

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Elizabeth A.

Claimant,

vs.

Eastern Los Angeles Regional Center,

Service Agency.

OAH No. 2013050014

DECISION

Administrative Law Judge Jerry Smilowitz, State of California, Office of Administrative Hearings, heard this matter on June 19, 2013, in Alhambra, California, at the offices of Eastern Los Angeles Regional Center (ELARC or Service Agency).

Elizabeth A. (Claimant) was present.¹ She was represented by her sister, Rosa H.

Judy Castaneda, Fair Hearing Coordinator, represented the Service Agency.

Prior to the hearing, Claimant executed a form authorizing her sister, Rosa H., to act as her representative at the hearing by placing an "x" on the signature line. This execution of the authorization document was witnessed and sworn to by another.

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on June 18, 2013.

¹ For purposes of this Decision, in order to protect the privacy rights and interests of Claimant and her family, only first names followed by initials will be used to identify them.

ISSUES

The parties agreed on the following statement of the issues to be decided: Should Claimant be transitioned from Personal Assistance, which is not a day program but is presently being utilized as such, to Behavior Management Program which is a day program, both of which are offered by the same vendor, People's Care? Has Claimant progressed to that point in her behavior where she can move from a program which has a ratio of one staff member for each consumer to one that has a ratio of one staff member for each three consumers?

EVIDENCE RELIED UPON

DOCUMENTS. SERVICE AGENCY'S EXHIBITS 1-12.

Testimony. For Service Agency, Ursula Cerezo, Service Coordinator with ELARC; for Claimant, Rosa H. and Norma Muracles, a Staff member with People's Care Personal Assistance Services (PAS).

FACTUAL FINDINGS

1. Claimant is a 32-year old unconserved woman who has a dual diagnosis of Autistic Disorder and Severe Mental Retardation associated with Down Syndrome. These conditions qualify her to be a consumer of the Service Agency. She weighs 133 pounds. A conference on her last Individual Program Plan (IPP) was conducted on March 4, 2013. The IPP describes her overall as "...being able to ambulate with some verbal prompts, but needs supports. She will also need a wheelchair when she is out in the community for example at the mall. Elizabeth will not walk for a long time and will tantrum and drop herself to the floor because she does not want to leave the mall. She needs to be accompanied at all times when out in the community. She has limited communication and communicates with gestures, sounds and pointing."

2. The IPP sets forth her behavior issues as follows: "Elizabeth expresses her frustrations by being physically aggressive towards family members and staff who work with her. She scratches, pinches and is physically combative. Rosa reported that this has improved and is not as violent when she is frustrated but it will occur 'from time to time.' During an episode, she becomes irritable, is physically resistive, she screams very loud, cries and then becomes physically aggressive. She is no longer banging her head nor is she pinching her face. She has exhibited other behaviors, such as, having bowel and bladder accidents where she is sitting or sleeping. She has been reported in all environments to have bladder and bowel control, however when she is in a very bad mood, she will soil herself and not inform anyone. Due to this change in behavior, Rosa has Elizabeth wear a diaper to prevent from soiling her clothes when she is out in the community."

3. Elizabeth resides with her sister Rosa and her family. The residence appears to be safe and provides the least restrictive environment. During challenging times, Elizabeth stays at her brother's house for support.

4. Elizabeth had attended the Arroyo Developmental Services Day Program (Arroyo), where her behavioral issues caused her to be terminated. At Arroyo, Elizabeth's primary staff person was Norma Muracles who now works for Personal Assistance Services (PAS), a program offered through a large vendor, People's Care. PAS is not considered by the Service Agency to be a day program. In its website, PAS characterizes itself as providing one-on-one services which, in part, are focused on "Implementing behavior intervention techniques to help the individual reduce challenging behaviors and increase socially significant behaviors." Before settling on such techniques, PAS conducts "an initial evaluation to determine the best approach and most appropriate goals for the individual."

5. Elizabeth started participating in PAS in 2011, where her principal staff attendant is Norma. The first Progress Report prepared by PAS stated, "Elizabeth is supervised at all times and is assisted and/or supported via redirection as needed."

Elizabeth's maladaptive behaviors include: Physical Aggression towards family members whom she pinches and scratches during the onset of her menstrual cycle. Nowadays, the antecedents are unknown. She displays Behavioral Outburst [sic] by crying and screaming loud before becoming physically aggressive. Elizabeth exhibits Non-Compliance by dropping her weight on the floor and refusing to get up for hours. She resorts to Self-Injurious behavior in the past by banging her head, pinching face. During this reporting period, PAS Staff indicated that, overall she has been able to redirect Elizabeth from her disruptive behaviors and has made her attend to tasks or activity with verbal prompts. PAS Staff will continue to closely supervise her for safety awareness at home and when out in the community as well as any other manner as needed. PAS Staff is well aware of Elizabeth's behaviors and is quick to intervene with the utmost care and support." [Original italics and underlines]. In conclusion, PAS called for regularly praising Elizabeth when she was not engaged in her negative behaviors and rewarding her for appropriately socializing with others.

6. The second, third, and fourth Progress Reports were prepared in May 2012, September 2012, and April 2013, respectively. These three reports use the exact same language that appears in the first report reciting Elizabeth's behaviors, and what steps should be taken to ameliorate problems.

7. The first report recommended for Elizabeth to have "1:1 service hours of 30 hours per week," commenting that it "appears that Elizabeth could greatly benefit from the PAS program and services, which focuses on assisting and supporting Elizabeth with behavioral episodes and assisting [her] when [she] is out in the community." The next three reports differ only slightly from the first. They urge a continuation of "1:1 PAS service hours of 30 hours per week," and conclude that she "greatly benefits from the PAS program and services, which focuses on assisting and supporting Elizabeth with behavioral episodes. Thus, it is recommended that the current service be continued since the PAS

program has been meeting [her] needs by supporting and assisting [her] with everyday life skills.”

8. In each of its reports, PAS stated that there had been no special incidents. According to Ursula Cerezo, Service Coordinator, ELARC’s file shows that the last incident report was prepared in 2004. These statements were at odds with the testimony of Norma who credibly testified that she prepared daily reports where sometimes she documented that Elizabeth had pushed, hit or struck other people. No one was able to explain why

9. Also on its website, People’s Care, under “Day Programs,” states that it provides, “Site-Based Behavior Management Day programs and Community-Based Behavior Management Day programs for individuals who have severe behavioral challenges that impede their ability to function successfully within a home or community environment. Our behavior analysts are expertly trained professionals who have innovative ways of targeting behavior patterns to help individuals reduce challenging behaviors and develop their own self-management skills.” The principal differences between these day programs and PAS is that the former has a ratio of one staff for every three consumers, and has, at its core, a behavior modification component.

10. At the IPP Conference, ELARC recommended that services be transitioned to People’s Care behavioral day program. Rosa H. was not in agreement with the transition and requested a Notice of Proposed Action (NPA). The NPA stated, as the reason for the transition, that during the two year period Elizabeth has spent with PAS, she “has shown great improvement in her behaviors and overall attitude. A transition at this time, within the same agency with the same employees and peers would prove to be a smooth and safe one.”

11. Norma testified that she would not be working with Elizabeth in the day program if the transition went forward. Service Agency responded that it would approach the Supervisor of PAS to see if he would allow Norma to train the staff at the behavioral day program.

12. Rosa H's opposition to the transition stemmed from a number of concerns. Although she is not the legal guardian for her sister, Elizabeth has lived with her for 15 years and she, Rosa H., knows her the best. She does not believe that Elizabeth has made great strides at PAS, although she works well with Norma who knows how to control her behavior problems. A group setting at any program would not be appropriate, and the only one she has participated in to date did not work. Elizabeth cannot be left unsupervised, and while menstruating, will scratch her own face and start screaming. She needs to be reminded to use the restroom and on many occasions has experienced accidents, and cannot go to the bathroom by herself. Elizabeth throws tantrums on the floor and is too heavy to be picked up. Elizabeth does not take change well. Because she is unable to converse, Elizabeth is not able to convey her opinion about the different programs.

13. Nothing in the record shows that the vendor supports the change.

14. Service Agency believes that it is not healthy for Elizabeth to interact only with Norma and her sister, and the group setting at the day program would provide an opportunity for Elizabeth to increase socialization with peers. Moreover, as a secondary consideration, the day program would be the more cost effective option, in keeping with the Lanterman Act's dictates to weigh financial savings while at the same time providing consumers with services which meet their needs.

CONCLUSIONS OF LAW AND DISCUSSION

1. Claimant has not met its burden of proof by establishing through a preponderance of the evidence that Claimant should be transitioned from PAS to the Behavior Management Program, in that the vendor, which administers both programs, has not reported that Elizabeth's behavior has progressed to a point where she no longer requires a one-on-one relationship with a staff member, and there is no other assessment to support the move.

2. One goal of the Lanterman Act is to ensure that provision of services and supports by the regional center system be centered on the individual and the family of the individual with developmental disabilities. (Welf. & Inst. Code, § 4646, subd. (a).) Towards this end, the Act contemplates that, "The individual program plan is developed through a process of individualized needs determination." (Welf. & Inst. Code, § 4646, subd. (b).) Consequently, the individual program plan must include assessments by qualified individuals to determine, *inter alia*, the concerns or problems of the person with developmental disabilities. (Welf. & Inst. Code, § 4646.5, subd. (a)(1).)

3. The intent of the Service Agency in promoting the transition from a program involving very close monitoring of Elizabeth's behaviors to a day program with less intense supervision, on its face, furthers the laudatory goal of the Lanterman Act to promote more, not less, interaction with others.

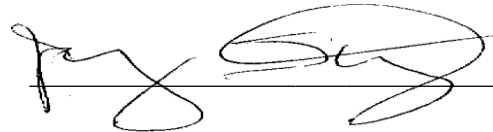
4. As established in Factual Findings 2, 5, 6, 7, and 8, ELARC, in reaching its decision to make the transition, relied almost entirely on the progress reports submitted by PAS. When discussing Elizabeth's behavioral issues, PAS appeared to just copy and paste the pertinent language describing the behaviors and how best to address them from the first report in 2011, and repeated the same language in each of the subsequent three reports. Further, the conclusions reached in the reports do not support ELARC's decision to go forward with the change, but rather the opposite. Each report found that "staff"—Norma—was able to have an effect on Elizabeth's negative behaviors, and recommended a continuation of the one-to-one ratio. Moreover, Norma credibly testified at the hearing that she did prepare write-ups of instances where Elizabeth engaged in aggressive acts towards others. Yet, each report stated that there were no incident reports in the specific period. Finally, as Norma testified, the continuity sought by the Service Agency in the transition would not include Norma, whose direct supervision of Elizabeth seems to have some positive effect.

5. These peculiarities in the reports do not lend them any sense that they reliably support a change to a program where there is a lesser degree of supervision. In fact, they support continuing a 1:1 ratio. ELARC has not met its burden of proof.

ORDER

The appeal of Claimant is sustained and Service Agency shall continue to provide funding for services provided to Claimant by People Care's Personal Assistance Services.

Dated: July 1, 2013

A handwritten signature in black ink, appearing to read 'JERRY SMILOWITZ', written over a horizontal line.

JERRY SMILOWITZ

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.