

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CARMEN F. D.,

Claimant,

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

Case No. 2012031105

DECISION

Administrative Law Judge Ralph B. Dash heard this matter on July 24, 2012, in Alhambra, California

Antonio R. Flores, Supervisor, Whittier Unit 1, represented Eastern Los Angeles Regional Center (Regional Center or Service Agency).

Claimant Carmen F.D.'s parents represented Claimant.

Evidence was received, the matter argued, and the case submitted for decision on the hearing date. The Administrative Law Judge makes the following factual findings, legal conclusions, and orders:

ISSUE PRESENTED

Whether Regional Center may discontinue funding Claimant's occupational therapy (two hours per week) and speech therapy (one hour per week) services.

FACTUAL FINDINGS

1. Claimant is four and three-quarters years old (date of birth October 31, 2007), and is a client of the Regional Center because she is severely autistic. Pursuant to the Lanterman Developmental Disabilities Services Act (the Lanterman

Act), California Welfare and Institutions Code, section 4500, *et seq.*¹ Claimant currently receives services as a result of her developmental disability.

2. There is no factual dispute in this matter. Regional Center currently funds two hours of occupational therapy and one hour of speech therapy for Claimant, who also receives 45 minutes weekly of occupational therapy and 30 minutes weekly of speech therapy through her local school district. Regional Center agrees that the therapy it now funds for Claimant is necessary and appropriate. On March 13, 2012, Regional Center sent Claimant a Notice of Proposed Action (NOPA) (Exhibit 3) notifying Claimant that it was going to terminate funding for these therapies because the Individualized Program Plans (IPP) dated October 24, 2011 and November 23, 2011, only obligated it to fund the therapies for three months while the family pursued funding through generic resources, such as Medi-Cal. In the NOPA, Regional Center also advised Claimant that it had identified three service providers who accepted Medi-Cal funding, White Memorial Hospital, Casa Colinas, and Rancho Los Amigos.

3. For religious reasons, not necessary to discuss here, Claimant cannot receive her therapies at any of the three locations offered by Regional Center. At hearing, Regional Center did not dispute that Claimant's religious practice was a sufficient and legitimate reason for Claimant to refuse to have her therapy at these locations. In addition, Claimant has exhausted any and all private insurance benefits she has that would cover these therapies and currently receives the maximum therapy time the school district will offer. The only "generic resource" Claimant has available to her is Medi-Cal.

4. Claimant's current providers of occupational and speech therapies that Regional Center currently funds do not accept Medi-Cal benefits. Neither Claimant nor Regional Center has been able to locate an acceptable service provider for occupational and/or speech therapy that accepts Medi-Cal as payment for services. In Exhibit M, a memorandum dated February 22, 2012, Claimant's Service Coordinator lists 18 establishments that provide speech and occupational therapy, each of which she had contacted. Other than the three unacceptable providers noted above, the Service Coordinator found that the 15 other providers listed either did not accept Medi-Cal or had a six-month waiting list to accept new clients. The Service Coordinator apparently did not place Claimant on any available waiting list.

5. Contrary to the statement set forth in the NOPA to the effect that Regional Center had agreed in the IPP to fund only three months of occupational and speech therapy services, Regional Center actually agreed to fund "one year or less" of two hours per week of occupational therapy and one hour per week of speech therapy. In Exhibits 1 and D, the most current IPP, dated November 23, 2011, the second page

¹ All statutory references are to the Welfare and Institutions Code unless otherwise noted.

of the “Service Provision Agreement” shows that Regional Center was designated as the “Responsible Agency” for funding these therapies. The IPP provides that Regional Center is to fund one year or less of each therapy “until Medi-Cal approves funding per clinical review.” At hearing, Claimant’s parents stated this provision meant that Claimant would stay with her current providers, each of whom is listed on the IPP, until the earlier of one year from the date of the IPP or the obtaining of the same services through a Medi-Cal funded provider. There was no competent evidence to the contrary.

LEGAL CONCLUSIONS

1. Throughout the applicable statutes and regulations, found in sections 4700-4716, and California Code of Regulations, title 17, sections 50900 - 50964, the state level fair hearing is referred to as an appeal of the regional center’s decision. In this instance, where the Service Agency seeks to modify a service, the burden is on it to demonstrate that its decision is correct. The burden of proof is by a preponderance of the evidence. (Evid. Code, §§ 115 and 500.) To meet its burden of proof, the Service Agency must submit a preponderance of evidence to establish that it is entitled to terminate the benefits provided to Claimant. The moving party, that is, the party asserting the claim or making the charges, generally has the burden of proof in administrative proceedings. (Cal. Administrative Hearing Practice (Cont. Ed. Bar 2d ed. 1997) § 7.50, p. 365; see also, Evid. Code §§ 115 and 500.) No published decision has been found that addresses the applicability of this general principle to Lanterman Act fair hearing proceedings. It is concluded by analogy, however, that the party in such proceedings who seeks to change the status quo has the burden of proof. In the present proceeding, it is the Service Agency which seeks to change the level of services. Accordingly, the Service Agency has the burden of proof.

2. The procedures that a regional center must follow when terminating the services that a vendor is providing to a consumer are set forth in California Code of Regulations, title 17, section 56718, which provides:

(a) Funding of a consumer's placement in a vendor's program shall be terminated when one or more of the following occur:

(1) The regional center issues a written determination stating that continued participation jeopardized the consumer's health and safety;

(2) The consumer or authorized consumer representative makes a written or oral request to the regional center to discontinue participation or the consumer can no longer attend the program due to an unanticipated change in residence;

(3) The ID Team has determined through a consumer evaluation that the vendor's program no longer meets the consumer's needs;

(4) The vendor determines that its program may no longer meet the consumer's needs; or

(5) The consumer, or authorized consumer representative acting on behalf of the consumer, consents to an alternate placement identified by the ID Team as being able to meet the consumer's needs and as being more cost effective. The alternate placement shall be considered more cost effective if the combined cost of the alternate placement and the cost of transporting the consumer to and from the alternate placement is less than the combined cost of the consumer's current placement and the cost of transporting the consumer to and from the current placement.

(b) When a determination is made pursuant to (a)(1), (3), (4) or (5) above, the basis for the determination shall be documented in writing in the consumer's case file by the regional center for (a)(1) and/or (3) and/or (5) and by the vendor for (a)(4). The regional center shall also include written documentation in the consumer's file that the consumer or authorized consumer representative has been informed of the fair hearing rights pursuant to Welfare and Institutions Code, Sections 4701, 4705 and 4710 when the determination is made pursuant to (a)(1), (3) or (5) above.

(c) When the regional center or the vendor proposes to terminate the consumer's placement in the vendor's program, other than in accordance with (a)(1) or (a)(2) above, the initiating party shall notify the other party and the consumer in writing at least 30 days prior to the proposed termination date. Such notice shall include a written statement of reasons for the termination. If the regional center terminates the placement prior to the end of the 30 day notice period, except as specified in (a)(1) and (a)(2) above, the vendor shall be paid for those days of program services during that 30 days period for which the consumer would have been authorized to receive services as identified in the IPP. Funding shall not continue under either of the following circumstances:

(1) There is agreement between the regional center, vendor, and the consumer or authorized consumer representative for an earlier termination date. In this instance, funding shall be provided through the date the consumer leaves the program.

(2) The consumer's vacated place in the program has been filled by another consumer. In this instance, funding for the consumer who is no longer in the program shall cease on the date the substitute consumer begins attending.

(d) When the conditions specified in (a)(1) above exist, termination shall be immediate and no further payment shall be made, except as specified in (e) below.

(e) When the conditions specified in (a)(1), (a)(3) or (a)(5) above exist, termination of funding shall not be made if the consumer files a fair hearing request pursuant to Welfare and Institutions Code, Sections 4700 through 4730.

(f) When the conditions specified in (a)(2) above exist, funding shall terminate immediately upon the consumer's nonparticipation. The regional center shall notify the vendor in writing of the reason that the consumer no longer wishes to participate in the program. Such notification shall be made within 10 days of the date the regional center is notified by the consumer or authorized consumer representative.

(g) A vendor may exclude a consumer from participation in the program during periods when the vendor determines that the consumer is a threat to the health and safety of other individuals in the program. Such exclusion shall be followed by a meeting scheduled by the vendor within three working days to include the consumer program coordinator, the consumer and authorized consumer representative to discuss the basis of the exclusion and any program changes that may be required. The provisions of this paragraph shall not apply to exclusions that are made in accordance with a prior written agreement with the regional center pertaining to the individual consumer.

3. Regional Center's attempt to terminate the occupational and speech therapy services did not comport with any of the above provisions. These services do not jeopardize Claimant (subdivision (a)(1)); Claimant did not request that the services be terminated (subdivision (a)(2)); the ID Team did not determine the program did not meet Claimant's needs (subdivision (a)(3)); the vendor did not make a determination that the program did not meet Claimant's needs (subdivision (a)(4)); and, there is no alternate placement (subdivision (a)(5)).

4. Regional Center should have convened a proper IPP team meeting and conducted the required evaluation before it sent the NOPA. Under section 4620, subdivision (c), a regional center is responsible for providing services and supports for individuals with developmental disabilities. In doing so, the Service Agency must respect the choices made by consumers and their families under section 4502.1.

Services are designed toward “alleviation of a developmental disability,” and among the services and supports to be provided are occupational training and speech therapy programs, under section 4512, subdivision (b).

5. The process for identifying the need for services and for providing funding for the services by regional centers is generally set forth in sections 4646 and 4648. As applied to this case, that process includes that a request for the services, or for a change in services, would be made and discussed by the team responsible for coordinating a consumer’s plan of services, including the parents and Service Agency representatives.

6. The applicable sections of the Code address the team nature of the decision-making process regarding those services that are to be supplied or funded by the Service Agency. This is accomplished by the IPP process, which is described and referred to in numerous sections of the Act. Set out below are some of the sections that describe the purpose of the IPP and the process of preparing and modifying the IPP.

7. Section 4512, subdivision (b), provides, in part:

“Services and supports for persons 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 for each consumer 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 or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option.”

8. Section 4646 provides, in part:

“(a) It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. 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.

“(b) The individual program plan is developed through a process of individualized needs determination. The individual with developmental disabilities and, where appropriate, his or her parents, legal guardian or conservator, or authorized representative, shall have the opportunity to actively participate in the development of the plan.

“[¶] . . . [¶]

“(d) Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer's goals, objectives, and services and supports that will be included in the consumer’s individual program plan and purchased by the regional center or obtained from generic agencies shall be made by agreement between the regional center representative and the consumer or, where appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting.”

9. Section 4646.5 provides, in part:

“(a) The planning process for the individual program plan described in Section 4646 shall include all of the following:

“(1) Gathering information and conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. For children with developmental disabilities, this process should include a review of the strengths, preferences, and needs of the child and the family unit as a whole. Assessments shall be conducted by qualified individuals and performed in natural environments whenever possible. Information shall be taken from the consumer, his or her parents and other family members, his or her friends, advocates, providers of services and supports, and other agencies. The assessment process shall reflect awareness of, and sensitivity to, the lifestyle and cultural background of the consumer and the family.

“(2) 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.

“[¶] . . . [¶]

“(4) A schedule of the type and amount of services and supports to be purchased by the regional center or obtained from generic agencies or other resources in order to achieve the individual program plan goals and objectives, and identification of the provider or providers of service responsible for attaining each objective, including, but not limited to, vendors, contracted providers, generic service agencies, and natural supports. The plan shall specify the approximate scheduled start date for services and supports and shall contain timelines for actions necessary to begin services and supports, including generic services.

“[¶] . . . [¶]

“(b) For all active cases, individual program plans shall be reviewed and modified by the planning team, through the process described in Section 4646, as necessary, in response to the person's achievement or changing needs, and no less often than once every three years. If the consumer or, where appropriate, the consumer's parents, legal guardian, or conservator requests an individual program plan review, the individual program shall be reviewed within 30 days after the request is submitted.”

10. Section 4647, subdivision (a), provides:

“(a) Pursuant to Section 4640.7, service coordination shall include those activities necessary to implement an individual program plan, including, but not limited to, participation in the individual program plan process; assurance that the planning team considers all appropriate options for meeting each individual program plan objective; securing, through purchasing or by obtaining from generic agencies or other resources, services and supports specified in the person's individual program plan; coordination of service and support programs; collection and dissemination of information; and monitoring implementation of the plan to ascertain that objectives have been fulfilled and to assist in revising the plan as necessary.”

11. Section 4648, subdivision (a)(1), provides:

“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.

“(1) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. The regional center shall secure services and supports that meet the needs of the consumer, as determined in the consumer’s individual program plan, and within the context of the individual program plan, the planning team shall give highest preference to those services and supports which

would allow minors with developmental disabilities to live with their families, adult persons with developmental disabilities to live as independently as possible in the community, and that allow all consumers to interact with persons without disabilities in positive, meaningful ways.”

12. The process created by these sections and others can be summarized and explained in less technical terms. The Code sections set forth criteria that relate to the development and modification of an IPP for a person with a developmental disability, referred to as a consumer.

An IPP is developed through a collaborative effort involving the appropriate regional center and the consumer and/or the consumer’s representative(s), and others, sometimes collectively referred to as the interdisciplinary team (or ID Team). It was the intent of the Legislature that persons with diverse skills and expertise were to serve on the ID Team. They were intended to confer, deliberate, and decide what should be included in the consumer’s IPP. The ID Team may not abdicate its role nor may it ignore its duty owed not only to the consumer but also to the IPP process.

The IPP is prepared for the consumer by identifying necessary services and supports. The Service Agency must allow the consumer and his parents to participate in developing the IPP. The plan must be based on information and assessments relating to the consumer’s life goals, his capabilities and strengths, his preferences, any barriers to meeting his goals, his concerns, and other relevant data.

Assessments must be conducted by qualified individuals and performed in natural environments whenever possible. Information must be obtained from the consumer, the consumer’s parents and other family members, friends, advocates, any providers of services and supports, and any other interested agencies. The assessment process must reflect an awareness of, and sensitivity to, the lifestyle and cultural background of the consumer and the family. Claimant and his parents have the reciprocal obligation to assist the Service Agency in meeting its mandate. No consumer should benefit by withholding information or by refusing to cooperate with the regional center, even if such conduct is well intentioned.

An IPP must include a statement of the consumer’s goals, based on the consumer’s needs, preferences, and life choices. An IPP must contain specific, time-limited objectives to implement identified goals. Objectives must be constructed to allow measurement of progress and monitoring of service delivery. Identified goals and objectives should maximize a consumer’s opportunity to develop relationships and participate in community life, in housing, work, school, and leisure activities. Identified goals and objectives should increase the consumer’s control over his life, should assist the consumer in acquiring increasingly positive roles in community life, and should be directed toward developing competency to help accomplish these goals. Proper goals and objectives allow for efficient evaluation of the effectiveness of the plan and the progress made by a consumer.

The regional center is required to prepare a plan identifying the services and supports a consumer needs to meet the goals and objectives identified by the ID Team, and determine whether those services and supports are to be purchased by the regional center, obtained from generic agencies, or provided from other sources. Claimant and her parents have the right to provide the Service Agency with input into the selection of the providers of those services and supports.

If a consumer and/or his representatives do not agree with all of the components contained in an IPP, the area(s) of disagreement may be noted; but, a disagreement with specific IPP components does not prevent implementation of those services and supports to which there is no disagreement. The regional center must send written notice advising the consumer and/or his representatives of the right to a fair hearing as to the areas of disagreement.

These statutes require that the services provided must be effective in meeting IPP goals, that the IPP should reflect the preferences and choices of the consumer, and that the IPP should be cost-effective in its use of public resources.

13. When the parties involved in planning the consumer's services cannot reach an agreement, it is appropriate to take that disagreement to a fair hearing, present relevant evidence, and have a decision prepared to resolve the issue. (See §§ 4710, 4710.5, 4710.7 and 4712.)

14. Before the Regional Center can rewrite Claimant's IPP with respect to cutting its funding of occupational and speech therapy services, it must first analyze her needs through the IPP process. It failed to do so.

ORDER

Eastern Los Angeles Regional Center shall continue to fund Claimant's current occupational therapy and speech therapy services until the earlier of November 23, 2011 or comparable services through a Medi-Cal funded provider can be found.

Dated: _____

RALPH B. DASH
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.