

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MELISSA R.,

Claimant,

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

Case No. 2012061200

DECISION

The hearing in the above-captioned matter was held on January 24, 2013, at Pomona, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. San Gabriel/Pomona Regional Center (Service Agency) was represented by Daniela Martinez, Fair Hearing Manager. Claimant Melissa R. was present and was represented by her father, P.R.¹

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

ISSUE PRESENTED

Should the Service Agency be ordered to purchase a powered wheelchair lift to install on the family's van, so as to assist in the transportation of Claimant, who is confined to a wheelchair?

FACTUAL FINDINGS

¹ Initials are used for the family surname to protect Claimant's privacy.

1. Claimant is a 24-year-old-woman who suffers from several maladies, three of which make her eligible for services from the Service Agency pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.² Her eligible conditions are mild intellectual disability, Cerebral Palsy, and Epilepsy. She also suffers from asthma, sleep apnea, and spine deformity. Claimant suffers from incontinence, and due to weight loss, she recently had a G-tube placed so she could be fed through it. She has a very limited ability to speak, and her most recent Individual Program Plan (IPP) shows she has lost language in recent months. (Ex. 5.)

2. Claimant had requested funding for purchase of a power lift that could be installed in her family's van, because the system they had had failed. On June 28, 2012, the Service Agency issued a Notice of Proposed Action, which stated that the Service Agency was denying a request "for funding for repairs to a van wheelchair lift totaling \$4,206." (Ex. 1, p. 2.) Claimant thereafter requested a fair hearing, and this matter ensued. All jurisdictional requirements have been met.³

3. Claimant lives with her mother, father, and younger sister. Her mother is her conservator. She is wholly dependent on the care and assistance of others, in every aspect of life. For example, her mother must take care of all personal care tasks; while Claimant used to have some capacity to assist in some tasks, that ability has faded in recent months. She has had a series of health problems that have required hospitalizations during the past year. Aside from placement of the G-tube in August 2012, she was hospitalized in September of that year for tachecardia and brachiocardia. She has had trouble with breathing as well. She suffers approximately 15 petit mal seizures per day. (Ex. 5.)

4. According to her IPP, it is "very hard" for Claimant to get around. (Ex. 5, p. 3.) She is non-ambulatory but cannot move her wheelchair, and thus she must have support at all times when she is out in the community. (*Id.*) This is not just a function of mobility, or the lack thereof, but she must have someone to help her with other needs, such as a diaper change. The record indicates that when she goes out, she is often accompanied by a nurse and a family member.

5. For years mobility was assisted by the fact that the family van had a power lift gate as an accessory, so Claimant's mother or a helper could get her wheelchair in and out of the van. However, the wheelchair lift was damaged, is no longer operable, and is beyond repair, a matter established by Claimant during the hearing. (See Ex. E, a letter from Aero

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

³ The record does not include a copy of the Fair Hearing Request. The ALJ takes official notice of the copy in the OAH file, which shows that it was executed on June 28, 2012.

Mobility.⁴ A new system, rear loading (as opposed to the old which loaded through the side doors), was estimated to cost \$5,300 in July 2012. (Ex. G-3.) That amount is in excess of the amount set out on the Notice of Proposed Action.

6. Since the existing system failed, Claimant's father and/or her brother, who does not live at home, have to load the wheelchair into the van. Claimant's mother and sister cannot do so, and furthermore, Claimant's mother has injured her back since the request for Fair Hearing was filed. Claimant's father has a full time job, and while he has some flexibility in his work hours, he cannot always be home to provide assistance. Likewise, Claimant's brother is not always available either.

7. Claimant has, at times, utilized a generic service, Access Services (Access), for transportation. Access has a fleet of small busses that do not run on regular routes, but do run on regular schedules. One may request a pick-up and drop-off the day before the planned trip. The Access bus will pick the rider up within 20 minutes of the scheduled time. Transport times can fluctuate, depending on whether the bus must pick up other riders—a common occurrence—and how long it takes to pick those other persons up. Claimant may have one person ride with her, such as her mother or an aide. And, after one has had the same trip for six weeks, one is eligible to have a "standing order" set up, so that daily phone calls are not necessary.

8. The Service Agency acknowledged that the Access system is not perfect, in that the drive times can be extended by other pick-ups and drop-offs. Further, the bus picks up curbside; if a rider must remain indoors, there is a chance of a missed ride.

9. Claimant's father pointed to other problems with using Access. Claimant now has all of her medical treatment at Rancho Los Amigos, in Downey. While getting there with Access is not the biggest problem (though it poses issues), pick up is. That is because a trip to that facility can last all day; it is just not practical to set up a pick up time; even if it is set late in the afternoon, there is no guarantee that Claimant will be finished with her visit and ready to go. It should be noted that six or more "no shows" by a rider within a 60-day period may lead to suspension of services altogether. (Ex. 2, p. 9.)

10. A further problem posed by using Access is that care issues that arise during transit are not readily amenable to a response. That is, if Claimant has a seizure, or needs a diaper change, the bus cannot pull over so that Claimant's mother or aide can respond. (Access allows one person to accompany the disabled passenger.) On the other hand, when she is transported in the family van, a stop does not pose the same problems.

11. (A) The Service Agency does not have a service policy that is completely on point in this matter. Two policies, however, possibly provide guidance. The first pertains to transportation services, but does not speak to the concept of providing or modifying a

⁴ Claimant's exhibits, produced in a binder, were not labeled. The ALJ has identified them alphabetically, to avoid confusion with the Service Agency's exhibits, which were numbered. To be clear, all exhibits offered by the parties were received in evidence.

vehicle. Generally, those consumers who can safely use public transportation are to do so, and Access is a preferred mode of public transportation. However, when the need is established, specialized transportation can be purchased for consumers of the Service Agency. The service policy also states "the regional center shall purchase the least expensive transportation modality that meets the individual's needs." (Ex. 4, p. 34.)

(B) The second policy spoke to the purchase of medical and dental supplies, which the Service Agency acknowledged are substantially different from the machinery requested by Claimant. Such can be purchased in some situations, including medications, where there is no generic or other third party source to provide the equipment. Furthermore, the needed equipment must be related to the eligible disability, must be deemed medically necessary, and the regional center must have reviewed the matter and approved of the treatment or equipment. (Ex. 4, p. 20.)

12. There is no evidence that the IPP team has studied the cost of transportation services if provided by a vendor rather than Access, that is, a vendor who could more flexibly respond to the Claimant's needs.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 and 2.

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 cannot 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., Code §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subd. (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, subd. (a)(1) & (a)(2).)

4. Section 4512, subdivision (b), of the Lanterman Act states in part:

‘Services and supports for person with developmental disabilities’ means specialized service and supports or special adaptations of generic services and support 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, . . . education, . . . recreation, . . . adaptive equipment and supplies . . . respite, . . . and transportation services necessary to ensure delivery of services to persons with developmental disabilities.

5. 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.) It is clear that 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.

6. Any service policies established by the Service Agency to generally govern the provision of services may not take precedence over the established individual needs of the consumer, which are ultimately paramount. (*See Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal. 3d 384, 390-393.) The decision in *Association of Retarded Citizens, supra*, stands for the proposition that the Department of Developmental Services can not enact regulations that would do violence to the obligation to meet a consumer's needs on an individualized basis. It follows that if the Department could not enact such regulations, then the individual regional centers cannot enact general policies that bar them from meeting the established individual needs of a given consumer.

7. The regional center is to utilize the service coordination model, in which each consumer shall have a designated service coordinator "who is responsible for providing or ensuring that needed services and supports are available to the consumer." (§ 4640.7, subd. (b).)

8. The IPP shall 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 disabled individual, 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).)

9. When developing IPP's for children, the regional center is to be guided by the principles, process, and services and support parameters laid out in section 4685. (§ 4646.5, subd.(a)(3).) Section 4685 makes it a clear legislative priority that disabled children remain with their families, and the regional centers are to be innovative so that the goal can be met. (§ 4685, subd. (c)(1).) To be sure, Claimant is now an adult. However, keeping her in the family home is plainly consonant with the intent of the Lanterman Act. With that in mind, it should be remembered that the regional centers are specifically authorized to utilize "innovative service delivery mechanisms, including but not limited to, vouchers, . . ." (§ 4685, subd. (c)(3).) The intent that the regional centers be innovative and economical in the practices used to reach the goals set out in IPP's is also set forth in section 4651.

10. (A) Section 4648, subdivision (a)(8), provides that "Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services."

(B) Section 4659 provides, in part, that the regional centers shall identify and pursue all possible sources of funding for consumers receiving services, including but not limited to, "Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniformed services, school districts, and federal supplementary security income and state supplementary income."

11. (A) It appears that modifications to a van, necessary to moving a wheelchair, fall into the term "adaptive equipment and supplies," as that term is used in section 4512, subdivision (b). As a sidelight, it should be noted that when the Legislature established the potential Self Directed Service Plan program, "vehicle adaptations" was one of the authorized uses of funds that would be provided to consumers. (§4685.7, subd. (b)(6)(K).)

(B) Furthermore, the ALJ takes official notice of two other decisions issued by OAH pertaining to van modifications, one involving Harbor Regional Center, and one involving Regional Center of Orange County (RCOC). In the former case, *Courtney W. v. Harbor Regional Center*, OAH No. 2006100330, the issue was not whether or not a wheelchair lift could be funded, but rather whether the IPP process had been followed by Claimant's father. Likewise, in the other matter, *Joseph J. v. RCOC*. OAH No. 2009030345 consolidated with 2009030349, the regional center in question had a service policy that covered the purchase of wheelchair lifts, denominated "van lifts" by that agency. Thus, neither regional center read the Lanterman Act to bar provision of such equipment; instead they disputed how that equipment should be provided, and whether the consumer needed it.

12. At this point, another viable option does not exist to the modification of the family van. While Access is a generic service, the service is inadequate. Vendored transportation would obviously cost much more money. A lift would allow the family to remain Claimant's primary caretakers for years to come, and would facilitate her ability to go out into the community with family, and to obtain medical care from a generic source.

ORDER

Claimant's appeal is granted. The Service Agency shall fund the installation of a rear loading lift, of the type specified in the Mobility Specialist Inc. estimate, Exhibit G-3.

February 7, 2013

/s/

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.