

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

Tyler P.,

Claimant,

vs.

SAN GABRIEL POMONA REGIONAL  
CENTER,

Service Agency.

OAH No. 2014030224

**DECISION**

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on May 28, 2014 in Pomona, California.

Tyler P. (Claimant) was represented by his mother, Tina P. (mother).<sup>1</sup> Claimant attended and participated in the hearing.

Daniela Santana, Fair Hearing Manager, represented San Gabriel Pomona Regional Center (SGPRC or Service Agency).

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<sup>1</sup> Claimant and his mother are identified by their first name and last initial to protect their privacy.

## ISSUE

Should Service Agency reassess Claimant's ability to use oxygen and a breathing nebulizer?

## FACTUAL FINDINGS

1. Claimant is a 22-year-old man who resides with his parents. Claimant is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.)<sup>2</sup> on the basis of an intellectual disability. He is also diagnosed with Potter Syndrome, chronic lung disease, asthma, and chronic obstructive pulmonary disease (COPD) related to bronchial pulmonary dysplasia.

2. Claimant's 2013 Individual Program Plan (IPP) was developed on November 26, 2013 (2013 IPP). Claimant's IPP includes long and short terms goals and desired outcomes. Claimant completed his public school education in December 2013. One of his desired outcomes is to stay focused and complete a task. The support needed for this outcome was to attend a work activity program on a daily basis. Service Agency agreed to "explore appropriate funding and program resources . . ." in order to facilitate this outcome.

3. In addition, the 2013 IPP established a desired outcome relating to Claimant maintaining his health and administering his oxygen when needed. Service Agency agreed to request current medical records. Healthnet, a Medi-Cal provider, provides his health insurance. On January 7, 2014, at the request of Claimant's service coordinator, Service Agency nurse Joan Williams, R.N., M.S.N. (Williams) completed a nursing review of Claimant's medical and equipment needs prior to his placement in a work program (Nurse's Assessment). Mother asked to have the assessment completed at the Service Agency facility, but at William's request it was completed at Claimant's home. The Nurse's Assessment briefly discussed Claimant's medical history and his ability to use his oxygen and his nebulizer, and contained precautions regarding the use of oxygen in general and in a workplace in particular.

4. In accordance with the 2013 IPP, in January 2014, Service Agency sent a packet of information about Claimant to three work activity programs, including San Gabriel Valley Training Center (SGVTC), a program Claimant was interested in attending. The packet included Claimant's IPP, medical information, including the Nurse's Assessment, psychological evaluations, educational history, and relevant administrative documents. After reviewing the packet, all three programs, including SGVTC, declined to accept Claimant into its program. According to Claimant's service coordinator's notes, the reasons state that

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

Claimant needed assistance with his oxygen and nebulizer, and the safety concerns cited in the Nurse's Assessment.

5. On January 30, 2014, Service Agency issued a Notice of Proposed Action (NPA) informing Claimant's parents that it was denying Claimant's funding for a work activity program. The NPA specifically identified SGVTC as the program. The NPA cited the Nurse's Assessment in setting forth the reason for the decision to deny funding for a work activity program. This included both concerns about Claimant's ability to use his equipment without assistance, his other medical needs, including his response to temperature changes, stress and anxiety, and his need to stay hydrated. Further, the NPA referenced the safety concerns relating to oxygen in a workplace as set forth in the Nurse's Assessment. The NPA also said that SGVTC indicated the program would not be able to meet Claimant's needs.

6. Claimant timely filed his Fair Hearing Request on March 25, 2014. Specifically, Claimant requested that Service Agency reassess Claimant's medical status and equipment needs. Jurisdiction was established and this hearing ensued.

#### *Additional Background Information*

7. Despite the NPA, Claimant's mother and Service Agency continued to make efforts to enroll Claimant in SGVTC as well as explore other options. Mother contacted Claimant's physician to determine Claimant's need for oxygen. Service Agency continued to explore work activity program options with SGVTC and make referrals to other programs. Service Agency's Executive Director made several attempts to have SGVTC reconsider its decision to reject Claimant's application. Claimant's service coordinator continued to explore other program options for Claimant. Mother rejected other programs offered, continuing to prefer SGVTC because it was a work activity program and because of its proximity to Claimant's residence.

8. On March 21, 2014, mother informed service coordinator that Apria provides Claimant's oxygen. Mother expressed her concern that Nurse William's did not have correct information about the use of oxygen. On March 27, 2014, mother informed service coordinator that Claimant's physician, Timothy Ferguson, M.D., stated that Claimant does not need to use oxygen and the nebulizer during the day. This was confirmed in a doctor's note dated March 26, 2014 stating: "Pt is only in need of Oxygen & Nebulizer at home in the evening. Pt has an inhaler for day time flare ups as needed." (Exhibit 7.) Mother also informed service coordinator that the doctor's office would train Claimant in the use of an inhaler.

9. On April 8, 2014, service coordinator sent a new packet to SGVTC, with a cover letter informing them that Claimant no longer requires daytime oxygen. On April 18, 2014, a SGVTC representative informed the service coordinator that it would not accept Claimant into the program because of his need for supervision with eating and some behavioral issues. Service coordinator asked SGVTC whether Service Agency could help to

address these concerns by providing Claimant with an aid. The program representative said it would put its concerns in a letter to the agency. Service Agency did not receive the proposed letter from SGVTC.

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10. On April 18, 2014, service coordinator, mother and Daniela Santana, Service Agency Fair Hearing Manager (Santana), conferred after SGVTC rejected Claimant due to concerns about Claimant's behavior.<sup>3</sup> The service coordinator agreed to look for alternative programs, although mother indicated that she continued to want Claimant to attend SGVTC. On April 22, 2014, SGVTC said they would reconsider Claimant because he no longer requires oxygen. At the time of the hearing, it appeared that SGVTC continues to be unwilling to accept Claimant into its program.

11. Sometime after SGVTC rejected Claimant's application for medical and equipment reasons and before Dr. Ferguson's March 26, 2014 note was received by Service Agency, mother spoke with Yvonne Murph, R.N., M.S.N. (Murph), William's supervisor, regarding mother's concerns about inaccuracies in the Nurse's Assessment and the impact this was having on Claimant's acceptance to SGVTC. According to mother, Murph agreed to reassess Claimant's ability to use his oxygen and nebulizer. However, after Dr. Ferguson's note was received, Service Agency changed its position and declined to reassess Claimant. Santana testified that Service Agency did not believe that a reassessment was necessary because the March doctor's note would "be put on top" of the January Nurse's Assessment in Claimant's chronologically based record and thus supersede anything in the Nurse's Assessment. Santana acknowledged that the Nurse's Assessment would remain part of Claimant's record and that it would be negligent to not include it in a packet sent to prospective programs.

12. Mother contends that Williams should have given Claimant the "benefit of the doubt" when evaluating Claimant's use of oxygen and nebulizer. She believes that Claimant is more independent than the Nurse's Assessment indicates. She also believes that assessing Claimant at home, where he is most comfortable and reliant on family members was not the best environment to obtain objective results. Mother offered into evidence an undated letter from April Durkee (Durkee), Claimant's health care para-professional educator in his former school district. (Claimant's Exhibit 1.) Durkee describes Claimant's ability to open his oxygen tank, attach the breathing tube to the tank and to himself, and turn the valve to the appropriate level to release the oxygen. Durkee explained that she prepared the nebulizer while Claimant was setting up the oxygen. Durkee also described Claimant's work

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<sup>3</sup> During the hearing, mother expressed concern that the IPP may contain some inaccurate information about Claimant's behavior. Claimant and Service Agency agreed that Service Agency would conduct a behavioral assessment, to include adaptive and functional skills as well as address any maladaptive behaviors.

experience and skills, what kind of support is needed to obtain Claimant's best effort, and his desire to work and earn a living.

13. Service Agency contends that a reassessment is not necessary because Claimant no longer needs oxygen or a nebulizer during the day when he would be attending a work activity program, and that the doctor's note stating this is the most recent medical entry in Claimant's record. Consequently, according to the Service Agency, there is nothing to reassess.

14. Service Agency misses the point made by mother: that William's Nurse's Assessment may not be accurate. Regardless of whether Dr. Ferguson's note will accompany the packet sent to prospective programs, the Nurse's Assessment, which may contain inaccurate information both about Claimant's ability to use oxygen and safety concerns, will also go to prospective programs. And despite the fact that Claimant does not need his oxygen and nebulizer during the day, the Nurse's Assessment may well cause a work activity program to have safety and liability concerns should it accept Claimant. Nor is it unreasonable to think that a program may be concerned that Claimant will again need access to oxygen and a nebulizer should his breathing condition worsen, and thus be very concerned about the information in the Nurse's Assessment. Clearly, the import of the Nurse's Assessment does not disappear merely because Doctor Ferguson's note is more recent. While it is not Service Agency's responsibility to give Claimant the "benefit of the doubt" when conducting an assessment, it is the responsibility of the Service Agency to be sure that the information it does report when it assesses a consumer, and then transmits that assessment to other programs, is accurate. Conducting a reassessment of Claimant's ability to use his oxygen and nebulizer is a reasonable way to achieve this goal. Reviewing the warning regarding the safe use of oxygen to be sure they reflect current standards is also reasonable. Moreover, since the Service Agency was initially willing to reassess Claimant before receiving the doctor's note, there is no plausible reason why it should not do so after receiving the doctor's note. Finally, since Service Agency has been willing to provide an aid for Claimant based on the Nurse's Assessment, a reassessment may obviate the need for an aid, resulting in cost savings.

## LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a regional center decision. (§§ 4700-4716.)

2. The standard of proof in this case is a preponderance of the evidence, because no applicable law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Because Claimant is requesting a service, he bears the burden of proof. In seeking government benefits, the burden of proof is on the person asking for the benefits. (See, *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).)

3. The Lanterman Act sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. (See §§ 4640 et seq.) As the California Supreme Court explained in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, the purpose of the Lanterman Act is twofold: "to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community" and "to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community." In addition to assisting consumer's and their families "in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community. . . [e]ach regional center design shall reflect the maximum cost-effectiveness possible and shall be based on a service coordination model . . . ." (§ 4640.7.)

4. Under the Lanterman Act, a consumer's needs and the services and supports required to achieve the consumer's goals are identified as part of the individual program planning process. (§§ 4646 et seq.) Section 4646.5, subd (a)(1) provides that the planning process shall include: "Assessments . . . conducted by qualified individuals and performed in natural environments whenever possible. . . . The assessment process shall reflect awareness of, and sensitivity to, the lifestyle and cultural background of the consumer and the family."

5. The IPP and the provision of supports and services is intended to be "centered on the individual and family[,] . . . take into account the needs and preferences of the individual and family, where appropriate[,] . . . 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." (§§ 4646, subd. (a), 4646.5.) The IPP "is developed through a process of individual needs determination," should involve the consumer and his parents, and should be prepared jointly by the planning team. (§ 4646 subd. (b).) "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 and the consumer . . . at the program plan meeting." (§ 4646, subd. (d); see also §§ 4646.7, 4648.) The program planning team may meet again if an agreement is not reached. (§ 4646, subd. (d).) If the parties are unable to reach an agreement, the consumer or her authorized representative may request a fair hearing. (§§ 4700 et seq.)

6. While a consumer and his parents' preferences and desires regarding goals and objectives and services and supports are to be given consideration in the planning process, regional centers are not authorized to purchase any and all services a consumer or her family may desire. (See §§ 4640.7, 4646, 4646.4, 4646.5, 4659, 4686.2.) Regional center design must "reflect the maximum cost-effectiveness possible . . ." (§ 4640.7, subd. (b).)

7. In light of Factual Findings 1 through 14 and Legal Conclusions 1 through 6, Claimant has met his burden to show that Service Agency should reassess his use of oxygen and a breathing nebulizer. As stated at Factual Finding 14, the possibility exists that

inaccuracies in the Nurse's Assessment will have significant adverse impact on Claimant's ability to enroll in a work activity program. As such, it is not unreasonable that Service Agency should conduct a reassessment to determine Claimant's abilities and needs relating to the use of oxygen and a nebulizer, and what if any safety concerns may exist, particularly in a work activity or other type of day program setting. The reassessment should be conducted at a place other than Claimant's home. The reassessment may be conducted by an employee of the Service Agency, a vendor, or other individual with knowledge of the use of oxygen, upon consultation with mother, and if necessary, Claimant's health care and medical device providers. If needed, Claimant should provide consent to release of medical information to permit the agency or individual conducting the evaluation to obtain current medical information. Without such consent, any reassessment may be incomplete and unreliable.

### ORDER

Service Agency shall conduct a reassessment to determine Claimant's abilities and needs relating to the use of oxygen and a nebulizer, and what if any safety concerns may exist, particularly in a work activity or other type of day program setting. . The reassessment should be conducted at a place other than Claimant's home. The reassessment may be conducted by an employee of the Service Agency, a vendor or other individual with knowledge of the use of oxygen, upon consultation with mother and if necessary, Claimant's health care and medical device providers.

Dated: June 2, 2014

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DEBORAH M. GMEINER  
Administrative Law Judge  
Office of Administrative Hearings

### NOTICE

**UNDER THE LANTERMAN DEVELOPMENTAL DISABILITIES SERVICES ACT, THIS IS A 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.**