

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of

FRANCINE F.,

Claimant,

And

SAN DIEGO REGIONAL CENTER,

Service Agency.

OAH No. L 2004080502

DECISION

On January 4, 2005, in San Marcos, California, Stephen E. Hjelt, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter.

The San Diego Regional Center (hereinafter, referred to as SDRC, or service agency) was represented by Ronald House, Attorney at Law.

Francine F. (hereinafter, claimant) was represented by Bernadette S., her sister and conservator.

The record was opened and evidence and testimony were taken. The record was held open for the submission of written argument. Both parties supplied written closing argument and the matter was submitted for decision on January 18, 2005.

ISSUE

Should the service agency be required to continue funding for supplemental staffing care of 20 hours per week at a cost of \$13.50 per hour?

FACTUAL FINDINGS

1. Claimant is a 41 -year-old Service Agency Consumer diagnosed with severe mental retardation and bipolar disorder. She is currently living at Independent Options in

Oceanside California. Since early 2003 she has been enrolled in a day program at ARC in Vista, California. This is a community based day program. After a period of adjustment, it was determined by ARC that the initial staffing ration of 3:1 (one staff member to 3 consumers) was not adequate to provide claimant with sufficient attention and safety. Supplemental staffing was requested and the San Diego Regional Center agreed on an interim basis. The intent of supplemental staffing was to enhance the staffing ratio (to 2:1 or 1:1 for example) for a time limited period when a consumer is going through an acute period of adjustment. San Diego Regional Center agreed to funding for supplemental staffing of 20 hours per week at \$13.50 per hour. It has been paying this amount as aid paid pending.

2. The tragedy in this case is that the inflexibility in position is not from the family or the regional center. It is from ARC the current day program operator. They will not keep claimant in their program unless they continue to receive the supplemental staffing funding. This is unfortunate because it significantly increases the monthly expense to the Regional Center. Although expense is not the sole determinant all Regional Centers are required to provide “necessary” services in a cost effective manner.

3. The San Diego Regional Center has regulations dealing with the purchase of supplemental services. Regional Center exhibit 19, in evidence, sets forth the criteria for such purchases: The relevant section reads as follows:

“San Diego Regional Center may purchase supplemental services for consumers in licensed residential facilities based on the SDRC Criteria and Procedures for this purchase. Expectations for the use of these services include the following:

Supplemental Services:

-Are transitional in nature. They represent intensified services to prepared the consumer to participate in programs with the staffing required by the service level approved for the facility. Expected time frames for reductions in additional supports are identified in the original plan.

-Are specific program interventions that are tied to specific expected outcomes.

-Include evaluation by the service provider of the effectiveness of the identified interventions and assessment of the continued need on an ongoing basis but not less than every two weeks.

-Are provided only for the hours that are justified by the program that has been designed for the consumer i.e., the interventions described include an explanation of why those interventions are needed and why the interventions can occur only through supplemental staffing.

What Supplemental Services Are Not

-They are not intended for use solely to serve as a “bodyguard” for the consumer to prevent injury to the consumer, to others, or to property.

-They are not intended to be in place for an extended or indefinite period of time.

-They are not intended to provide the services for which the facility receives the rate assigned by DDS.

-They are not intended to instill a dependence by the consumer or by the facility on supplemental staffing in order for the consumer to sustain success in the facility. Therefore, additional staff are not assigned to the person in need of the supplemental services. Rather, the additional staff supplement routine staffing so that each staff present interacts/intervenes/provides programs to the consumer who receives the supplemental staffing. This arrangement prevents the consumer from becoming attached to "his/her buddy" who then goes away, setting the consumer up for failure and making the transition to reduced services extremely difficult.

4. Claimant has severe disabilities and is extremely low functioning. She also has boundless energy. She is a handful and unless she gets a great deal of physical activity (typically in the form of walking) she becomes even more difficult to deal with and control. She is loved and supported by a devoted family who are by any definition extraordinary. They not only provide support (they visit often and take her out at least once each weekend) but are excellent advocates as well. They are knowledgeable about claimant's condition and her limitations and also are well versed in the types of programs and facilities that may be of benefit to claimant.

5. The Regional Center has worked very well with the family in the 2 plus years that claimant has been a client. There is nothing in this record that suggest in any way that the Regional Center does not have claimant's interests at heart. Claimant's representative suggested that all the Regional Center cares about is a few bucks. Unfortunately, they are supposed to care about "bucks" and they are duty bound to operate in a cost effective manner so that all consumers may benefit from the services they need.

6. This case is a disagreement over differing conceptions of what is the most appropriate placement for claimant consistent with fiscal prudence. What was established by the evidence in this case is that Claimant is in a day program that suits her needs quite well and that she has been stable for quite some time. She has had less satisfactory placements in the past. She does get a crucial benefit from the current day program placement. She gets a considerable amount of attention and daily physical activity. She walks and is in the community regularly. This, for claimant, is no small benefit. For her, based on her level of functioning, this level of activity is necessary. Despite her relatively low level of functioning, she is being provided more than just a babysitter or a bodyguard. Documentary evidence presented in this case from her day program coaches demonstrates that her "behaviors" are continuously being evaluated and that behavior change remains a goal.

7. Claimant argues that then new program proposed for claimant at Advanced Options (AO) is not a good fit for claimant because it is a behavior program. This misses the point. All such programs are behavior programs in that they seek to change or modify

behavior through various techniques. The program claimant is currently in is a behavior program at its core although the behavioral change is approached indirectly. Calling it community based does not adequately describe it nor does it change the fact that it has a behavior component.

8. There were no unimpressive witnesses in this case. Each, whether a lay witness or an expert witness, added to the understanding of the issue in the case. Each witness testified with candor and sincerity. One of the witnesses, Mary Heed, a behavior specialist for the Regional Center, was asked if moving claimant from the current day program to the program at Advanced Options was an appropriate transfer. Her response was "It could very well meet her needs." Perhaps this best sums up the general state of the evidence in this case. There are too many maybe's, too much speculation and too many unanswered questions about the level of services that might be provided at Advanced Options. Ken Krieger, a service coordinator at SDRC, felt that the program at AO offered great promise and that there was a new "culture and outlook" as well as great enthusiasm. However, what was lacking in this record were details and structure of how this new program would provide the type of services that claimant needs. The testimony was long on belief and enthusiasm but short on specifics.

9. Any such move, as proposed by SDRC, involves significant dislocation in the life of this claimant. Transitions are difficult for anyone. For those with claimant's challenges they take on much greater significance. This is not a good and sufficient reason to avoid change. It is a good and sufficient reason to order change only when it can be demonstrated to be reasonably beneficial to the claimant. In this case, there is insufficient evidence to support a finding that claimant's acknowledged needs can and will be met in the new program. This certainly does not preclude the Regional Center from seeking a future change of programs. If that occurs, what will matter will be the quality of the evidence presented. Claimant appears to seek an order to make supplemental funding permanent. This would be contrary to the law. Although supplemental funding will be ordered continued, it will be done only for a discrete period of time. An additional three month period of time is appropriate under the circumstances. Although not evidence in this case, claimant submitted closing argument that suggested that ARC had agreed to charge less and that this reduced the discrepancy between the cost of the current program and the new program to about \$10.00 per day. Eventually, unless the parties can agree on a future day program, this question will obviously be revisited. And, once again the question of cost effectiveness will be addressed.

10. The contention of SDRC that claimant's needs for a day program can be well and adequately met at Advanced Options, an adult behavior management day program may well, at some future date, be established. However, on the basis of this record, insufficient persuasive evidence was introduced to justify changing the current level of services. A regional center witness described this as a dispute between "want" vs. "need." The suggestion was that the level of services currently provided is what claimant's representative want but is more than what claimant needs. On the basis of the record here, what claimant is getting is far closer to "need" than "want." However, claimant is in error in believing that the current level of services (and the attendant expense) is the only satisfactory placement to

satisfy claimant's needs. If the Regional Center can present good evidence that another placement is functionally equivalent (irrespective of whether the facility is called a behavioral program or a community based program) and the Regional Center can demonstrate that there would be significant cost saving, that would strongly tip the scale toward a transfer, despite the dislocation inherent in such change.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (hereafter the Lanterman Act) is set forth at Welfare and Institutions Code section 4500 et seq.

The Lanterman Act was enacted to prevent or minimize the institutionalization of developmentally disabled persons, to prevent their dislocation from their families and the community, to enable developmentally disabled persons to approximate the pattern of everyday living of non-disabled persons of the same age and to permit developmentally disabled persons to lead more independent and productive lives within the community.

The Lanterman Act authorizes the Department of Developmental Services to contract with regional centers to provide developmentally disabled individuals with access to services and supports that are best suited to them throughout their lifetime or until it is determined that such services and supports are no longer required.

Regional centers are operated by private nonprofit community agencies. While the Department of Developmental Services may promote uniformity and cost effectiveness in the operation of regional centers, its responsibility does not extend to the control of the manner in which regional centers provide services or in general operate their programs. See, *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.App.3d 384.

2. The Lanterman Act imposes an obligation on the regional centers to be cost-effective in their operations.

Welfare and Institutions Code section 44648 provides in part:

“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.”

Welfare and Institutions Code section 4659 provides in part:

“(a) Except as otherwise provided . . . the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) 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 the state supplementary program.

(2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer.”

3. The Lanterman Act clearly contemplates that the services to be provided to each client be selected on an individual basis. Whether a consumer is eligible for services depends on a consideration of all relevant circumstances. See, *Williams v. Macomber (San Gabriel/Pomona Regional Center)* (1990) 226 Cal.App.3d 225.

4. Welfare and Institutions Code section 4685 provides in part:

“(a) [T]he Legislature finds and declares that children with developmental disabilities most often have greater opportunities for educational and social growth when they live with their families. The Legislature further finds and declares that the cost of providing necessary services and supports, which enable a child with developmental disabilities to live at home, is typically equal to or lower than the cost of providing out-of-home placement. The Legislature places a high priority on providing opportunities for children with developmental disabilities to live with their families, when living at home is the preferred objective in the child’s individual program plan.

(b) It is the intent of the Legislature that regional centers provide or secure family support services that do all of the following:

(1) Respect and support the decision making authority of the family.

(2) Be flexible and creative in meeting the unique and individual needs of families as they evolve over time.”

5. Welfare and Institutions Code section 4646.5 provides that the IPP planning process shall include gathering of information and conducting of assessments to determine a client’s life goals, his or her capabilities, strengths and preferences. Welfare and Institutions Code section 4646.5, subdivision (a)(2) provides:

“A statement of goals, based on the needs, preferences, and life choices of the individual with developmental disabilities, and a statement of specific, time limited objectives for implementing the person’s goals and addressing his or her needs. These objectives shall be stated in terms that allow measurement of progress or monitoring of service delivery. These goals and objectives should maximize opportunities for the consumer to develop relationships, be part of community life in the areas of community participation, housing, work, school, and leisure, increase control over his or her life, acquire increasingly

positive roles in community life, and develop competencies to help accomplish these goals.”

6. Good cause exists to grant claimant’s request to continue funding for supplemental staffing as currently being supplied for an additional period of three months based on Factual Findings 1-10..

ORDER

Claimant’s appeal of the regional center’s decision to discontinue supplemental service funding is granted. Supplemental services funding shall be extended for three months from the effective date of this Decision.

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 ninety days.

DATED: _____

STEPHEN E. HJELT
Administrative Law Judge
Office of Administrative Hearings