

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DAVID N.

vs.

FRANK D. LANTERMAN REGIONAL
CENTER,

Service Agency.

OAH No. 2012010872

DECISION

Michael A. Scarlett, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California on May 15, 2012.

Marc Baca, Appeals Coordinator, represented Frank D. Lanterman Regional Center (Service Agency or Regional Center).

Sharona N. (Mother) represented David N. (Claimant)¹.

Oral and documentary evidence was received and the matter was submitted for decision on May 15, 2012.

¹ Last name initials are used to protect the privacy of the Claimant and his parents.

ISSUE

1. Did Service Agency Improperly Deny Claimant's Request for a One-to-One Aide for an "Optional Afterschool Program"?

FACTUAL FINDINGS

1. Claimant is a six year-old boy who has been diagnosed with autism. He lives with his parents and three siblings. Claimant's last Individual Program Plan (IPP) was dated September 20, 2011, with subsequent IPP Amendments from September 26, 2011 through February 28, 2012. Claimant is described as needing some assistance in self-help skills such as bathing and dressing, but he is toilet trained. He is able to communicate his needs in clear and complete sentences, but he is described as being impulsive and "will hit and kick when upset." Mother describes Claimant's behaviors as being "unpredictable" and the IPP indicates that he engages in "obsessive compulsive behaviors and can be very rigid." Claimant eats and sleeps well, but he needs supervision by an adult to ensure his safety. He is described as being in good physical health, although he is taking Celexa to reduce anxiety, which Mother does not believe is effective. Claimant enjoys spending time with his peers and has a close relationship with his younger brother.

2. Service Agency is currently providing Claimant 16 hours per month of respite services through Tender Touch. Service Agency is also funding two hours per week of a one-to-one aide for a structured activity two times per week, one hour per session. The two structured programs, drum class and karate class, are afterschool programs funded by Claimant's parents.

3. Claimant is attending a private Jewish School, Ohr Eliyahu. He is in pre-first grade and attends school 30 hours per week. Parents are paying for his tuition and transportation for the private school placement. Parents have also been paying for a

one-to-one aide to assist Claimant in accessing the educational curriculum. Until recently, parents were paying for a one-to-one aide for the entire school day, but due to Claimant's improved behavior, Ohr Eliyahu has allowed Claimant to attend school with a one-to-one aide for only one-half of the school day. Parents voluntarily made the decision to place Claimant at the Ohr Eliyahu private school and initially did not seek to have Los Angeles Unified School District (LAUSD) fund the placement or the one-to-one aide sought by Claimant's parents. However, as of the date of hearing, parents had sought funding for the one-to-one aide from LAUSD but have not received a decision on their request. There has not been an Individual Educational Plan (IEP) implemented for Claimant at Ohr Eliyahu. Parents did not seek services or private school placement from LAUSD prior to placing Claimant in the private school placement. Parents do not believe that LAUSD could provide an appropriate educational placement for Claimant due to his deficits in social skills and the unavailability of a school that could provide suitable peer support and an appropriate social environment for Claimant's Jewish cultural background. Parents believed that a placement other than a Jewish Private school would significantly hinder the development of Claimant's social skills.

4. Mother contends that Service Agency should provide a one-to-one aide for Claimant for four hours per day at Ohr Eliyahu private school. Mother essentially contends that Service Agency should consider Claimant's afternoon classes at the private school as an afterschool program and fund the one-to-one aide as a component of an afterschool program. Mother argues that Service Agency has provided funding in this manner for other consumers, essentially considering the private school placement as a half-day school program, and deeming the afternoon classes at Ohr Eliyahu as an afterschool program, which would make Claimant eligible for a one-to-one aide to be funded by the Service Agency.

5. On January 12, 2012, Service Agency denied funding of Claimant's request for a one-to-one aide stating that the regional center can not supplant services that would have been generally been available to Claimant had Mother sought an educational placement in LAUSD public school. Service Agency cites Welfare and Institution Code² section 4659, subdivision (a)(1), which provides in pertinent part that the Service Agency shall identify all sources of funding for consumers, including "school districts." Service Agency further asserts that section 4648, subdivision (a)(8), prohibits the Regional Centers from supplanting the budget of any agency which has the legal responsibility to provide services to the general public, here LAUSD for Claimant's educational services. Finally, Service Agency cites section 4646.4, subdivision (a)(2), which provides in pertinent part that Regional Centers shall develop an IPP using the internal process to ensure that appropriate services and supports are provided to consumers, including "utilization of generic services and supports when appropriate."

6. On January 17, 2012, Claimant filed a Fair Hearing Request (FHR) seeking an aide for four hours per day for Claimant's "optional after school program." All jurisdictional requirements have been met and subsequently, this hearing ensued.

7. Claimant attends Ohr Eliyahu private school from 8:00 a.m. to 3:40 p.m. Monday through Thursday, and 8:00 a.m. to 1:30 p.m. on Friday. Mother's request that Service Agency deem Claimant's afternoon classes at the private school as an "optional afterschool program" is not justified. Claimant is actually attending classes in the afternoon that are part of his educational curriculum at Ohr Eliyahu. Although his afternoon classes at times include such subjects as music, physical education, and art, he also has core curriculum subjects such as math and language scheduled during the

² All further statutory references shall be to the Welfare and Institutions Code unless otherwise denoted.

afternoon class periods. To consider Claimant's classes at Ohr Eliyahu as a one-half day educational program would not accurately describe his private school program.

Claimant's class schedule and program at Ohr Eliyahu constitutes a full day educational program. Claimant is not entitled to funding by Service Agency for a one-to-one aide for the afternoon classes at his educational program at Ohr Eliyahu private school.

LEGAL CONCLUSIONS

1. The party asserting a claim 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.) Claimant seeks an appeal of the denial of a requested service not previously funded by the Service Agency and therefore claimant has the burden to demonstrate that Service Agency's decision was incorrect. Claimant has the burden to show by a preponderance of the evidence that he is entitled to a one-to-one aide at his Ohr Eliyahu private school placement. (*See* Evid. Code, § 115.)

2. Section 4646.4 provides that in pertinent part that:

Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

(1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.

- (2) Utilization of generic services and supports when appropriate.
- (3) Utilization of other services and sources of funding as contained in Section 4659.
- (4) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting.

3. Section 4659, subdivision (a)(1), provides that:

...the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

- (1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.

4. Section 4648, subdivision (a)(8), provides that "Regional Center funds shall not be used to supplant the budget of an agency which has the legal responsibility to serve all members of the general public and is receiving public funds for providing those services."

5. Claimant has not shown by a preponderance of the evidence that he is entitled to a one-to-one aide at the Ohr Eliyahu private school placement. The evidence established that Claimant's parents enrolled him into the private Jewish School voluntarily with the stated preference and purpose of ensuring that Claimant was in an environment conducive to the development of his social skills which has been impaired due to his autism. Mother testified that she did not believe an LAUSD public school placement was best for Claimant because of his cultural background. Mother did not seek private school placement from LAUSD through the IEP process prior to enrolling

Claimant at Ohr Eliyahu private school. Only recently has Mother sought funding for the one-to-one aide for Claimant's private school from LAUSD. As of the date of hearing, Mother had not received approval of the funding from LAUSD.

6. Claimant's Ohr Eliyahu private school placement is a full-time, full day educational program. Claimant may not deem the afternoon portion of the educational program as an "afterschool program" for purposes of receiving funding for a one-to-one aide from the Service Agency. Claimant is receiving educational instruction from Ohr Eliyahu from 8:00 a.m. until 3:40 p.m. Monday through Thursday, and 8:00 a.m. until 1:30 p.m. on Friday. Consequently, he is not entitled to Regional Center funding for a one-to-one aide to access his educational services at Ohr Eliyahu private school. The responsibility for this funding should be borne by LAUSD, the generic resource for Claimant's educational services. Claimant's parent voluntarily choose the private school placement forgoing access to public school services provided by LAUSD, including a one-to-one aide to assist Claimant in accessing his educational curriculum.

ORDER

Claimant David N.'s appeal of the Service Agency's decision to deny funding for a one-to-one aide is DENIED.

DATED: June 19, 2012

MICHAEL A. SCARLETT

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5, subdivision (a). Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.