

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

TIMOTHY S.,

Claimant,

and

FRANK D. LANTERMAN REGIONAL
CENTER,

Service Agency

OAH No. 2012020706

DECISION AFTER REMAND

This matter came on regularly for hearing on February 11 and 13, 2014, at Los Angeles, California, before David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California (OAH). Claimant Timothy S. was represented by his father. (Initials and titles are used to protect confidentiality.) Frank D. Lanterman Regional Center (FDLRC or Service Agency) was represented by Julie A. Ocheltree, Attorney at Law, Enright & Ocheltree LLP.

Oral and documentary evidence was presented. The record remained open for briefs, received and marked for identification as follows: Timothy S.'s Closing Argument, March 14, 2014, Exhibit R-35; Frank D. Lanterman Regional Center's Closing Argument After Remand Hearing, March 18, 2014, Exhibit R-O; and Timothy S.'s Reply to Service Agency Closing Argument, April 1, 2014, Exhibit R-36.

The matter was submitted for decision on April 1, 2014.

FACTUAL FINDINGS

Procedural History, Issue on Remand, and Note About Marking of Exhibits

1. The Fair Hearing Request in this matter was signed by Claimant's father on February 13, 2012. The original hearing was on June 19, 2012, before ALJ Eric Sawyer, who issued a Decision dated July 23, 2012. (Ex. AR [for Administrative Record], pp. 601-616. This Decision is referred to herein as "Sweeney I.") (The Administrative Record is found in Exhibits R-L and R-32 to this remand hearing. The marking of exhibits is explained in more detail below.)

2. Claimant filed a Petition for Writ of Administrative Mandamus, which was denied in part and granted in part. (Order on Petition for Writ of Administrative Mandamus (Order on Writ), Exs. R-A and R-1, dated November 5, 2013, Honorable James C. Chalfant, Judge, Superior Court of California, County of Los Angeles.) Among other things, the Order on Writ remanded the matter to OAH for further proceedings.

3. A second Fair Hearing Request was signed by Claimant's father on June 30, 2012. A separate fair hearing occurred during October and November 2012, and January and May 2013, before ALJ David Rosenman, who issued a Decision dated August 2, 2013. (Exs. R-B and R-6. The Decision, in OAH case number 20122050727, is referred to herein as "Sweeney II." For convenience, reference will be made only to Ex. R-B.) No writ or other appeal was filed and the Decision in Sweeney II is final.

4. During the writ proceedings, Judge Chalfant was made aware of the Decision in Sweeney II. In the Order on Writ, he suggested that the remand of Sweeney I be assigned to ALJ Rosenman.

5. The relevant substantive portions of the Order on Writ include the following:

"1. The Petition for Writ of Administrative Mandamus is DENIED in all respects, including, but not limited to, the request for retroactive funding for services from June 2010 to January 13, 2012, except as set forth below:

"a. The Respondent Office of Administrative Hearings did not err in deciding that it did not have jurisdiction to decide what services Timothy S[.] was entitled to under the law. At the same time, the issue is moot as a result of a second fair hearing, [Sweeney II], which resolved certain service issues that were in dispute.

"2. The Court REMANDS the matter back to the Office of Administrative Hearings for a Lanterman Act Fair Hearing on the issue of whether [Timothy S.] is entitled to retroactive funding for services provided to [Timothy S.] after January 13, 2012, in light of the decision and order [in Sweeney II].

"a. In deciding whether Timothy S[.] is entitled to retroactive funding for services from January 13, 2012, the Office of Administrative Hearings (OAH) may consider facts from June of 2010. The OAH may rely on the record and/or consider supplemental evidence, at the OAH's discretion."

(Exs. R-A and R-1.)

6. Exhibits were submitted to ALJ Sawyer during the hearing in Sweeney I. As part of the writ proceedings, the Administrative Record was prepared, including those exhibits, a transcript of the hearing, and other documents from the OAH file. As noted above, both parties referred to the Administrative Record during the remand hearing and in subsequent briefs, and those references are designated AR, with the page number therein (the

AR has pages numbered at the top, from 1 to 832). Although both parties listed the AR in their exhibit lists for the remand hearing (Exs. R-L and R-32), there is only one copy of the AR in evidence, sparing some trees and ink. All references herein to AR are, therefore, also references to Exs. R-L and R-32.

7. For the remand hearing, both parties submitted further exhibits. To differentiate these exhibits from the exhibits used during the hearing in Sweeney I, ALJ Rosenman ordered that exhibits for the remand hearing would have the designation “R-,” followed by the letter (FDLRC) or number (Claimant Timothy S.) that the parties used to pre-mark their exhibits. As to page references in these further “remand / R-” exhibits, many of the exhibits were numbered at the bottom right with “FDLRC” and consecutive page numbers. These page numbers, when available, will be used herein, without the reference to “FDLRC.”

8A. Many of the same documents used during the hearing in Sweeney I, and therefore appearing in the AR, were used during the hearing in Sweeney II and are referenced in the Decision in Sweeney II. As noted above, Judge Chalfont was aware of the Decision in Sweeney II, and gave OAH the discretion to either rely on the record “and/or consider supplemental evidence, at the OAH’s discretion.”

8B. ALJ Rosenman hereby exercises that discretion to consider the evidence adduced during the remand hearing and also to consider the evidence adduced during the hearing in Sweeney II. ALJ Rosenman notified the parties that he would do so during the remand hearing. The Decision in Sweeney II is final, and the factual findings therein are incorporated herein by reference. (Again, the Decision in Sweeney II is Ex. R-B in the exhibits on remand.)

8C. To the extent they were supported by the evidence, many of the factual findings from ALJ Sawyer’s Decision in Sweeney I have counterparts in ALJ Rosenman’s Decision in Sweeney II.

9. On remand, Claimant contends that the factual findings in Sweeney I are not final because the Order on Writ grants a portion of the writ petition. This contention is rejected. First, the final Decision in Sweeney II contains many of the same or similar factual findings. Second, Judge Chalfont denied the writ as to the majority of the issues decided in Sweeney I, including ALJ Sawyer’s order denying Claimant’s request to order FDLRC to reimburse Claimant’s family for services provided by the family from June 2010 to January 13, 2012, leaving only the determination of possible reimbursement after that date. The Order on Writ does not explicitly or implicitly overturn any factual findings in Sweeney I.

10. Sweeney I states one of the issues was reimbursement “from June 2010 to the present,” a date which is arguably as late as the date of the Sweeney I Decision, July 23, 2012. Logic could extend this to the date of the Order on Writ, November 5, 2013. However, the evidence at the remand hearing established that FDLRC started funding supported living services (SLS) for Claimant as of December 1, 2013, pursuant to the

Decision in Sweeney II. SLS was a primary service Claimant's father requested in both fair hearings. Under a fair interpretation of the circumstances, the issue here is whether FDLRC should reimburse Claimant's parents for services for the period from January 13, 2012, to December 1, 2013. The parties were aware of the time period of the issue. (See, e.g., Timothy S.'s Closing Argument, Ex. R-35, p. 6, fn. 3; and FDLRC's Closing Argument After Remand Hearing, Ex. R-O, p. 3.)

Additional Factual Findings on Remand

11. As a result of the validity of the factual findings in Sweeney I and Sweeney II, the additional factual findings below are those necessary to resolve the current issue.

12. The issue herein relates to a period beginning on January 13, 2012. The significance is, on January 13, 2012, Ms. Johnson from FDLRC sent Claimant's father a Notice of Proposed Action and attached letter wherein FDLRC denied funding for retroactive services and attorney's fees. (AR, pp. 95-99.) That Notice of Proposed Action was followed by Claimant's Fair Hearing Request (AR, p. 101), which was followed by the hearing and Decision in Sweeney I (AR, pp. 601-616).

13. Claimant contends that he is entitled to the equivalent of 544 hours per month of SLS at a rate of \$27, as that rate is now being paid to Claimant's SLS vendor, Modern Support Services. In the alternative, Claimant uses \$24.29 per hour, a state median rate for SLS. This computes as \$13,213.76 per month, for a 22.5 month period, for an approximate total of \$297,309.60.

14. Claimant uses 544 hours per month, stating it is the amount of SLS ordered in Sweeney II. To a certain extent this is correct, however, it is not the right figure to use for these purposes. Sweeney II determined that FDLRC would provide SLS on two levels: 436 hours per month to cover the hours from 8:00 a.m. to 10:30 p.m., seven days per week, and 108 hours per month, contingent on a certain event, covering additional SLS from 9:00 a.m. to 2:00 p.m., Monday to Friday. (Sweeney II, Legal Conclusions 35B and 41-44, Ex. R-B.)

15. As more specifically explained in Sweeney II, Claimant also receives 279 hours per month of In-Home Supportive Services (IHSS), a benefit funded by the county to provide certain listed services by a third party (in this case, Claimant's mother). Added to the 436 hours per month of SLS in the first level, there is a total of 705 hours per month of services funded for Claimant. There are 744 hours in the average month.

16. The second level of 108 hours per month addressed the weekday time period typically covered by a school program. The contingency for Claimant to receive these added hours required Claimant's father to make a formal request to the school district to assess Claimant and potentially offer special education services. Again, as more specifically explained in Sweeney II, FDLRC is not required to fund for services that should be supplied by a school district. If Claimant's father made that request, the second level of SLS services

of 108 hours per month would be implemented, but only for 60 days to allow the school district process to run its course.

17. FDLRC and Claimant's father agreed to amend Claimant's Individual Program Plan (IPP) to include these two levels of funding: for the period December 1, 2013, to May 13, 2014, for level one, 436 hours per month, and for level two which added 108 hours per month for 60 days, from December 1, 2013, to January 31, 2014. (Ex. R-G.)

18. Claimant's father requested the school district to assess Claimant on September 22, 2013. (Ex. R-D.) A meeting was scheduled in January 2014 between Claimant's father and the school district to discuss an Individual Education Plan (IEP). There was no evidence whether that occurred. For reasons not explained in the evidence, the second level of SLS was extended to February 28, 2014. (Notes found in Ex. R-E, pp. 65-67, and the Purchase of Service for three months at 544 each, Ex. R-31.) Michelle Johnson testified that the level two hours authorized for February 2014 were a mistake. As there was evidence that Claimant's father met the contingency to add 108 hours per month, they are added, but only for 60 days under the Decision in Sweeney II or, perhaps, an extra month based on a mistake by FDLRC. However, level two SLS was time limited and based on a contingency that did not occur until September 22, 2013. Therefore, the maximum Claimant is possibly entitled to receive prior to September 22, 2013, would be 436 hours of SLS per month.

19. The IPP is the backbone of the process whereby regional centers identify a consumer's strengths and needs and develop a plan of services. The law relating to IPP's is discussed in more detail in Sweeney I (Exs. R-L and R-32, AR, pp. 610 to 612) and Sweeney II (Legal Conclusions 7-16, Ex. R-B, pp. 33-37). Of particular note, the process to determine these needs is found in several sections of the Welfare and Institutions Code¹ and emphasizes the gathering of information and conducting of assessments. (See, for example, sections 4512, 4646 and 4646.5; see, also, *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) Therefore, under usual circumstances, until the appropriate information has been gathered, and an assessment is performed when necessary, a regional center has no basis to include a particular service in an IPP.

20. Claimant was assessed for possible SLS by Inclusion Services on January 24, 2012. Inclusion Services issued its SLS assessment report dated February 8, 2012. (AR, pp. 297-312.) The report is discussed in detail in Sweeney II, Factual Findings 19A to 19M (Ex. R-B, pp. 19-21), and includes a detailed list of services and activities for Claimant. The report recommends funding for 543 hours per month of SLS, at a proposed total cost of \$13,739 per month.

¹ All statutory references are to the Welfare and Institutions Code unless noted otherwise. Code sections 4500 through 4868, known as the Lanterman Developmental Disabilities Services Act, will be referred to as the Lanterman Act. References to regulations are from the California Code of Regulations, title 17, and will be referred to as "Regulation."

21. Until the assessment report was received, there was no basis under the Lanterman Act, on which FDLRC could sufficiently determine what services were needed and in what amount. Its potential obligation to provide such services therefore did not exist before that time. Therefore, there is no legal or factual basis to order FDLRC to reimburse Claimant's parents for any time prior to February 8, 2012.

22. For this period from February 8, 2012, through December 1, 2013, while Claimant's parents were responsible for his care, there is relatively little evidence of the specific types of care and activities actually provided to or engaged in by Claimant. Claimant's father noted that, for a period when he was unavailable and Claimant's mother was recovering from surgery, he engaged the sister of Claimant's mother, paid for her airfare, and offered her \$300 per day for several days of her assistance. However, the sister did not accept the payment.

23. As noted more specifically in Sweeney II, Enrique Roman at FDLRC requested Claimant's father to provide a schedule of the services he was providing. Claimant's father declined. (Ex. R-B, Factual Findings 36D, 37 and 38; Ex. R-16.) He testified that his schedule exceeded 533 hours, but, again, there was insufficient evidence of the services actually being provided by Claimant's parents. At the remand hearing, Claimant's father testified Claimant's family provided substantially more than 543 hours of care per month, but provided few details.

24. After the Sweeney II Decision, Claimant's father and FDLRC agreed that SLS would be provided by Modern Support Services, which was authorized to provide 544 hours per month from December 1, 2013, through February 28, 2014, at a rate of \$27 per hour. Claimant's father requests the same level of hours herein as damages, computed at \$27 per hour for 544 hours per month.

25. Modern Support Services pays its regular SLS staff \$13 per hour, a manager \$16 per hour, and a program director \$18 per hour. (Ex. R-I, p. 125.) The rate paid by FDLRC on the Purchase of Service is \$27 per hour, which includes administrative costs. Modern Support Services was vendored before the median rates were established and can therefore continue to claim the higher rate.

26. In the alternative, Claimant's father claims the rate could be \$24.29 per hour, the amount which was determined by the Department of Developmental Services to be the statewide median rate for SLS as of December 2011 and thereafter. (Exs. R-N and R-34.)

27. Numerous contentions were raised by both parties during the remand hearing and in the closing arguments. All have been considered. The contentions have been referenced only to the extent necessary to determine the relevant legal issues.

LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judges makes the following legal conclusions:

Burden and Standard of Proof

1. Sweeney I and II both determined that the standard of proof is the preponderance of the evidence, and that Claimant bears the burden of proof. Claimant's contention that the burden of proof has shifted and that an estoppel should operate is rejected as not supported by the facts or the law under the circumstances of this case.

Recovery of Damages Under the Lanterman Act

2. The entirety of Claimant's present claim is based on father's contention that FDLRC should be required to pay monetary damages for various acts or failures to act, and that such damages should be measured by the value of the SLS ultimately ordered to be provided, either at the contract rate or the state median rate. This contention is rejected as not supported by the facts or the law under the circumstances of this case.

3. In the Order on Writ, Judge Chalfont uses the phrase "retroactive funding for services." In Sweeney I, ALJ Sawyer set forth the legal prerequisites of a grant of retroactive services, also referred to therein as retroactive funding, retroactive benefits and reimbursement. (AR, pp. 610-612.) In summary, the Lanterman Act does not grant specific authority to award retroactive service payments in the fair hearing context and retroactive funding is only referred to in Regulations that do not apply here. However, the ALJ may resolve "all issues concerning the rights of persons with developmental disabilities to receive services under [the Lanterman Act]" (§ 4706, subd. (a)), which would support reimbursement only when the purposes of the Act would otherwise be thwarted. Therefore, ALJ Sawyer adopted the process, from prior fair hearing decisions, of reviewing the reimbursement requests before him against the backdrop that reimbursement would be ordered "only when the equities weighed in favor of the consumer, or when the purposes of the Lanterman Act would be thwarted if not granted." (Footnote omitted; AR, p. 611.) ALJ Sawyer then determined that, under the facts in Sweeney I, FDLRC had not acted inequitably or in a manner to thwart the purposes of the Lanterman Act. The claims for reimbursement were therefore denied. Judge Chalfont agreed with this approach by virtue of his order that the petition for writ was denied regarding those determinations by ALJ Sawyer.

4. The facts have been considered from June 2010 through December 1, 2013. These facts include, but are not limited to, FDLRC's error in not determining that Claimant had moved from its catchment area to another between before 2010; FDLRC's error in advising Claimant's father that he could not legally apply to be family vendor for Claimant's SLS; the process whereby information was gathered, including some delays, and IPP meetings that occurred in December 2011 and March and May 2012; and the exchange of information and positions in meetings and in writing through October 2013. Further,

Sweeney II overturned FDLRC's decision that Claimant should not receive SLS. Nevertheless, in total, FDLRC has not acted inequitably or in a manner to thwart the purposes of the Lanterman Act such as to justify the claims for reimbursement in the form of damages. Therefore, the facts do not support the request for damages.

5. There is no legal authority to grant money damages in lieu of retroactive funding for services. The Lanterman Act and the related Regulations, as they apply to Claimant, focus on the provision of services. There are references to assessing the need for services, identifying possible services, vrending the providers of services, rate-setting for services, cost-effectiveness of services, quality control and progress reports for services, etc. If the process breaks down and a fair hearing is needed, the ALJ may resolve all issues relating to "services." This is a defined term meaning "the type and amount of services and service components set forth in the recipient's individual program plan pursuant to Section 4646." (§4703.7.) As noted in *Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d at p. 393, "we conclude that [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. In any event, the Act clearly defines the right of the developmentally disabled person to be provided with services and the corresponding obligation of the state to provide them."

6. To the understanding of this ALJ, retroactive funding has been ordered only in instances where a third-party provided the service and was paid out-of-pocket by Claimant or a family member and there was a determination that the regional center should have paid for the services. There is no statutory right to recover damages in the nature of the value of services for which no out-of-pocket expense was incurred. This is more in the nature of a claim that would repose in the Superior Court of California. There was an insufficient basis on this record, and under the law, to expand the concept of reimbursement to include Claimant's claims for damages.

7. In addition to fair hearings, the Lanterman Act includes a process for lodging a complaint to the director of a regional center if it is believed that "any right which a consumer is entitled has been abused, punitively withheld, or improperly or unreasonably denied" by a regional center. (§ 4731.) If dissatisfied with the decision of the regional center's director, the complainant may refer the matter to the Director of Developmental Services. Claimant's father filed three complaints under section 4731 and in several instances FDLRC was found to be out of compliance. Neither section 4731 nor its accompanying Regulation (Regulation 50540) refers to an award of damages. The right to pursue an action in court is specifically assured. Among the listed rights of each person with a developmental disability in Regulation 50510, subdivision (a)(12), is the "right of access to the courts for purposes including, but not limited to the following: (A) To protect or assert any right to which any person with a developmental disability is entitled." This reference to court access to assure a "right" is much broader than the references to "services" noted above. This is a reference to a court of competent jurisdiction, such as the Superior Court, and not to the administrative tribunal in which the fair hearing process occurs.

8. There was a lack of evidence of the type and nature of care, or “services,” provided by Claimant’s family before the commencement of SLS on December 1, 2013. It is too simplistic to assume that Claimant’s family provided the type of services set forth in the SLS assessment by Inclusion Services, without specific evidence to support that assumption. The statutes and Regulations describing SLS include references to services that were probably a part of the care provided by Claimant’s parents; e.g., under Regulation 58614, subdivision (a), SLS consists of individually designed services which assist an individual consumer to live in his own home, “with support available as often and for as long as it is needed,” and “make fundamental life decisions, while also supporting and facilitating the consumer in dealing with the consequences of those decisions; building critical and durable relationships with other individuals; choosing where and with whom to live; and controlling the character and appearance of the environment within their home.” Under Regulation 58617, the list of services includes, inter alia, assistance with common daily living activities such as meal preparation, including planning, shopping, and cooking; performing routine household activities to keep a clean and safe home; locating and scheduling medical services; acquiring household furnishings; becoming aware of and effectively using the transportation, police, fire, and emergency help available in the community; managing personal financial affairs; recruiting, screening, hiring, training, supervising, and dismissing personal attendants; dealing with governmental agencies; asserting civil and statutory rights through self-advocacy; building and maintaining interpersonal relationships, including a circle of support; participating in community life; and 24-hour emergency assistance. The Inclusions Services assessment includes most of these services in the plan it created for Claimant’s services. Although it is likely that some and perhaps most of these services were provided by Claimant’s family, they did not meet their burden of proving what specific services they provided.

9. There is attenuation between, on the one hand, what Modern Support Services receives to provide SLS or the statewide median cost for SLS and, on the other, the value of the services provided by Claimant’s parents. Vendors have requirements for staffing, supervision and progress reporting, for example, that may not apply to Claimant’s family. Without further evidence, there is an insufficient basis to use either figure of \$27 or \$24.29 per hour.

10. The issue is further complicated in that Claimant’s family provided for his care, and not a third party. FDLRC may not pay parents to supply the type of typical family relationship support that can be expected in any family situation, as such is considered a natural support (§ 4512, subd. (e)). Under section 4791, subdivision (h)(1)(A), FDLRC “shall take into account, in identifying the consumer’s needs, the family’s responsibility for providing similar services to a child without disabilities.” Section 4646.4, subdivision (a), requires regional centers, when purchasing services and supports, to utilize generic services and supports when appropriate. (See, also, §§ 4648, subd. (a)(8), and 4659.) Specific to SLS, it can be provided by a relative only when it is determined that “[u]npaid family-based, or other natural supports for the consumer will not be supplanted.” (Regulation 58616, subdivision (b)(1).) Claimant’s needs are such that some of his care, perhaps a substantial portion, is beyond what a parent typically provides to a child. However, there was

insufficient evidence on which to determine what components or portions of the care provided by Claimant's family would fall within the category of typical care and, therefore, would be excluded by law from being considered for FDLRC reimbursement.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Claimant is not entitled to retroactive funding for services from January 13, 2012, to December 1, 2013.

DATED: April 18, 2014.

DAVID B. ROSENMAN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.