

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

WILLIAM L.

Claimant,

vs.

FRANK D. LANTERMAN REGIONAL
CENTER,

Service Agency.

OAH No. 2011110909

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on February 14, 2012, in Los Angeles. As discussed in more detail below, and in the ALJ's orders dated October 8, 2012, and November 21, 2012, the record remained open after the hearing for various reasons. The record was ultimately closed and the matter submitted for decision on November 27, 2012.

Claimant, who was present, was represented by his sister, who is his authorized representative.¹

Pat Huth, Esq., Waterson & Huth, LLP, represented the Frank D. Lanterman Regional Center (Service Agency).

ISSUE

May the Service Agency relocate Claimant to another residential facility?

EVIDENCE RELIED ON

In making this Decision, the ALJ relied upon exhibits 1-20 submitted by the Service Agency, exhibits A and C submitted by Claimant, and the testimony of Carol Kaplan, Michele Johnson, Karen Carbajal, Melinda Sullivan, Karen Ingram, Katina Jones, Terra

¹ Initials and family titles are used to protect the privacy of Claimant and his family.

Collins, Hector Rodas, and Claimant's sister. The parties' closing briefs (exhibits 21-22 and B) were read, but they are not considered to be evidence.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a 55-year-old male who is a Service Agency consumer based on his qualifying diagnosis of mild mental retardation.
2. For the past several years, Claimant has resided in the Dare 2 Care residential facility. Toward the end of the summer of 2011, Service Agency staff discussed with Claimant's sister a plan to relocate Claimant to the Sundance Home (Sundance). Claimant's sister requested the Service Agency to allow Claimant to remain at Dare 2 Care.
3. By a Notice of Proposed Action dated October 25, 2011, Claimant's sister was notified that the Service Agency proposed to relocate Claimant to Sundance, effective immediately. In its notice, the Service Agency stated that Claimant had been so successful in his programs that he no longer needed the level of service provided by Dare 2 Care. The Service Agency also stated that it had tried to renegotiate the rate it paid to Dare 2 Care to adjust for a lower level of service provided to Claimant without success. The Service Agency also stated that Sundance could meet Claimant's needs in a less restrictive environment.
4. On November 14, 2011, a Fair Hearing Request on Claimant's behalf was submitted to the Service Agency, which appealed the proposed relocation of Claimant.
5. The parties participated in an Informal Conference to discuss this matter, but no agreements were reached.
6. The matter was initially scheduled to be heard on December 14, 2011, but was continued at the request of Claimant's sister upon a showing of good cause. In connection with her continuance request, Claimant's sister executed a written waiver of the time limit prescribed by law for holding the hearing and for the ALJ to issue a decision.
7. The matter was heard on February 14, 2012. A second hearing day was scheduled for June 8, 2012, to allow the Service Agency to present the testimony of Paul Boyle, Ph.D., a behaviorist with Dare 2 Care.
8. On June 4, 2012, the Service Agency requested a continuance based on conservatorship proceedings before the Los Angeles County Superior Court, in which both the Service Agency and Claimant's sister were requesting to be appointed Claimant's conservator. The second hearing day was therefore continued to August 30, 2012. The Superior Court subsequently appointed Claimant's sister to be his temporary conservator.

9. On August 27, 2012, the Service Agency withdrew its request to present testimony from Dr. Boyle. The parties agreed to submit closing argument by way of briefs. The record remained open for submission of such briefs, which were thereafter timely received and marked as exhibits B and 21, respectively. The record was closed and the matter was submitted for decision upon receipt of the briefs on September 12, 2012.

10. Claimant's sister advised in her closing brief that the Superior Court had scheduled a hearing for October 17, 2012, regarding her status as temporary conservator. The ALJ therefore reopened the record so the parties could submit information regarding the outcome of that hearing. Claimant's sister submitted an order from the Superior Court in which she was appointed limited conservator for Claimant (marked as exhibit C). The Service Agency in its response (marked as exhibit 22) points out that the appointment does not become effective until Claimant's sister files the appropriate letters, which apparently has not happened yet. Exhibit C was admitted into evidence. The record was closed and the matter submitted for decision upon receipt of exhibit 22 on November 27, 2012.

11. The Service Agency has provided Claimant funding for the service in question while this matter has been pending. (Welf. & Inst. Code, § 4715, subd. (a).)

Background Information

12. In addition to his developmental disability, Claimant is profoundly deaf and has a behavioral disorder. Although he is usually cooperative and pleasant, he has a history of maladaptive behaviors, such as striking out at others, pounding his forehead, property destruction, manipulation and resistance. He responds best to calm, structured environments. He is compulsive and can become upset if events do not occur on schedule.

13. Claimant was formerly institutionalized. In or about 2003, he was transitioned to Dare 2 Care, where he has resided to date. He has also attended the same day program for the past several years and is doing well there.

14. At the time of the hearing, Claimant's operative Individual Program Plan (IPP) was that executed in November of 2009. Among many goals and services specified, Claimant stated a desire to continue residing at Dare 2 Care.

15. In becoming Claimant's limited conservator upon the filing of appropriate letters with the Superior Court, Claimant's sister will be granted the power to fix the residence or specific dwelling of Claimant.

Claimant's Residential Setting

16. Dare 2 Care is a specialized residential care facility designed specifically for individuals with substantial behavior problems who require increased levels of care provided

by staff with more experience than ordinary service workers. Dare 2 Care has a maximum capacity of three residents, and provided 1:1 care for each resident.

17. Claimant was originally placed at Dare 2 Care due to the increased level of care that was needed to respond to his problem behaviors. Although Dare 2 Care is located out of the Service Agency's catchment area, it was selected, in part, because it is located close to Claimant's day program.

18. Quarterly reports from Dare 2 Care's behaviorist, Dr. Boyle, were submitted for much of the period from November 2003 through January 2012. The reports document problem behaviors for Claimant in four areas: physical aggression, self-injurious behavior; property destruction; and non-compliance. While the more recent reports document fewer instances of problem behaviors in those areas per month than the older reports, the more recent reports also document that Claimant still engages in problematic behaviors in all four areas. Some of the reports show temporary increases of problem behaviors during intervening times. There is nothing in Dr. Boyle's reports which suggest that Claimant is not likely to engage in such behaviors without the level of care he is currently provided.

19. Service Agency personnel, including Claimant's current Service Coordinator, testified that they have observed Claimant function at both Dare 2 Care and in his day program, and that his behaviors and overall functioning have improved since he was first transitioned out of an institutional setting. These staff members were impressed that they did not observe any violent behaviors from Claimant. Resource Specialist Julio Vicente reviewed records for Claimant from Dare 2 Care and his day program, and he conducted an unannounced visit at Dare 2 Care. He saw no evidence of violent behaviors by Claimant.

20. An audit conducted of Dare 2 Care's 2008 operating expenses revealed that Dare 2 Care had been overpaid by \$68,207.92. That was due to many reasons, some of which included that Dare 2 Care's residents required a reduced level of services than the rate paid. For example, the audit revealed that Dare 2 Care had scaled back on the training given to its staff and on the level of care and oversight provided to its residents, and sometimes the staff ratio was 2:3 instead of 1:1. Dare 2 Care's administrator, Katina Jones, testified that the facility's clients, including Claimant, have stabilized their problem behaviors due to the program's success, which has allowed her to scale back services somewhat.

21. Documentation submitted by the Service Agency indicates that Dare 2 Care's rate was \$27,168 per month per client. As a result of the audit findings, the Service Agency reduced Dare 2 Care's rate to \$13,584 per month per client, effective in April of 2011. The documentation sent to Dare 2 Care from the Service Agency indicates that the rate change became final, which was corroborated by Ms. Jones and Service Agency employee Melinda Sullivan, who both testified that Dare 2 Care has agreed to a substantially reduced rate. However, the Service Agency is interested in further reducing the rate to the ARM level 4-I rate of approximately \$6,000 per month per client. Based on this evidence, it was established that Dare 2 Care's monthly rate for serving Claimant has been substantially reduced from the level it was paid when he was initially placed there, to the new amount of \$13,584 per month per client.

22. Ms. Jones testified that Claimant could continue to reside at the facility at the current rate the Service Agency pays, but that the facility could not stay open if it was paid at the ARM level 4-I rate. For that reason, Ms. Jones has told the Service Agency that instead of accepting the ARM level 4-I rate for Claimant, she would have to ask that Claimant be relocated and a new client referred for placement at a higher rate.

23. Although the Dare 2 Care audit confirms that Claimant's problem behaviors have reduced over time, Claimant's sister provided evidence indicating his problem behaviors have not resolved. For example, Claimant's sister saw her brother become violent with a care giver not long before this matter was heard. One of Claimant's current care givers, Terra Collins, witnessed Claimant punch another care giver in the face the week before the hearing. Claimant also had a violent episode at his day program not long before the hearing. The ALJ also observed that Claimant had a knot on his forehead, which Ms. Collins indicated was self-administered by Claimant. He still becomes easily anxious, and needs two people to calm him when that happens. Overall, it was established that Claimant still requires close supervision, otherwise he is apt to injure himself or others.

24. The Service Agency staff believe that Sundance would be a more appropriate residential placement for Claimant, because his behaviors are now less severe and Sundance has a reduced staffing level to accommodate residents with less problem behaviors. The Service Agency also indicates that Sundance has better medical services to deal with Claimant's health issues, such as high blood pressure, diabetes, high cholesterol, hypothyroidism, etc. Moreover, Sundance has a less restrictive environment than Dare 2 Care, which Service Agency staff members believe would better promote Claimant's social and independence skills. No evidence was presented indicating the monthly rate Sundance would be paid for Claimant's care. At the time of the proposed relocation, the Service Agency indicated that Sundance had a bed available for Claimant. It is not apparent if that is still the case. No evidence from Sundance was presented.

25. On the other hand, Claimant's sister is not impressed with Sundance. She has spoken to Sundance staff and learned they only have a staffing ratio of 3:1 and that the program focus is more on medical/mental health issues than behaviors. Because Claimant does not yet need acute medical care, the special medical attention offered by Sundance is not valuable to Claimant's sister. Moreover, she is not concerned with Dare 2 Care's more restrictive environment. In fact, she believes Claimant thrives only on the type of rigid structure provided by Dare 2 Care. For example, Claimant has been known to get into trouble when staff has "slacked off" on their supervision over him.

DISCUSSION

Jurisdiction and Burden of Proof

The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.²) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established. (Factual Findings 1-11.)

The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

A regional center seeking to terminate or reduce ongoing funding provided to a consumer has the burden to demonstrate its decision is correct, because the party asserting a claim or making changes generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, the Service Agency bears the burden of proof regarding its proposed relocation of Claimant from Dare 2 Care to a new facility. (Factual Findings 1-11.)

Claimant's Residential Needs

In creating an IPP, the parties agree upon services that are necessary to meet goals and respond to developmental problems. (§ 4646.) A consumer's IPP "shall be reviewed and modified by the planning team . . . as necessary, in response to the person's achievement or changing needs. . . ." (§ 4646.5, subd. (b).) The planning process relative to an IPP shall include, among other things, "[g]athering information and conducting assessments to determine the . . . concerns or problems of the person with developmental disabilities." (§ 4646.5, subd. (a).)

In this case, the parties previously agreed to Claimant's residential placement at Dare 2 Care while developing his operative IPP. Since there is evidence that Claimant's needs and services may have changed, review of his residential placement is warranted.

The Lanterman Act directs regional centers to accomplish agreed-upon IPP goals in a cost-effective manner (§ 4646, subd. (a)). A regional center shall consider the cost of providing services or supports, and generally shall use the least costly available provider who is able to meet all of a consumer's needs; however, a consumer shall not be required to use the least costly provider if that will result in moving him to a more restrictive or less integrated service or support. (§ 4648, subd. (a)(6)(D)).

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

Regional centers are also mandated to provide services and supports which promote independence. (§§ 4502, subd. (a), 4646, subd. (a)). In doing so, however, regional centers must take into account the choices made by consumers and their families. (§ 4502.1.) Similarly, a limited conservator is statutorily required to assist the limited conservatee in the development of maximum self-reliance and independence. (Prob. Code, § 2351.5, subd. (a).)

Finally, section 4681.7, subdivision (a), provides that in order to maintain a consumer's preferred living arrangement and adjust the residential services and supports in accordance with changing service needs identified in an IPP, a regional center may "enter into a signed written agreement with a residential service provider for a consumer's supervision, training and support needs to be provided at a lower level of payment than the facility's designated Alternative Residential Model (ARM) service level."

In this case, the Service Agency has proposed to relocate Claimant to another residential facility in furtherance of the above-described mandates of the Lanterman Act.

For example, the Service Agency contends that such a relocation will be cost-effective, a laudable goal indeed. However, no evidence was presented indicating how much it would cost for Claimant to reside at Sundance. In fact, at this point in time, it is not even clear if Sundance has a bed available for Claimant. It is true that Claimant no longer requires the level of services once provided by Dare 2 Care. But it is equally true that Dare 2 Care no longer provides that level of service. For that reason, Dare 2 Care's rate has been substantially reduced after an audit and negotiations with the Service Agency. While it is not clear if Dare 2 Care is currently being paid to care for Claimant at the new negotiated rate of \$13,584 per month, Dare 2 Care's administrator Katina Jones testified that Dare 2 Care could do so. Thus, Claimant's behaviors have improved and Dare 2 Care's rate has been reduced. Ultimately, it is Dare 2 Care's decision on whether it will accept the new negotiated rate for Claimant. To that extent, the Service Agency has already met its mandate of providing cost-effective funding. In addition, it was not established that Claimant's behaviors are no longer a concern. The fact that his frequency of problem behaviors has reduced does not mean that he is no longer apt to engage in them. A substantial reduction in supervision would likely lead to Claimant injuring himself or others. In sum, it was not established that Claimant's behaviors have improved to the extent of ARM level 4-I funding.

The Service Agency also proposes to relocate Claimant because Sundance would be a less restrictive environment for him, again a laudable goal. But while it is true that Sundance would be less restrictive, it is not clear that such would be good for him. Claimant needs structure, order and consistency to thrive, and to help keep his problem behaviors in check. It must be remembered that Claimant is not far removed from institutional placement. While less restrictive services and supports are always preferred, the preferences of Claimant and his family must also be respected. Here, it is abundantly clear that both Claimant and his sister strongly prefer a more restrictive environment. Since the evidence does not support a reason to disregard their wishes, it cannot be concluded that relocation from Dare 2 Care is warranted for purposes of providing Claimant with a less restrictive or a more independent environment.

LEGAL CONCLUSION

1. Pursuant to sections 4646, 4646.5, 4648, 4502, 4502.1, and 4681.7, the Service Agency has not met its burden of proving by a preponderance of the evidence that cause exists to relocate Claimant to another residential facility. (Factual Findings 12-25 & Discussion.)

ORDER

Claimant William L.'s appeal is granted. The Service Agency may not relocate Claimant to another residential facility.

DATE: December 10, 2012

A handwritten signature in black ink, appearing to read 'Eric Sawyer', written over a horizontal line.

ERIC SAWYER
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.