

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Case No. 2012080982

TESS V.-B.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

DECISION

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard the above-captioned matter on October 9, 2012, at Bakersfield, California. Kern Regional Center (KRC or Service Agency) was represented by Jeffrey F. Popkin, LCSW, ACSW, C-ASWCM, Associate Director of KRC. Claimant, Tess V-B. (Claimant or Tess) was represented by her mother, B.V.¹

Evidence was received, the case was argued, and the matter submitted for decision on the hearing date. The ALJ hereby makes his factual findings, legal conclusions, and orders.

ISSUE PRESENTED

May KRC terminate funding for an after school program provided to Claimant, on the grounds that it is duplicative of services provided through the residential placement that is largely funded by the Service Agency?

¹ Initials are used in the place of surnames in the interest of privacy.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Claimant is a 19-year-old woman who is a consumer of services from KRC. Because she suffers from Autism and Mild Mental Retardation, she is eligible for services from KRC under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.² There is no dispute as to her eligibility for services, just the nature of what those services should be at this time.

2. Since March 2011, Claimant has lived in a residential facility, an Adult Care home licensed by the California Department of Social Services, known as PTS-4, and referred to during the proceeding as “Phase Four.” The cost of that residential placement is nearly \$9,000 per month, and KRC pays all but \$1,000 of the cost, the latter amount coming from Claimant’s Social Security benefits.

3. Claimant receives special education services from the local school district. When her school day is over, at approximately 2:00 p.m., the school district transports her to her after school program, which is provided at Valley Achievement Center (VAC). At approximately 4:30 p.m., staff from Phase Four pick Claimant up and take her back to the facility. The cost of the after school program, which is paid for by KRC, is \$2,700 per month.

4. On August 1, 2012, KRC issued a Notice of Proposed Action (NOPA) to Claimant, stating KRC’s intent to terminate funding for the after school program. The stated reason for the action was that “KRC is obligated to first seek funding from all other possible sources. Additionally as you reside in a specialized residential facility after school program is considered a ‘duplication’ of services.” (Ex. 3, p. 2.)

5. On August 3, 2012, Claimant’s mother submitted a Fair Hearing Request on Claimant’s behalf, even though Claimant is an unconserved adult. Thereafter, Claimant ratified her mother’s act by signing an authorization for her mother to act as her authorized representative. During the hearing, KRC indicated it did not object to the authorization.

6. During the proceeding, the matter focused on the issue of whether there was a duplication of services that are provided by the after school program and the residential facility. The issue of pursuing other funding sources was not raised.

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

Claimant's Disability and Prior Planning

7. Claimant is significantly disabled by her maladies, especially in the area of communication. She has very limited language, and tends to communicate around her residence with gestures. She has behavioral issues as well, “melting down” at the facility on a somewhat routine basis.

8. An Individual Program Plan (IPP) meeting was held in June 2012, though it does not appear that an IPP plan was signed by KRC staff until October 2012. The long range goals set out in the IPP plan, part of Exhibit 4, were for Claimant to be able to communicate her wants and needs, and to better communicate with peers and adults, as well as to improve her social skills. (Ex. 4, p. 10.) The IPP document indicated that maladaptive behaviors were an ongoing problem at her residential facility, with non-compliant behavior occurring 32 times per week, and physical aggression and property damage occurring twice per month. Other maladaptive behavior was described as well. (Ex. 4, pp. 10-11.)

9. The IPP noted a number of objectives, including continued residence in the facility and continued attendance at the ABLE program, her special education program. Objective number 4, pertinent to this case, stated:

Provided the opportunity and funding to do so, Tess will participate in an after school program, specifically designed to meet the needs of autistic children, five days a week in order to increase her socialization skills and meet her ISP goals. Baseline: Tess currently participates in VAC after school program 3 hours per day, 5 days per week. Skills to be addressed in the areas of: a) Communication b) Motor Skills c) Vocational, and d) Social Behavior, over the next 12 months. Currently Tess has made a lot of progress in her goals over the past year, but still requires participation in this intense program so she can master the concepts and skills, and be able to function in the future in society. She continues to demonstrate regression when exposed to change. (Ex. 4, p. 13.)

The Residential Facility Program

10. According to the testimony of Arturo Gonzalez, the Administrative Director for Phase II Services, the company that operates the Phase Four facility, three other KRC consumers live in the facility with Claimant. Each consumer has their own bedroom. Claimant is the only resident that suffers from autism. Staffing ratios vary during the day, but during the evening there are typically three staff persons to look after the four resident KRC consumers.

11. The Phase Four program is meant to assist and train developmentally disabled consumers in achieving their potential. The program is designed (in part) to collect data regarding each resident so as to assist in proper placement and to provide support. Behavioral techniques are to be used to provide skill training to residents. Efforts are to be made to build social skills, and activities in the community will be planned and carried out. (Ex. 5.)

12. An updated treatment plan was generated by Phase Four in May 2012, and received by KRC in early July 2012. The plan was written by a behavior consultant, Ms. Banuelos. According to that document, Exhibit 9, Claimant has a history of behavioral problems, such as physical aggression, non-compliance, tantrums, property destruction, elopement, and self-injurious behavior, such as constantly scratching herself until she bleeds. During the summer of 2011, after Claimant had been at the facility for approximately three months, she exhibited inappropriate toileting behaviors. (Ex. 9, p. 1.) Non-compliance and self-injurious behaviors were the most usual problems, as the report indicates a baseline of 168 and 109 incidents per month, respectively. The other maladaptive behaviors, emotional outbursts, refusal to eat, property destruction, and inappropriate toileting occurred two to four times per month. Phase Four set goals of reducing these incidents by 25 to 50 per cent by May 2013. (*Id.*, p. 2)

13. The facility developed a plan to reduce the incidents of Claimant's maladaptive behaviors. However, through April of 2012, she had not met all of the goals set for reducing them, though she was on target in terms of decreasing incidents of property destruction. (Ex. 9, pp. 6-7.)

14. Mr. Gonzalez testified that the facility program does not include efforts directed at increasing communication skills, such as language acquisition. The facility does not have and is not attempting to teach Claimant how to use augmented communication devices, or American Sign Language (ASL). Claimant is somewhat verbal with staff, in that she can understand and respond to staff verbalizations. However, she is not communicating back to staff with verbal communication, instead gesturing to staff to communicate with them.

15. Mr. Gonzalez explained that if Claimant did not go to the after-school program, then she would likely come home and then rest. Thereafter, staff would work on skills training, such as cooking; the staff works with an eye toward getting her involved in her environment.

16. If the after school program were eliminated, and Claimant went back to the facility on weekday afternoons, the facility's monthly rate would not increase.

The Afterschool Program

17. The VAC program was described by Alfredo Buendia, a program manager with that program. He testified that VAC uses one-to-one engagement when possible to improve function in the areas of communication skills, behavioral skills, peer engagement, and community integration. The program works only with autistic persons. Mr. Buendia also testified that VAC has been attempting to teach American Sign Language to Claimant, and to work with augmented communication devices, which are keyboard-based.

18. VAC submitted a progress report to KRC in mid-May 2012, which was received as Exhibit 8. At that time, the goal for American Sign Language was to have Claimant sign two simple phrases with 80 to 100 percent independence by May 2013. At the time of the report, she could do so with one simple phrase. In this area, she was signing the phrase “how are you?” with complete independence of prompts. (Ex. 8, p. 2) Likewise, a goal of producing two simple phrases with 80 to 100 percent independence was set for typing on an augmented communication device by May 2013. She had not met any such goals at the time the report was issued; she was typing the phrase “my name is Tess” with only 18 percent accuracy. (*Id.*, p. 3.) In other areas, such as vocational training and to participate in group activities, she was having some success, and some lack of success. (*Id.*, pp. 4-8.)

19. VAC has set goals for “social/behavioral skills.” (Ex. 8, pp. 7-8.) However, the program is not oriented toward suppression of maladaptive behaviors, as is the Phase Four program. Instead, the goals are designed to build positive behaviors. Hence, one goal is for Claimant to facilitate group activities five days per week, and another is for Claimant to initiate interaction with a store clerk, so Claimant can obtain a desired item.

Other Findings Necessary to Resolve the Case

20. The two programs are not working on the same issues, though progress in either sphere might bring progress in the other. That is, as asserted by Claimant and her witnesses, if her communication skills are increased, she may have less maladaptive behavior, and it may become easier to suppress such behaviors while building positive behaviors. The starkest contrast is in the comparison of the two programs’ efforts at behavior control: VAC has not set goals designed to suppress behaviors, whereas Phase Four has. Some overlap exists in the areas of socialization or engagement with others: when the group home involves Claimant in the meal preparation process, they are fostering interaction and communication with others, just as VAC has been fostering group activities in the afternoon.

21. It is plain that the group home is not attempting to increase communication skills, and staff there appears to be getting by with the rather limited skills that Claimant possesses. At the same time, it does not appear that the limited

communication skills that are being fostered in the after-school program are being generalized in the home.

22. Based on the record in this matter, it can not be found that there is a significant duplication in services between the two programs. Though they may share some common goals, such as increasing community integration and interaction with others, such goals are being carried out in substantially different ways. In this regard, some overlap should come as no surprise, as the hallmarks of Autism are a failure to communicate with others, and significant impairment of social skills and interactions.

23. It appears that more coordination might be undertaken between the two programs, in the hope that there would be generalization of newly-acquired skills and behaviors. And, it appears that KRC may need to conduct further independent assessment of Claimant's current abilities, as the Service Agency was able to only produce a years-old psychological assessment. Such assessment should be part and parcel of any IPP program. And, it is also necessary so that the cost-effectiveness of the two programs can be assessed fully.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 6.
2. Services are to be provided in conformity with the 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, subd. (a), 4646, subd. (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 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 children and families.

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

“Services and supports for person 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 of 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, . . . community integration services, . . . respite, . . . social skills training

Thus, either of the programs at issue in this case are available under section 4512, subdivision (b).

6. 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 individual consumer, 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).)

7. In this instance, the planning team—the Service Agency through its service coordinator and Claimant’s family—using the prescribed IPP process, previously determined that both the after school program and the residential program were appropriate services. (Factual Finding 9.)

8. The Service Agency should bear the burden of establishing that a program previously obtained through the IPP process should be discontinued. (Evid.

Code, §§ 115, 500.) KRC has not met that burden in this case. The two programs are substantially different, with the VAC program definitely oriented toward remediating the hallmarks of Autism by building positive behaviors and communication skills. Claimant rightly asserted that the residential program does not focus on building communication, and its behavioral components are mainly designed to suppress maladaptive behavior. In all of the circumstances, the appeal should be granted.

ORDER

The appeal of Claimant, Tess V.-B. is granted, and the VAC after school program shall not be discontinued.

October 22, 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.