BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

TRI COUNTIES REGIONAL CENTER,

Service Agency.

OAH No. 2016050641

DECISION

The hearing in this matter was held on July 13, 15, and 22, 2016, at Atascadero, by Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH).

Claimant, who was not present during the hearing, appeared through his mother (Mom), who is his conservator, and was represented by Daniel R. Shaw, Ruderman & Knox, LLP.[1] The Service Agency, Tri Counties Regional Center (TCRC or Service Agency) was represented by Donald R. Wood, Benton, Orr, Duval & Buckingham.

Evidence was received, the case argued, and the record was held open until July 27, 2016 so that Claimant could submit a post-hearing brief. It was timely received and is identified as Claimant's exhibit 41. Thereafter, the Service

---

[1] Initials and titles are used in the place of names in the interests of privacy.

Agency objected, in writing, to Claimant's brief, and moved to strike it. The objection, submitted by letter, is identified as Service Agency exhibit 19, the Service Agency's original trial brief, and brief regarding generic services being identified as Service Agency exhibits 17 and 18, respectively. Claimant replied to the motion to strike, which is identified as Claimant's exhibit 42.

On August 4, 2016, the ALJ directed an OAH clerk to contact the parties to schedule a telephonic hearing, which would be electronically recorded. The parties had stipulated to such a proceeding if the ALJ wished to have further hearing time. A telephonic conference was scheduled for August 8, 2016. This re-opened the record.

During the August 8 proceeding, the ALJ indicated he would deny the motion to strike, and gave the Service Agency the option of filing further briefing, which offer was declined. The ALJ gave notice to the parties that he intended to take official notice of the Letters of Conservatorship issued to Claimant's parents. There being no objection, the Letters, which had been filed with OAH before the hearing, are made part of the record as Claimant's exhibit 43. Finally, during the August 8 hearing the ALJ requested input from the parties regarding Independent Living Services (ILS).

On August 9, 2016, Claimant submitted a letter addressing the issue, which is identified as Claimant's exhibit 44. The Service Agency also submitted a letter brief, which is identified as Service Agency exhibit 20. The matter was again submitted for decision on August 9, 2016.

The ALJ hereby makes his factual findings, legal conclusions, and order.

ISSUE PRESENTED

Should the Service Agency be ordered to fund various services and supports, including behavioral interventions for Claimant, in a home that he owns, under the aegis of Supported Living Services, or otherwise?

SUMMARY OF THE CASE

Claimant is an adult male who is substantially disabled by autism and has been diagnosed with intellectual disability. He has significantly impaired communication skills, few social skills, and has in years past engaged in maladaptive behaviors that made him a danger to himself and others.

For most of his life, Claimant has lived with his parents in the northern part of the Service Agency's catchment area. School placements have been problematic, so at times he has been educated at home. Behavioral therapies, provided mainly by his schools, have been inconsistent in quality and efficacy. After he was sent to an out-of-state residential placement, Claimant was injured there in an altercation with staff, and returned home. His maladaptive behaviors increased after that incident.

In May 2013, Claimant's parents settled a suit with their school district for a substantial sum, which was to be used to fund an educational program for Claimant, to be implemented by his parents. With that funding, Mom has developed a program for Claimant that utilizes behavioral interventions, which have ameliorated maladaptive behaviors, while increasing some skills for Claimant.

The funding for the existing program runs out on Claimant's next birthday, August 28, 2016. For some months, Mom has worked with Claimant's service coordinators to find a way to have the Service Agency take over the funding of the program. However, in meetings held in March and April 2016, senior staff for the Service Agency declined to do so, citing various impediments, including the inability to pay the current staff at the rates that the family is paying.

Claimant asserts that given his unique needs, and the paucity of resources in his area, the ALJ should order the Service Agency to fund the existing program notwithstanding regulations that control pay rates for vendors, as well as statutes that might delimit the ability of a regional center to pay for behavioral interventions. The Service Agency, in the course of the hearing, made some suggestions for bridging the gap between the parties.

FACTUAL FINDINGS

THE PARTIES AND JURISDICTION

1. (A) Claimant is a man who is approximately two weeks away from his 23rd birthday (August 28, 2016), and who is eligible to receive services from the Service Agency pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.[2] Claimant is eligible for services because he suffers from autism. The Service Agency records in this case indicate that such was his sole diagnosis, although there is substantial evidence that he has been diagnosed with mental retardation by third parties, and there is clearly evidence of intellectual disability in various reports.[3] (E.g., ex. SA 14, pp. 285, 286.)[4]

---

[2] All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

[3] Intellectual Disability is the term now used to encompass, for the most part, the earlier diagnostic category Mental Retardation. It denotes a situation

(B) On September 6, 2011, the Superior Court of California, County of San Luis Obispo, granted Claimant's parents a limited conservatorship over his person. Seven powers were given to them, including the power to medicate, or not to medicate; to control his social and sexual contacts; and to determine whether he would marry or enter into a domestic partnership. (See ex. CL 43.)

2. On April 21, 2016, TCRC issued a Notice of Proposed Action (NOPA), that denied services requested by Claimant. (Ex. CL 31.) The NOPA itself referenced an accompanying letter (ex. CL 32), which addressed three general areas: supported living services (SLS), funding for the services Claimant has been receiving in his parents' home, but rather in a home of his own, and parent coordinated personal services.

---

where a person's IQ is at 70 or below—in the bottom two percent—and where adaptive function is significantly impaired.

[4] Both parties numbered their exhibits. References herein shall be to "CL" for Claimant's exhibits, or "SA" for the Service Agency's exhibits. The Service Agency affixed "Bates Stamp" numbers to each page of their exhibits; the numbers are consecutive from the first page of exhibit SA 1 to the last page of exhibit SA 16. Claimant used page numbers that set out the exhibit number first, then page numbers. Hence exhibit CL 8 is paginated 8001 through 8011; his exhibit 14 is paginated 14001 through 14010. The parties' page numbers will be used in citations, and where an exhibit is cited several times, the page numbers alone may be cited, i.e., P. 8002. Finally, there was some duplication of exhibits; for example, the NOPA (Factual Finding 2), Claimant's exhibit 31, was also received as exhibit SA 1.

3. On May 2, 2016, Mom, acting on Claimant's behalf, submitted a Fair Hearing Request (FHR) which stated disagreement with the NOPA, and which requested that TCRC provide "appropriate supported living skills to support [Claimant] in his own home." (Ex. CL 33.) This proceeding ensued. All jurisdictional requirements have been met.

CLAIMANT'S BACKGROUND

4. It is indisputable that Claimant is substantially disabled by autism and intellectual disability. A review of several reports, and the testimony of Mom and some of the professionals, is more than sufficient to establish that fact. The findings that follow (5 through 10) are based primarily on the 2012 report of Dr. Robert Patterson, which report is exhibit CL 7, along with the 2006 report of Dr. Gina Green, and Mom's testimony. Dr. Patterson's report is cited extensively hereafter, as it covered much ground and was based on many prior reports; in most cases the page numbers alone are cited.

5. Claimant exhibited symptoms of autism in his early development. According to prior reports that trace his history, the Service Agency determined he suffered from autism when he was 18 months old. (Ex. CL 7, p. 7001; ex. SA 14, p. 283; Mom's testimony.) That diagnosis followed Claimant's regression from some words at 10 months to no speech at 18 months. He began receiving special education at age three, but he continued to regress and his parents took him out of his first school when he was five. (SA 14, p. 283.) It was reported that he had begun to mimic the behaviors of other children with disabilities at the school, had no language, had learned no new skills, and at age five was not toilet trained. (CL 7, p. 7002.) Mom testified to the effect that the school was using aversive reinforcement and otherwise acting in an abusive manner.

6. One assessment report, issued when Claimant was five years old, stated that Claimant's development within and across domains was atypical and uneven; he did not follow normal development models. Even at stages where he functioned most comfortably, there were "holes" or missing skills and a high degree of inconsistency. His development was further reported as not only delayed, but disordered and disorganized. At age five years, two months, his highest cognitive functioning was equivalent to that of a mid- to upper three-year-old. Adaptive function was then at a two year old's level. (Ex. SA 14, p. 284, summarizing a December 1998 report by Diagnostic Center, Central California.)

7. A psycho-educational evaluation was conducted when Claimant was age 12, in September 2005. It was reported that a Vineland Adaptive Behaviors Scales (Vineland) test, which was based on Mom's reports, showed a composite adaptive behavior standard score of 32. This was more than four standard deviations below the mean, and would place Claimant at a fraction of the first percentile when compared to others of his age. (Ex. SA 14, p. 285.)

8. (A) Robert Patterson, Psy.D. (Dr. Patterson), a licensed psychologist, conducted an observation of Claimant in April 2012, when Claimant was 18 years old. His subsequent report, issued June 13, 2012, was 29 pages long, with several pages of attachments; again, the report is Claimant's exhibit 7. The report summarized numerous other reports, and traces Claimant's education and treatment history. That history supports the finding that Claimant has a history of very significant behavioral problems and significant deficiencies in communication and socialization, despite interventions that, at times, were

seemingly intensive in nature.[5] Claimant was at times provided special education and behavioral interventions at school sites, and at times in his family's home.

(B) Claimant's problem behaviors included, but have not been limited to, aggression toward others, including family, teaching staff, and others; self-injurious behavior (SIB); eloping—running away from support staff, home, school, or other locations. Somewhat less challenging was a refusal to perform certain tasks, which usually led to Claimant acting out in some way.

9. (A) Various educational placements and programs were utilized after Claimant left school at age five. They are described in some detail in Dr. Patterson's report, and in less detail in the 2005 psycho-educational report. (Ex. SA 14.) The Service Agency was providing some supports as well.

(B) At times, Claimant was placed in special education classrooms, with various supports and interventions, including services in the home, such as a 30 hour-per-week Discrete Trial Training (DTT) program when he was about five or six years old. (P. 7002.) But, he was also placed in a regular education kindergarten when he was receiving that intensive DTT program, which program was later criticized by assessors. (P. 7003.) In 2004, Claimant was placed in a Special Day Class (SDC) for severely handicapped students, with an aide on the bus, and one in the classroom. (P. 7004.) The parents found that Claimant was mimicking the behaviors of other substantially disabled children, to his detriment.

---

[5] The adjective "seemingly" is used because there were reports that the behavioral interventions, especially those provided by the schools, were not always effectively administered, thereby failing to bring significant improvement. (See ex. CL 7003, 70024; ex. CL 1, pp. 1005-1006.)

(C) In January 2008, when he was 14 years old, Claimant was accepted for placement at Heart Springs, a residential school placement in Kansas; his first day there was at the beginning of February 2008. Such a placement had been recommended by Dr. Green, who believed that prior behavioral interventions, especially those supplied by his schools, had been deficient. She was of the opinion that he needed to be in an environment where behavioral programming, under the supervision of qualified personnel, would be provided around the clock.

(D) In March 2008, Heart Springs conducted assessments. At that point, his Adaptive Behavioral Composite score on the Vineland was a 52,[6] and all the domain scores (Communication, Daily Living Skills, Motor Skills, and Socialization) were at or below the first percentile. (Ex. CL 7, p.7008.) He was unable to complete a standard IQ test. (P. 7009.)

(E) In October 2008, Claimant was injured in an altercation with Heart Springs staff, and he suffered a broken arm. It was reported that he had been hit in the back by another student, and he had copied that behavior. It was asserted that the altercation wherein he was injured occurred when he was being corrected. And, the school had reported aggressive behavior on Claimant's part while he was at Heart Springs. (P. 7009.) Claimant returned home shortly after he was injured.

(F) In November 2008, Claimant was seen by Dr. Debra L. Balke, M.D., a neurologist, who recommended home/hospital teaching with ongoing intensive behavioral therapy. She noted self injurious behaviors, but she classified them as

---

[6] According to a school psychologist, that placed Claimant at the .07 percentile. (Ex. SA 14, p. 289.)

minor. (Pp. 7009-70010.) In a letter she wrote that same month, she described the injury to his arm as a right humerus fracture, status post open reduction/internal fixation, with a right radial nerve palsy. (Ex. CL 2.) According to Mom, he had been able to write with his right hand before the arm injury, but that he lost that ability due to the injury, which has diminished his already limited expressive communication skills.[7]

(G) After his return home, Claimant engaged in challenging behaviors. He was physically aggressive, and he would have outbursts where he would damage the home. He would run away from family members. In January 2009, further assessments were undertaken. Behaviors such as non-compliance, self-injury, property destruction, tantrums and elopement were observed. At that point, aggression was counted at six incidents per day, elopement four times per day, SIB's up to 20 times per day, and property damage incidents averaging one and one-half times per day. (P. 70012.) In February 2009, Claimant was attending school at a local high school, and when seen by a Speech and Language Specialist from the school district, he could not answer simple yes/no questions. (P. 70013.) Thereafter, various tests were administered, and Claimant performed poorly. For example, his score on the Peabody Picture Vocabulary Test placed his age equivalence at the three year, one month level, but he was fifteen years and six-months old at the time. (P. 70014.) On the C-TONI, an intelligence test, he

---

[7] Mom has requested, on more than one occasion since the fall of 2015, to obtain technical support, in the form of a computer-based device or program, that potentially would make up for the lost communication capacity, but the Service Agency appears unable to provide that service, even though it has not denied the request.

placed below the first percentile. The results of a test of Visual Motor Integration also placed him below the first percentile. His mother provided responses to the ABAS-II, a test of adaptive functioning. His General Adaptive Composite score placed him below the first percentile. (*Id.*)[8]

(H) In 2009 and 2010, Claimant went back and forth between school placements and home placements. This was the result of maladaptive behaviors exhibited on campus, such as aggression and elopement. In the first part of 2010, new behavioral plans had to be developed because of Claimant's aggressive behaviors; his large size and the fact that he had injured several people added impetus to developing new plans. (P. 70021.) By 2011, the elimination of aggressive behavior was the priority, especially because of his size. (P. 70023.) According to Dr. Patterson's report, by November 2011, Claimant was displaying significant behaviors as a result of medical conditions, which were going uncontrolled because staff was not following the supervisor's directions. (P. 70024.) Again, staff was being injured by Claimant.

(I) In mid-November 2011, Claimant's mother removed him from the school environment, and a home program was re-established. She expressed concern that staff was going to be seriously hurt. It should be noted that SIB's had escalated to head banging. (P. 70025.) A school psychologist who saw Claimant in approximately January 2012 indicated that when he had assessed Claimant three years earlier, Claimant was a joy to be around, but that what the school psychologist saw in early 2012 was not the same person seen previously. (*Id.*)

---

[8] The psycho-educational report shows the score as being at the .1 percentile. (Ex. SA 14, p. 290.)

10. (A) In March 2012, Dr. Patterson observed Claimant in his home program while Claimant worked with Guy Hatchell (Hatchell) from Hayden Consultation Services (HCS), which was providing behavioral interventions. One of Dr. Patterson's many observations was that when Claimant became frustrated, it was possible to transition him from negative behaviors. He noted that earlier-developed protocols were still in effect and working. Dr. Patterson formed the opinion that the program was working, and that Claimant had shown reduced aggression, increased compliance, and that Claimant was going into the community in a controlled manner. He was also learning simple assembly tasks as had previously been recommended. (P. 70025-70027.)

(B) Dr. Patterson recommended more staff to take some load off of Hatchell, and noted there was a need for additional staff when Claimant went into the community. He raised the specter of placing Claimant in a developmental center if the home program did not work out. He also recommended transition planning for after Claimant's 22nd birthday. (Pp. 70028-70029.)

THE CURRENT PROGRAM

11. (A) In 2012, Claimant's parents filed a due process complaint against his school district. In essence, it was alleged that the district had failed to comply with the Individuals with Disabilities Education Act and related California law, by failing to provide him with a Free and Appropriate Public Education (FAPE).

(B) In May 2013, the school district agreed that it would fund educational and related services for Claimant through his 23rd birthday, and the amount it agreed to fund was substantial. It was agreed that the settlement agreement would be confidential. (Ex. CL 9.) However, the Service Agency was informed that the agreement had been reached, and that it was being used to fund substantial services for Claimant in his parents' home.

12. Claimant's parents have utilized the school district's funding to provide a program of behavioral services administered by HCS. This includes behavioral supports six hours per day during the week, and on Saturday.

13. The current program provides the following services and supports:

(A) Six hours per day of ABA services, Monday through Friday. Medical insurance pays for two of those hours on the five weekdays, the other four hours per day are paid for by Claimant's family, from the funds provided by the school district settlement. During the week, Hatchell and John Aynes work with Claimant.

(B) On Saturdays, another person trained by the ABA provider works for six hours with Claimant; this is also funded by the settlement.

(C) Mom provides 166 hours of protective supervision, funded by IHSS (In Home Supportive Services).

(D) Respite services have been provided to parents by TCRC at the rate of 30 hours per month.

14. An issue in the case is the cost of the current program, in part because of the pay rates that various regulations may allow the Service Agency to pay. Hatchell is paid $36.00 an hour by Mom, 22 hours per week. He also is paid for his travel time, three hours per day at $25 per hour, along with mileage at 55 cents per mile. John Aynes works with Hatchell four days per week, seven hours per day, at $19.00 per hour. One other person, Bill, works on Saturdays for six hours, at $19.00 per hour. Thus, Hatchell is being paid $1,167 per week for his work and travel time, John is paid $532 per week, and Bill $119, for a total of $1,821 per week. This does not include mileage.

15. Claimant has been learning some basic vocational tasks. For example, he assembles pizza boxes. He then is taken to a local pizza parlor, and they pay him for the assembled boxes. He also goes to the local Mission, and helps with clean up. He does some recycling. These excursions are programmed into his routine; this gets him out into the community, while doing something constructive; the small amount of money he earns he can spend on things that he likes. Typically, Claimant has two to one support when he goes into the community.

16. Claimant has a number of routines, especially in the morning. It appears he is fairly compliant, and he can move from one task to another with a minimum of conflict.

17. Elopement remains a concern, but that behavior is substantially diminished in recent months. Claimant can now go into the front yard of the family home and will not run away. The family went on a camping trip recently, and Claimant stayed in his own cabin, and there were no escapes. It has been some months since the last serious elopement. As an additional safeguard, the Service Agency is funding, through a parent reimbursement, the cost of a tracker that is built into Claimant's watch, to make it easier to find him if there is another elopement.

THE PLAN TO TRANSITION CLAIMANT INTO HIS OWN HOUSING

18. At some time prior to September 2015, Mom broached, with Claimant's service coordinator, the idea of moving Claimant into a modular home that he would own, and which would be either on the family's property or an adjacent lot. Mom also raised the idea of transferring the program she had built up with the school district's funding to the Service Agency. While the exact date of that first discussion is not clear from the record, an e-mail from Darcy Bishop

(Bishop), then the service coordinator, to Mom dated September 24, 2015 indicates that Bishop had spoken to her supervisor the day before, and was hopeful that TCRC could start funding services for Claimant "soon." (Ex. CL 17.) Ms. Bishop also informed Mom that she was taking a new position, and would no longer be Claimant's service coordinator.

19. Bishop was replaced as service coordinator by Justin Sutton (Sutton). On November 15, 2015, Mom e-mailed Sutton, following up on her request for augmentive communication technology. (See ex. CL 18.) In that same e-mail, she referred to the matter of Claimant's new home: "I also wanted to talk to you about [Claimant's] home. His home is now purchased and we are now in the process of getting everything ready for it to be moved here. I am thinking we should be and talk about services – transition of [Claimant] moving into his new home?" (Ex. CL 30, grammatical error in original.)

20. (A) On December 15, 2015, an Individual Program Plan (IPP) meeting was held at Claimant's home. (See SA 13, pp. 235-236.) Sutton met with Mom, and he had a chance to meet Claimant, who was returning home from an outing. At one point, Claimant came out of his room and went into the kitchen but was naked; his mother asked him to put some clothes on and he did.

(B) Mom explained how the program was operating, telling Sutton about Claimant's small jobs in the community. She stated he needed 2:1 support in the community, and did not do the jobs if there were crowds, as he became over-stimulated. She also told Sutton that the behavioral staff was working on desensitizing him to that.

(C) Mom explained that due to Claimant's size and behaviors, staff had to be males who were not intimidated by him. She told Sutton that the funding for HCS would end in July 2016, and that while she received IHSS hours, they were mainly used to cover support she provided at night. She provided a history of Claimant's inability to do well in schools or residential programs.

(D) At this meeting Mom discussed her plans to put a modular home on an adjacent lot when she had the proper permits, and she said that Claimant would like to live in that home.

(E) Sutton explained "personal assistance" and parent coordinated services. Mom expressed concerns about the pay rate, and the ability to maintain staffing, and a replacement for Hatchell if there was not enough money. Sutton stated he would further explore resources with his supervisor and a resource person.

21. In the next several weeks, TCRC staff met on occasions with each other and they discussed Claimant's case. On January 8, 2016, Sutton explained to Assistant Director Eulalia Apolinar (Apolinar) that HCS was the only program supporting Claimant, and how they were funded. Sutton further explained that there did not appear to be an appropriate alternative to HCS at that point in time, and that the funding was by insurance and private pay, and that the latter would run out at the end of July 2016. Thus, Apolinar, and the Service Agency, were clearly on notice that a program vital to Claimant's well-being would run out of funding within seven months.

22. What followed were various internal meetings and communications that did little to address the long-term situation. Staff did agree on January 11, 2016 that a staff psychologist, Dr. Campos, should conduct a home observation, "in order to determine if [Claimant] may qualify for funding for ABA services through an exception." (Ex. SA 13, p. 233.)

23. (A) On January 19, 2016, Kristin Read Campos, Ph.D. (Campos), a Service Agency staff psychologist with a background in behavioral treatments,

observed Claimant in his home, and in his program. She wrote an "ID Note" (Interdisciplinary Note, a term used for entries into a consumer's file or chart) the next day. A copy is found at exhibits SA 4 or CL 20.

(B) Dr. Campos spent about one hour and twenty minutes at the home. She spoke to Mom and obtained background information, regarding Claimant's behaviors, and that he had experienced physical aggression from treating staff in his youth. She reviewed his behavioral support plan, and spoke to Hatchell and observed Claimant's response to the plan. She also had some interaction with Claimant.

(C) Dr. Campos made the following point about dealing with Claimant, highlighting the statement below in bold print on the second page of her report:

> Given his size, impulsivity, strength, and his history of physical aggression resulting in physical harm to staff, [Claimant] should be considered to be at high risk for presenting safety concerns when with individuals [who] are unaware of or unable to meet [Claimant's] individual needs.

(D) Dr. Campos further stated:

> It is my opinion that short-term, intensive support that allows [Claimant] to become established in his own residence with a consistent behavioral plan could result in successful community placement. Without appropriate staffing and behavioral support, [Claimant] is at high risk of engaging in physical

> aggression towards himself and others resulting in placement in a more restrictive setting. (P. CL 20003.)

(E) Dr. Campos went on to state some further conclusions. They included that Claimant was at high risk of regression following any changes in routine, which could include changes in staffing or his living arrangements, and that the regression could include increased SIB's and aggression towards others. She went on to state that Claimant "requires constant supervision and will not be able to live independently without support." (*Id.*)

(F) Dr. Campos noted that Mom and staff told her Claimant had strong receptive language, that he understood most of what people around him said, which meant that people working with him had to be careful about what they said, and must act in a respectful manner. Finally, she noted that she had advised Mom and the staff (Hatchell and John) to consider more training for Claimant in using coping strategies.

24. On February 2, 2016, Mom asked Sutton where things stood on Claimant's services. Sutton replied on February 4 that he was in the process of coordinating a meeting with Dr. Campos and his supervisor to discuss "the next steps." (Ex. CL 22.) He went on to say he was advocating for Claimant to receive TCRC funded ABA services so that they might be able to keep John as Claimant's staff and to have other behavioral goals in place.

25. (A) On February 9, 2016, Sutton, Campos, and a manager, Dee Rittenhouse (Rittenhouse) met and discussed the matter. According to the ID notes (recently reclassified as "T-19's") Campos discussed her observation, noting that while Hatchell was not a BCBA—Board Certified Behavioral Analyst—he had a good understanding of the behavioral principals involved in the plan, while the

other staff person, John did not demonstrate as much understanding. She noted that the plan has caused progress, and the need to teach more coping strategies.

//

//

(B) According to the note, "the team[9] agreed that [Claimant] would benefit from on-going ABA support, and that he is not capable of living on his own. The type of program that would best support [Claimant] must be individualized to his needs. If possible, he would benefit from continuing his current plan because he has developed a trusting relationship with his staff. If that is not possible, it is important that he gradually be introduced to his new support staff with his existing supports in place. The team agreed that this will need to be discussed further with [Apolinar] as part of the conversation." (Ex. SA 13, p. 231.)

26. Thereafter, on February 22, 2016, Apolinar, the Atascadero branch manager, and Sutton met to discuss the case. Apolinar recommended that Claimant be added to the SSRS list, and that Sutton work with the CPP team to look for suitable placements. The former is the list of statewide facilities that a regional center might use, and the latter team works with consumers being moved from placements in the developmental centers. (SA 13, pp. 230-231) When, on or about March 2, such ideas were communicated to Mom, she reiterated that she preferred the current situation, and that she was concerned about the efficacy of any residential placements. (*Id.*, p. 230.)

---

[9] It is inferred that this group of TCRC staff was the "diagnostic team" that the Service Agency later said had determined that Claimant was not suitable for SLS services. (See Factual Finding 29 (C).)

27. (A) Mom requested a meeting with managers to discuss the situation, and a meeting was held on March 23, 2016. Before that occurred, on March 18, 2016, senior staff met with Sutton and Campos to discuss the case. (Ex. SA 13, pp. 227-228.) There it was expressed that if ABA services were provided, there was an expectation that they would be time-limited, and Mom would be expected to take over stimulus control. Campos told the group that Hatchel had such expectations.

(B) At the staff meeting it was stated that 12 hours per month of ABA could be offered as an exception which could be "braided" with personal assistance, behavioral respite, and even Independent Living Services (ILS). They also discussed the notion of SLS services, but Apolinar stated that Claimant could not have SLS if he was living with his family, even in a separate home if it was on the family property. The staff discussed that other determinations would have to be made before SLS could be used, including whether Claimant could live independently, could afford his living expenses, whether SLS services were appropriate, and whether cost would exceed cost of a residential placement. (Ex. SA 13, p. 228.)

28. (A) On March 23 Mom and Hatchell met with Sutton and Rittenhouse; Apolinar and Campos participated by telephone. Mom reiterated her views regarding how care should continue, and she made clear that she had a home for her son with a separate address. She expressed the preference to have him live in that home, and stated she would use the IHSS protective supervision for overnights in the new house. Mom reiterated that funding would dry up after July. (Ex. SA 13, p. 224.)

(B) Apolinar did not offer ABA funding on an exception basis, as discussed with staff less than a week before the meeting. Instead, she stated

TCRC could not fund ABA in lieu of insurance funded ABA; Mom told the group that the insurer routinely tried to cancel the treatment, and she expected that sooner or later it would be cancelled.

(C) According to the notes, Apolinar "explained that it would be difficult for TCRC to approve funding for ABA services if an insurance provider deems it is no longer medically necessary; however this is addressed on a case-by-case basis." (Ex. SA 13, p. 225.) Apolinar went on to say that TCRC could not maintain the exact same support as provided by the private pay and insurance, and that Mom could appeal if she wanted. According to the notes, Campos opined that Claimant should not move because his supports were going to change.

(D) Apolinar stated that Claimant could receive SLS in his own home but that "this would not be ideal at this time." (*Id.*) There was also a discussion of using ILS that might evolve into SLS; Mom was concerned about the staffing issues.

(E) According to the ID Notes, other options were discussed, including "self-determination," which would not be available for two to three years.

29. (A) Another IPP meeting was held on April 14, 2016. Mom did not have a schedule of Claimant's activities that had been requested at the March 23 meeting. Instead, she wanted to delve into what she believed were inaccuracies in the service coordinator's notes of that meeting, which had been edited by Apolinar before they were shared with Mom. Apolinar refused to get into Mom's claims, asserting that the notes were not a legal document.

(B) Once again, the group discussed Claimant's existing program, i.e., six hours per weekday of work with Hatchell, two hours of it funded by insurance. The team pointed out the program amounted to 270 hours per month of support, and that TCRC could fund 270 hours of support, but it would be through a combination of personnal assistance, ILS, and a vouchered day program. (SA 13, p. 220.) It was also explained that the personal assistance pay rate was $13.90 per hour, minus taxes and administrative costs, and that the rate had been frozen by the state and could not be adjusted by TCRC. That rate is well below what Mom had been paying staff.

(C) At this meeting, Apolinar told Mom that TCRC could not fund SLS at that time due to a "clinical determination" (Ex. SA 13, p. 220) that such was not appropriate for Claimant. When Hatchell spoke in support of the idea of moving Claimant into his own home, Apolinar stated that he would have to be capable of safely and independently making his own choices, and that the clinical determination was that he was not capable of doing so. (*Id.*)

(D) Mom requested a NOPA at the meeting. It took TCRC approximately one week to issue one; it was delayed because they said they needed confirmation of her status as conservator, and they did not have paperwork that established that. (Ex. SA 13, p. 220.) Furthermore, one packet that was mailed to Mom was returned because incorrectly addressed. (SA 13, p. 218, April 26 entry.)

THE MEDICAL INSURER'S EFFORT TO DISCONTINUE ABA SERVICES

30. As noted above, Claimant receives 10 hours per week of ABA service that are funded by an insurance carrier. The insurer recently took steps to cancel the coverage. Mom authorized Jeffery Hayden (Hayden), one of the owners of HCS, to appeal that decision. He did so, at the "first level," and was rebuffed.

31. One of the issues raised by the insurer is medications for Claimant. It asserts that such had been recommended, but that Mom refuses to authorize

the use of medications. The other issue raised is a contention that behavioral services should, in essence, be time limited.

32. The insurer has also asserted that the ABA services are not medically necessary. Just how the carrier defines medical necessity is not clear from the record.

33. As of the July 22 hearing date, the "second level" appeal had not gone forward. However, Mom intends to appeal.

USE OF MEDICATIONS

34. As noted above, Claimant's health insurer appears to have partially based its denial of future services on Mom's decision not to medicate Claimant. Under her powers as conservator, she can allow or refuse medication.

35. Mom testified that medications have been tried over the years, but they have not been conducive, because of side effects. The side effects vary from drug to drug. It appears that as a general proposition, one problem is raded for another when medications have been utilized to control Claimant's behaviors or his anxiety. For example, one drug caused weight gain, and Mom believes it caused Claimant's diabetes. In another case, medication caused facial tics, and Tourette's-like behaviors. Mom has informed TCRC staff of such problems. (E.g., ex. SA 4, p. 101 where she discussed Claimant's medication history with Dr. Campos.)

36. According to Dr. Patterson's report, Claimant had taken Abilify to address behaviors; it appears this started, at least, when Claimant was five years old. At that point, he was taking 2.5 mg. per day. (Ex. CL 7, p. 7017.) In January 2010, Claimant was seen by Dr. Elliott at the Children's Health Council at Stanford University. They recommended weaning Claimant off of Abilify to a lower dose. To deal with Claimant's anxiety, it was determined to try Zoloft or Celexa in place

of Abilify. By June 2011, Claimant was off Abilify. (*Id*., p. 23.) He was taken off of Celexa and given Ativan, but it had deleterious side effects as well.

OTHER FINDINGS

37. The record establishes that Claimant needs constant support, 24 hours per day. And, he requires substantial ABA supports, beyond what is being funded by the insurance carrier, and beyond the 12 hours per month that Service Agency staff thought might be provided as an exception when they met in February 2016. Indeed, Dr. Campos testified, in response to a question by the ALJ, that Claimant will need some behavioral supports for life. Hayden testified that in the future, as some of the behavioral supports are diminished, any other services should still be "behaviorally informed."

38. A substantial change to Claimant's support program, especially a sudden one, has a high probability of causing Claimant to regress. This finding is based in part on Dr. Campos's opinion, and on other evidence as well.

39. Aside from Dr. Campos's "observation" of Claimant in January 2016, no assessments of any type have been performed by TCRC in recent history. TCRC did not utilize the standard SLS questionnaire to assist in determining the viability of SLS services.[10] This has tended to leave the IPP process uninformed, except by Mom and Hatchell, who found themselves explaining to TCRC staff more than once just what they are doing, and how many hours are being expended in caring for Claimant.

40. A group home placement at any point in the next few years appears to be a recipe for failure, and would be a more restrictive environment for

---

[10] Sutton, the current service coordinator, testified that he had not been trained on the questionnaire, and had never utilized it.

Claimant than if he were living in his own home near his family. Claimant has not done well in group settings, whether it has been in a classroom or the failed residential placement of 2008. Indeed, his presence in community settings can be difficult; as noted above, if a work site is too crowded, he has difficulties. Claimant has very minimal social skills. While his team has been working to improve social skills, the team has a significant challenge before it. Furthermore, the ability to locate a small group facility, with significant supports, such as 2:1 staffing for some periods, appears unlikely, and such a placement would be costly.

41. The current staff is a good one, but is paid at rates in excess of what is paid by the Service Agency. This includes the fact that some staff are now paid (by Mom) for travel time and mileage, something not paid by the Service Agency. On the other hand, the private insurer is paying sufficiently for the staff's basic hourly rate, but is not paying for the bulk of the program.

42. The Service Agency has known, for months leading up to the hearing, that there was no SLS or ILS vendor available to work with Claimant, even if TCRC could agree to an SLS program. Indeed, there is a paucity of staff of all types, and the Service Agency's witnesses agreed, on cross-examination, that it would be difficult to find staff that could work with Claimant at the personal assistance rate of $13.90 per hour, gross.

43. Service Agency has taken the position that it can not pay for ABA services if the insurance company deems them not to be medically necessary, and has further asserted that if the insurer is providing any ABA services, it cannot provide services on top of that. (See ex. SA 13, p. 225.) Apolinar reiterated that position in her testimony. As discussed in the Legal Conclusions, this is a misinterpretation of the law, and fails to consider the Service Agency's status as the payer of last resort.

44. Service Agency staff did not raise the issue of obtaining a Health and Safety Waiver from the Department of Developmental Services with Mom during the March and April meetings. Sutton and other lower level staff did not know that such a tool existed. To the extent that that process could help solve the problem of how to provide for Claimant, valuable time has been lost.

45. As of August 9, 2016, the modular home is all but complete, with electrical hook-up being the last major step to regular use. Mom remained willing to stay overnight in the trailer, in order to help ease Claimant's transition to it.

46. As of August 9, 2016, Mom was willing to act as an SLS vendor for Claimant.

47. Mom and her team propose that Claimant's move into the trailer would be gradual, and that the team would facilitate that move. They have had no intention of changing the team and the program at the same time as the move would be underway. They are cautiously optimistic that the move could be accomplished in approximately six months.

48. It appears that the Service Agency would thrust much of the expense of the existing program onto the family once the school funding runs out. This could amount to nearly two thousand dollars per week, leaving the family to fund their adult son's program, or risk regression, and ultimately placement in a more restrictive environment. Claimant's family, and especially his mother, have acted with great fidelity in their efforts to care for him and to ameliorate his condition. His parents have been doing so for over 20 years, but plainly will not be around forever. In this regard, Mom has a commitment from her daughter that when Mom and Dad can no longer help care for Claimant, his sister would move into the family home to do so.

49. Claimant, given his particular problems, is deemed an unusual consumer, and an outlier, in terms of finding the appropriate services for him. Such was acknowledged by Sutton and Bishop. The protection of Claimant's health and welfare, and the continued rehabilitation and habilitation of him, requires an unusual and exceptional effort by the Service Agency, which has not been sufficiently forthcoming in recent months, especially in light of the Service Agency's knowledge, since September 2015, of the limits on funding for an effective program. The order that follows is designed to maximize Claimant's health, safety, welfare, rehabilitation, and integration into the community.

50. The current program operated by Mom is cost-effective, in that it has been observed to yield positive and favorable results. It is not inexpensive. On the other hand, a group home would costs at least $5,000 per month, and could run as high as $17, 000 per month if Claimant was placed in a facility and substantially regressed. Placement in a group home is not a viable option, and therefore cannot be deemed cost-effective.

51. The Service Agency has not had either SLS or ILS vendors capable of operating such programs for Claimant. It does not appear that a suitable vendor can be counted on in the foreseeable future. At the same time, suitable ABA providers are not available either. In part this paucity of vendors is a function of Claimant's relatively remote location, and the lack of vendors in the northern area of TCRC's catchment area.

52. Claimant's ability to live independently and to make independent choices is delimited, but on the other hand, some of that ability has been legally placed in his parents' hands by the conservatorship approved by the Superior Court. However, the Service Agency's position, that he is not suitable for SLS services from some clinical standpoint is rejected. In this regards, Dr. Campos's

opinion of his ability to live independently, quoted in Factual Finding 23(D), is credited. However, it also appears that ILS services could be appropriate for Claimant, as they could be designed to give him the structure that he needs in his day-to-day activities, while building skills, positive behaviors, and community integration.

LEGAL CONCLUSIONS

JURISDICTION

1. Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 3.

//

GENERAL RULES APPLICABLE TO RESOLVING SERVICE DISPUTES:

2. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act 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 life of the community." (§ 4501.) These services and supports are provided by the state's regional centers. (§ 4620, subd. (a).)

3. The California Legislature enacted the Lanterman Act "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." (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388; hereafter, *ARC v. DDS*.)

4. Services provided under the Lanterman Act are to be provided in conformity with the IPP, per section 4646, subdivision (d). Consumer choice is to play a part in the construction of the IPP. Where the parties cannot agree on the terms and conditions of the IPP, a Fair Hearing decision may, in essence, establish such terms. (See § 4710.5, subd. (a).)

5. Regional centers must develop and implement IPP's, which shall identify services and supports "on the basis of the needs and preferences of the consumer, or where appropriate, the consumer's family, and shall include consideration of … the cost-effectiveness of each option …." (§ 4512, subd. (b); see also §§ 4646, 4646.5, 4647, and 4648.) The Lanterman Act assigns a priority to services that will maximize the consumer's participation in the community. (§§ 4646.5, subd. (a)(2); 4648, subd. (a)(1), (2).)

6. In order to determine how an individual consumer is to be served, regional centers are directed to conduct a planning process that results in an IPP designed to promote as normal a life as possible. (§ 4646; *ARC v. DDS, supra,* 38 Cal.3d at 389.) Among other things, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services (which must be provided based upon the client's developmental needs), contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences. (Code §§ 4646; 4646.5, subd. (a)(1), (2) and (4); 4512, subd. (b); and 4648, subd. (a)(6)(E).)

7. Section 4512, subdivision (b), of the Lanterman Act states in part:

> Services and supports for person with developmental disabilities" means specialized services and supports or special adaptations of generic services and support 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 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's family, and shall include consideration of … the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, … physical, occupational, and speech therapy, … education, … *behavior training and behavior modification programs*, … respite, … social skills training, … transportation services necessary to ensure delivery of services to persons with developmental disabilities. (Emphasis added.)

8. Services provided must be cost effective (§ 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., §§ 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 children and families.

9. The IPP is to be prepared jointly by the planning team, and any services purchased or otherwise obtained by agreement between the regional center representative and the consumer or his or her parents or guardian. (§ 4646, subd. (d).) The planning team, which is to determine the content of the IPP and the services to be utilized, is made up of the disabled individual or their parents, guardian or representative, one or more regional center representatives, including the designated service coordinator, and any person, including service providers, invited by the consumer. (§ 4512, subd. (j).)

10. Pursuant to section 4646, subdivision (a), the planning process is to take into account the needs and preferences of the consumer and his or her family, "where appropriate." Further, services and supports are to assist disabled consumers in "achieving the greatest amount of self-sufficiency possible … . " In the planning process, the planning team is to give the highest preference to services and supports that will enable a minor to live with his or her family, and an adult person with developmental disabilities to live as independently in the community as possible. Planning is to have a general goal of allowing all consumers to interact with persons without disabilities in positive and meaningful ways. (§ 4648, subd. (a)(1).)

11. The planning process includes the gathering of information about the consumer and "conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities… . Assessments shall be conducted by qualified individuals … . Information shall be taken from the consumer, his or her

parents and other family members, his or her friends, advocates, providers of services and supports, and other agencies." (§ 4646.5, subd. (a)(1).) Given that services must be cost effective and designed to meet the consumer's needs, it is plain that assessments must be made so that services can be properly provided in a cost-efficient manner.

12. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each consumer's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a) & (b), 4648, subd. (a)(1) & (a)(2).) The Lanterman Act assigns a priority to services that will maximize the consumer's participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).) Under section 4640.7, each regional center is to assist consumers and families with services and supports that "maximize opportunities and choices for living, working, learning, and recreating in the community."

13. Reliance on a fixed policy "is inconsistent with the Act's stated purpose of providing services 'sufficiently complete to meet the needs of each person with developmental disabilities.' (§ 4501.)" (*Williams v. Macomber* (1990) 226 Cal.App.3d 225, 232-233.) The services to be provided to each consumer will be selected on an individual basis. (*ARC v. DDS*, *supra*, 38 Cal.3d at 388.)

14. One important mandate included within the statutory scheme is the flexibility necessary to meet unusual or unique circumstances, which is expressed in many different ways in the Lanterman Act. Regional centers are encouraged to employ innovative programs and techniques (§ 4630, subd. (b)); to find innovative and economical ways to achieve the goals in an IPP (Code § 4651); and to utilize innovative service-delivery mechanisms (§§ 4685, subd. (c)(3), and 4791).

15. (A) Under section 4502, persons with developmental disabilities have certain rights, including the right to treatment services and supports in the least restrictive environment. Those services and supports should foster "the developmental potential of the person and be directed toward the achievement of the most independent, productive and normal lives possible." (Subd. (b)(1).) There is also a right to dignity, privacy and humane care. (Subd. (b)(2).) The person also has the right to make choices, including where and with whom they live, and the pursuit of their personal future. (Subd. (b)(10).)

(B) The Act favors supporting minor children in their family home. When it comes to adults, the Legislature has placed "a high priority on providing opportunities for adults with developmental disabilities, regardless of the degree of disability, to live in homes that they own or lease with support available as often and for as long as it is needed, when that is the preferred objective in the individual program plan." (§ 4689.)

16. Section 4648, subdivision (a)(3), provides that a regional center may purchase services pursuant to vendorization *or* contract. Subdivision (a)(3)(A) provides that vendorization or contracting is the process of identifying, selecting, or utilizing vendors or contractors, based on qualifications and other factors. The Department of Developmental Services has enacted regulations governing the establishment of persons or firms as vendors. (See California Code of Regulations (CCR), title 17, §54300, et. seq.)[11] Other regulations control the purchase of services by contract. (CCR §§ 50607 through 50611.) All of these provisions plainly exist to not only control costs, but to assure the quality of services.

---

[11] Further citations to the CCR shall be to title 17.

THE SERVICE AGENCY REMAINS THE PAYER OF LAST RESORT FOR ABA AND OTHER SERVICES

17. Service Agency has taken the position that it cannot pay for ABA services if Claimant's health insurer discontinues the service on the grounds that the ABA services are not medically necessary. And, Service Agency asserts it cannot provide any ABA services in excess of what the health insurer will provide. (Testimony of Apolinar; ex. CL 24002.) Neither position can be sustained.

18. In recent years, state law mandated that health insurers are obligated to provide coverage for behavioral interventions that are needed by a person who suffers from autism. And, TCRC correctly points out insurers are now deemed to be a generic resource, and that a consumer must attempt to obtain services from generic resources. That does not end the analysis.

19. (A) Nothing in the Lanterman Act ties the provision of behavioral services to "medical necessity," which may be a term of art in the insurance business. Section 4686.2, added in 2009, does place some limits on the use of behavioral interventions, but does not tie them to "medical necessity."

(B) Section 4686.2, subdivision (b)(4), provides that such services shall be discontinued if treatment goals are met, but it also provides that "ABA or intensive behavioral interventions shall not be discontinued until the goals and objectives are reviewed and updated as required in paragraph (5) and shall be discontinued only if those updated goals and objectives do not require ABA or intensive behavioral intervention services." Given Dr. Campos testimony that some sort of behavioral interventions will be necessary throughout Claimant's life, and the evidence that such services are needed now, ABA services should be written into Claimant's IPP, with appropriate detail as to what objectives and goals are to be focused on.[12]

20. (A) A number of competing rules are relevant to this matter. It has long been the law that the regional centers cannot supplant the budgets of generic resources. Section 4648, subdivision (a)(8), provides that "Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." Section 4659 has long provided that the regional centers shall identify and pursue all possible sources of funding for consumers receiving services.

(B) Section 4659 underwent substantial revision in 2009. The statute retained its mandate for the regional centers to pursue sources of funding for their consumers, such as generic resources (school systems, Medi-Cal, etc.). The statute now provides that the regional centers shall not purchase services that could be obtained by the consumer from traditional generic resources, as well as "private insurance, or a health care service plan when a consumer or family meets criteria of this coverage but chooses not to pursue that coverage." (§ 4659, subd. (c).)

(C) Section 4659, subdivision (a), still contains language that authorizes the regional centers to pursue generic sources that may not be doing their duty. As stated by the Attorney General in one of his opinions, "A regional center for persons with developmental disabilities may initiate an action at law for the

---

[12] For example, Dr. Campos opined that more coping strategies should be utilized. Such could be one of the goals or objectives in future IPP's.

purpose of pursuing a source of funding for clients receiving services." (73 Ops.Cal.Aty.Gen. 156, 157 (1990).)

(D) The Lanterman Act has long been interpreted as requiring the regional centers to provide services if a generic resource will not, or if that service being provided by a generic resource did not provide all that was necessary. This was because the regional centers were the payers of last resort. This often occurred in connection with behavioral services when they were provided by the schools. If the school district failed to provide the services, or what was provided was insufficient, than the regional center would have to step forward and provide services as the payer of last resort.

(E) The regional centers remain the payers of last resort, as noted in section 4659.10. That statute, enacted in 2011, is part of several statutes authorizing the regional centers to pursue third parties who may be responsible for injuries that result in a person becoming a consumer of regional center services. Section 4659.10 states, in part: "It is further the intent of the Legislature that the department and regional centers shall continue to be the payers of last resort consistent with the requirement of this division [Division 4.5, encompassing services for the developmentally disabled] and the California Early Intervention Program."

(F) Claimant's parents have sought and obtained behavioral services from health insurance. TCRC asserts that they should have pursued more than just the 10 hours of services now being provided. Claimant's rejoinder, that if the insurance carrier is trying to stop providing 10 hours per week, they certainly won't fund close to 40 hours per week, is a more realistic assessment of the situation. The record shows that Claimant's mother has pursued an appeal of the carrier's effort to terminate the existing funding. Given the Service Agency's obligation to coordinate services, including generic ones, it may have an interest in assisting Mom in her efforts to obtain more services from the insurance carrier.

(G) So long as Claimant requires behavioral services, he is obligated to attempt to obtain some or all of them from any generic resource, including health insurance. However, if he cannot obtain what he needs, TCRC, as the payer of last resort must provide the needed services.[13]

SUPPORTED LIVING SERVICES VERSUS INDEPENDENT LIVING SERVICES

21. In the course of the proceeding, Claimant has sought SLS services as the vehicle to, essentially, take over the program developed by Mom. Toward the end of the hearing, the Service Agency advanced the notion of using ILS services. During the telephonic hearing on August 8, the ALJ requested briefing on the use of ILS services, which yielded exhibits SA 20 and CL 44.

22. (A) There are numerous statutes and regulations regarding SLS, some of which are summarized as follows. Under section 4354, SLS "means a range of appropriate supervision, support, and training in the consumer's place of residence, designed to maximize independence." Further specifications are found in CCR section 58614, subdivision (a), which states that SLS consists of

---

[13] During the hearing, Claimant's current service coordinator, Sutton, twice testified that it was his understanding that TCRC had an agreement "with the state" that it would limit the amount of ABA services it would provide. No further evidence of such an agreement was forthcoming. If he is correct, the agreement would be of questionable validity in light of the basic precepts set out in Legal Conclusions 2 through 15, and it may be a type of "underground" regulation disfavored in the law. And, it would tend to contravene section 4686.2, subdivisions (b) and (d)(2).

individually designed services which assist an individual consumer to live in his own home, “with support available as often and for as long as it is needed,” and “make fundamental life decisions, while also supporting and facilitating the consumer in dealing with the consequences of those decisions; building critical and durable relationships with other individuals; choosing where and with whom to live; and controlling the character and appearance of the environment within their home.”

(B) Furthermore, SLS has been defined in the regulations to mean:

> “those services and supports referenced in Section 54349(a) through (e), and specified as SLS service and support components in Title 17, Section 58614, which are provided by a SLS vendor, paid for by the regional center, and support consumers' efforts to:

(A) Live in their own homes, as defined in Title 17, Section 58601(a) (3);

(B) Participate in community activities to the extent appropriate to each consumer's interests and capacity; and

(C) Realize their individualized potential to live lives that are integrated, productive, and normal”; (CCR § 54302, subd. (71).)

(C) SLS must be “tailored to meet the consumer’s evolving needs and preferences for support so that the consumer does not have to move from the home of choice.” (CCR § 58614.) Under CCR section 58617, the list of services includes, inter alia, assistance with common daily living activities such as meal preparation, including planning, shopping, and cooking; performing routine household activities to keep a clean and safe home; locating and scheduling medical services; acquiring household furnishings; becoming aware of and effectively using the transportation, police, fire, and emergency help available in the community; managing personal financial affairs; recruiting, screening, hiring, training, supervising, and dismissing personal attendants; dealing with governmental agencies; asserting civil and statutory rights through self-advocacy; building and maintaining interpersonal relationships, including a circle of support; participating in community life; and 24-hour emergency assistance. Further, a regional center is obligated to assess the projected annual costs of the consumer's supported living assistance, as determined through the IPP process, before SLS is provided.

(D) The regulations define a home, for purposes of SLS, as follows:

> "Home" means, with respect to the home of a consumer receiving SLS, a house or apartment, or comparable dwelling space meeting community housing standards, which is neither a community care facility, health facility, nor a family home certified by a Family Home Agency, and in which no parent or conservator of the consumer resides, and which a consumer chooses, owns or rents, controls, and occupies as a principal place of residence. (CCR § 58601, subd. (3).)

This runs contrary to the position that Apolinar took during staff meetings, to the effect that Claimant could not have SLS services in his own home, if it was on his parents' property. And, while Mom might stay overnight as an IHSS worker, she would not be residing in the home, and thus her overnight presence is not a bar to the provision of SLS services to Claimant.

(E) It is clear from the law and the testimony, that SLS services may include behavioral supports, and 24/7 supports. (See also ex. SA 10, p. 204.)

23. (A) ILS is provided under a different rubric. The regulations specifically define an Independent Living Program (ILP) as:

> a community-based day program that provides to adult consumers the functional skills training necessary to secure a self-sustaining, independent living situation in the community and/or may provide the support necessary to maintain those skills. Independent living programs focus on functional skills training for adult consumers who generally have acquired basic self-help skills and who, because of their physical disabilities, do not possess basic self-help skills, but who employ and supervise aides to assist them in meeting their personal needs. (CCR § 54302, subd. (35).)

(B) Section 56742 of the regulations provides for the components of various day programs (of which ILS is a type). At subdivision (b)(3), it provides that an ILP shall have all of the functional skill training listed therein, which includes 13 categories from cooking to home and community training. However, subdivision (b)(4) of the regulation provides that "independent living programs may also, or in lieu of (b)(3) above, provide the supports necessary for a consumer to maintain a self-sustaining, independent living situation in the community." At this place, ILS and SLS appear to overlap.

24. The rates payable for ILS are substantially higher than those available for SLS services, at least under the regulations. The information provided in the briefs, exhibits CL 44 and SA 20, show that hourly rates run from just over $25 per hour to $48.75 per hour. The SLS services average $18.48 per hour.

OTHER CONCLUSIONS

25. The Service Agency, by the end of the case, essentially acknowledged that the program now in place is efficacious. Based on the entire record, it must be found and concluded, that Claimant needs the services that are currently being provided for him by Mom. Such admissions, findings, and conclusion, taken with the lack of resources in the north county area for outlier consumers such as Claimant, lead to the conclusion that the program should remain in place. This has raised the practical and legal issues of how to do so in an environment where the ability to pay for services is hampered by regulations that tend to impede appropriate application of the Lanterman Act's core directives and values.

26. (A) The sorts of activities and training that has been provided to Claimant in recent years fits within the rubric of the training referenced in CCR section 56742, subdivision (b)(3). It can be provided in Claimant's own home. While ILS services do not clearly show as authorizing behavioral services, which are authorized under section 4689, subdivision (c), they are not barred either. And, while ILS or ILP is supposed to be less than a 24-hour per day program, part of the total daily supervision would continue to be provided through IHSS, not by the ILS program. If the situation changes, some innovative means can be found to provide the round-the-clock supports necessary.

(B) To the extent that the nature of ILS services is "stretched" by the order in this case, it amounts to an order to the Service Agency to use innovative methods of service delivery. (§§ 4651, 4685, subd. (c)(1) & (c)(3).)

27. Claimant invoked the rule in *Harbor Regional Center v. OAH* (2012) 210 Cal.App.4th 293, where the Court of Appeal upheld a decision to order a regional center to make payments for services above and beyond the rates set in the regulations, it being necessary to keep necessary services in place for a severely disabled consumer. The undersigned would apply that case, and makes such an order regarding payment of travel expenses for Hatchall and his assistant. These payments are necessary to continue to provide the appropriate program to Claimant. Such an order is also supported by the general rule that regulations must conform to the statutes, and may be disregarded if contrary to relevant statutes. Therefore, the Service Agency will be ordered to pay for the travel time of Hatchell, and his mileage, and the mileage charged by John.

ORDER

Claimant's appeal is granted, as follows:

1. The Service Agency shall fund the services and supports currently provided to Claimant, excepting the 10 hours per week of behavioral services now funded by the family's health insurance, and those services paid for by IHSS, forthwith. This includes the travel billing charged by Guy Hatchell, and the mileage reimbursement for him and John Aynes. The program shall be funded whether or not Claimant is able to transition into his own home.

2. The Service Agency shall take steps to provide Claimant's mother with an emergency vendorization as an ILS provider.

3. Once Claimant's mother is established as an ILS vendor, payment for the program may be provided through that vendorization and payment

process. Until that occurs, the Service Agency shall reimburse Claimant's mother for costs of the program paid by her after Claimant's 23rd birthday, and until the emergency vendorization is in place. Claimant's mother shall submit documentation of the expenses incurred every 30 days, and TCRC shall review and reimburse her promptly.

4. The Service Agency may file for an exception with the Department of Developmental Services as may be needed to cover the costs of the ILS program if it deems such an exception necessary.

5. Within six months the Service Agency shall conduct an SLS assessment to determine if Claimant can transit to SLS from ILS. The assessor shall be mutually agreed upon by the parties.

6. If the SLS assessment shows that such services are appropriate, the Service Agency shall file for an exception with the Department of Developmental Services as may be needed to cover the costs of the program.

August 17, 2016

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

NOTICE

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