

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2016070953

DECISION

This matter was heard by Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings, State of California, on February 2, 2017, in Alhambra, California.

Jacob Romero, Fair Hearing Coordinator, represented the service agency, Eastern Los Angeles Regional Center (Service Agency or ELARC). Claimant's brother represented claimant. Claimant's co-conservator/mother was also present.

Testimony and documentary evidence was received, the record was closed, and the matter was submitted for decision on February 2, 2017.

ISSUE

Whether ELARC should be required to fund staffing at the ratio of 2:1¹ through vendor Elwyn NC Halifax Home (Halifax Home) during claimant's activities in the community.

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EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1-3, 6, 9-31, 33-37; claimant's exhibits A-VV.

Testimony: Jennifer Taylor (Elwyn NC Executive Director); Jose Rios (Elwyn NC Behavioral Consultant); Jessica Barba-Acosta (ELARC Community Services Supervisor); Marlen Cervantes (ELARC Service Coordinator); Carlos Valenzuela (ELARC Service Coordinator); D.F.² (claimant's co-conservator); and claimant's brother.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a 59-year-old adult female who qualifies for regional center services based on diagnoses of Profound Intellectual Disability, Epilepsy, and Cerebral Palsy. She is conserved by her brother, mother, and family friend, D.F. She currently lives in Halifax Home, a community care facility operated by Elwyn NC (Elwyn).

¹ 2:1 ratio refers to the number of staff members to disabled individuals. A 2:1 ratio would be two staff members to one disabled individual. A 1:1 ratio would be one staff member to one disabled individual.

² Initials are used to protect the privacy of the witness.

2. On July 6, 2016, ELARC sent claimant a Notice of Proposed Action letter (NOPA) notifying her that the following requests were denied: (1) an increase in recreation therapist hours during claimant's participation in Special Olympics, and (2) 2:1 staffing ratio during all of claimant's activities in the community. Regarding the request for additional recreation therapist hours, ELARC had determined that the Service Agency's authority to purchase social recreation services has been suspended due to changes to the Lanterman Developmental Disabilities Act. Regarding the request for the 2:1 staffing ratio, ELARC had determined that claimant had not substantiated the need for additional staffing during her activities in the community. On July 15, 2016, claimant filed a request for a fair hearing appealing the denial.

3. At the hearing, the parties reached an agreement with respect to the issue of recreation therapist hours and stipulated that the sole issue under consideration for this hearing is whether ELARC should be required to fund staffing at the ratio of 2:1 through vendor Halifax Home during all of claimant's activities in the community.

BACKGROUND

4. Prior to her residence at Halifax Home, claimant lived at Lanterman Developmental Center (LDC), to which she was admitted at the age of eight. On March 8, 2013, in anticipation of the planned closure of LDC, claimant moved to Halifax Home.

5. Halifax Home is a community care facility developed for individuals transitioning into the community from LDC. Claimant underwent a lengthy transition in order to familiarize herself with the new staff at Halifax Home. By all accounts, the transition was successful, and claimant is content in her new home where she lives with three other female peers with similar developmental disabilities.

6. ELARC funds claimant's residence at Halifax Home pursuant to a General Agreement between ELARC and Elwyn, dated April 20, 2015. Halifax Home staff consists of an administrator, who acts in a managerial capacity; Direct Support Professionals (DSP),

who provide direct care to the residents; and a licensed psychiatric technician or licensed vocational nurse. All of Halifax Home's staff must complete two 35-hour certification programs on providing direct care to consumers in order to serve in the facility. Halifax Home is a level 4N specialized home, meaning that it receives a higher, negotiated rate for its services because of its staff's specialized training. ELARC pays Halifax Home a negotiated rate of \$17,000 per month for each resident. To request additional funding beyond this negotiated rate, Halifax Home must submit a Health and Safety Waiver to ELARC.

7. Currently, Halifax Home staffs claimant's activities in the community at the ratio of 1:1. For example, when claimant is being transported to community-based activities with Halifax Home, the driver is the only person accompanying her. Claimant's conservators have requested staffing at the ratio of 2:1 while claimant participates in community-based activities with Halifax Home. However, an interdisciplinary team, consisting of Halifax Home staff, the ELARC service coordinator, and other consultants, has determined that the current staffing ratio of 1:1 is sufficient to meet claimant's needs. Consequently, Halifax Home did not submit a Health and Safety Waiver to ELARC to request additional funding to increase the staffing ratio.

CLAIMANT'S INDIVIDUAL PROGRAM PLAN

8. Claimant's most recent Individual Program Plan (IPP), dated November 16, 2015, contains the Service Agency's and claimant's family's agreements, sets forth specific objectives and goals, and contains the services and supports to achieve them. It also describes claimant's needs and behaviors.

9. A. As set forth in the IPP, claimant has limited vocabulary, but she is able to communicate her needs using one to two word phrases and physical gestures. She is able to walk independently, but she tends to walk fast, at times almost running, while not paying any attention to hazardous objects. Claimant is very

easily distracted and may wander off course if something catches her attention. Claimant has no safety awareness and requires 24-hour care and supervision.

- B. Although claimant has a pleasant, outgoing personality, she experiences behavioral challenges. She engages in physical aggression, including striking, biting, and scratching others. She also engages in self-injurious behavior, including hair pulling, head banging, slapping herself, and scratching herself. Claimant's maladaptive behaviors usually manifest with changes in routine or changes in staff.

CLAIMANT'S COMMUNITY-BASED ACTIVITIES UNDER THE IPP

- 10. A. Pursuant to the IPP, claimant attends a day program, People's Care, Monday through Friday, six hours per day. People's Care is a community-based program that allows claimant to participate in a variety of social activities, such as shopping, bowling, and going to the park. People's Choice also provides transportation services for each day that she attends the program.
- B. Prior to September 2014, People's Care provided staffing to claimant at the ratio of 1:1. However, in April and September of 2014, claimant had behavioral incidents which prompted meetings to address these problems and to provide better support for her. After the second incident in September 2014, ELARC began to fund additional staffing for claimant's day program to ensure her safety in the community. Specifically, the IPP noted, "Thus, 2:1 began in mid-September 2014 to assure [claimant's] health and safety, especially during times of transit. Increased staffing will be reviewed every three months to review continued need and appropriateness. Once [claimant] is stable, a fade out plan will be discussed and implemented." (Ex. 27, p. 3.)
- C. Claimant's prior IPP, dated November 19, 2014, her current IPP of November 16, 2015, and subsequent IPP quarterly review reports dated March 14, 2016

- and June 3, 2016, have consistently noted that claimant's day program implements staffing for her community activities at the ratio of 2:1, although the continuation of this service was subject to quarterly review.
- D. At the hearing, Marlen Cervantes, claimant's service coordinator at ELARC from June 2002 to January 2016, confirmed that from September 2014 to December 2015, People's Care staffed claimant's outings in the community at the level of 2:1. In particular, Ms. Cervantes emphasized that, in addition to the driver, there is always a staff member from People's Care accompanying claimant while transporting her to community activities.
- E. At the hearing, Carlos Valenzuela, claimant's service coordinator at ELARC from January 2016 to January 2017, also confirmed that from January 2016 to the present, People's Care staffed claimant's outings in the community at the level of 2:1. Mr. Valenzuela reported a conversation he had with a supervisor at People's Care on June 3, 2016, during which the supervisor had stated that staffing for claimant's activities could be reduced to 1:1. However, Mr. Valenzuela testified that that the 2:1 ratio of staffing for claimant's communities activities with People's Care has continued to the present day, despite this conversation.
11. A. Pursuant to the IPP, claimant's community activities with Halifax Home include attending bowling for Special Olympics and attending church on Sundays. The IPP states that claimant's continued participation in social recreational activities is an objective. To enable claimant to achieve this goal, Halifax Home will "provide [claimant] with a variety of socialization activities, supervise [claimant] at all times during these activities, [and] provide transportation to and from activities." (Ex. 27, p. 16.) The IPP also indicates

- that Halifax Home has developed formal objectives for claimant's participation in social recreational activities.
- B. These formal objectives are set forth in claimant's Individual Service Plan (ISP) developed by Halifax Home. Claimant's most recent ISP, dated October 17, 2016, identifies the following three objectives for community integration: (1) participation in a minimum of four community-based outings each month; (2) attendance at church each Sunday morning to fulfill her acolyte responsibilities; and (3) participation in a variety of preferred Special Olympics activities each month.
- C. The October 17, 2016 ISP indicates that for the first objective of participating in at least four community-based outings, claimant had the following success rates: 66 percent and 50 percent in November and December of 2015, respectively; 33 percent in January, February, March, and April of 2016; and 94 percent, 73 percent, and 91 percent in June, July, and August of 2016, respectively. For the second objective, claimant was able to attend church three out of four times in March and April of 2016 and four out of four times in June and July of 2016. For the third objective, claimant was able to participate in Special Olympics activities three out of four times in March of 2016, five out of seven times in April of 2016, and two out of two times in June and July of 2016.

CLAIMANT'S HISTORY OF BEHAVIORAL PROBLEMS

12. Jose Rios, M.S., Board Certified Behavioral Analyst (BCBA), testified at the hearing as a witness for ELARC. He has worked in the behavioral analysis field for 44 years, and he has been board certified for 16 years. As a BCBA, Mr. Rios performs functional assessments and devises and implements behavioral intervention plans. He is a consultant for Halifax Home, and he has known claimant since 2012.

13. Mr. Rios performed the first functional assessment of claimant on March 20, 2013, shortly after claimant moved from LDC to Halifax Home. In a report dated the same date, Mr. Rios noted that claimant's transition from LDC to Halifax Home went well and there were no documented issues with claimant's behavior. However, Mr. Rios indicated that Halifax Home staff is expected to record any acts of physical aggression by claimant, such as striking of others and biting, and any self-injurious behavior by claimant, such as slapping herself, hand-banging, and hair pulling.

14. Since 2013, Mr. Rios has performed functional assessments of claimant on a quarterly basis and revised claimant's behavioral intervention plan on an annual basis. As a summary, Mr. Rios noted that from March 2013 to May 2016, claimant continued to display both physical aggression and self-injurious behavior at varying frequencies and at varying degrees of severity at Halifax Home and during activities in the community. Rates were initially high in some months, with Halifax Home staff reporting 20 to 27 episodes of aggression a month. At times, claimant's behavioral issues necessitated the cancellation of some community outings mid-way or postponement of others entirely. However, by 2016, there was a decrease in the frequency of claimant's behavioral problems, and she had fewer instances of both physical aggression and self-injury. From May 2016 to December 2016, for example, claimant had a total of five episodes of physical aggression.

15. Nevertheless, Mr. Rios acknowledged that, in January 2017, claimant experienced a significant increase in behavioral issues. In that month alone, claimant had 11 incidents of physical aggression involving impact and 7 to 10 attempts of aggression. Mr. Rios attributed this uptick to changes in Halifax Home staff. Halifax Home had several turnovers in staff, and claimant does not react well to people with whom she is unfamiliar.

16. A. Specific incidents of claimant's recent behavioral issues are documented in a log of consumer notes maintained by Halifax Home. The entries for January 2017 show that claimant has been exhibiting severe behavioral problems, some of which have led to the cancellation of community-based activities.
- B. For instance, the entry for January 3, 2017 noted, "[Claimant] attempted to attack staff during van ride but was redirected verbally. She attempted a second time and scratched staff member even after verbally redirecting. [Claimant] still attempted but eventually calmed down." (Ex. VV, p. 5.)
- C. On January 11, 2017, Halifax Home staff wrote,
- [Claimant] became physically assaultive to self, striking her cheeks with 2 open hands, 5-6 quick times. Stopped when verbally prompted to, but immediately began exhibiting physical aggression to this writer, securing hold on staff hair, attempting to scratch and kick staff x3. [*sic*] This writer verbally prompted [claimant] to "stop" and have nice hands. [Claimant] remained fearful at this time. Any attempts to refocus her to shower or have a drink of beverage were unsuccessful. [Claimant] said, "Go in van." Staff replied by telling [claimant] that we could not take her in the van until she was having nice hands and could be safe.
- (*Id.* at p. 12-13.)
- D. On January 11, 2017, claimant did not attend bowling because she was "exhibiting crisis behavior which made it unsafe to take her into the community." (*Id.* at p. 15.)
- E. On January 12, 2017, Halifax Home staff wrote,

At approximately 1350, [claimant] suddenly stood up and walked rapidly towards new DSP staff with bilateral arms reaching out in attempt to grab DSP staff. Lic [sic] staff immediately stood between [claimant] and DSP and verbally prompted client to "stop." [Claimant] calm. At approx. [sic] 1355 [claimant] again suddenly stood up and walked rapidly towards DSP Staff with both her arms reaching out to grab DSP. Lic [sic] staff again stood between [claimant] and DSP. [Claimant] reached out with her left hand and pulled lic. [sic] staff's hair. DSP assisted in asking [claimant] to "let go" and behavior therapist verbally prompted [claimant] to "stop."
(Ibid.)

F. On January 12, 2017, Halifax Home staff wrote,

Around 1600 while a DSP staff was sitting on the other couch, [claimant] got up and secured hold of the DSP staff's hair. Another DSP staff interfered [claimant] and told her to stop. [Claimant] let go and complied. And approximately 10 min [sic] later, while this writer was about to give [claimant's] medication, [claimant] tried to grab this writer's hand but this writer quickly got away and kept a distance. *(Id. at p. 16.)*

17. Based on these incidents, Mr. Rios recommended that Halifax Home implement 2:1 staffing during claimant's activities in the community. Mr. Rios opined that 2:1 staffing is necessary to ensure the health and safety of claimant as well as the staff members who care for her. Specifically, Mr. Rios recommended the implementation of Pro-Act, which is a behavior intervention protocol that requires two staff members to

implement at one time. Because the escalation in claimant's maladaptive behavior is a reaction to turnover in Halifax Home staff, Mr. Rios declined to speculate on how long it would take for claimant's behavior to stabilize. Assuming that there are no further changes in staff at Halifax Home, Mr. Rios believed that it should take no more than six months for claimant's behavior to stabilize, at which point the 2:1 staffing ratio may be reduced.

TESTIMONY OF CLAIMANT'S BROTHER AND CLAIMANT'S CO-CONSERVATOR, D.F.

18. At the hearing, claimant's brother testified credibly that claimant is capable of taking off the seat belt by herself when she is riding in a car. However, when claimant is being transported to outings with Halifax Home, the only staff present is the driver. Claimant's brother expressed concerns that his sister would harm herself or the staff during the van rides to activities in the community. Claimant's brother asserted that claimant has missed activities such as bowling because the staff at Halifax Home was afraid to take her. Although claimant's brother believed that Halifax Home has a "nice atmosphere" due to its small size, he does not believe that his sister is receiving the same quality of care as she had at LDC.

19. D.F., a long-time family friend and claimant's co-conservator, also testified at the hearing on behalf of claimant. D.F. stated that claimant has a history of seizures which necessitates an increase in the staffing ratio. D.F. noted that, in December 2014, Halifax Home had implemented 2:1 staffing during claimant's activities in the community, but the ratio was reduced to 1:1 three months later. D.F. also testified that claimant's mother has attempted to assist Halifax Home's staff. However, she is limited in her capacity to do so because claimant's mother is 91-years old.

LEGAL CONCLUSIONS

1. The burden of proof is on the party seeking government benefits or services. (See, e.g., *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that she is entitled to funding for a 2:1 staffing ratio during her activities in the community with Halifax Home. (Evid. Code, § 115.) She has met that burden.

2. Based on Factual Findings 1 to 19 and Legal Conclusions 1 to 12, cause exists to grant claimant's appeal and to require ELARC to fund staffing at the ratio of 2:1 through vendor Halifax Home during claimant's activities in the community.

3. The Lanterman Developmental Disabilities Services Act (Lanterman Act)(Welf. & Inst. Code, § 4500 et seq.) sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. 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." Under the Lanterman Act, regional centers are "charged with providing developmentally disabled persons with 'access to the facilities and services best suited to them throughout their lifetime'" and with determining "the manner in which those services are to be rendered." (*Id.* at p. 389, quoting from Welf. & Inst. Code, § 4620.)

4. To comply with the Lanterman Act, a regional center must provide services and supports that "enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (Welf. & Inst. Code, § 4501.) The types of services and supports that a regional center

must provide are “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.” (Welf. & Inst. Code, § 4512, subd. (b).) The determination of which services and supports the regional center shall provide is 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.” (*Ibid.*) However, regional centers have wide discretion in determining how to implement an IPP. (*Association for Retarded Citizens, supra*, 38 Cal.3d at p. 390.)

5. As set forth in Welfare and Institutions Code section 4646, subdivision (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.

6. In addition, Welfare and Institutions Code section 4640.7, subdivision (a), states, "It is the intent of the Legislature that regional centers assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community."

7. In this case, the evidence established that claimant requires 2:1 staffing during activities in the community in order to ensure her health and safety and those of the staff who assist her. Claimant is diagnosed with Profound Intellectual Disability, Epilepsy, and Cerebral Palsy. The effects of claimant's disability include a tendency to wander off and a lack of safety awareness. Claimant also suffers from a long history of behavioral issues and engages in acts of physical aggression and self-injury. In 2014, claimant's maladaptive behavior escalated to a point that her day program, People's Care, began to implement 2:1 staffing for her health and safety. Although the continuation of this increased level of staffing was subject to quarterly review, People's Care has continued to staff claimant's activities in the community at this level to the present day.³ Halifax Home, however, staffs claimant's activities in the community at the

³ Mr. Valenzuela testified that, on June 3, 2016, a supervisor at People's Care had stated that staffing for claimant's activities could be reduced to 1:1. However this testimony is given no weight because the supervisor did not testify at the hearing. Therefore, there was no evidence regarding the grounds on which he had based any such statement. Additionally, Mr. Valenzuela himself later testified that the 2:1 staffing at claimant's day program is reviewed on a quarterly basis and has continued to the

level of 1:1. No reasonable explanation was provided as to the discrepancy in the staffing levels between that of People's Care and Halifax Home. Although ELARC contended that Halifax Home staff receives specialized training, there was no evidence to show that this specialized training has enabled the staff to care for claimant safely at the current ratio of 1:1.

8. In fact, the evidence demonstrated the opposite. Recently, claimant has experienced a significant increase in behavioral problems because of turnover in staff at Halifax Home. In January 2017, claimant had 11 incidents of physical aggression involving impact and 7 to 10 attempts of aggression. As detailed in the consumer log entries from Halifax Home, the nature of these incidents is serious and poses a danger to both claimant and the staff who care for her. Claimant has grabbed her caretakers by the hair, scratched them, and attempted to hit and kick them. Of particular concern is the incident of January 3, 2017, during which claimant attempted three separate times to attack the van driver as she was being transported to a community-based activity. Given that claimant is capable of taking off her seat belt and attacking the van driver, without an additional staff member to help restrain claimant, her current 1:1 staffing ratio is inadequate to ensure the health and safety of claimant and the driver.

9. Further, Mr. Rios's opinion regarding the necessity of 2:1 staffing is given substantial weight. Mr. Rios is a highly qualified BCBA who has known claimant since 2012. He also performs functional assessments of claimant on a quarterly basis and revises her behavioral intervention plan on an annual basis. In light of his knowledge of claimant's case, Mr. Rios concluded that the current staffing level of 1:1 is not safe and

present day, despite any statements which may have been made on June 3, 2016.
(Factual Finding 10 E).

that a 2:1 staffing ratio should be implemented. Mr. Rio's conclusion is reasonable and unrefuted.

10. There was also evidence that Halifax Home staff shared these concerns about claimant safety, to the extent that some of claimant's community-based activities, such as bowling, were cancelled. Claimant's continued participation in social recreational activities in the community is a stated objective in her IPP, but a lack of safe and effective supervision when staffing is at the ratio of 1:1 has prevented her from meeting these goals.

11. Given these facts, staffing at the ratio of 2:1 for all of claimant's activities in the community is a "specialized service" within the meaning of Welfare and Institutions Code section 4512, subdivision (b). It is also a service necessary to enable claimant to achieve the goals stated in her IPP and to maximize her opportunities to recreate in the community, within the meaning of Welfare and Institutions Code sections 4646, subdivision (a), and 4640.7, subdivision (a), respectively. Consequently, ELARC must provide staffing at the ratio of 2:1 for claimant's activities in the community with Halifax Home.

12. Mr. Rios declined to speculate on a timeframe for how long it would take for claimant's behavior to stabilize to a point where 2:1 staffing will no longer be necessary. Assuming that there is no further change in Halifax Home staff, he opined that it should take claimant no more than six months to stabilize her behavior. It is also noted that 2:1 staffing under claimant's day program is reviewed every three months to assess for continued need. Therefore, it is appropriate to require ELARC to increase staffing for claimant's community outings with Halifax Home to 2:1 for an initial period of six months, but continuation of this service beyond the initial period will be subject to quarterly review.

ORDER

1. Claimant's appeal is granted.
2. Eastern Los Angeles Regional Center shall fund staffing at the ratio of 2:1, through vendor Elwyn NC Halifax Home, during claimant's activities in the community for an initial period of six (6) months. Any continuation of this service beyond the initial six-month period shall be subject to quarterly review for further assessment of claimant's needs.

DATED:

JI-LAN ZANG

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.