

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request
of:

N.T.,

Claimant,

and

EASTERN LOS ANGELES REGIONAL CENTER,

Service Agency

OAH No. 2013090436

PROPOSED DECISION

This matter came on regularly for hearing on November 13, 2013, at Alhambra, California, before David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California. Claimant N.T. was represented by his mother, F.T. (Initials are used to protect confidentiality.) Eastern Los Angeles Regional Center (ELARC) was represented by Judy Castañeda, HIPAA Coordinator and Fair Hearing Coordinator.

At the outset of the hearing, Claimant's mother expressed concern over confidentiality of herself and her son, considering the nature of his disability and some of the evidence concerning his diagnosis and special needs. As a result, the ALJ issued a protective order on the record to the effect that initials would be used in this Decision and in any transcript prepared of the hearing, and that all exhibits in the matter are to be confidential. Oral and documentary evidence was presented. The record was closed and the matter was submitted for decision on November 13, 2013.

ISSUE

Should ELARC reimburse Claimant's mother for the cost for Claimant to attend the

Swing Into Action program from July 15 through August 8, 2013?

FACTUAL FINDINGS

The Administrative Law Judge finds the following facts:

1. Claimant is a nine year-old boy eligible for ELARC services based on his diagnosis of autism. In April 2013 his mother requested that ELARC provide funding for Claimant to attend the Swing Into Action (SIA) summer program, described in more detail below.

2. On July 2, 2013, ELARC sent a Notice of Proposed Action (NOPA) denying the request for funding. Claimant's mother filed a Fair Hearing Request, establishing jurisdiction for the hearing.

3. Claimant and his twin brother are both consumers of regional center services. Claimant has received services for many years. (A report from one vendor, Exhibit 5, indicates the vendor has supplied services since January 2008.) The most recent meeting to develop Claimant's Individual Program Plan (IPP) occurred on March 20, 2013. At that time, ELARC agreed to provide respite, funding for mother to attend conferences, "floor-time/DIR" one hour per week, and adaptive skills training of eight hours per week (some of which was for supervision and reporting). Services supplied by the Los Angeles Unified School District (LAUSD) due to Claimant's special education needs included speech therapy, once per week, consultative occupational therapy, 30 minutes per month, RSP, one hour per week, and recreational therapy, 45 minutes per month. Among other things, the IPP notes that Claimant's parents will pursue speech and language therapy from the school district during the extended school year.

4. In April 2013, Claimant's mother requested funding for SIA, described as a therapeutic summer program overseen by Glendale Adventist Medical Center, Play to Learn Center. According to the program flyer (Exh. 7), the program runs from July 15 to August 8, 2013, four days per week (a total of 16 days), three hours per day. It is a "sensory

integrative, social skills program” that “facilitates appropriate engagement with peers, verbal and non-verbal communication with adults and children, community interaction and improved play skills.” “The program is designed and directed by experienced speech-language pathologists, occupational therapists and/or physical therapists.” Components include supported social interaction, games, sports, swimming, arts & crafts, and community integration. The program cost is \$1,400. The provider was originally vendored by another regional center, and is listed by ELARC as a vendor providing a socialization training program under service code 028. (Exh. 13.)

5. Claimant’s mother paid for Claimant to attend. She obtained a partial scholarship, and paid \$700 out-of-pocket. Claimant was involved in various group activities. Claimant’s mother attributes significant changes in Claimant’s subsequent behaviors and abilities to his participation at SIA. Although SIA usually does not provide written reports, one was provided at mother’s request. (Exh. 8.) It is titled “Social Skills Group” and lists three goals, all of which were met: (1) initiate communicative interactions with others by asking questions in four out of five opportunities with moderate cues; (2) engage in conversational turn-taking with others across three to four conversational turns in four out of five opportunities with moderate cues; and (3) respond verbally to greetings from a peer or an adult in four out of five opportunities with moderate cues.

6. The service described in the IPP as “floortime/DIR” is provided by Pasadena Child Development Associates (PCDA), one hour per week. The most recent progress report (Exh. 5) is dated March 15, 2013, is titled “socialization skills training program,” and addresses the IPP goal for Claimant to learn to play with his peers and communicate with others. Claimant works in a group with two other children and adult support. Six milestones have been developed, and the report gives details on each milestone as well as relevant other information. Milestone 1 is basic regulation and shared attention, and includes sustained engagement with peers and allowing comfort from a peer while experiencing

negative emotions such as frustration, sadness or distress. Claimant's skill rating scale of 3 means he demonstrates the skill intermittently/ inconsistently, and only with persistent and/or predictable support. Milestones 2 and 3 are forming relationships, intimacy and trust, and two-way purposeful communication. These milestones include expressing emotions such as frustration, sadness, distress and anger in appropriate ways, refraining from hitting, kicking, removing his shirt during win-lose games and/or activities, and initiating play with peers. Claimant has a skill rating scale of 3 for these milestones. Milestone 4 is complex communication and social problem-solving. Claimant's skill rating scale of 2 means he demonstrates the skill rarely, barely even with support, very intermittent, and only with intensive physical/ sensory motor structure and supports and/or intensive verbal and non-verbal support. Milestone 5 is emotional ideas: representational capacity and elaboration. Milestone 6 is emotional thinking: building bridges between ideas. Claimant's skill rating scale of 1 in milestones 5 and 6 means he does not yet evidence this level of capacity or skill.

7. The service described in the IPP as adaptive skills training is provided by Pacific Child & Family Associates (Pacific). An Addendum Report is dated April 1, 2013 (Exh. 6) and relates primarily to a reduction from 11 hours to 8 hours per week. The report addresses three skill areas: personal living skills, home living skills, and community living skills. The sub-skills that are relevant to this matter are socialization as a personal living skill, and social interaction and time management as community living skills. These are a small portion of the larger set of adaptive skills encompassed in this service. There is little substantive information about Claimant's progress, as that was not the purpose of the report. However, the report notes that adaptive skills will give Claimant the opportunity to use skills he has learned in intensive behavior therapy and apply them in a natural setting for generalization. The report recommends a fading of services, from 11 to 8 hours.

8. When mother requested funding for SIA, Claimant's service coordinator, Al-

bert Barajas (Barajas) requested a review by an occupational therapist, and a report was prepared by Angela Espinosa Puopolo (Puopolo). (Exh. 9.) Puopolo examined the Individualized Education Plan (IEP) for Claimant's special education services and noted that the IEP indicates he does not require additional supports or occupational therapy (OT) or speech therapy (ST), and does not require extended school year (ESY) services to maintain his skills. Puopolo concluded there was no clinical need or reason to provide OT, ST, or highly structured activities to maintain Claimant's skills.

9. ELARC's denial of the request to fund SIA was based largely on Puopolo's consultation, the needs, goals and services identified in Claimant's IPP, the progress reports from PCDA and Pacific, a reading of the SIA program flyer, and other information presented by mother. ELARC concluded that there was no demonstrated of additional needs of Claimant that were not being addressed in the current services it provided. The SIA program would be duplicative of services already funded. The SIA program appeared to be community based and largely recreational in nature for one month during the summer. Further, mother had not requested any adjustment of services or expressed any criticism of the services, except as noted below.

10. Mother was concerned about the socialization skills program by PCDA, and informed ELARC that often the other children who were supposed to be there in the group were absent. If so, Claimant would not have the level of social engagement necessary for the program to be effective. ELARC investigated and determined that, in the six months prior to mother's complaint, there was only one weekly session where Claimant was the only child present. Mother also expressed a concern that Claimant was moved from a group of six children to a group of three children. According to Ms. Castañeda the move was because of some challenging behaviors by Claimant, and mother never requested that Claimant be returned to the larger group.

11. Mother presented a letter from Paul Brown, M.D., Claimant's psychiatrist,

which states Claimant and his twin brother are under his care for Autistic Disorder and, it is his "professional opinion that swim therapy is clinically necessary" for the brothers' medical condition. (Exh. A.) The letter is undated. There is no other information, including what the bases were for the recommendation or any discussion of Claimant's needs or goals supporting the recommendation.

12. In Claimant's IEP, there is no discussion of any need for ESY or, specifically, for OT or ST during the summer of 2013. Mother explained that she requested ESY, but it was denied because Claimant tested at grade level for math and other subjects. Although mother believed ESY was available only for students with severe disabilities, a LAUSD brochure (Ex. B) states the purpose of ESY is to "assist students in maintaining the skills at risk of regression or the students with severe disabilities to attain the critical skills or self-sufficiency goals essential to the student's continued progress." As ESY was not offered, it appears that LAUSD determined that ESY was not necessary to assist Claimant in maintaining the skills at risk of regression.

13. Mother established that Claimant and his brother have a rigorous schedule during the school year to accommodate school and outside activities and therapies. The summer presents challenges because there is more unstructured time. She would also like to spend time addressing the needs of both children. Claimant did not attend PCDA services during the summer because the timing conflicted with SIA.

LEGAL CONCLUSIONS AND DISCUSSION

1. This case is governed by the Lanterman Developmental Disabilities Services Act (Lanterman Act), found at Welfare and Institutions Code section 4400 et seq.¹ The jurisdictional requirements of the Lanterman Act have been met.

¹ All statutory references are to the Welfare and Institutions Code unless noted.

2. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) The burden of proof is on the person whose request for government benefits or services has been denied. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) Here, the burden of proof is on Claimant.

3. Various portions of the Lanterman Act apply to Claimant's request. In general, these sections provide for a process, including the IPP, to assess skills, identify goals, and provide services to meet those goals.

4. Section 4512, subdivision (b), provides, in part:

“‘Services and supports for persons with developmental disabilities’ means 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. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be 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.”

5. Section 4646 provides, in part:

“(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.

“(b) The individual program plan is developed through a process of individualized needs determination. [¶] . . . [¶]

“(d) Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer’s goals, objectives, and services and supports that will be included in the consumer’s individual program plan and purchased by the Service Agency or obtained from generic agencies shall be made by agreement between the Service Agency representative and the consumer or, where appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting.”

6. Section 4646.5 provides, in part:

“(a) The planning process for the individual program plan described in Section 4646 shall include all of the following:

“(1) Gathering information and conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. For children with developmental disabilities, this process should include a review of the strengths, preferences, and needs of the child and the family unit as a whole. Assessments shall be conducted by qualified individuals and performed in

natural environments whenever possible. . . .

"(2) A statement of goals, based on the needs, preferences, and life choices of the individual with developmental disabilities, and a statement of specific, time-limited objectives for implementing the person's goals and addressing his or her needs. [¶] . . . [¶]

"(4) A schedule of the type and amount of services and supports to be purchased by the Service Agency or obtained from generic agencies or other resources in order to achieve the individual program plan goals and objectives, and identification of the provider or providers of service responsible for attaining each objective, including, but not limited to, vendors, contracted providers, generic service agencies, and natural supports. The plan shall specify the approximate scheduled start date for services and supports and shall contain timelines for actions necessary to begin services and supports, including generic services. . . ."

7. Section 4647, subdivision (a), provides:

"Pursuant to Section 4640.7, service coordination shall include those activities necessary to implement an individual program plan, including, but not limited to, participation in the individual program plan process; assurance that the planning team considers all appropriate options for meeting each individual program plan objective; securing, through purchasing or by obtaining from generic agencies or other resources, services and supports specified in the person's individual program plan; . . . and monitoring implementation of the plan to ascertain that objectives have been fulfilled and to assist in revising the plan as necessary."

8. Section 4648, subdivision (a)(1), provides, in pertinent part:

"In order to achieve the stated objectives of a consumer's individual program plan, the Service Agency shall conduct activities including, but not limited to, all of the following:

"(a) Securing needed services and supports.

"(1) It is the intent of the Legislature that services and supports assist individuals

with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. The Service Agency shall secure services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan"

9. The Lanterman Act makes distinctions between those services which address a consumer's developmental disability and the services that are common to everyone, disabled or not. Section 4791, subdivision (h)(l)(A), provides, in pertinent part, that regional centers "shall take into account, in identifying the consumers needs, the family's responsibility for providing similar services to a child without disabilities." Under section 4512, subdivision (b), the services and supports to be offered by regional centers are defined as specialized, and are directed towards alleviating the disability.

10. Based on this legislative mandate, the Service Agency expects families to carry out the same responsibilities for family members with disabilities as for other non-disabled family members. When the responsibilities of caring for a family member with disabilities exceeds the costs and responsibilities of caring for a non-disabled individual, the Service Agency may fund services to supplement what parents and consumers are expected to provide. Only when there are special needs related to a developmental disability can the Service Agency provide additional financial assistance related to the disability.

11. The key portions of the laws cited above, as they relate to this case, establish that there must be a need for a service, usually identified through the process of assessment, before the service can be provided. The need, when identified, is discussed as potentially being included in the IPP, which must be based on information and assessments and other relevant data. Assessments must be conducted by qualified individuals. An IPP must include a statement of the consumer's goals, based on the consumer's needs. An IPP must contain specific, time-limited objectives to implement identified goals. Objectives must be constructed to allow measurement of progress and monitoring of service delivery. Services

that would usually be provided by a family for any child may not necessarily be of the specialized type falling within a regional center's responsibilities.

12. Further, services provided must be cost effective (section 4512, subd. (b)), and the Lanterman Act requires the regional centers to control costs so far as possible, and to otherwise conserve resources that must be shared by many consumers. (See, e.g., sections 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) To be sure, the obligations to other consumers are not controlling in the decision-making process, but a fair reading of the law is that a regional center is not required to meet a disabled person's every possible need or desire, in part because it is obligated to meet the needs of many people and families.

13. Claimant's IPP includes discussion of his needs and goals as well as the services to be provided as a result. The progress reports from PCDA and Pacific indicate that the services provided are meeting Claimant's needs. No additional services are recommended. The only document addressing an additional need, swim therapy, is the letter from Dr. Brown. However, the letter lacks any discussion of why swim therapy is needed or what goals of Claimant it is designed to address. Further, the SIA flyer is the only document describing what is included in the program, and swim appears to be listed as one of several recreational activities, not necessarily in the manner of a therapy designed to address any specifically identified need of anyone in particular.

14. The SIA report on Claimant does not address swimming at all. Rather, it only refers to three communication goals.

15. ELARC properly denied the request to attend the SIA program. There was no assessed need for any service not already being provided under the IPP. The proper measure for whether a service is provided under an IPP is not whether a consumer will benefit from the service. Rather, there must be an identified, assessed need that is not being met. The Lanterman Act makes repeated reference to assessment of needs and inclusion within the IPP, as related to goals to be met and services to be provided. Here, there was no as-

assessment of Claimant that established a need or goals that were not being met. Claimant's needs in the realm of communication and socialization are not defined by his success in the SIA program. And the fact that Claimant succeeded in the SIA program does not establish that there was an unmet need. Many children who are consumers of regional center services may benefit from any number of different services and programs. However, the regional centers are only required by law to provide services that meet needs identified by assessment, and address goals and provide services as included in the IPP. In this manner, regional centers can operate cost-effectively. Further, a summer program such as SIA appears to be the type of summer activity that any parents might provide for their child during summer months, albeit SIA has the added component of professional design and direction.

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16. Grounds do not exist under the Lanterman Act to grant Claimant's request for services from June 30, 2011, or for reimbursement at the rate of \$15 per hour, or for services beyond 20 hours per week, as set forth in more detail below, based on Factual Findings 1- 24 above.

ORDER

Wherefore, the Administrative Law Judge makes the following Orders:

The appeal of claimant N.T. from the decision of the Eastern Los Angeles Regional Center to deny reimbursement for the Swing Into Action program is denied.

Dated: November 25, 2013

A handwritten signature in black ink, reading "David Rosenman". The signature is fluid and cursive, with a horizontal line drawn underneath the name.

DAVID B. ROSENMAN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision and either party may appeal this decision to a court of competent jurisdiction within ninety (90) days.