

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Request for
Fair Hearing of:

CLAIMANT,

v.

GOLDEN GATE REGIONAL CENTER,

Service Agency.

OAH No. 2013050274

DECISION

Administrative Law Judge Perry O. Johnson, Office of Administrative Hearings, State of California, heard this matter on June 10 and 26, 2013, in Corte Madera, Marin County, California.

Lisa Rosene, Chief, Regional Center Services, represented the Golden Gate Regional Center (GGRC or service agency). Service agency's manager for Regional Center Services, Ms. Beth P. Dewitt, was present for all phases of the proceeding.

Claimant's mother and conservator represented claimant, who was not present.

On June 26, 2013, the record closed and the matter was submitted.

ISSUES

1. Did service agency violate the Lanterman Act when the day program vendor, which had provided services to claimant since May 2012, unilaterally discontinued the provision of the day program without first delivering claimant's conservator a 30-day notice of discontinuation of that vendor's services?

2. Did service agency incorrectly disallow claimant's conservator reimbursement of the cost of transportation service?

3. Was claimant entitled to an aid-paid pending cash stipend during the period of time necessary for the resolution of claimant's dispute regarding reimbursement for cost of transportation?

FACTUAL FINDINGS

Background

1. Claimant is a 26-year-old consumer of GGRC. She has been diagnosed with Fragile X syndrome and mild mental retardation.

Claimant is ambulatory, but she has been found to be in the low percentile for her age for language skills. Over the years, claimant has attempted to participate in site-based and community based day programs; but, for various reasons each program ended. Claimant lives in her mother's home.

Claimant is burdened with anxiety, obsessive compulsive disorder and depression. She has a prescription for medication to reduce her anxiety.

Claimant receives assistance with dressing, washing her hair and attending to personal hygiene needs. She is able, however, to complete various simple tasks and chores, such as folding clothes, unloading a dishwasher, vacuuming floors, feeding her pets, and taking out garbage at the home.

2. On April 29, 2013, service agency issued a Notice of Proposed Action (NOPA), effective April 23, 2013, that informed claimant that "GGRC discontinues funding of Lifehouse: community integration training program, at vendor's request."

The reason for the action was expressed as "[f]unding of Lifehouse: community integration training program expired on [March 31, 2003]. [Claimant's conservator/mother] did not sign the IPP Consent for Service page for Lifehouse: community integration training program, until [April 19, 2013]. Lifehouse was providing services without funding from [April 1, 2013 through April 18, 2013]. Lifehouse requested to stop serving [claimant]."

3. Following receipt of the NOPA, claimant's conservator timely filed a Request for a State Level Fair Hearing with the Regional Center. The matter was scheduled for a State Level Fair Hearing before an Administrative Law Judge of the Office of Administrative Hearings. All prehearing jurisdictional requirements have been met, and jurisdiction exists for these proceedings.

4. In complainant's conservator's State Fair Hearing request, she unpersuasively set out, "GGRC terminated funding for day program [with] Lifehouse . . . after they accepted [conservator's] signed Consent for Services fax and confirmed via email that funding was valid [through March 31, 2014.] For years, transportation has not met Katharine's day

program needs [and mother] pays difference of \$200 per [month], while GGRC refuses adequate funding.”

Claimant’s conservator’s proposed resolution of the controversy was to “restart day program [with Lifehouse April 23, 2013 to March 31, 2014] as confirmed by GGRC on [April 23, 2014] using aide hired by [Lifehouse] to work [with Claimant]. Fund transportation to meet average daily miles during day program: 40 miles per day. Increase mileage rate to IRS rate, [\$0.55 per mile]. Reimburse partial cost of transportation to \$1,800 since [June 2012].”

Dispositive Factual Findings

5. The weight of the evidence supports resolution of the controversy as follows:

DAY PROGRAM VENDOR’S TERMINATION OF SERVICES

6. Under an IPP addendum, dated May 31, 2012, claimant’s conservator accepted that claimant’s day programming activity would be provided by Lifehouse. Lifehouse agreed to hire claimant’s aunt to serve as the one-to-one staff person for claimant’s benefit. The IPP addendum noted that Lifehouse’s vendorized service for community integration included transportation reimbursement.

On March 1, 2013, an annual review of the two-year old IPP was conducted. Service agency agreed to continue funding the community integration day program for claimant as provided through Lifehouse. On March 8, 2013, service agency, through service coordinator Ms. Katie Schloesser, sent conservator a proposed addendum that would assure funding Lifehouse for the ensuing year beginning April 1, 2013. Conservator refused to timely sign and to return the addendum that contemplated service agency’s provision of funding for Lifehouse.

By operation of the expiration date of service agency’s contract with Lifehouse for the services to claimant, on March 31, 2013, the funding for Lifehouse to provide community integration day program services to claimant ended.

Because of claimant’s conservator refused to sign the IPP addendum, which acted as a lack of proper authorization, service agency did not pay Lifehouse for the period of April 1 through April 17, 2013. On April 19, 2013, Lifehouse’s chief executive officer, Nancy Moody, sent conservator a letter indicating that effective immediately Lifehouse would not serve claimant because no purchase of service agreement was in place for continued funding of the day program.

On approximately April 19, 2013, conservator signed the IPP addendum and she requested the continued provision of day program services by Lifehouse to claimant.

On April 23, 2013, the Lifehouse chief executive officer sent conservator a letter stating that Lifehouse would no longer be able to serve claimant as Lifehouse had “been unable to meet the requirements of the conservator” with regard to the day program’s objectives.

After April 23, 2013, service agency had an interest and desire for Lifehouse to continue the provision of day program services to claimant. Despite, service agency’s position that requested Lifehouse to continue providing day program services to claimant, Lifehouse has not rescinded its position to terminate service because of the chief executive’s determination that Lifehouse could not meet the needs of claimant because of conservator’s requirements.

7. Before the date on which Lifehouse’s chief executive officer made the independent determination to end the provision of day program services through Lifehouse, the personnel of GGRC were neither consulted nor asked to participate in the vendor’s determination that it could not serve the needs of claimant.

TRANSPORTATION

8. In the IPP, dated February 16, 2012, claimant’s conservator was designated as the vendor for transportation. GGR extended to the conservator a mileage limit. Later in an IPP addendum, dated March 1, 2012, the prescribed monetary rate for transportation was set at \$0.555 per mile for the period of March 1, 2012, through March 31, 2013. However, on approximately May 31, 2012, conservator accepted an IPP addendum regarding transportation that recognized that the contract rate for the provision of Lifehouse’s community integration “includes transportation reimbursement.” The IPP addendum noted that “mileage transportation that [conservator] has been vendored . . . will discontinue” effective May 18, 2012. Thereafter, Lifehouse provided transportation allowance for claimant’s and her one-to-one aide.

Also, the IPP addendum that appointed Lifehouse as the provider of day programming activity noted that “community integration (1:1) includes transportation reimbursement. Therefore, mileage reimbursement that [conservator] has been vendored . . . will discontinue.”

AID-PAID-PENDING

9. Service agency’s NOPA makes no reference to the costs of transportation being an issue in its action that involved claimant or conservator as of April 29, 2013. Hence, claimant had not received notice that service agency sought to terminate the provision of services and supports relating to transportation or reimbursement for costs of transportation by a properly vendorized person.

As the Fair Hearing Request was not responsive to service agency's NOPA, no evidence exists to require service agency to provide aid-paid-pending due to the discontinuation of a service that existed at the time of the NOPA.

LEGAL CONCLUSIONS

1. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

2. Welfare and Institutions Code section 4643.5, subdivision (b), provides that a service agency seeking to change a service contained in a consumer's IPP has the burden of demonstrating that its proposed action to limit or eliminate a service presently being received by a consumer pursuant to that consumer's IPP is correct. However, in this matter, GGRC did not propose to discontinue or limit claimant's participation in a day program. Rather, the vendor, that is Lifehouse, terminated the provision of the day program when the vendor was not paid and then later determined that the vendor could not provide day program services because of conservator's requirements.

In this matter, the burden of proof falls upon claimant. "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that the party is asserting."¹ And in this matter, claimant did not meet her burden on any of the three issues.

Applicable Law

3. The Lanterman Act, and pertinent regulations, govern this case. (See, Welf. & Inst. Code, § 4500 et seq; Cal. Code Regs., tit. 17.)

Jurisdiction: Claim for Costs of Transportation

4. An administrative "fair hearing" to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (Welf. & Inst. Code, §§ 4700-4716.)²

Pursuant to Code section 4710.5, subdivision (a), a consumer is entitled to such a fair hearing when dissatisfied with a decision or action of a regional center, provided that a

¹ Evidence Code section 500; *Harmon. v. Board of Retirement of San Mateo County* (1976) 62 Cal.App.3d 689, 696.

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

request for the fair hearing is submitted within 30 days “after notification of the decision or action”

Code section 4710 delineates two types of notifications that a regional center is required to provide a consumer regarding a decision or action from which a request for a fair hearing pursuant to Code section 4710.5. In subdivision (a) of Code section 4710, a regional center is required to provide a notification when it proposes to “reduce, terminate, or change services set forth in an individual program plan” or when a consumer is determined to be no longer eligible for agency services. In subdivision (b) of the same statute, a regional center is required to provide a notification when it makes a decision “to deny the initiation of a service or support requested for inclusion in the individual program plan.” It is clear from these statutes that jurisdiction does not exist to decide a request for services that is made for the first time in a fair hearing request, or that has not been previously requested for inclusion in an IPP and been the subject of a notification required by Code section 4710.5.

Hence, claimant’s request for reimbursement for transportation expenses, and for an award to prospectively pay transportation costs to claimant’s conservator, is not a matter that can be resolved through this decision.

Service Agency’s Lack of Control Regarding Vendor’s Termination of Day Program

5. In order to determine how an individual consumer is to be served, regional centers are directed to conduct a planning process that results in an IPP designed to promote as normal a life as possible for the consumer. (Code, § 4646; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389.) The IPP is developed by an interdisciplinary team and must include participation by the consumer and/or his or her representative. Among other things, the IPP must set forth goals and objectives for the consumer, contain provisions for the acquisition of services (which must be provided based upon the consumer’s developmental needs) and reflect the consumer’s particular desires and preferences. (Code, §§ 4646 and 4646.5, subd. (a)(4).) The stated goals and objectives should maximize opportunities for the consumer to develop relationships, be part of community life in the areas of community participation, housing, work, school, and leisure, etc. (Code, § 4646.5, subd. (a)(2).)

The development of an IPP is to be a collaborative and cooperative enterprise. Code section 4646 specifically provides that an IPP “shall be prepared jointly by the planning team.” That section further provides that “decisions concerning the consumer’s goals, objectives, and services and supports that will be included in the consumer’s IPP and purchased by the regional center . . . shall be made by agreement between the regional center representative and the consumer” or her representatives. It was not the intention of the Legislature to have IPP programming and implementation of that programming decided unilaterally, either by a consumer or her representatives or by the regional center.

An authorized regional center representative and the consumer or her authorized representative must sign the IPP prior to its implementation. (Code, § 4646, subd. (g).) If the

consumer or his representative does not agree with all the components of the plan, the consumer or the representative may indicate that disagreement on the plan. (*Id.*) Disagreement with specific plan components cannot prohibit implementation of services and supports agreed to by the consumer or his representative. (*Id.*) If a final agreement regarding the services and supports to be provided to the consumer cannot be reached at the IPP meeting, a subsequent IPP meeting shall be convened within 15 days, or later at the request of the consumer or her authorized representative or when agreed to by the IPP planning team. (Code, § 4646, subd. (f).) Additional meetings may be held with the agreement of the IPP planning team. (*Id.*)

If, at the end of this process, the consumer or her conservator does not agree with the plan in whole or in part, she shall be sent written notice of the fair hearing rights, as required by section 4701. (Code, § 4646, subd. (g).)

An IPP must be reviewed and modified by the planning team as necessary in response to the client's achievement or changing needs, and no less often than every three years, or upon request of the client or her representative. (Code, § 4646.5, subd. (b).) There is no known legal authority for the proposition that an IPP expires. No statute places any sort of "life span" on an IPP. In fact, section 4646.5 does not state that the IPP expires if the provisions of the statute are not complied with, or if the process goes on past the three-year period. This does not mean that an IPP lasts indefinitely if the IPP team fails or refuses to develop an updated version. While there is no specific guidance provided in the Lanterman Act for such a situation, it is clear that where an IPP is so outdated as to no longer accurately depict a consumer's situation, goals or objectives, and that it no longer serves its statutory purpose, it is no longer a valid document.

California Code of Regulations, title 17, section 58620, subdivision (c), provides, in pertinent part, that a consumer receiving services "shall have the right to make decisions that shape the nature and quality of their lives in accordance with their preferences, and consistent with the goals of the consumer's IPP." Although this regulations implements a significant policy directive of the Lanterman Act, it does not afford the consumer or her conservator with an unbridled prerogative to determine which vendor provides services under the IPP, or that a regional center has the power to command a vendor to provide day program services.

Furthermore Code of Regulations, title 17, section 58672, subdivision (b), requires a vendor to "immediately cease providing services to . . . any consumer" when termination of the contract with the service agency ends. When claimant's conservator failed to sign the agreement with GGRC, the contract with Lifehouse terminated as of March 31, 2013. Thereafter, GGRC could no longer fund the provision of services to claimant by Lifehouse. And when Lifehouse decided to end the provision of services to claimant because of the executive determination that the needs of claimant could no longer be met, service agency had no ability to compel Lifehouse to provide day program services.

No evidence exists to establish that GGRC gave notice to claimant or claimant's conservator that the subject regional center contemplated the termination or decrease of the

service of a day program to claimant. Rather, conservator's failure to sign an amendment to extend the IPP led to the cessation of funding to Lifehouse as the vendorized day program provider. And it was Lifehouse that exercised its discretion to end services to claimant.

Aid-Paid-Pending

6. Code section 4715, subdivision (a), provides that "if a request for a hearing is postmarked or received by the service agency no later than 10 days after receipt of the notice of the proposed action mailed pursuant to subdivision (a) of Section 4710, services that are provided pursuant to a recipient's individual program plan shall be continued during the appeal procedure" This is known as "aid-paid-pending."

In this matter, it was not established by a preponderance of the evidence that claimant's conservator received any form of GGRC notification that it would effect termination of the provision of funding for transportation. Rather, conservator's previously granted "vendorized" status as the provider of claimant's transportation expired in May 2012 when Lifehouse was made the vendor for day program services, which included transportation services.

Pursuant to Code section 4715, subdivision (a), claimant was not entitled to aid-paid-pending for the services and supports pursuant to the controlling IPP addendum, in that the Fair Hearing Request was not submitted in a timely manner for that purpose.

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ORDER

1. The appeal of claimant, from the Golden Gate Regional Center's proposed notice of action, is denied.
2. The request of claimant that Golden Gate Regional Center's reimburse her conservator for transportation rendered from mid-2012 until April 29, 2013, is dismissed.
3. The request of claimant for aid-paid-pending is dismissed.

DATED: July 11, 2013

_____/s/_____
PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

NOTICE

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