

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ALEJANDRO D.,

Claimant,

and

EASTERN LOS ANGELES

REGIONAL CENTER,

Service Agency.

OAH No. 2012030751

DECISION

Jennifer M. Russell, Administrative Law Judge with the Office of Administrative Hearings, heard this matter in Whittier, California on May 16, 2012.

Arturo Del La Torre, Supervisor School Age Unit, represented Eastern Los Angeles Regional Center (ELARC or service agency).

Claimant Alejandro D.'s parents represented him.¹ Claimant was not present at the hearing. 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, 2012. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

¹ Initials are used to preserve confidentiality.

ISSUE

Whether the service agency should fund in-home respite service in lieu of out-of-home respite service.

FACTUAL FINDINGS

1. Claimant is a 14-year-old consumer of ELARC based on his qualifying diagnosis of mental retardation. Claimant also has diagnoses of expressive language disorder and mitochondrial disorder. He resides with his parents and sibling. He receives special educational services from the Whittier City School District where he is matriculated under the categories of autistic-like behavior and other health impairment.

2. Claimant's vocabulary is limited. He communicates using a communication device. He cannot tend to his personal hygiene independently. He has temper tantrums daily. He is hyperactive. He exhibits resistive and aggressive behaviors. He bites, hits, scratches, screams, kicks, and throws objects. Claimant has difficulty forming friendships and interacting appropriately with his peers and others. He displays inappropriate sexual behaviors. He requires supervision at all times to avoid injury to others and himself. His mitochondrial disorder requires him to eat frequently and regularly and to avoid extreme physical activities to prevent leg pain, lethargy, severe headaches, abdominal pain, nausea and vomiting episodes.

3. ELARC currently funds 18 hours per month of in-home respite services for claimant. ELARC does not fund any out-of-home respite service for claimant. Claimant's parents requested in-home respite service in lieu of out-of-home respite service in anticipation of a June 23 and 24, 2012 vacation and any future emergent visit to claimant's 70-year-old grandmother residing in Mexico. By Notice of Proposed Action (NOPA), dated March 17, 2012, ELARC denied the requested in-home respite service in lieu of out-of-home respite services "due to refusal from the family to adhere to the POS

guidelines for Out-Of-Home Respite Policy.” (Exhibit 2.) In response to the NOPA, claimant’s mother filed a timely Fair Hearing Request. Thereafter, these proceedings ensued.

4. ELARC’s Out of Home Respite Services Purchase of Services Policy & Procedure, which became effective May 2, 2011, provides as follows: “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.” The purchase of service policy and procedure further provides 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 11.)

5. ELARC requires claimant’s compliance with its out-of-home respite service policy and procedures, the implementation of which require, among other things, that claimant obtain a tuberculosis (TB) test and that his parents visit several recommended residential facilities. Claimant has done neither.

6. Claimant’s parents seek an exemption for claimant from ELARC’s out-of-home respite policy and procedures asserting that the medical and psychological professionals treating claimant recommend against any out-of-home residential placement for claimant. Claimant’s treating psychiatrist Priti R. Sahgal writes in a February 3, 2012 letter that “because of the severity of [claimant’s] . . . anxiety and because his anxiety is generally triggered by change in his environment and his routine .

. . . [.] I am recommending only In Home care for him.” (Exhibit 15.) Dr. Sahgal did not testify at the hearing.

7. Licensed clinical psychologist Rodric B. Rhodes has been treating claimant’s anxiety, mood symptoms, and associated behaviors. At the request of claimant’s parents, Dr. Rhodes prepared a February 28, 2012 Treatment Summary indicating that claimant’s anxiety and depressive symptoms and behaviors are manifested through crying, clinging, noncompliance, temper outbursts, screaming, hitting, kicking, scratching, biting, pulling hair, grabbing clothes, throwing property, toileting accidents, refusing to eat, lack of energy, drowsiness, and disturbed sleep. According to Dr. Rhodes’ Treatment Summary, claimant exhibits these symptoms and behaviors across all environments, including home, school, and community. Changes in claimant’s routine exacerbate these symptoms and behaviors. Based on his treatment of claimant, Dr. Rhodes, in the Treatment Summary, opined that claimant’s “significant anxiety and mood symptoms and associated behaviors would escalate, placing [claimant’s] . . . mental and physical health at risk for deterioration, in addition to increased risk for harm to patient . . . were [claimant] to stay out-of-home and outside of the care of familiar caregivers, and caregivers who have been extensively trained in [claimant’s] individual behavioral, medical, and communication needs.” (Exhibit 16.)

8. Dr. Rhodes testified at the hearing, and his credible testimony was consistent with the February 28, 2012 Treatment Summary. Dr. Rhodes acknowledged during the course of his testimony that he lacked expertise in the process of obtaining out-of-home respite care. He nonetheless emphasized that out-of-home respite care placement for claimant would require retaining trained personnel who had spent enough time with claimant to understand his needs and limitations. Dr. Rhodes stressed that he himself had to develop a careful relationship with claimant over an extensive period of time, and he expressed his concern for the likely challenges of finding

someone with the knowledge, background, and established, intimate familiarity with claimant to work intermittently on a temporary basis with claimant at a residential facility. Dr. Rhodes opined that “it is not in [claimant’s] best interest to access out-of-home respite care.” ELARC presented no evidence refuting Dr. Rhodes’ opinion.

9. Based on Drs. Sahgal and Rhodes’ recommendations against out-of-home respite services for claimant, his parents declined ELARC’s request to visit several residential facilities. Claimant’s parent testified that it was not possible to obtain the required TB test because claimant was uncooperative during an attempted administration of the test using the stick method. Claimant’s parents testified that obtaining claimant’s TB status by an alternative means—x-ray—would have been just as difficult. They cite to a prior occasion when an x-ray was required of claimant during the course of treating him for pneumonia; claimant’s agitated state, hand-flapping and jumping made it very difficult to x-ray him. Claimant’s parents’ fears of a recurrence of the same behavior counseled against the likely stress to claimant over the TB test.

10. From March 5, 2012 to April 16, 2012, claimant’s special education classroom was staffed with substitute teachers. In a May 4, 2012 letter, claimant’s special education instructor Tom Reynolds describes a disruption to claimant’s daily routines and its impact on claimant’s behavior as follows:

. . . there was significant regression to behaviors that were almost extinguished. As example: one of his goals was to cease assault behavior and property destruction. Without the classroom structure and with new and unfamiliar teaching personnel, his old behavior patterns returned. His baseline went from only one incident in two months to daily events. (Claimant’s Exhibit 20.)

11. It is established that variation in claimant’s routine triggers recurrence of and exacerbates his maladaptive behaviors. Implementation of ELARC’s out-of-home respite service policy and procedure requires an individualized placement assessment

that is unobtainable because claimant's maladaptive behaviors make it impossible to assess him for such service.

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. The preponderance of the evidence establishes the volatility of claimant’s behavior and the careful, sustained efforts required to manage it. Any alteration in routine is not only unsettling, but destabilizing for claimant. Sporadic placement of claimant in a residential facility, even assuming claimant’s susceptibility to completing the out-of-home respite service assessment process, would be inconsistent with the Lanterman Act’s mandate to provide services and supports directed toward the alleviation of the effects of claimant’s developmental disability. Having accounted for claimant’s intense needs set forth above, deference to ELARC’s out-of-home respite service policy and guidelines is unwarranted for “there is no out of home respite arrangement available” to meet claimant’s needs. Based on Factual Findings 4 through 9, inclusive, in-home respite service in lieu of out-of-home respite services is the appropriate alternative for claimant.²

² Claimant’s receipt of 18 hours per month of in-home respite services is well below the statutory maximum of 30 hours per month (or 90 hours per quarter) provided for under section 4686.5, subdivision (a)(2). Claimant’s request could have been handled (at least partially) with a grant of 12 additional hours per month of in-home respite

5. Cause exists under these circumstances for Eastern Los Angeles Regional Center to fund in-home respite in lieu of out-of-home respite by reason of Factual Findings 1 through 9, inclusive, and Legal Conclusions 1 through 4, inclusive.

ORDER

Eastern Los Angeles Regional Center shall fund in-home respite in lieu of out-of-home respite for claimant Alejandro D.

DATED: May 25, 2012

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.

service given that the intensity of his care and supervision needs exceeded that of an individual of the same developmental age without developmental disabilities.