

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

FRANK D. LANTERMAN REGIONAL
CENTER,

Service Agency.

OAH No. 2014120261

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 20, 2015, in Los Angeles.

Pat Huth and Nora Asahara, Waterson & Huth, LLP, attorneys at law, represented Frank D. Lanterman Regional Center (FDLRC or Service Agency).

Claimant's mother, his authorized representative, represented claimant, who was present.¹

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on March 20, 2015.

ISSUE

Whether the Service Agency should be required to fund claimant's individual counseling services and supplemental parent training in an amount greater than that provided in the Schedule of Maximum Allowances for services provided by a clinical psychologist.

¹ Family titles are used to protect the privacy of claimant and his family.

EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1-10; claimant's exhibits A-E.

Testimony: Da Vonna Jenkins; claimant's mother.

FACTUAL FINDINGS

1. Claimant is a twenty-year-old man. He is an eligible consumer of FDLRC based on his diagnosis of autism. Claimant lives at home with his mother and attends community college. He would like eventually to live independently and attend a four-year college.

2. Claimant, through his mother, filed a request for a fair hearing on November 24, 2014. Claimant contends he is entitled to individual psychological counseling with supplemental parent training, and since August 2014 has requested that the Service Agency fund those services. Claimant specifically sought funding for services to be provided by C. Enjey Lin, Ph.D., a licensed clinical psychologist and board-certified behavior analyst. The Service Agency, by letter dated November 5, 2014, denied claimant's funding request on the ground that Dr. Lin's rate exceeded the amount the Service Agency could fund.

3. To date, the Service Agency has failed to provide that service, contrary to claimant's Individual Program Plan (IPP) and repeated requests. Claimant's most recent IPP, based on meetings on December 29, 2014, and January 16 and 23, 2015, recognizes claimant's mother's request for "counseling to help with addressing the symptoms of OCD. Mother would like a professional psychologist, psychiatrist and/or counselor who has experience with dealing with his unique needs (co-existing symptoms of OCD and Autism)." (Ex. 3.) The IPP reflects the Service Agency's commitment to "obtain possible regional centers vendor to [claimant] for ongoing counseling services by/on 1/30/15." (*Ibid.*) Claimant's mother testified at hearing that, among other symptoms, claimant becomes extremely anxious when outdoors, fears that insects are all around him, fears that he will get an infection, and feels a need to cover himself up and go inside to take a shower. This behavior occurs repeatedly during the day.

4. At hearing, the Service Agency witness, Regional Manager Davonna Jenkins, agreed that claimant needs and would benefit from psychotherapy or counseling, and that Dr. Lin is qualified to provide the services to claimant. The Service Agency contends, however, that the law impedes its ability to provide the needed therapy, because the only provider identified to date who has the qualifications and experience to provide appropriate counseling to claimant charges an hourly rate of pay that exceeds the maximum amount the Service Agency is allowed to pay.

5. On January 29, 2015, the Service Agency referred claimant's mother to a vendor who has provided counseling to other Service Agency consumers who have autism. Claimant's mother contacted that vendor; the vendor, however, said she had no experience addressing OCD behaviors and was not qualified to and could not help claimant due to his behaviors. By email on February 2, 2015, claimant's mother informed the Service Agency of this and asked for another referral. She asked for a referral by email again on February 26 and on March 4, but has received no other referrals. Claimant's mother sought a continuance of the hearing on this matter, originally scheduled for January 2015, in order to allow the Service Agency to identify an alternative provider.

6. Dr. Lin's rate for therapy services is \$275 per session. The Service Agency was willing to pay Dr. Lin a maximum of \$38.02 per hour. That rate is the maximum payment rate allowed by state regulation and the schedule of maximum allowances (SMA) for psychotherapy services, as set by the Medi-Cal program and followed by the Department of Developmental Services (DDS). (See, Legal Conclusions 10 & 11, *post.*) The Service Agency offered to vendorize Dr. Lin and pay her \$38.02 per hour, but Dr. Lin would not accept that rate.

7. The Service Agency explored other options, offering to reimburse claimant's mother \$38.02 per hour if she were to retain Dr. Lin; claimant's mother testified that she cannot afford to pay Dr. Lin the balance of her hourly rate. The Service Agency offered to identify other vendors qualified and available to provide counseling services appropriate to address claimant's needs. To date, though, despite agreeing months ago that claimant requires and would benefit from therapy to ameliorate the effects of his qualifying disability, the Service Agency has failed to make a referral to an appropriate service provider.

8. Thus, claimant has received no psychotherapy or counseling services and supports.² It has been seven months since claimant's mother first requested the services, and two months since the Service Agency referred claimant to a counselor not qualified to provide the needed services. The Service Agency has made no further referrals; Dr. Lin is, so far, the only qualified therapist known to claimant who can provide appropriate therapy services to claimant.

///

///

///

² Dr. Lin has been vendored by the Service Agency to provide social skills training to claimant. The fees Dr. Lin charges for those services are not subject to the schedule of maximum allowances under Title 17 of the California Code of Regulations.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)³

2. Under the Lanterman Act, issues concerning the rights of persons with developmental disabilities to receive services must be decided under the appeal and fair hearing procedures set forth in section 4700 et seq. (§ 4706, subd. (a).) As the party seeking services not agreed to by the Service Agency, claimant bears the burden of proving that the denial of services was improper and that he should receive funding for those services. (See § 4712, subd. (j); *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) Claimant must prove he is entitled to the funding by a preponderance of the evidence, because no law or statute requires otherwise. (Evid. Code, § 115.)

3. Cause exists to grant claimant's appeal, as set forth in Factual Findings 1 through 8, and Legal Conclusions 4 through 14.

4. Welfare and Institutions Code section 4502 states in pertinent part:

It is the intent of the Legislature that persons with developmental disabilities shall have rights including, but not limited to, the following:

(a) A right to treatment and habilitation services and supports in the least restrictive environment. Treatment and habilitations services and supports should foster the developmental potential of the person and be directed toward the achievement of the most independent, productive, and normal lives possible.

5. Welfare and Institutions Code section 4690 states:

The Director of Developmental Services shall establish, maintain, and revise, as necessary, an equitable process for setting rates of state payment for nonresidential services purchased by regional centers, and may promulgate regulations establishing program standards, or the process to be used for setting these rates, or both, in order to assure that regional centers may secure high-quality services for developmentally disabled persons from individuals or agencies vendored to provide these services. In developing the rates pursuant to regulation, the director may require vendors to submit program, cost, or other information, as necessary. The director shall take into account the rates paid by other agencies and jurisdictions

³ All further statutory references are to the Welfare and Institutions Code.

for comparable services in order to assure that regional center rates are at competitive levels. In no event shall rates established pursuant to this article be less than those established for comparable services under the Medi-Cal program.

6. Welfare and Institutions Code section 4646, subdivision (a), states in pertinent part:

(a) 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.

7. Mental health services and parent training are among the services and supports to be funded by regional centers. (§ 4512, subd. (b).)

8. Welfare and Institutions Code section 4648 states in pertinent part:

In order to achieve the stated objectives of a consumer’s individual program plan, the regional center shall conduct activities including, but not limited to, all of the following:

(a) Securing needed services and supports.

[¶] . . . [¶]

(4) [A] regional center may contract or issue a voucher for services and supports provided to a consumer or family at a cost not to exceed the maximum rate of payment for that service or support established by the department. . . .

(5) In order to ensure the maximum flexibility and availability of appropriate services and supports for persons with developmental disabilities, the department shall establish and maintain an equitable system of payment to providers of services and supports identified as necessary to the implementation of a consumers’ individual program plan. The system of payment shall include provision for a rate to ensure that the provider can meet the special needs of consumers and provide quality services and supports in the least restrictive setting as required by law.

[¶] . . . [¶]

(g) Where there are identified gaps in the system of services and supports or where there are identified consumers for whom no provider will provide services and supports contained in his or her individual program plan, the department may provide the services and supports directly.

9. Welfare and Institutions Code section 4669.2, subdivision (a), states in pertinent part:

(a) Notwithstanding any other provision of law, and provided that there shall be no reduction in direct service to persons eligible for services under this article, a regional center, with the approval of the State Department of Developmental Services, and in consultation with the local area boards, consumer and vendor advisory committees, and local advocacy organizations, may explore and implement any regional center service delivery alternative included in this section for consumers living in the community, as follows:

[¶] . . . [¶]

(3) Procedures whereby regional centers may negotiate levels of payment with providers for delivery of specific services to a group of consumers through a mutually agreed upon contract with a specific term and a guaranteed reimbursement amount. Contracted services may be for any specific service or combination of services across vendor categories.

10. California Code of Regulations, title 17, section 57210, subdivision (a) states in pertinent part:

(14) “Schedule of Maximum Allowances (SMA)” means the schedule of the maximum allowable rate for the service provided as established by the Department of Health Services (DHS) for services reimbursable under the Medi-Cal program. If the vendor’s usual and customary rate is less than the maximum rate allowed pursuant to the SMA, the regional center shall pay the vendor’s usual and customary rate.

11. The Service Agency considers itself constrained and unable to pay a rate greater than the \$38.02 hourly rate of pay under the Medi-Cal program’s SMA. (Cal. Code Regs., tit. 17, § 57210, subd. (a)(14); see also §§ 4690 & 4648, subd. (a)(4).) If the Service Agency were to pay a therapist a rate greater than the SMA rate, it contends, it would violate the applicable statutory and regulatory provisions.

12. Nevertheless, the Service Agency violates the law if it holds to its current position. If the Service Agency does not pay a rate greater than the SMA rate, and claimant continues without psychotherapy or counseling, an undisputed necessary service in his IPP, then the Service Agency violates other statutory and regulatory provisions, as well as applicable case law. Saliiently, if the Service Agency does not act to provide claimant with therapy, the Service Agency violates what is arguably the central and predominant purpose of the Lanterman Act: to provide needed services to persons with developmental disabilities. (§§ 4502, subd. (a), 4646, subd. (a), & 4648, subd. (a).)

13. The California Supreme Court has stated unequivocally that, “[w]hile it is true, as the Attorney General has observed, that the regional centers have ‘wide discretion’ in determining *how* to implement the IPP [citations], they have no discretion at all in determining *whether* to implement it: they must do so [citation].” (*Assn. for Retarded Citizens v. DDS* (1985) 38 Cal.3d 384, 390, original italics.) Here also, the Service Agency must implement claimant’s IPP. The Legislature’s insistence on having the needs of persons with developmental disabilities met by the provision of services is so significant that the Legislature directs DDS itself to provide services directly to consumers in cases like this one, where, on the evidence presented at hearing, demonstrating that claimant has had no therapy services for seven months despite an acknowledged need for such services, there appear to be “gaps in the system of services and supports or where there are identified consumers for whom no provider will provide services and supports contained in [his] individual program plan.” (§ 4648, subd. (g).)

14. The Service Agency is capable of providing claimant’s therapy through an appropriate provider if it pays a rate greater than the SMA rate. The SMA rate, which the Legislature presumes “ensure[s] the maximum flexibility and availability of appropriate services and supports” and “ensure[s] that the provider can meet the special needs of consumers” (§ 4648, subd. (a)(5)), does not do so in this case. The evidence proved that the SMA rate provided no such flexibility or availability, and has resulted in claimant’s need for therapy going unmet. The Service Agency will, therefore, better carry out its obligations under the Lanterman Act by paying a greater rate and implementing claimant’s IPP than by not providing claimant a needed service and frustrating the statute’s principal purpose. What the Legislature requires of the Service Agency is that, in implementing claimant’s IPP, the therapy be effective in meeting his needs and that it balance that effectiveness with the cost-effective use of public resources. (§ 4646, subd. (a).)

15. In this case, it is appropriate that the Service Agency implement claimant’s IPP, paying a cost-effective rate greater than the SMA rate, for claimant’s therapy.

///

///

///

ORDER

Claimant's appeal is granted. The Service Agency shall approve a cost-effective rate of pay, greater than the SMA rate for individual psychotherapy and supplemental parent training, to engage a therapist who will provide claimant with counseling appropriate to ameliorate the effects of his qualifying disability. In an IPP meeting to be held as soon as reasonably possible, claimant's planning team shall meet to decide on an appropriate provider, under section 4648, subdivision (a)(6), and shall decide on an appropriate provider no later than 30 days from the effective date of this Decision.

DATE: March 25, 2015

/s/
HOWARD W. COHEN
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.