

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

David H.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH Nos. 2013100920
2013100924

DECISION

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on November 22, 2013, in Pomona, California.

David H. (Claimant) was represented by his mother and father.¹ Claimant did not attend the hearing. Parents were assisted by a Vietnamese language interpreter.

Lee Strollo, Supervisor, represented Eastern Los Angeles Regional Center (ELARC or Service Agency).

Claimant's case was consolidated for hearing with the appeals of his siblings Kevin (OAH case number 2013100929), and Jennifer (OAH case numbers 2013100928 and 2013100924). Evidence was received and the matter was submitted for decision at the conclusion of the hearing on November 22, 2013.

¹ Claimant and his siblings are identified by first name and last initial to protect their privacy.

ISSUE

Should Service Agency fund for round trip transportation to Pasadena Child Development Associates (PCDA)?

Should Service Agency fund 30 hours per month of respite at the regular per-hour rate rather than the sibling rate?²

FACTUAL FINDINGS

1. Claimant is a 10-year-old boy who resides with his parents and his three siblings. Claimant is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.) on the basis of autism.³ Claimant's twin sister Jennifer, and his brother, Kevin are also eligible for Lanterman Act services on the basis of autism. Kevin's twin sister, Linda, is not a recipient of Lanterman Act services.

2. On September 18, 2013, the Service Agency gave Claimant notice of its proposed action denying Claimant's request for Service Agency to fund for round trip transportation to PCDA. In denying Claimant's request, Service Agency's NPA stated:

ELARC will not fund . . . Transportation to minors living with their parents. Parents, guardians, or primary caregivers are responsible for providing routine transportation for ELARC consumers who are minors. In working with the consumer to identify service needs, ELARC should identify the family's responsibility for providing similar services to a child without disabilities. In your cas (sic), the parents have the responsibility to provide transportation. Transportation for children in the educational setting will be the responsibility of the school district.

² California Code of Regulation, title 17, section 58140 authorizes a regional center to negotiate with a respite vendor "the level of payment when a family member has more than one consumer residing with them who has been authorized by the regional center to receive in-home respite services. The amount of the level of payment may be less than but shall not exceed the per-consumer per-hour rate established by the Department and shall only apply to the additional consumer(s) receiving services." Throughout this Decision, the per-consumer per-hour rate is referred to as the "regular rate" or the "regular per-hour rate." The negotiated rate for additional consumers respite is referred to as the "sibling rate." All further references to the California Code of Regulation, title 17, are cited as CCR.

³ All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

3. On September 18, 2013, the Service Agency gave Claimant notice of its proposed action denying Claimant's request for Service Agency to fund 30 hours per month of in-home respite at the regular per-hour rate. In denying Claimant's request, Service Agency's NPA stated:

[Claimant's] brother Kevin . . . receives in home respite 30 hour per month in regular rate. Based on the timesheets we receive from you, the respite worker takes care of the consumers at the same time. We agree 20 hours in the regular rate, 10 hours in the sibling rate for each of your children with a respite agency. The hours will only be approved through agency and not a family member based on reasons for your termination of vendorization dated 07/31/2013.

4. In support of its decisions, Service Agency cited section 4646, subdivisions (a) and (d) (it is the intent of the Legislature that the individual program plans (IPP) and the provision of services and supports be centered on the individual and family needs and preferences, and be prepared jointly by the planning team); section 464,8 subdivision (a)(1) (securing services and supports to achieve the objectives of consumer's IPP); section 4659, subdivision (a)(1) (regional center's obligation to identify and pursue all sources of funding for consumers receiving regional center services including but not limited to governmental programs); section 4686.5, subdivision (a)(1) (purchase of respite services); and section 4512, subdivision (b) (defines the term "services and supports" for persons with developmental disabilities).

5. On September 24, 2013, Claimant timely filed two fair hearing requests. Claimant asked for round trip transportation to PCDA (OAH case number 2013100920) and for 30 hours per month of in-home respite at the regular per-hour rate (OAH case number 2013100929).

6. On October 28, 2013, Lee Strollo (Strollo), a Service Agency supervisor, met with parents for purposes of an informal fair hearing to consider Claimant and his siblings' appeals. By letter dated October 29, 2013, Strollo upheld Service Agency's original determination denying each appeal filed by Claimant. This hearing ensued.

Claimant's Background

7. Claimant is in stable health and sees his primary physician annually and as needed.

8 Claimant requires assistance with his self-help skills.⁴ He is able to eat with a spoon, with some spillage. Sometimes it takes Claimant 45 minutes to finish a meal. He can use the toilet but needs assistance to clean himself. Sometimes Claimant will wipe his hand on the wall if he gets feces on it after a bowel movement. Claimant needs assistance with his personal hygiene and dressing tasks to insure he completes them appropriately.

9. Claimant is enrolled in the fourth grade in a full inclusion general education class at school. Claimant attends school from 8:30 A.M to 2:30 P.M. According to father, Claimant has problems following direction and staying on task at school, Claimant is able to use simple sentences to convey his needs. He is able to read and reportedly has good penmanship. He can perform grade level addition and subtraction.

10 Claimant can be resistive. He often does whatever he wants. If parents try to re-direct him, he will have a temper tantrum. He runs into the community if not closely supervised. Claimant sometimes touches his father while driving. Father has to pull over to re-direct Claimant. He also pushes his siblings, although he has not caused them physical injury.

Claimant's Family Situation

11. Claimant lives with his twin sister Jennifer, his younger brother Kevin and his younger sister Linda, in a single family home. Neither parent is currently working. Father suffered an injury several years ago that makes it difficult for him to work. Mother has tried to work part time, but with the children's needs, this has been difficult to do. Parents own two cars but one is currently inoperable. Claimant's parents described the stress they experience caring for Claimant and his siblings. Father is often up at night caring for Claimant and his siblings. He rests, works on the family vehicle, and help mother with chores during the day. Mother is able to sleep during the night but has primary responsibility for taking care of household chores during the day. According to father, the children are very messy and caring for the house requires a lot of effort on parent's part.

12. Jennifer has autism. She attends a special education class at a school in her district. She also receives speech and language services and adaptive physical education. Transportation is provided by the school district. Jennifer has deficits in her self-help skills. Future Transitions, Inc. (Future Transitions), an adaptive skills training (AST) service provider, assessed Jennifer in October 2013 and is recommending 20 hours per month of AST training. Service Agency has agreed to fund this service. Jennifer currently receives one and a half hours per week of socialization training group provided by PCDA on Friday from 5:00 to 6:15 P.M. Jennifer attends this activity at the same time as Claimant. Jennifer currently receiving 10 hours per month of in-home respite at the sibling rate of \$3.30 per

⁴ The terms self-help and adaptive skills are used interchangeably in the evidence received in this matter. For purposes of this decision, self-help and adaptive skills are used interchangeably to refer to personal hygiene and grooming skills and safety skills.

hour and 20 hours per month at the regular rate of \$14.77 per-hour. Uncle is the respite care provider.

13. Claimant's younger brother Kevin, who is almost 7 years old and has autism, has self-help, safety awareness and behavioral deficits. Kevin has a variety of medical needs. Kevin attends a special day class in his school district. His educational program includes speech and language services and adaptive physical education services. Transportation to and from school is provided by the district. Kevin receives two hours per week of Social Emotional Development Intervention (SEDI) services on a one to one basis in the home. PCDA is the service provider. This service is funded by the Service Agency. Kevin is authorized by the Service Agency to receive 12 hours per week of discrete trail training services (DTT) from SEEK, a vendored program, but the family decided to temporarily suspend this service. Kevin also receives 30 hours per month of in-home respite at the regular per-hour rate of \$14.77 per hour. Respite is funded by the Service Agency. The current respite vendor is Premier Healthcare, Inc. (Premier). Claimant's Uncle is the respite care provider.

14. Prior to September 1, 2013, father was the respite vendor for Claimant, Kevin and Jennifer. This meant that father could hire an individual to perform respite services and father, as the vendor would submit an invoice to Service Agency for payment. Father would then pay the respite worker. At that time, Uncle was the respite provider for all three children.

15. On July 31, 2013, Service Agency notified father that it was terminating his vendorization because an audit showed that father had submitted an invoice for the period from August 1 through August 21, 2011, for 257 hours of respite services for family members, for a total of \$1,318.41. David was out of the country at the time. Claimant and Kevin were in the country during the same period. Service Agency concluded that father submitted invoices and received payment for services allegedly rendered to David based on incorrect time sheets submitted by Uncle. When Service Agency terminated father's vendorization, Premier became the respite vendor. Uncle is now employed by Premier and submits his timesheets to them.

Claimant's 2012 and 2013 IPPs

PCDA Services

16. Claimant's 2012 IPP included an objective directed at improving Claimant's self-help skills. Service Agency funded in-home DTT services through SEEK between June 2010 and January 2013. Claimant's September 23, 2013 IPP also includes an objective directed at improving Claimant's self-help skills. To address this need, Service Agency agreed to fund an AST assessment by Future Transitions. The assessment was completed on October 30, 2013. The assessment identified Claimant's self-help and safety deficits. Future Transitions recommended 20 hour per month of AST to address Claimant's needs. Strollo testified that Service Agency will fund this Future Transitions' AST services, which are expected to begin soon.

17. At Claimant's September 23, 2013 IPP meeting, Claimant's socialization deficits were again identified and an objective was again adopted to address those needs. The IPP specifies that PCDA will provide one and a half hours per week of specialized recreation therapy⁵ for Claimant to address his social skills deficits. The Service Provision Agreement, part of the IPP, notes that father wants additional PCDA services.

18. According to PCDA's October 2013 progress report, Claimant initially attended a socialization training group on Monday from 3:45 until 5:15 P.M. The group started in June 2013. Claimant's attendance was an area of concern. Father usually brings Claimant and Jennifer to the group sessions. David missed approximately six weeks of socialization training during the summer of 2013. In July 2013, Father informed PCDA that the Monday group was not good for their schedule and asked to have Claimant changed to a Friday group after 5:00 PM. On one occasion mother told OCDA she was not sure Claimant could attend a Friday group because it was his birthday.

19. Claimant is making progress on several of his socialization goals. He is showing an emerging ability to debate, negotiate, and express opinions with peers when experiencing a difficult or challenging situation, the ability to engage in pretend /representational play with multi-step sequences while engaged with peers, and the ability to expand on pretend/representational play with a wide range of emotional themes. PCDA noted that Claimant's inconsistent attendance has impacted his ability to establish a relationship with his peers. PCDA discussed with father PCDA's attendance policy and the importance for consistency in attendance.

20. In its October 2013 progress report, PCDA recommended Claimant continue to participate in one and a half hours of socialization training in a peer group one time per week, with progress to be assessed in six months. Service Agency has agreed to continue to provide this service.

Roundtrip Transportation to PCDA

21. Claimant's 2012 and 2013 IPPs do not include round trip transportation for Claimant to attend PCDA. Father typically provides transportation to and from PCDA. Prior to Claimant's September 23, 2013 IPP meeting, Claimant requested round trip transportation for Claimant to attend PCDA. The group is held at PCDA's office on Lake Avenue in Pasadena, California, about 7 miles from parents' home. Service Agency denied Claimant's request for round trip transportation to PCDA. On September 18, 2013, Claimant filed a request for fair hearing and this hearing ensued.

Respite Services

⁵ It appears from the evidence that specialized recreation therapy is another term used to describe the socialization training group provided by PCDA.

22. Claimant's 2012 IPP included an objective that Claimant will continue to live with his family. Service Agency agreed to fund in-home respite as allowed by its Purchase of Service Policy (Policy). As of July, 2012, Service Agency was funding 30 hours per month of in-home respite at what was then called the respite service family, additional member rate of \$5.29 per hour. Father was the respite vendor at that time.

23. Claimant's 2013 IPP also includes an objective that Claimant continue to live with his family. To achieve this objective, Service Agency again agreed to fund 30 hours per month of in-home respite as allowed by Service Agency Policy. As of June 2013, Claimant was receiving 30 hours of in-home respite at the sibling rate of \$3.30 per hour.

24. Prior to the September 2013 IPP meeting, Claimant had requested that the 30 hours of respite be fully funded at the regular per-hour rate rather than at the lower sibling rate.

Parties Contentions

Round-Trip Transportation to PCDA

25. Claimant has asked Service Agency to fund round trip transportation for Claimant to attend PCDA. According to father, he does not take the freeway to get to PCDA and it takes about 45 minutes each way because of Friday evening traffic. Parents want Service Agency to fund transportation because sometimes Kevin has a doctor's appointment at the same time that Claimant attends his socialization training group. This can be a problem because the family currently has only one operable car. Father also pointed out that literature produced by ELARC describing its services includes transportation as one of the included services.

26. Strollo testified that the Agency believes that it is the parents' responsibility to transport Claimant to his Friday socialization training group at PCDA. Strollo testified that it is only 7 miles from parents' home to PCDA offices. Strollo disputed that father's testimony that it takes 45 minutes to get to the facility, even if the parents use side streets in traffic.

27. Moreover, according to Strollo, Kevin's medical records since June 2013 do not support their contention that Kevin's doctors visits interfere with parents' ability to transport Claimant to his group. The records show that Kevin had doctor's appointments on June 8, July 15, September 24, October 2, October 22, and November 8, 2013. Strollo correctly testified that only the most recent appointment on November 8, 2013 with Claimant's general practitioner fell on a Friday. Strollo also testified that Uncle is a natural support who could and sometimes does provide transportation for Claimant on those occasions when parents are unable to drive Claimant to an appointment.

28. Claimant has not produced sufficient evidence that he requires Service Agency funded transportation in order to access his PCDA program. In fact, it appears that he has regularly attended his program since PCDA changed his from a Monday group to his current Friday group as parents requested. Moreover, PCDA provides father with valuable

information about how parents can address Claimant's social skills needs and how to help generalize what Claimant is learning in his socialization training group to other situations. This opportunity would be lost if father no longer transports Claimant to the program.

Respite Services

29. Parent's use respite for a variety of activities, including doctor's appointments, going on errands, and taking one of their children on an outing. This could include occasions when Claimant would need a respite provider while parents are away from the home with both Jennifer and Kevin. Claimant currently receives 30 hours of in-home respite per month at the sibling rate of \$3.30 per hour. Claimant's request to have 30 hours per month of in-home respite funded entirely at the regular per-hour rate of \$14.77 per hour was denied by the Service Agency. Claimant's sibling, Kevin, receives 30 hours per month at the regular per-hour rate of \$14.77 per hour. Jennifer receives 20 hours at the regular rate and 10 hours at the sibling rate.

30. Father testified that the current rate structure presents a problem because Uncle's pay check varies considerably from pay period to pay period because of the rate setting used by Service Agency. Parents' are unwilling to change respite workers because Uncle is familiar with Claimant's needs.

31. Strollo testified that the Service Agency is unwilling to change the respite rate for Claimant or David as long as Uncle continues to be the respite worker. The NPA in this case and in David's case states that if Claimant agrees to use a non-family member as the respite provider, then Service Agency is willing to fund 20 hours of respite at the regular per-hour rate and 10 hours at the sibling rate for "each child." This would result in an increase in the overall amount committed for respite for Claimant and David, but a reduction in the overall rate for Kevin, who is currently funded at the regular per-hour rate for all 30 hours.

32. Strollo also testified that the children are typically cared for as a group in respite and that the rate configuration using a combination of the regular and sibling rate for Jennifer, the regular per-hour rate for Kevin and sibling rate for Claimant reflects how respite care is typically delivered and billed. Strollo did not believe that father's desire to have all three children receive respite at a regular per-hour rate in order to stabilize the amount the respite worker receives is a good reason to change the per-hour rates.

33. While Claimant has failed to present sufficient evidence that he requires 30 hours per month at the regular per-hour rate, he has presented sufficient evidence that the rate should be changed to provide Claimant with 10 hours at the regular rate and 20 hours at the sibling rate. Parents testified that they sometime need respite for one child separate from the other children. In providing Kevin with 30 hours of respite at the regular rate and Jennifer with 10 hours of respite at the regular rate, this parental objective can be achieved. Under the current rate structure, if parents want to leave David with a respite care provider without his siblings, the provider will be paid only \$3.30 per hour. Service Agency has produced no evidence to show that David is not entitled to the same respite services with the same rate structure as his twin sister Jennifer.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Act governs this case. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a regional center decision. (§§ 4700-4716.) Claimant requested a fair hearing to appeal the Service Agency's decision to deny round trip transportation to PCDA and 30 hours per month of respite services at the regular per-hour rate. (Factual Findings 1 through 5.)

2. The standard of proof in this case is a preponderance of the evidence, because no applicable law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Because Claimant is requesting additional services he bears the burden of proof. In seeking government benefits, the burden of proof is on the person asking for the benefits. (See *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).)

Applicable Law

The IPP: Services and Supports for Regional Center Consumers

3. The Lanterman Act sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. As the California Supreme Court explained in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, the purpose of the Lanterman Act is twofold: "to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community" and "to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community." Under the Lanterman Act, regional centers are "charged with providing developmentally disabled persons with 'access to the facilities and services best suited to them throughout their lifetime'" and with determining "the manner in which those services are to be rendered." (Id. at p. 389, quoting from § 4620.)

4. To comply with the Lanterman Act, a regional center must provide services and supports that "enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (§ 4501.)

5. Regional centers provide "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." (§ 4512, subd. (b).)

6. The determination of which services and supports the regional center shall provide is 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 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.” (§ 4512, subd. (b).) As the California Supreme Court recognized in *Association for Retarded Citizens, supra*, 38 Cal.3d at p. 390, while a regional center has “no discretion at all in determining whether to implement” an individual program plan, it has “wide discretion in determining how to implement” an individual program plan.

7. As set forth in section 4646, subdivision (a): “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.”

8. Section 4646, subdivision (d): “Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer’s goals and objectives, and services and supports that will be included in the consumer’s individual program plan and purchased by the regional center or obtained by generic agencies shall be made by agreement between the regional center representative and the consumer or, where appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting.”

Transportation Services

9. Section 4648.35, subdivision (d) limits the authority of a regional center to purchase transportation for a minor child. “A regional center shall fund transportation services for a minor child living in the family residence, only if the family of the child provides sufficient written documentation to the regional center to demonstrate that it is unable to provide transportation for the child.”

Respite Services

10. One of the services under the Lanterman Act that is available to consumers is respite. However, a regional center’s authority to purchase respite is not unlimited. Section 4686.5, subdivision (a)(1) provides: “A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.”

11. Section 4686.5, subdivision (a)(2), limits the authority of a regional center to purchase respite to not “more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer.” Section 4686.5, subdivision (a)(3)(A) provides: “A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) if it is demonstrated that the intensity of the consumer’s care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member’s ability to meet the care and supervision needs of the consumer.” A family member is one who has a consumer residing with her, is responsible for 24- hour care and supervision of the consumer, and is not an unrelated licensed residential care facility or foster family service. (§ 4686.5, subd. (a)(3)(B).)

12. “In-home respite services” are defined in the Lanterman Act as “intermittent or regularly scheduled temporary nonmedical care and supervision provided in a client’s own home for a regional center client who resides with a family member.” (§ 4690.2, subd. (a).) Subdivision (a) of section 4690.2 goes on to state that respite services are designed to “do all of the following: (1) Assist family members in maintaining the client at home. (2) Provide appropriate care and supervision in maintaining the client’s safety in the absence of family members. (3) Relieve family members from the constantly demanding responsibility of caring for the client. (4) Attend to the client’s basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by family members.”

13. CCR, section 58140, authorizes a regional center to negotiate with a respite vendor a different level of payment where a family member has more than one consumer member residing with them who is authorized to receive in-home respite services. This rate may not exceed the per-consumer per-hour rate established by the Department and may only apply to additional consumers receiving the respite services.

Discussion

Round Trip Transportation to PCDA

14. In light of Factual Findings 1 through 33 and Legal Conclusions 3 through 13, Claimant has failed to establish that he is entitled to have the Service Agency fund round trip transportation to PCDA. Claimant and Jennifer attend the same program at the same time each Friday evening. The decision to attend the program at 5:00 P.M. on Friday was made by the parents. Transporting a child to an activity that improves a child’s social skills is something that parents of typically developing children do. While the trip to PCDA on a Friday evening may be inconvenient, there is no evidence that Claimant has not attended the program since it was rescheduled to Friday evening at parents’ request. There has been only one occasions since June 2013 when Kevin had a doctor’s appointment in Alhambra on a Friday. The possibility that Kevin may have a conflicting doctor’s appointment sometime in the future or that other events may arise that make it impossible for Claimant to attend the program on an occasional basis, is insufficient reason to grant Claimant’s request for Service Agency funded round trip transportation to PCDA.

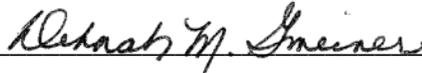
Respite

15. In light of Factual Findings 1 through 33 and Legal Conclusions 3 through 13, Claimant has failed to establish that he requires 30 hours of in-home respite at the regular per-hour rate in order to meet his and his family's need for in-home respite. However, Claimant has established that his parents want to be able to leave him in the care of a respite provider while taking Kevin and Jennifer on an outing, to the doctor or other event. Under Claimant's current respite allocation this is not possible. Without an authorization for some respite at the regular respite, parents would have to locate a respite care provider willing to accept \$3.30 per hour. This is unreasonable and does not comport with CCR section 58140. There is sufficient evidence that parents may sometimes want to provide respite to Claimant separate and apart from his siblings to warrant 10 hours of respite at the regular rate in addition to 20 hours at the sibling rate.

ORDER

Service Agency shall provide Claimant with 10 hours of respite at the regular rate and 20 hours at the sibling rate. Claimant's request for 30 hours of respite at the regular per-hour rate and for round trip transportation to PCDA is denied.

Dated: December 12, 2013



DEBORAH M. GMEINER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

Under the Lanterman Developmental Disabilities Services Act, this is a 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.