

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No.: 2017020431

DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Alhambra, California on March 8, 2017. Jacob Romero represented Eastern Los Angeles Regional Center (ELARC or service agency). Claimant's mother represented Claimant, who briefly appeared at the outset of the hearing.¹

Testimonial and documentary evidence was received and the case argued. The record was closed and the matter was submitted for decision on the same day. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

¹Claimant's name and his representative's name are not used to preserve confidentiality.

ISSUE

The issue presented is whether the service agency should fund (a) two-to-one personal assistant services to prepare Claimant for school on Mondays through Fridays and (b) 13.5 hours per day of nursing care services for Claimant on Saturdays and Sundays.

FACTUAL FINDINGS

1. Claimant is an 11-year-old male with qualifying diagnoses of Intellectual Disability-Unspecified and Cerebral Palsy. Claimant presents with X-linked Hydrocephalus, Hyperbilirubinemia and Hypothermia. He has a history of seizure disorder, but he has not experienced any seizures in the last several years. His vision is impaired. He communicates using simple, one-word utterances and his speech is difficult to understand. He ambulates with a walker for short distances and a manual wheelchair for long distances. He has allergic reactions to several foods including gluten and peanuts.

2. Claimant resides with Mother, who is estranged from Claimant's father. Claimant is dependent on others for his self-help needs and safety. He is not toilet-trained. He cannot groom or dress himself. He feeds himself with spillage. He requires assistance transitioning to and from his wheel chair. He is resistive and he exhibits temper tantrums. His aggressive behaviors include hitting, scratching, and pulling his mother's hair. Claimant lacks safety awareness and his self-injurious behaviors include biting himself and smearing his feces on himself and placing inappropriate items in the microwave and oven. Claimant requires constant supervision during his waking hours in all settings to prevent injuries.

3. Claimant is enrolled in and attends a special day class Mondays through Fridays at his school where he receives speech therapy and physical therapy services.

4. ELARC funds the following services for Claimant: 137.5 hours per month of intensive behavioral services provided by Behavioral CUSP; 62 hours per month of personal assistant services provided by Behavioral Respite in Action; 69 hours per month of homemaker services provided by HomeInstead; 30 hours per month of in-home nursing respite services; and 21 days per fiscal year of in-home nursing respite services in lieu of out-of-home respite services.

5. In addition to the ELARC-funded services set forth in Factual Finding 4, MediCal funds 35 hours per week of nursing care services provided through Royal Health Homecare Agency. The Los Angeles County Department of Public Social Services funds 283 hours per month of In-Home Supportive Services (IHSS) with Mother serving as Claimant's IHSS worker.

6. On a typical weekday, Claimant's schedule is as follows:

6:45 a.m.	Claimant receives ELARC-funded personal assistant services to help Mother prepare him for school
8:45 a.m.	Claimant attends school ²

² In November 2016, Claimant sustained an injury boarding his school bus, and consequently he is unable to attend school and he is required to convalesce at home. ELARC funds nursing care services for Claimant on Mondays through Fridays between 8:45 a.m. and 3:00 p.m. In such circumstances where Claimant receives ELARC-funded nursing care services, ELARC's Policy and Procedure Manual requires a temporary postponement of in-home nursing respite services. When Claimant resumes attending school, his in-home nursing respite services will be restored and the nursing care services will cease. (See Exh. 16.)

- 2:00 p.m. Claimant in transit
- 3:00 p.m. Claimant returns home from school
- 3:00 to 6:00 p.m. Claimant receives ELARC-funded intensive behavioral intervention services at home³
- 3:00 to 10:00 p.m. Claimant receives MediCal-funded nursing care services at home

7. Claimant's typical weekend schedule is as follows. On Saturdays, Claimant receives his ELARC-funded intensive behavioral intervention services from approximately 6:45 a.m. to 12:00 noon. Mother usually uses up to seven hours of in-home nursing respite services on Saturdays. On Sundays, Claimant receives MediCal-funded nursing from 7:00 a.m. to 2:00 p.m., which is then followed by his ELARC-funded intensive behavioral intervention services, which lasts until 5:00 p.m.

8. In late December 2016, Mother informed ELARC of difficulties retaining a personal care worker willing to work a two-hour block of time in the mornings readying Claimant for school. On January 10, 2017, ELARC resolved the situation by funding three hours of HomeInstead homemaker services to provide Mother with support as she readies Claimant for school in the mornings on Mondays through Fridays. Mother has complained that the homemaker staff is too slow and she has requested an additional personal care assistant so that Claimant would have two-to-one support during his morning routine. In response, ELARC proposed a temporary shift of a portion of Claimant's intensive behavioral intervention service hours to school mornings so that an

³ On Tuesdays, Claimant's intensive behavioral intervention services commence at 2:00 p.m. and ends at 8:00 p.m.

interventional behaviorist would be able to work with Claimant on his morning routine and to train the service provider how best to assist Mother. Mother has rejected that proposal.

9. Mother further informed ELARC that Claimant was without his MediCal-funded nursing care services because of a staffing issue.⁴ ELARC agreed to fund, on a temporary basis, an additional 35 hours per week of homemaker services for Claimant until the MediCal-funded nurse staffing issue is resolved. The temporary homemaker staff, however, is prohibited from performing the duties or tasks of a nurse and Mother is prohibited from leaving Claimant in the sole care of the homemaker staff. Mother has requested ELARC to fund an additional 13.5 hours per day of nursing care services for Claimant on Saturdays and Sundays, and in the event that a nurse is unavailable for Saturdays and Sundays to provide Claimant with the service of a substitute aide.

10. By Notice of Proposed Action, effective January 10, 2017, ELARC memorialized its determination to deny Mother's request for ELARC-funded two-to-one personal aide support on Mondays through Fridays in the morning and for an additional 13.5 hours per day of nursing care services for Claimant on Saturdays and Sundays. Mother filed a January 18, 2017 Fair Hearing Request appealing the denial and maintaining that the requested additional services and service hours are needed to prevent Claimant from sustaining life threatening injuries.

11. The preponderance of evidence offered at the administrative hearing establishes that Claimant is "medically fragile." In an undated letter to ELARC, Dinesh Ghiya, M.D. writes the following about claimant.

⁴ In January 2017, Royal Health Homecare Agency found a nurse for Claimant; however, the nurse's schedule did not meet Mother's specifications, and the agency continues its search.

[Claimant] is medically fragile, has multiple disabilities, and autism behavior. He needs care daily, and 2:1 support for home and community. [Claimant] is under the care of one parent[,] his mother, without nature [sic] support in the area. Incidents happened when his mother was busy, or was too tired. Some incidents happened when he was with behavior PA or therapist. Mother's health is damaged by the continuing 24 and 7 care. Please provide LVN care extra 26hr for each weekend, and extra 2.5hr/day for each no school day and early release day.

- give medication, observe allergy and side effect
- manage incontinent bowel bladder digital stimulation, enema for bowel movement
- manage outbursts tantrums to prevent him from injuring himself
- implement safety plan, and shunt care plan
- use orthopedic AFO, twist belt, different splints etc
- provide range of motion and exercise
- implement oral muscle exercise, and mealtime management plan for safety
- continue monitor water intake to avoid dehydration
- reposition to avoid sourness [sic] and help with blood flow
- monitor absence seizure
- implement therapy home exercise for vision, vestibular, and sensory integration etc
- support transition and transportation
- operate all medical equipment

(Exh. 7.)

12. A November 14, 2016 medical prescription pad bearing Dr. Ghiya's name provides for "13.5 LNV for no school day. For school day deduct school hours" for Claimant. (Exh A.)

13. ELARC does not dispute the fact of Claimant's medical fragility or Claimant's need for nursing services on Saturdays and Sundays. ELARC correctly maintains, however, that the appropriate course of action requires Mother to exhaust all generic resources before seeking any funding for additional nursing care services from the service agency. In that regard, ELARC has instructed Mother to have Claimant's physician write a Treatment Authorization Request to MediCal in order to obtain authorization for an increase in nursing care services for Claimant. (See Exh. 8.) In the event that MediCal denies the request for authorization, Mother may then provide ELARC with documented proof of denial and have ELARC consider the request. Mother has not exhausted available generic resources for additional nursing care services for Claimant, and unless and until Mother does so, ELARC has no authority to fund the requested additional nursing care services.

14. The preponderance of evidence offered at the administrative hearing further establishes that ELARC conducted an assessment to determine whether Claimant requires two-to-one personal care services to help with his preparation for school. ELARC determined that Claimant's behaviorist has been providing training for the caregiver assisting Mother to ready Claimant for school in the mornings. The caregiver is capable of assisting Mother with the preparation of Claimant for school.

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Services Act (Lanterman Act), developmentally disabled persons in California have a statutory right to treatment and habilitation services and supports at state expense. (Welf. & Inst. Code, §§ 4502, 4620, 4646-4648; *Association for Retarded Citizens—California v. Department of*

Developmental Services (1985) 38 Cal.3d 384, 389.) 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 of life in the community.” (Welf. & Inst. Code, § 4501.)

2. Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Regional centers are responsible for developing and implementing individual program plans for consumers, for taking into account individual consumer needs and preferences, and for ensuring service cost effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

3. Services and supports for persons with developmental disabilities are defined as “specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic 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.” (Welf. & Inst. Code, § 4512, subd. (b).)

4. “In implementing individual program plans, regional centers, through the planning team, shall first consider services and supports in natural community, home, work, and recreational settings. Services and supports shall be flexible and individually

tailored to the consumer and, where appropriate, his or her family.” (Welf. & Inst. Code, § 4648, subd. (a) (3).)

5. Generally, when purchasing services and supports, regional centers are required to ensure all the following:

- (1) Conformance with the regional center’s purchase of service policies
- (2) Utilization of generic services and supports when appropriate.
- (3) Utilization of other services and sources of funding as contained in Section 4659.
- (4) Consideration of the family’s responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer’s service and support needs as provided in the least restrictive and most appropriate setting. In this determination, regional centers shall take into account the consumer’s need for extraordinary care, services, supports and supervision and the need for timely access to this care.

(Welf. & Inst. Code, § 4646.4, subd. (a)).

6. As the party asserting a claim for services and supports under the Lanterman Act, Claimant bears the burden of proving by a preponderance of evidence his entitlement to the services and supports. (Evid. Code, §§ 115 and 500.) Claimant has not met his burden.

7. As set forth in Factual findings 1 through 14, Claimant’s needs for supports and services are being met with a combination of service agency-funded and generic resources. In particular, Claimant’s behaviorist has been training a caregiver working three hours on school mornings on how best to assist Mother as she prepares Claimant for school when he is attending school. It is not established that additional personnel is required to ready Claimant for school. It is not disputed that Claimant presents with medical conditions requiring nursing care services. Claimant is required, however, to

exhaust generic support and services before the service agency may properly consider any funding request for nursing care services, and Claimant has not yet done so.

8. Cause does not exist for ELARC to fund two-to-one personal assistant services to prepare Claimant for school on Mondays through Fridays by reason of Factual Findings 8 and 14 and Legal Conclusions 1 through 7.

9. Cause does not exist for ELARC to fund 13.5 hours per day of nursing care services for Claimant on Saturdays and Sundays by reason of Factual Findings 11 through 13 and Legal Conclusions 1 through 7.

ORDER

Claimant's appeal is denied.

Dated:

JENNIFER M. RUSSELL

Administrative Law Judge

Office of Administrative Hearings

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.