of a state hospital is \$307,000.00 per year and the **out of state** funding is estimated at \$102,372.00 per month based on a four month stay, totaling \$409,488.00, from Kennedy Krieger documentation dated November 12, 2010.

Samantha is residing in a placement that is currently able to meet her level of care and there is a potential Supported Living Services vendor who is willing to conduct an assessment and potentially provide services once her stay has been exhausted. (Emphasis added.)

12. For reasons it did not explain, Regional Center confused the limitation on “out-of-home care” referenced by DDS with “out-of-state placement” and “out of state funding,” neither of which, as explained below, have a dollar limitation under the Lanterman Act. However, Regional Center did contact Mr. Dent on December 19, 2011, and inquired whether, if no appropriate placement could be found for Claimant, after exhausting the possibility of a suitable placement through Supported Living Services or a Developmental Center, DDS would reconsider funding KKI. Mr. Dent’s reply (part of Exhibit 14) was, “No, the language in WIC does not provide a means to reconsider.” As noted in Footnote 2, the Administrative Law Judge requested that DDS file a brief addressing whether section 4682

was applicable to the facts of this case. In its brief, it did not discuss this issue. It merely pointed to that code section as prohibiting treatment at KKI based on the cost limitation contained therein.

LEGAL CONCLUSIONS

Statutory Authority

1. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq.

2. Welfare and Institutions Code section 4418.7, subdivisions (a) and (b), establish that:

(a) If the regional center determines, or is informed by the consumer's parents, legal guardian, conservator, or authorized representative that the community placement of the consumer is at risk of failing, and the admittance to a state developmental center is a likelihood, the regional center shall immediately notify the appropriate regional resource development project, the consumer, and the consumer's parents, legal guardian or conservator.

(b) In these cases, the regional resource development project shall immediately arrange for an assessment of the situation, including, visiting the consumer, if appropriate, determining barriers to successful integration, and recommending the most appropriate means necessary to assist the consumer to remain in the community. If, based on the assessment, the regional resource development project determines that additional or different services and supports are necessary, the department shall ensure that the regional center provides those services and supports on an emergency basis.

Welfare and Institutions Code section 4501 states:

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

“The complexities of providing services and supports to persons with developmental disabilities requires the coordination of services of many state departments and community agencies to ensure that no gaps occur in communication or provision of services and supports. A consumer of services and supports, and where appropriate, *his or her parents*, legal guardian, or conservator *shall have a leadership role in service design.*

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 to support their integration into the mainstream life of the community. . . .

Services and supports should be available to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities. . . .

The Legislature finds that *the mere existence or the delivery of services and supports is, in itself, insufficient evidence of program effectiveness.* 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.*

(Emphasis added.)

Welfare and Institutions Code section 4502 provides:

Persons with developmental disabilities shall have the same legal rights and responsibilities guaranteed to all other individuals by the United States Constitution and laws and the Constitution and laws of the State of California . . . 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 in the least restrictive conditions necessary to achieve the purpose of the treatment, services or supports.*

(Emphasis added.)

Welfare and Institutions Code section 4512, subdivision (b), establishes:

“Services and supports for persons with developmental disabilities” means specialized services and supports . . . directed toward the alleviation of a developmental disability or toward the social, person, 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 consumer, or when appropriate, the consumer’s family and

shall include consideration of a range of service options proposed by the 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 . . . may include but are not limited to, diagnosis, evaluation, treatment (Emphasis added.)

Welfare and Institutions Code section 4519, subdivision (a), states:

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 services 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 Section 4646 to 4648. *The department shall authorize 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.* (Emphasis added.)

Welfare and Institutions Code section 4629 provides:

(a) *The state shall enter into five year contracts with regional centers subject to the annual appropriation of funds by the Legislature.*

[¶] . . . [¶]

(c) *The contracts shall include annual performance objectives that shall do both of the following:*

(A) Be specific, measurable, and designed to do all of the following:

(i) *Assist consumers to achieve life quality outcomes.*

(ii) *Achieve meaningful progress above the current baselines.*

(iii) *Develop services and supports identified as necessary to meet identified needs.*

(Emphasis added.)

Welfare and Institutions Code section 4646, subdivision (a), sets forth:

It is the intent of *the Legislature to ensure that the individual program plan and provision of services and supports by the 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 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. (Emphasis added.)

Welfare and Institutions Code section 4647, subdivision (a), provides:

Pursuant to Section 4640.7, service coordination shall include those activities necessary to implement an individual program plan, including but not limited to, participation in the individual program plan process; assurance that the planning team considers all appropriate options for meeting each individual program plan objective; securing through purchasing or obtaining from generic agencies or other resources, services and supports specified in the person's individualized program plan; coordination of service and support programs; collection and dissemination of information; monitoring implementation of the plan to ascertain that objectives have been fulfilled and to assist in revising the plan as necessary.

Welfare and Institutions Code section 4648, subdivision (a)(6), establishes:

The regional center and the consumer, or where appropriate his or her parents, . . . (or) conservator . . . shall, pursuant to the individualized program plan, consider all of the following when selecting a provider of consumer services and supports:

- (A) *A provider's ability to deliver quality services or supports which can accomplish all or part of the consumer's individualized program plan.*
 - (B) *A provider's success in achieving the objectives set forth in the individualized program plan.*
 - (C) Where appropriate, the existence of licensing, accreditation, or professional certification.
 - (D) The cost of providing services or supports of comparable quality by different providers, if available.
 - (E) The consumer's or, where appropriate, *the parents, legal guardian or conservator of a consumer's choice of providers.*
- (Emphasis added.)

Welfare and Institutions Code section 4652 provides, “A regional center *shall investigate every appropriate and economically feasible alternative* for care of a developmentally disabled person available in the region. *If suitable care cannot be found within the region, services may be obtained outside of the region.*” (Emphasis added.)

Welfare and Institutions Code section 4659 states:

(a) Except as otherwise provided in subdivisions (b) or (c), *the regional center shall identify and pursue all possible sources of funding* for consumers receiving regional center services. *The 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 services, including Medi-Cal . . . *school districts*, and federal supplemental security income and 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.

(b) *Any revenues collected by a regional center pursuant to this section shall be applied against the cost of service* prior to use of the regional center funds for the services. This revenue shall not result in a reduction in the regional center purchase of services budget, except as it related to federal supplemental security income and the state supplementary program.

(c) This section *shall not be construed to impose any additional liability on the parents of children with developmental disabilities*, or to restrict eligibility for, or deny services, to any individual who qualifies for regional center services but is unable to pay. (Emphasis added.)

Discussion

A. *Claimant’s Request for Out-of-State Placement at KKI Qualifies as Treatment, Services and Supports under the Lanterman Act.*

i. *The Mandate To Provide Critical Services.*

1. The Lanterman Act establishes an entitlement for eligible consumers to diagnostic, treatment and habitlitation services through regional centers. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal. 3d 384, 392.) Under the Act, the State of California accepts an obligation to provide facilities and services that are sufficiently complete to meet the needs of each individual with a developmental disability, regardless of age or disability. (Welf. & Inst. Code, § 4501.)

As an individual with a developmental disability, Claimant's placement at KKI would grant Claimant access to critical services that are necessary for her to have a more independent and productive life, which will affect the totality of her life situation. (Welf. & Inst. Code, § 4501, subd. (a)). The evidence at the hearing rendered undisputed the fact that Claimant requires extensive treatment for her pervasive, severe self-injurious maladaptive behavior which has not been successfully addressed through multiple placements. No IPP program has resulted in any successful combination of effective services and supports for Claimant to overcome, to any extent at all, her self-injurious behavior. There has been a pervasive failure of success to arrest Claimant's aberrant behaviors as she enters adulthood. Claimant moves further away from desirable goals with each unremitting episode of self-injurious behavior, attacks upon others, and elopement.

ii. *The Mandate Of Individualized Services.*

2. The statute regarding the individualized nature of service provision to eligible consumer, as confirmed by California courts, is not ambiguous. (*Association for Retarded Citizens v. Department of Developmental Services, supra*, 211 Cal. 3d 391, 392; *Williams v. Macomber* (1990) 226 Cal. App. 3d 225, 232.) The weight of evidence is undisputed that appropriate treatment for Claimant can be provided by KKI and by no other entity. Thus, Claimant's placement at KKI, which specializes in consumers who exhibit the type of self-injurious behaviors that she does, meets the statutory mandate of services and supports that constitute an individualized program centered on the needs of the individual.

3. Also Claimant has met the criteria of Welfare and Institutions Code section 4648, subdivision (a)(6), that directs that placement in a residential treatment program is not to be determined by whether a bed is available within the state, but rather by specific criteria. Those criteria include:

a. *A provider's ability to deliver quality services or supports which can accomplish all or part of the consumer's individualized program plan.* It is undisputed that KKI, which provides unique services, has an 80 percent success rate.

b. *The cost of providing services or supports of comparable quality by different providers, if available.* Although other service providers may utilize some of the techniques used by KKI, there is no service provider anywhere in this state that offers the combination of services that KKI offers.

c. *The consumer's or, where appropriate, the parents, legal guardian or conservator of a consumer's choice of providers.* After a lengthy, good faith effort to explore every possible option, Claimant's grandmother/guardian chose the only option available.

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B. *Treatment at KKI Meets the Statutory Criteria for Cost Effectiveness.*

4. DDS' denial of Claimant's treatment through KKI was based solely on the cost and, as set forth below, on a misinterpretation of its own statutes and regulations. But that cost notion is without regard to treatment needs, or whether Claimant's best interests would be met at KKI. Also the notion that costs must dictate the determination of placement of a consumer in the proper and appropriate setting is unsupported by statute or regulation. Such a position defeats the intent of the Legislature to ensure that the provision of service and supports by the regional center system is centered on the individual with developmental disabilities.

The term "cost-effectiveness" appears in Welfare and Institutions Code section 4512, subdivision (a). That provision states, in pertinent part, in reference to which services and supports are to be provided: "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 the 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."

"Cost effective" is defined in California Code of Regulations, title 17, section 58501, subdivision (a)(6), as "obtaining the optimum results for the expenditure." The term "least expensive" or its equivalent is not found in the Lanterman Act.⁸ Nor can it be found in any description of or mandate for an individualized program of service and supports appropriate to the needs of the consumer.

Welfare and Institutions Code section 4648, subdivision (a)(6), states,

The regional center and the consumer, or where appropriate his or her parents, legal guardian, (or) conservator . . . shall, pursuant to the individualized program plan, consider *all of the following when selecting a provider of consumer services and supports*:

(A) A provider's ability to deliver quality services or supports which can accomplish all or part of the consumer's individualized program plan.

⁸ Welfare and Institutions Code section 4646, subdivisions (b) and (d), describing the IPP process, and Code sections 4512, subdivision (b) and 4646, subdivision (a)(2), in prescribing the mandate for services and supports to assist consumers to achieve and maintain independent, productive, normal lives utilizing individually *tailored flexible services and supports*, are helpful in this analysis. Welfare and Institutions Code section 4647, subdivision (a), requires that "the planning team considers *all appropriate options* for meeting each individual program plan objective; securing through purchasing or obtaining from generic agencies or other resources, services and supports." (Emphasis added.)

(B) A provider's success in achieving the objectives set forth in the individualized program plan.

(C) Where appropriate, the existence of licensing, accreditation, or professional certification.

(D) The *cost of providing services or supports of comparable quality by different providers, if available.*

(E) The consumer's or, where appropriate, the parents, legal guardian or conservator of a consumer's choice of providers.
(Emphasis added.)

In Claimant's case, there is no evidence in the record to establish equivalency of services among KKI and any other entity as they relate to Claimant's need for treatment. Welfare and Institutions Code section 4501 states that "The Legislature finds that the mere existence or the delivery of services and supports is, in itself, insufficient evidence of program effectiveness." The Lanterman Act mandates procedures whereby the regional centers "shall produce evidence" of the effectiveness of programs utilized for individuals with developmental disabilities. Claimant has produced such evidence regarding KKI and neither Regional Center nor DDS rebutted that evidence.

The statute and regulations equate cost effectiveness with services and supports that are expected to be effective in meeting goals rather than forcing families to forego available and necessary service solely on the basis of cost.

C. As a Remedial Statute, the Lanterman Act must be Liberally Construed in Order to Effectuate its Purpose.

5. Statutes such as the Lanterman Act are intended to provide beneficial services and remedies to persons or classes who require protection from harm or exploitation and thus fit the category of "remedial" statutes. (*Wilson v. Superior Court*, (1935) 2 Cal. 2d 632, 637; *Lande v. Jurisich*, (1943) 59 Cal. App. 2d 613, 617.) It is established law that remedial statutes are to be interpreted broadly to effectuate the purposes for which they were enacted. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal. App. 3d 340, 347; *People v. Merrill* (1914) 24 Cal. App. 206, 210 (1914).) The Lanterman Act, by its acceptance of its obligation to persons with developmental disabilities, clearly intends to remedy harm caused by lack of treatment and services. (Welf. & Inst. Code, § 4501.)

That Claimant exhibits maladaptive, aberrant and self-injurious behaviors is undisputed, and it is also undisputed that she has the need for a treatment program that can address these behaviors. There is no evidence other than that presented by Claimant that treatment must include the services offered by KKI.

Thus, the liberal interpretation of the Act to effectuate its remedial nature cannot be accomplished by denying placement at KKI, which offers a program not available anywhere else and which is designed to address Claimant's aberrant behaviors, solely on the basis of cost.

D. Statutory Construction

6. It is a fundamental rule of statutory construction that the intent of the enacting authority should be determined so as to give effect to the purpose of the law. (*Chavez v. Civil Service Commission* (1978) 86 Cal. App. 3d 324 at 330.) If possible, effect should be given to the enacted provision as a whole so that no part of it will be useless or meaningless.

7. A statute must be construed in view of its general purpose, scope and object, so that mere literal construction of a provision will not prevail if it is opposed to the intention of the Legislature. A literal construction that will lead to absurd consequences should be avoided. (See generally 58 Cal. Jur. 3d, Section 99 at pages 466-7.)

8. Where a statute contains both general and special provisions, effect should be given to both if possible but, in the event of irreconcilable conflict, a general provision is ordinarily controlled by a special provision. (See, Code Civ. Proc. §1859. See also *In re Ricardo A.* (1995) 32 Cal. App. 4th 1190.)

9. The Legislature is deemed to be aware of statutes already in existence and to have those laws in mind at the time it enacts a new statute. (See, *Schmidt v. Southern California Rapid Transit District* (1993) 14 Cal. App. 4th 23. See also, *People v. McGuire* (1993) 14 Cal. App. 4th 687.)

11. In determining legislative intent, one must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase, and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose. Statutes must be construed so as to give a reasonable and common sense construction that is consistent with the apparent purpose and intention of the lawmakers, that is the practical rather than technical, and that leads to wise policy rather than mischief or absurdity. (*People v. Turner* (1993) 15 Cal. App. 4th 1690.)

12. The quest for legislative intent in statutory construction is not unbounded. There can be no intent in a statute not expressed in its words, and there could be no intent on the part of the framers of such a statute which does not find expression in their words. The meaning of a statute is to be sought in the language used by the Legislature. Words may not be inserted in a statute under the guise of interpretation. (*City of Sacramento v. Public Employee's Retirement System* (1994) 22 Cal. App. 4th 786.)

13. Wherever possible, potentially conflicting provisions should be reconciled in order to carry out the overriding legislative purpose as gleaned from a reading of the entire act. A construction that makes sense of an apparent inconsistency is to be preferred. (*Viking Insurance Co. v. State Farm Mut. Auto. Ins. Co.* (1993) 17 Cal. App. 4th 540.)

14. Statutes *in pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. (*Isobe v. Unemployment Ins. Appeals Bd.* (1974) 12 Cal. 3d 584, 590.)

15. As the Supreme Court noted in *Meijia v. Reed* (2003) 31 Cal.4th 657 at 663:

Under well-established rules of statutory construction, we must ascertain the intent of the drafters so as to effectuate the purpose of the law. [Citation.] Because the statutory language is generally the most reliable indicator of legislative intent, we first examine the words themselves, giving them their usual and ordinary meaning and construing them in context.” (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268 [121 Cal. Rptr. 2d 203, 47 P.3d 1069].) “[E]very statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect.” (*Moore v. Panish* (1982) 32 Cal.3d 535, 541 [186 Cal. Rptr. 475, 652 P.2d 32].) “Where as here two codes are to be construed, they ‘must be regarded as blending into each other and forming a single statute.’ [Citation.] Accordingly, they ‘must be read together and so construed as to give effect, when possible, to all the provisions thereof.’ [Citation.]” (*Tripp v. Swoap* (1976) 17 Cal.3d 671, 679 [131 Cal. Rptr. 789, 552 P.2d 749].)

When the plain meaning of the statutory text is insufficient to resolve the question of its interpretation, the courts may turn to rules or maxims of construction “which serve as aids in the sense that they express familiar insights about conventional language usage.” (2A Singer, *Statutes and Statutory Construction* (6th ed. 2000) p. 107.) Courts also look to the legislative history of the enactment. “Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent.” (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 [241 Cal. Rptr. 67, 743 P.2d 1323].) Finally, the court may consider the impact of an interpretation on public policy, for “[w]here uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.

16. In *Environmental Protection Information Center v. California Department of Forestry and Fire Protection* (1996) 43 Cal.App. 4th 1011, the court noted the California Supreme Court’s holding in *Rivera v. City of Fresno*, 6 Cal. 3d 132 (1971) at page 140:

“The contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized.”

E. Analysis of Welfare and Institutions Code section 4682

Article 3, commencing with section 4680, of the Lanterman Act deals with the “rates of payment for community living facilities.” Section 4680 explains the intent of this Article. It states:

In order to assure the availability of a continuum of *community living facilities* of good quality for persons with developmental disabilities, and to ensure that persons placed out of home are in the most appropriate, least restrictive living arrangement, the department shall establish and maintain an equitable system of payment to providers of such services. The system of payment shall include provision for a rate to ensure that the provider can meet the special needs of persons with developmental disabilities and provide quality programs required by this article. (Emphasis added.)

Section 4681 spells out how the rate of payment for providers of these services are to be established. Section 4681.1 requires DDS to “adopt regulations for community care facilities serving persons with developmental disabilities” including “special services required by the client’s IPP. Article 3 then concludes with section 4682, the section at issue in this proceeding, with a limitation on the amount that can be paid for services rendered in a community living facility. It provides:

Under no circumstances shall the rate of state payment to any provider of out-of-home care exceed the average amount charged to private clients residing in the same facility, nor shall the monthly rate of state payment to any such facility, with the exception of a licensed acute care or emergency hospital, exceed the average monthly cost of services for all persons with developmental disabilities who reside in state hospitals.

The obvious intent of the foregoing code sections is to place a limitation on the Regional Center regarding the amount that a community care living facility may be reimbursed for providing its services. Since a state hospital is a very expensive form of providing community living services, it is only natural for the Legislature to limit the private providers of such services to the amount it would cost the state for providing the same services. In its own regulations, DDS, in implementing the provisions of Article 3, clearly understood that the limitations placed on payment for services rendered in a community living facility applied only to facilities within this state.

California Code of Regulations, title 17, section 56002, promulgated by DDS, defines certain terms including “facility” and “residential service provider.” Those sections read as follows:

(15) “Facility” means a licensed community care facility as defined in Health and Safety Code Section 1502(a)(1), (4), (5) or (6); or a licensed residential care facility for the elderly as defined in Health and Safety Code Section 1569.2(k), which has been vendorized as a residential facility by a regional center pursuant to the requirements of Title 17, California Code of Regulations, Division 2, Chapter 3, Subchapter 2.

(41) “Residential Service Provider” means an individual or entity which has been licensed by the Department of Social Services as a community care facility pursuant to Health and Safety Code Section 1502(a)(1), (4), (5) or (6); or is defined as a licensed facility for the elderly in Health and Safety Code Section 1569.2; has completed the vendorization process pursuant to Title 17, California Code of Regulations, Division 2, Subchapter 2; and has been assigned a vendor identification number beginning with the letter “H” pursuant to Title 17, California Code of Regulations, Section 54340(a)(1).

No out-of-state facility or provider of residential services may be licensed under California statutes. By requiring the facilities and providers at issue to be licensed by this state, DDS clearly understood that the code sections upon which these regulations are based apply only to California facilities and providers. Only in-state facilities are subject to the relevant California licensing statutes.

A reading of the entirety of Article 3 shows that the limitations placed on funding applies to the regional centers, not to DDS. It is the DDS that sets the rates that regional centers pay for services. That interpretation is in harmony with section 4519, subdivision (a), noted in footnote 1. That section provides that a decision as to whether or not funds should be allocated for the type of out-of-state placement at issue here rests solely with the DDS Director or his/her designee. In making this decision, DDS assumes the role of the service agency. Under this section, it is up to the Director of DDS to determine whether the services should be purchased. The cost of those services is not subject to a specific dollar limitation when provided outside the state. Clearly, the cost of out-of-state services could easily exceed the cost of providing services for a resident of a state hospital, the limit of funding a regional center is permitted to expend. However, if the services are necessary, and cannot be provided in-state, the Director may order them to be provided by an out-of-state provider. Of necessity, cost would be a factor in the Director’s decision, but that cost must be weighed against the need for the service. Here, the Director never evaluated the need for Claimant to receive the treatment she seeks at KKI, treatment which is only available at KKI. Rather than reviewing Claimant’s needs, the Director’s designee erroneously based his decision on section 4682, never taking into account Claimant’s needs. The evidence in this case clearly established that Claimant needs the services provided by KKI, and those services

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are not available anywhere in this state. Because the services are necessary and not available anywhere except KKI, which is located in Baltimore, Maryland, the Director has no choice but to authorize the purchase of those services.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The Department of Developmental Services shall fund the cost of a four-month placement for Claimant at the Kennedy Krieger Institute Neurobehavioral Unit.

DATED: _____

RALPH B. DASH
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.