

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

and

EASTERN LOS ANGELES

REGIONAL CENTER,

Service Agency.

OAH No. 2014040870

DECISION

Jennifer M. Russell, Administrative Law Judge with the Office of Administrative Hearings, heard this matter in Alhambra, California on May 16, 2014.

Lilia Ortega, Supervisor, represented Eastern Los Angeles Regional Center (ELARC or service agency). Claimant's mother represented him.¹ Spanish language interpreter services were provided.

Testimonial and documentary evidence was received, the case was argued, and the matter was submitted for decision on May 16, 2014. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUES

1. Should the service agency fund 21days of in-home respite care services in lieu of 21 days of out-of-home respite care services for Claimant.

¹ Claimant and Claimant's mother are not identified by their names to preserve confidentiality.

2. Should the service agency reimburse Claimant for out-of-pocket in-home respite care in lieu of out-of-home respite care expenses incurred May 10, 2014 through May 13, 2014.

FACTUAL FINDINGS

1. Claimant is a 9-year-old consumer of ELARC based on his qualifying diagnoses of autism and seizure disorder. He resides with his mother, who is also his primary care taker. Claimant's older sibling resides at the family dwelling when not attending college in another state.

2. Claimant's most current Individual Program Plan (IPP), dated February 10, 2014, indicates that caring for Claimant is "challenging." (Exhibit 3 at p.3.) Claimant has multiple seizures daily. Consequently, Claimant is restricted to his residence for activities that typically occur elsewhere. Claimant's IPP indicates, for example that "[O]ver the past few months, [Claimant's] seizure activity has increased. [Claimant's] physician has recommended that he be home schooled due to the severity of his seizure [and its] frequency and intensity." (Exhibit 3 at p.4.) Claimant's school district provides him with educational services at his residence three days at varying hours per week. Claimant takes several medications for seizure control and he requires assistance with his medications. He communicates using one— or two—word sentences, sounds, and gestures. He requires assistance with his self-help needs. Claimant displays maladaptive behaviors, which include frequent elopement, trantums, restiveness, and aggression towards others. Claimant lacks awareness of the danger of oncoming traffic. He receives interventional behavioral therapy services to address his maladaptive behaviors. He requires constant supervision at home and in the community.

3. Claimant's residence is equipped with cushions, padding, and modified furniture to prevent or minimize injury to Claimant.

4. ELARC funds 30 hours per month of in-home respite care services for Claimant.

5. During Claimant's February 10, 2014 IPP meeting, Mother informed Claimant's service coordinator about Claimant's sibling's May 2014 college graduation, and her desire to attend the ceremony. Mother requested additional in-home respite care services for May 10, 2014 through May 13, 2014. After considering Mother's request, Claimant's service coordinator determined that Mother and Claimant's needs should be met with out-of-home respite care services, and the service coordinator provided Mother with a list of three possible facilities for consideration. The service coordinator additionally provided Mother with the service agency's written policies on both in-home and out-of-home respite care services.

6. ELARC's Out of Home Respite Purchase of Services Policy & Procedure, effective May 2, 2011, states that "Out-of-home respite service means intermittent or regularly scheduled temporary care provided outside of the consumer's home by a vendored service provider. Providers in this category include adult day care centers, child care centers, residential facilities serving either adults or children, Intermediate Care Facilities/Developmentally Disabled-Habilitative and Intermediate Care Facilities/Developmentally Disabled-Nursing. Out-of-home respite services are intended to assist the family in securing temporary outside support in providing appropriate care and supervision of the consumer." (Exhibit 5 at p. 1.) The availability of an out-of-home respite care arrangement is determined after assessment of a consumer's level of care, a facility's level of services, a facility's location in relation to a consumer's residence, and vacancy at a facility. In addition, consumers and their representatives are afforded an opportunity to visit a facility to meet with administrators to discuss whether and how a consumer's specific needs are to be met. The Out of Home Respite Purchase of Service Policy & Procedure states that "[i]n-home respite in lieu of out-of-home respite may be

used only when there is no out-of-home respite arrangement available.” (Exhibit 5 at p.2.)

7. Claimant’s service coordinator provided Mother with a list of at least three out-of-home respite care facilities for her consideration. The evidence at the hearing establishes that Claimant’s needs required no less than a level three facility. On April 12, 2014, Mother visited Candlelight Home. Mother observed that the residents at Candlelight were older teenagers. Given Claimant’s young age, Mother was uncomfortable leaving Claimant at this facility. Mother additionally determined that there were insufficient safety precautions in place to address Claimant’s elopement.

8. On April 23, 2014, Mother visited Kaiser Children’s Home. There were two adolescent boys, ages 16- and 18-years old, a 13-year old girl, and their caretaker at Kaiser at the time of Mother’s visit. The 18-year old boy exhibited severe behaviors which Mother feared Claimant would emulate. Mother worried that one caretaker for more than three residents at Kaiser was inadequate given the fact of Claimant’s frequent seizures. The bedroom available for Claimant was located near an entrance door without a lock. Mother was concerned that Claimant could easily exit the premises without detection. The manager of Kaiser was not present at the time of Mother’s visit, but Mother spoke to the manager by telephone about her (Mother’s) concerns, and the manager told Mother that ELARC would provide a one-on-one aide for Claimant.

9. Claimant’s service coordinator affirmed ELARC’s willingness to fund a one-on-one-aide for Claimant should Claimant use Kaiser’s out-of-home respite care services. Mother queried whether the one-on-one aide could be available to Claimant at his residence where certain safety precautions were already in place and to avoid disruption of Claimant’s daily routine including his home schooling. Mother’s absence is a source of stress for Claimant, which Mother wants to minimize. Claimant is both familiar and comfortable with his current in-home respite care provider, who in turn

knows how to administer his medications and to coach him at meal times so that he eats.

10. Mother visited no additional facilities to determine their suitability for an out-of-home respite care placement for Claimant. There was no apparent agreement between Mother and the service agency regarding Claimant's care as the date for Claimant's sibling's college graduation approached. And, in anticipation of the graduation, Mother had purchased her airline ticket. Given the exigencies of the situation, Mother attended Claimant's sibling's graduation without placing Claimant in an out-of-home respite care facility. Claimant's in-home respite care worker, whom Mother paid out of pocket, cared for and supervised Claimant in his home during Mother's absence.

11. By Notice of Proposed Action (NOPA), dated March 13, 2014, ELARC advised Mother of its "denial of 21 days of [i]n-home respite services in lieu of out[-]of[-]home respite services per fiscal year as set forth in your Individual Program Plan . . . without abiding to out of home respite purchase of services policy procedure." (Exhibit 1.)

12. Mother filed a timely Fair Hearing Request. Mother seeks 21 days of in-home respite care services in lieu of 21 days of out-of-home respite care services retroactively to cover her expenses incurred in connection with the care and supervision provided to Claimant in-home while she attended her other child's college graduation. Additionally, Mother anticipates having surgery, and that she will need care for Claimant during her hospitalization, the length of which was unspecified at the hearing. A grant of 21 days of in-home respite care services in lieu of 21 days of out-of-home respite care services is expected to meet Claimant's needs during Mother's anticipated hospitalization.

13. The exact amount of Mother's out-of-pocket expenditure for Claimant's in-home respite care service while she attended Claimant's sibling's graduation May 10, 2014 through May 13, 2014 was not established at the hearing.

14. The exact cost of placing Claimant in an out-of home respite care facility with a one-on-one aide was not established at the hearing. The service agency representative estimated that the hourly rate of a one-on-one aide is "about \$150 per hour," but she was unable to say with certainty that such a rate is used in residential facilities which typically are vendored "with their own rates." As the party most knowledgeable about the costs associated with one-on-one aides at out-of-home respite care facilities, the service agency was unable to establish at the hearing that provision of such services to Claimant was cost efficient when compared to maintaining Claimant at home with a service provider already known to him and intimately acquainted with his routines and needs.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disability Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.), which mandates that an "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream of life in the community." (Welf. & Inst. Code, § 4501.) Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Regional centers are responsible for taking into account individual consumer needs and preferences, and for ensuring service cost effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

2. The services and supports to be funded for a consumer are determined through the individualized program planning process, which involves collaboration with

the consumer and service agency representatives. Services and supports for persons with developmental disabilities are defined as “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 rehabilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives.” (Welf. & Inst. Code, § 4512, subd. (b).) Services and supports include out-of-home care, for which section 4686.5, subdivision (a)(2), authorizes up to 21 days in a fiscal year.

3. When purchasing services and supports a regional center must conform to its purchase of service guidelines. (Welf. & Inst. Code, § 4646.4, subd. (a)(1).) The Lanterman Act requires the Department of Developmental Disability (Department) to review the guidelines “to ensure compliance with statute and regulation.” (Welf. & Inst. Code, § 4434, subd. (d).) Reflecting the Department’s interpretation of statute and regulation, the purchase of service guidelines are not entitled to the deference given to a regulation; rather, the purchase of service guidelines are entitled to a degree of deference that is dependent on the circumstances in which the agency has exercised its expertise. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-15.) Most important, a regional center’s implementation of its purchase of service guidelines must account for a consumer’s individual needs when making determinations regarding the appropriateness of particular services. (See *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

4. In this case, Mother sought to attend Claimant’s sibling’s college graduation. She purchased airline tickets and she sought to arrange for Claimant’s care at home during her absence. The service agency alternatively proposed placing Claimant in an out-of-home respite care facility. However, Claimant’s frequent and intense seizures are such that he is restricted to his residence even for his education. The

environs of Claimant's residence are modified to prevent him from being injured. Claimant has maladaptive behaviors which include elopement. As set forth in Factual Findings 7 and 8, the out-of-home respite care facilities under consideration presented opportunities for Claimant to elope. It was established that he continuity of care for Claimant in his home with a service provider familiar with his needs was likely to avoid exacerbating stresses associated with Mother's absence. The exigent circumstances of Claimant's sibling's college graduation constituted cause to grant Claimant in-home respite care in lieu of out-of-home respite care to meet his need for care and supervision May 10, 2014 through May 13, 2014.

5. The intensity and frequency of Claimant's seizure restricts him to his residence where modifications have been made to ensure his safety while he engages in activities typical for a minor of his age. Claimant, for example, receives his education services at home where his safety in the event of intense seizures is most likely assured. Claimant's need for continuous care and supervision at home establishes his entitlement to an exemption from ELARC's purchase of service policy and procedure for out-of-home respite care services. Accordingly, cause exists to grant retroactively Claimant's request for 21 days of in-home respite care services in lieu of 21 days of out-of-home respite care services minus three days used in connection with the circumstances set forth in Legal Conclusion 4.

ORDER

1. Claimant's appeal is granted.
2. Upon its receipt of documentation from Claimant's mother, Eastern Los Angeles Regional Center shall reimburse the cost of providing in-home respite care services in lieu of out-of-home respite care services to Claimant May 10, 2014 through May 13, 2014 while Claimant's mother attended his sibling's college graduation ceremony. Such costs shall not exceed \$150 per hour.

3. The Eastern Los Angeles Regional Center shall provide Claimant with 18 days of in-home respite care services in lieu of out-of-home respite care services effective February 10, 2014, the date of Claimant's most recent Individualized Program Plan.

4. At the expiration of Claimant's February 10, 2014 Individualized Program Plan, Claimant's continuing need for in-home respite care services in lieu of out-of-home respite care services shall be determined annually.

DATED: June 2, 2014

JENNIFER M. RUSSELL

Administrative Law Judge

Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.