

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT ,

vs.

NORTH LOS ANGELES COUNTY
REGIONAL CENTER,

Service Agency.

OAH No. 2015030904

DECISION

The hearing in the above-captioned matter took place on June 8, 2015, in Lancaster, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. Claimant was represented by his mother, G.A., and Ibrahim Saab, attorney at law, Office of Clients' Rights Advocacy.¹ The Service Agency, North Los Angeles County Regional Center (NLCARC or Service Agency) was represented by Stella Dorian, Fair Hearing Representative.

Evidence was received on the hearing date. The record was held open so that the parties could file post-hearing briefs. Claimant's brief was timely filed, and is marked as exhibit W for identification. The Service Agency's brief was timely filed, and is marked for identification as exhibit 12. The matter was submitted for decision on July 17, 2015.

The ALJ hereby makes his factual findings, legal conclusions, and orders, as follows:

ISSUE PRESENTED

May the Service Agency discontinue personal assistant services currently provided to Claimant on the grounds that Claimant's adoptive parents receive Adoptions Assistance Program (AAP) funds, and that such funds are to be treated as a

¹ Initials are used in the place of the parents' names in the interests of privacy.

generic resource to fund the service? Alternatively, may the Service Agency terminate the service because Claimant is receiving services funded by Medi-Cal?

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Claimant is a 17-year-old young man who has been receiving 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 based on a diagnosis of moderate intellectual disability and seizure disorder.

2. Mr. and Mrs. A. adopted Claimant in 2005, when he was seven years old. They had been his foster parents up until that time. (Ex. A.) Claimant lives with his adopted parents, and two older siblings, both adopted.

3. On February 26, 2015, NLACRC issued a Notice of Proposed Action (NOPA) to Claimant which, in essence, stated that effective March 26, 2015, it would no longer fund for attendant care/personal assistance at the rate of 18 hours per month. (Ex. 1, p. 8.) The Service Agency took the position that Claimant was receiving 28 hours per week of nursing services from a publicly funded program administered by Medi-Cal, and that the Service Agency could not fund the services. The Service agency cited section 4648.5, subdivision (a)(8), in support of its action, but this appears to be a typographical error, section 4648.5 has no subdivision (a)(8). Instead, this is deemed to be a reference to section 4648, subdivision (a)(8), which essentially provides that the regional centers may not use their resources to supplant the budget of public agencies.

4. On or about March 16, 2015, Claimant's mother submitted a fair hearing request. Her fair hearing request calls for continuance of the 18 hours per month of personal assistance. (Ex. 1, p. 7.) This proceeding ensued, all jurisdictional requirements having been met.

Claimant's Condition

5. In 2005, when Claimant seven years and eight months old, he was evaluated by Larry E. Gaines, Ph.D., a licensed psychologist. Dr. Gaines noted that Claimant had previously been through regional center evaluations which found that he suffered from Moderate Mental Retardation and symptoms of Attention Deficit Hyperactivity Disorder. His mother was concerned with some autistic-like behaviors.

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

Dr. Gaines found that cognitively Claimant was then functioning at the level of a 13-month old child. (Ex. E, p. 2.) Dr. Gaines diagnosed Claimant as suffering from Severe Mental Retardation, with some autistic features. (*Id.*, p. 4.) However, that diagnosis is not carried forward into Claimant's current Individual Program Plan (IPP) or Client Development Evaluation Report (CDER). The reason is not established in the record.

6. A review of Claimant's CDER reveals that his disabilities negatively impact him and his family in a number of ways, and those impacts are significant. Claimant requires assistance when taking medication, and in personal care activities. He wets or soils himself at least once per week. He requires constant supervision during waking hours, in all settings, to prevent injury or harm to himself or others. He has a limited vocabulary—30 words or less—and he uses the words in short sentences of about three words. He does not initiate social interaction, but rather will disrupt it on a daily basis. His physical aggression has caused injury, and he has caused major property damage. He runs away on a near daily basis. He has emotional outbursts at least once per week, and they usually require intervention. He can eat with at least one small utensil without spillage. (Ex. F.)

7. (A) Claimant's September 2014 IPP sheds further light on his condition. He needs assistance with personal hygiene, including after a bowel movement, although he is toilet trained. He wets himself at school about once per month, and at night, so his mother has him wear a diaper to bed. He is vocal, but his speech is unintelligible to those who don't know him well, unless he is using profanity, which "comes out rather clear." (Ex. B, p. 2.) He cannot prepare meals for himself, and although he can cut up his food, his mother keeps sharp objects away from him.

(B) Claimant's aggressive behavior is often directed at his mother, and includes hitting, kicking, biting, scratching, and pushing. Outbursts of such behavior can last up to an hour, and Claimant often requires restraint to prevent injury to himself and others. Claimant's service coordinator saw that Mrs. A.'s arms were "full of black, blue, purple, and yellowish type bruises." (Ex. B, p. 2.) Claimant's aggressive behavior has not been focused solely on his mother; his behavior was the reason that his former home nursing agency quit; the nurses could not deal with his aggression. Claimant also engages in self-injurious behavior, which can be substantial. For example, he was biting his feet so much that he was damaging his toe nails, and his pediatrician recommended removing his toe-nails, which seemed to lead to an abatement of the foot biting.

(C) When Claimant runs away, his mother has to chase him down, and he will dart out into traffic. On the day of the September 2014 IPP meeting, Claimant got out of the house, walking at a fast pace, and his mother was forced to follow him around the neighborhood for somewhere between 30 and 45 minutes before she could get him home again, an event witnessed by Claimant's service coordinator.

(D) Claimant receives special education services from his local high school district. He has a one-to-one aide at school due to his behaviors. The school district found him eligible for special education services due to his intellectual disability as well as for autism.³ (Ex. B, p. 2.)

(E) As of the September 2014 IPP meeting, seizure activity had increased to about three times per month.

(F) Claimant suffers from Methicillin-Resistant Staphylococcus Aureus, known as MRSA, and severe acne. MRSA can cause boils and lesions on the skin, and he is being treated with antibiotics. Claimant also suffers from asthma. (Ex. B, p. 3.)

8. Claimant receives a number of medications, including Doxycycline (for MRSA outbreaks), Lamotrigine (for seizures), Carbamezepine (seizures), and Levetricam (seizures). He also takes four other medications for his acne and asthma. (Ex B, p. 4.)

9. The service coordinator who has been assigned Claimant's case testified to seeing Claimant elope on the occasion described in Factual Finding 7(C). She also testified to seeing Claimant have an aggressive outburst. In the latter situation, the clinical team was visiting, and Claimant got aggressive, scratching his mother and himself, and pushing his mom. The service coordinator described Claimant as all but unable to be redirected, and believes that in some cases he must be restrained.

10. (A) Claimant's mother testified, and added to the information obtained from the Consumer's IPP and CDER. She explained that Claimant is almost 18, but he must have help bathing, as he can't adjust the temperature of the water, or deal with shampoo. He has some ability to dress himself, though his shirt may be on backward, or his belt strung through only two belt loops. His food needs to be cut up when he eats, and he often forgets to eat. He is rather sensitive to hot weather and wind, both weather conditions prevalent in the area where Claimant lives. Claimant has injured his mother many times, including biting her. A few days before the hearing, Claimant was angered, threw a travel cup at his sister, and dented the stove. The doors to the family home must be constantly locked, and if Claimant goes out into the community, he has to have two people with him to manage his behaviors.

³ The basis of that conclusion is not established by the record. It should be noted that the Home Health Certification and Plan of Care, which pertains to the nursing services now being provided, states a diagnosis of autistic disorder, with what appears to be a diagnosis date of September 3, 1997. (Ex. I.)

(B) Claimant's mother testified that she tends to use the personal assistance in the community, such as when she is grocery shopping. Sometimes the assistant will go with her and Claimant when he goes to the doctor. She sometimes pays her adult daughter to assist with Claimant.

Services and Supports Received by Claimant

11. (A) According to the September 2014 IPP, Respondent was receiving the following services from the Service Agency: behavior respite, up to 30 hours per month, from the vendor Behavior Respite in Action (BRIA); attendant care, also provided by BRIA, 18 hours per month; and in-home parent training, up to 41 hours per month, provided by California Psychcare. The IPP notes that the attendant care had been approved by "exemption staffing team." (Ex. B, p. 1.)

(B) California Psychcare terminated services in April 2015 because there had had consistent problems with reaching Claimant's mother and father. Between October 2014 and March 2015, the vendor had only been able to spend five and one-half hours with the parent to work on a plan. (Ex. 5.) The vendor declared that in-home parent training services were not appropriate as of April 2015.

12. Behavior respite, rather than regular respite services, is apparently utilized due to Claimant's maladaptive behaviors. (Ex. 3.)

13. The IPP lists a number of "generic services," including Medi-Cal, Claimant's special education program, AAP "to assist in [Claimant's] [c]are and supervision needs," and Early Periodic Screening and Diagnosis & Treatment (EPSDT) up to 28 hours per week at the LVN level provided by Maxim Health Care (Maxim). (Ex. B, p. 1.)

14. (A) EPSDT services are funded by Medi-Cal, and are currently provided by Maxim. Prior to March 2014, the services had been provided by other vendors; the last one to provide the services, the last one to do so before Maxim was available was Accent Care. That firm stopped providing EPSDT to Claimant because of his behavioral issues; the nurses providing the services would not work with him. Furthermore, as of March 2014, the other firms that could provide such services refused to do so. It appears Claimant had been through every available firm in the Lancaster/Palmdale area until Maxim was convinced to try to provide the services. (Ex. 10, p. 1.)

(B) When the EPSDT services were lost, Claimant's mother sought the attendant care services from the Service Agency. As noted in the September 2014 IPP, they were authorized by the exemption staffing team. The cost of the service is \$32 per hour, or \$576 per month. (Ex. 11.)

(C) The Home Health Certification and Plan of Care (Care Plan) provides goals for the EPSDT, including that Claimant will be injury free, that his seizures will be managed, that his respiratory status will remain stable, and that behaviors will be managed. (Ex. I, p. 1.) However, when maladaptive behaviors are exhibited, then staff are to leave Claimant alone. It appears that the staff are to provide medications to Claimant, and are to document seizures, and to provide breathing treatments as needed. (*Id.*, p. 2.)

15. During the hearing, Claimant's service coordinator testified that, in her opinion, Claimant requires two-to-one supervision at all times.

AAP Benefits

16. Claimant's adoptive parents receive AAP benefits. In November 2013, the Department of Social Services (DSS) approved monthly payments of \$4,386.

17. In March 2008, the DSS issued an "all county" letter, number 08-17, which spoke to the issue of AAP payments and regional center services. It was premised on then-recent legislation that enacted/amended section 11464. The letter states that the legislation provided that AAP benefits were not generic resources within the meaning of the Lanterman Act, and that such benefits could not be counted by the regional centers as benefits or gross income for purposes of the Family Cost Participation Program. (Ex. R, pp. 1, 3.)

18. Excerpts from a publication by the Department of Developmental Services (DDS), entitled A Guide to Regional Center Services for Foster and Adoptive Families, published in 2008, were submitted in evidence. The document states, in part, that regional centers will not consider AAP benefits as a substitute for regional center services or as income in calculating a family's income in the Family Cost Participation Program. (Ex. Q, p. 2.)

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 4.

General Rules

2. Services under the Lanterman Act 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, in essence, establish such terms. (See § 4710.5, subd. (a); see also, § 4646, subd. (g).)

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, subd. (a)(1) & (a)(2).)

4. (A) Services provided must be cost effective (§ 4512, subd. (b)), 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 consumers and families.

(B) In determining what services to provide, a priority is assigned to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).) At the same time, a priority is assigned to keeping a disabled child in the family home. (§§ 4646.5, subd. (a)(3); 4685, subds. (a), (c).)

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, . . .

6. (A) The Lanterman Act calls for the use of generic resources to assist in meeting the needs of developmentally disabled persons. For example, the Act looks to public schools to provide education, and government programs such as Medicare to provide other needed services, and Social Security to provide monies that might be used for the benefit of consumers. (§ 4659, subd. (a); see also §4648, subd. (a)(8) [regional centers not to supplant the budget of government agencies].) Section 4646.4 also speaks to the issue, as it requires the pursuit of generic resources, private funding such as insurance, and family responsibility for providing services and supports to non-disabled children.

(B) The term “generic resources” is not defined by the Lanterman Act. However, the terms “generic agencies” and “generic sources” are defined in regulations. California Code of Regulations (CCR), title 17, section 54302, subdivision (31),⁴ defines a generic agency as “any agency which has a legal responsibility to serve all members of the general public and which is receiving public funds for providing such services.” Generic sources are defined in CCR section 54032, subdivision (32), as “voluntary service organizations, commercial businesses, non-profit organizations, generic agencies, and similar entities in the community whose services and products are regularly available to those members of the general public needing them.”

The AAP Benefits Are Not Generic Resources

7. AAP benefits exist to help children who might benefit from adoption. It was the Legislature’s intent to benefit children living in foster homes by providing them the security of a permanent home, and to reduce the expenditures associated with foster care. (§ 16115.5; see also 16122, subd. (a).) Regulations enacted to assist in the administration of the AAP program are found in title 22 of the CCR. In section 35333, subdivision (a)(5) of that title, it states: “The agency shall advise the adoptive parents that the AAP benefit does not include payment for any specific good or service, but is intended to assist the adoptive parents in meeting the child's needs.” Given the Service Agency’s efforts to have Claimant’s parents “account” for how they spend the AAP grant, this regulation appears relevant, and would tend to be a bar to an accounting obligation.

8. (A) The AAP benefits do not readily fit into the definition of a generic resource, in the sense that they are not regularly available to all members of the public, even if they are provided under the auspices of the DSS. Only particular people are entitled to receive such public monies, i.e., those who adopt children, whether the children suffer from developmental disabilities, or not. They are not “all members of the general public,” as that term is used in CCR section 54302, subdivision (31).

⁴ Further citations to the CCR shall be to title 17 thereof.

(B) As agreed by both parties, the AAP benefits, by statute, are to be used for the “care and supervision” of an adopted child. (§ 4684, subd. (d)(2).) Section 4684, subdivision (d)(2) references section 11460, subdivision (b) for a definition of the term “care and supervision.” There, in pertinent part, it states:

“Care and supervision” includes food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which he or she is enrolled at the time of placement.

9. (A) At the same time, section 4684 makes clear that the regional centers remain obligated to fund services set out in the IPP, or the analog of the IPP that is used in Early Start cases, the Individual Family Service Plan (IFSP). Section 4684, subdivision (c)(2), provides that the “regional centers shall purchase or secure the services that are contained in the child's IFSP or IPP.”

(B) Section 4684, subdivision (d)(2), which states that the AAP benefits are to be used for care and supervision, repeats the rule set out in subdivision (c)(2) in more detail, as follows:

[t]he regional centers shall separately purchase or secure other services contained in the child's IFSP or IPP pursuant to Section 4646 to 4648, inclusive, Section 4685, and Sections 95018 and 95020 of the Government Code. Notwithstanding any other provision of law or regulation, the receipt of AFDC-FC or AAP benefits shall not be cause to deny any other services that a child or family for which the child or family is otherwise eligible pursuant to this division.

Here the Service Agency seeks to deny the personal assistance services because Claimant’s parents receive AAP benefits, contrary to the rule quoted above. As discussed below, Claimant is eligible for the personal assistant services.

(C) Section 16121, subdivision (c)(3), mirrors the aforementioned statutes, stating that “regional centers shall separately purchase or secure the services contained in the child's IFSP or IPP, pursuant to Section 4684.”

(D) Section 4684, subdivision (c)(3), is consistent with subdivisions (c)(2) and (d)(2), providing that:

For regional center consumers receiving services under paragraph (1) or (2), these services shall be separately purchased or secured by the regional center, pursuant to Sections 4646 to

4648, inclusive, and Section 4685, and pursuant to Sections 95018 and 95020 of the Government Code. AFDC-FC and AAP benefits shall not be counted toward the gross income calculated for the purposes of the Family Cost Participation Program pursuant to Section 4783. Recipients of AFDC-FC benefits shall not be subject to the Family Cost Participation Program requirements.

Section 4783 essentially allows the regional centers to consider parental income when providing what have typically been specialized services and supports, namely respite, day care, and camping. Such insulation of the AAP (or AFDC) funds from consideration in providing respite care, a core service under section 4512, subdivision (b), is telling. Beyond care and supervision, AAP funds are not available to fund services and supports that are needed to assist regional center consumers in 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).)

10. Claimant is correct when he points to evidence that both DSS and DDS do not treat AAP benefits as generic resources that must be used to provide services and supports of the type to be provided by the regional centers. The DSS All Counties letter discussed in Factual Finding 17 is rather clear on the point, as is a DDS publication referenced in Factual Finding 18. Some weight should be given to the interpretation of the statutes made by the two state agencies that have been charged with implementation of the relevant legislation, for a period of years. (*In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1272, and cases cited thereat.)

The Personal Assistant Services Are Necessary

11. The testimony of Claimant's mother service coordinator are sufficient to establish the need for the personal assistant services. Their testimony is supported by documents as well, including the treatment plan developed by the nursing service. (Factual Findings 5-10.)

12. The Service Agency has contended that the disputed services are part and parcel of Claimant's care and supervision, one thing for which the AAP monies are paid. That is not the case, given that Claimant's mother and others need assistance in caring for and supervising Claimant. Again, as opined by the Service Coordinator, Claimant needs two-to-one supervision. (Factual Finding 15.) Thus, sections 4684 and 11460 cannot avail the Service Agency in this case.

13. This case started with the Service Agency taking the position that since EPSDT services had been restored, the personal assistant services should be

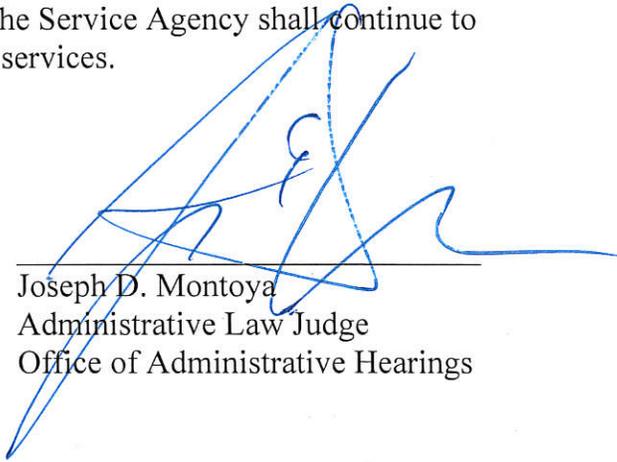
terminated. (Factual Finding 3.) However, the record establishes that the EPSDT services are not a substitute for the personal assistant services; the two services at this time serve two different needs. The nursing services now being provided do not assist in managing Claimant's behaviors; the services are medical in nature. (Factual Finding 14.) If Claimant were to act up, any nurse on duty would be under instruction from his or her employer to not become involved in managing the unruly behavior. (Factual Finding 14.) The Service Agency is not supplanting the budget of Medi-Cal in violation of section 4648, subdivision (a)(8), because Medi-Cal is funding EPSDT, not the personal assistant services.

14. In summary, the services are needed to assist Claimant's mother in carrying out her obligation to provide care and supervision of her son. The services are not interchangeable with the EPSDT nursing services. AAP payments are not generic funds (and should not have been listed in the IPP as such). Given all the facts and circumstances of this case, Claimant's appeal should be granted.

ORDER

The appeal of Claimant is sustained, and the Service Agency shall continue to provide 18 hours per month of personal assistant services.

July 30, 2015



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.