

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Requests of:

CLAIMANT,

vs.

TRI-COUNTIES REGIONAL CENTER,

Service Agency.

OAH Nos. 2018050535 (Primary) &
2018080893 (Secondary)

DECISION

These consolidated matters were heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on October 23 and November 19-20, 2018, in Atascadero.¹

Daniel R. Shaw, Esq., represented claimant, who was not present.²

Donald R. Wood, Esq., Benton, Orr, Duval & Buckingham, represented the Tri-Counties Regional Center (service agency).

The record was held open after the conclusion of the hearing for submission of closing briefs, which were timely received and marked for identification as exhibits C 41

¹ The parties agree one decision should be prepared for these consolidated cases. (Cal. Code Regs., tit. 1, § 1016, subd. (d).)

² The names of claimant and his family are omitted to protect their privacy.

(claimant's) and RC 47 (service agency's). The record was closed and the matters submitted for decision upon receipt of the briefs on December 11, 2018.

ISSUES

Shall the service agency provide funding for additional weekly mileage and driving time for the staff supporting claimant in his current ILS program? (OAH no. 2018050535.)

Shall the service agency submit to the Department of Developmental Services a Health and Safety waiver exemption request for an SLS program for claimant and, if so, what components shall it have? (OAH no. 2018080893.)

EVIDENCE RELIED UPON

In reaching this Decision, the ALJ relied upon exhibits C 1- C 40 submitted by claimant, exhibits RC 1- RC 46 submitted by the service agency³, as well as the testimony of Dee Rittenhouse, Diva Johnson, Darcy Bishop, Eulalia Apolinar, Joe Hoeflich, Justin Sutton, Joseph Donofrio, Guy Hatchell, and claimant's mother.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. The service agency determines eligibility and provides coordination of and funding for services to persons with developmental disabilities under the Lanterman

³ Both parties numbered their exhibits. References during the hearing were, and herein shall be, to "C" for claimant's exhibits and "RC" for the service agency's exhibits.

Developmental Disabilities Services Act (Lanterman Act), among other entitlement programs. (Welf. & Inst. Code, § 4500 et seq.)⁴

2. Claimant is a 25-year-old male consumer of the service agency based on his qualifying diagnosis of autism spectrum disorder (or ASD).

3. On September 6, 2011, the Superior Court of California, County of San Luis Obispo, granted claimant's parents a limited conservatorship over claimant's person.

4. These consolidated cases arose from disputes between the parties concerning services the service agency was ordered to fund for claimant in a Decision issued by ALJ Joseph Montoya on August 17, 2016.

5. One key part of ALJ Montoya's Decision was an order that the service agency fund mileage reimbursement for two staff members of claimant's ILS program, and driving time (compensation for time spent commuting to and from the program) for one of them, Guy Hatchell. (Ex. RC 6, p. 27.) Said funding was subsequently provided by the service agency. Over time, however, one staff member went from part-time to full-time on claimant's program, and claimant's mother decided to increase mileage reimbursement to the federal rate. Those actions resulted in claimant's mother spending her own money to pay staffers. Claimant's mother requested the service agency for that additional funding.

6. In a Notice of Proposed Action dated June 15, 2017, the service agency denied the funding request. The service agency argued ALJ Montoya's Decision only contemplated such travel expenses as a temporary solution until an independent living services (ILS) program could be vendored on an emergency basis which, if done, would internally cover travel costs. The service agency also argued ALJ Montoya intended

⁴ All further unspecified statutory references are to the Welfare and Institutions Code.

claimant's home program to use local residents as staffers, which would eliminate or reduce travel expenses; and that paying staffers for mileage and driving time was not cost-effective. (Ex. RC 1.)

7. On May 1, 2018, claimant's mother submitted to the service agency a Fair Hearing Request in which she appealed the proposed denial of additional mileage and driving time funding.⁵ (Ex. C 2.) This became OAH case number 2018050535.

8. A. Another key part of ALJ Montoya's Decision was an order that the service agency conduct a supported living services (SLS) assessment to determine if claimant "can transit to SLS from ILS." (Ex. C 6, p. 28.) ALJ Montoya further ordered that, "If the SLS assessment shows that such services are appropriate, the Service Agency shall file for an exception [also known as a Health and Safety waiver exemption] with the Department of Developmental Services as may be needed to cover the costs of the program." (*Ibid.*)

B. An SLS assessment was completed in June 2017, including a projected budget for the various costs and components of the program. Thereafter, the parties engaged in frequent and intense negotiations concerning the budget of claimant's SLS program. By August 2018, the parties reached an impasse concerning several

⁵ The service agency moved to dismiss that matter, in part, because the June 2017 Notice of Proposed Action predated the May 2018 Fair Hearing Request by more than the 30-day appeal deadline provided in section 4710.5. (Ex. RC 7.) However, that argument was rejected by ALJ Eileen Cohn in her order denying the motion to dismiss. ALJ Cohn observed that claimant's mother had continually requested the same additional funding subsequent to the June 2017 Notice of Proposed Action, and concluded her failure to appeal from the earlier denial did not permanently foreclose her from seeking such funding in the future. (Ex. RC 8.)

components of the SLS budget; claimant's mother requested a written denial of her budget so she could appeal.

9. By a Notice of Proposed Action dated August 6, 2018, the service agency described the budget dispute as arising from claimant's mother's unwillingness "to move forward" with the Health and Safety waiver exemption (H&S waiver) process, and that the service agency could not submit a waiver to the Department of Developmental Services (DDS) until claimant's mother provided it with a "cost statement completed with accurate information." (Ex. C 4, p. 1.) The service agency also argued ALJ Montoya intended claimant's program to be transitioned from ILS to SLS, and that because claimant's mother had become an SLS vendor, the service agency intended to "switch" claimant to an SLS program by October 1, 2018. (*Ibid.*)

///

10. On August 17, 2018, claimant's mother submitted to the service agency a Fair Hearing Request in which she appealed the service agency's refusal to submit to DDS an H&S waiver request based on the budgets she presented to the service agency before the impasse arose. (Ex. C 5.) This became OAH case number 2018080893.

11. At the outset of the hearing, the parties agreed the issues to be decided in OAH case numbers 2018050535 and 2018080893 are as described in the Issues section above.

12. In connection with her prior continuance requests, claimant's mother executed a written waiver of the time limit prescribed by law for holding the hearing and for the ALJ to issue a decision in these consolidated matters.

CLAIMANT'S BACKGROUND INFORMATION

13. In addition to ASD, claimant is intellectually disabled and is diabetic. He is rather large; he stands over 6 feet tall and weighs at least 275 pounds.

14. Claimant engages in severe negative behaviors, including self-injury and aggression. His aggressive behavior can be unpredictable, so staffers must always be on-guard. Due to his size, claimant is capable of causing serious injury to himself and others, as well as severe property damage. (Ex. RC 13, pp. 3-4.)

15. Although claimant has some language, he is functionally non-verbal. His limited communication and processing skills make him dependent on others for communicating his needs, structuring the flow of his day, and helping diagnose his state of health. (Ex. RC 13, pp. 3-4.)

16. Claimant's behavioral services are programmed through Hayden Consultation Services, Inc. (HCSI). Guy Hatchell is claimant's main contact with HCSI and he essentially oversees claimant's program. With the support of HCSI, claimant's family has implemented the use of visual supports across his day, both in the home and in the community. These include picture icons, which provide choice opportunities and predictability within his daily schedule. As is typical for individuals with ASD, changes are difficult for claimant and extra care must be given to help him through these transitions. (Ex. RC 13, pp. 3-4.)

17. Claimant continues to work on controlling his challenging behaviors and increasing his tolerance of less preferred activities. Although some behaviors are still present, the consistent application of the proactive and reactive strategies developed and maintained by HCSI has resulted in significant growth in his ability to take part in home life and maintain community access. (Ex. RC 13, pp. 3-4.)

18. Claimant has a close relationship with his family. Although it takes a lot of time to gain his trust, he has bonded with a few staffers who spend a lot of time with him. From past experience, the only successful staffers who have remained in the program for any length of time have been those who have worked long enough to

become “familiar” with and to claimant. This process can take a significant period of time. (Ex. RC 13, pp. 3-4.)

ALJ MONTOYA’S DECISION IN 2016

19. For many years, claimant’s services were funded by his local school district, as a result of a settlement of litigation over the sufficiency of his special education program. However, the school district’s funding was scheduled to run out in August 2016. (Ex. RC 6, p. 3.) As that deadline approached, claimant’s mother worked to find a way to have the service agency take over the funding of the program that had been developed. (*Ibid.*) However, in meetings held in March and April 2016, service agency staff declined to do so, citing various impediments, including the inability to pay the current staff at the rates that the family was paying at the time. (*Ibid.*)

20. The dispute ultimately led to the fair hearing before ALJ Montoya, which was held in July and August 2016. In that case, claimant asserted that, given his unique needs and the paucity of resources in his area, the service agency should be ordered to fund the existing program previously funded by the school district, 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. (Ex. RC 6, p. 3.)

21. On August 17, 2016, ALJ Montoya issued his Decision, which granted claimant’s request in all respects. (Ex. RC 6.) ALJ Montoya made a number of observations and legal conclusions that would shape the future provision of services to claimant, including the following:

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 [California Code of Regulations, title 17,] 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 [Welfare and Institutions Code] 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 Hatchell 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 [his assistant]. (Ex. RC 6, pp. 26-27.)

22. Based on the above, ALJ Montoya issued the following Orders:

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 [his assistant]. 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 [H&S waiver] 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 [H&S waiver] with the Department of Developmental Services as may be needed to cover the costs of the program.
(Ex. RC 6, pp. 27-28.)

THE PARTIES' RESPONSES TO ALJ MONTOYA'S DECISION

Order No. 1: Services and Supports in Place

23. In compliance with Order number 1, the service agency has continued to fund the services and supports in place at the time of the fair hearing before ALJ Montoya, including mileage for Guy Hatchell and his assistant, Billy (claimant's nephew), and driving time for Mr. Hatchell. (Ex. RC 28, pp. 2-3.)

Order Nos. 2-4: ILS Vendorization

24. With regard to Order number 2, the parties agreed to forgo an emergency ILS vendorization so claimant's mother had more time to complete the standard ILS vendorization proposal. Also, an emergency ILS vendorization is limited to a very short time period. (Test. of Bishop.)

25. In compliance with Order number 3, claimant's mother eventually became an established ILS vendor, effective January 16, 2017. (Ex. RC 13.) According to claimant's ILS Program Design Approval, the program "operates 24 hours per day and 7 days a week." (*Id.* at p. 5.) Pursuant to the ILS Payment Agreement effective April 1, 2017, the service agency provides ILS funding up to the rate of \$35.84 per hour, reimburses staffers 20 cents per mile driven to and from work, and pays \$154 per week maintenance for claimant's car used for his access to community programs. (Ex. RC 12, p. 1.) By the time of claimant's individual program plan (IPP) meeting held in March 2018, the service agency was funding 10 hours per week of behavioral intervention and two hours per week of supervision provided by HCSI; 603 hours per month of ILS staff time, reimbursement of 6084.5 miles per month driven by staff, and \$154 per month for claimant's vehicle used to access community programs. (Ex. RC 28, pp. 2-3.)

26. No H&S waiver was sought for the ILS program pursuant to Order number 4 because the service agency determined that the costs for driving time and mileage for Mr. Hatchell and Billy could be funded under the ILS vendorization of claimant's mother. The evidence does not show that claimant's mother sought an H&S waiver request for the ILS program before the disputes in question arose.

27. However, the evidence clearly established that the service agency has consistently operated under the erroneous impression that Order numbers 2 through 4 were intended by ALJ Montoya to start a process of transitioning the ILS program to solely an SLS program or that the ILS program only was meant to be temporary. That

interpretation comes, in part, from service agency policy guidelines, in which the service agency has articulated its expectations that an ILS program will have a maximum of 20 hours per month (ex. RC 31) and that an SLS program will support a consumer who chooses to live in his own home (ex. RC 32). Nonetheless, it is clear from ALJ Montoya's Decision that he concluded ILS and SLS programs have overlapping components, that both should be used where necessary to meet the unique needs and goals of claimant (i.e., "braiding the services together"), and that one or both should be used so claimant's needs are met. (Ex. RC 6, pp. 24-27.)

Order No. 5: SLS Assessment

28. In compliance with Order number 5, the parties agreed upon an SLS assessment to be conducted by Joe Donofrio of CHOICESS. (Ex. RC 14.)

29. Mr. Donofrio issued a report dated June 6, 2017, in which he concluded that SLS was appropriate for claimant. (Ex. RC 14.) In the summary portion of his report, Mr. Donofrio wrote, in part:

[S]upporting [claimant] requires individualized and enhanced supports to minimize or eliminate risks to his health and safety. He will require enhanced 24-hour staff who are familiar and appropriately trained with [claimant's] unique rhythms of life to insure that a trusting relationship is developed. He will require a 2:1 support staff to be supported in the community. He will also need to continue his individualized day program customized to his needs. His behavioral, communication and medical needs will require a number of specialists who will provide guidance for [claimant's] care. The overnight staff at this time will need to

be awake. It is the hope that this can be managed with sleep overnights, however at this time [claimant] has difficulty sleeping and support staff will need to be attentive. [Claimant] lives in a rural area which benefits him in many ways but also increases the difficulty of finding qualified support staff to choose from. The costs for someone to work in a rural area are much higher and the travel is much greater and needs to be addressed to insure that [claimant] finds a stable and reliable team of support. (*Id.* at p. 2.)

30. Attached to Mr. Donofrio's report is a proposed budget for claimant's SLS program. (Ex. RC 42.) The service agency contended but failed to establish, that Mr. Donofrio was "tipped off" by claimant's mother or attorney and urged to add the budget to the assessment, and that his doing so was inappropriate. However, claimant's mother (in her testimony) and claimant's counsel (based on representations he made during the hearing as "an officer of the court") persuasively denied doing so, as did Mr. Donofrio in his testimony. In fact, Mr. Donofrio persuasively testified he decided to include the budget when he realized claimant's program would be unique, expensive, and would certainly include costs warranting an H&S waiver request, in which case a proposed budget would be necessary. Mr. Donofrio explained he did the same thing in a similar case involving a consumer being relocated from a state developmental center. During the hearing, service agency assistant director of supports and services, Eulalia Apolinar, testified about two conversations she had with Mr. Donofrio concerning the inclusion of the proposed budget. Her recollection of those conversations was consistent with Mr. Donofrio's testimony. Under these circumstances, it was not established that Mr. Donofrio did anything inappropriate by including a proposed budget with his SLS assessment.

Order No. 6: H&S Waiver for SLS Program

31. The parties entered into an SLS agreement for claimant, effective September 1, 2017, to run through June 30, 2019. (Ex. RC 9.) The compensation rates are: \$341.42 per month for administration; personal support at a 1:1 ratio at \$19.26 per hour; personal support awake overnight at a 1:1 ratio at \$17.83 per hour; and training and habilitation at a 1:1 ratio at \$22.16 per hour. (*Id.* at p. 26.)

32. As discussed in more detail below, after Mr. Donofrio issued his SLS assessment, the parties engaged in considerable discussion concerning a budget for the program. The parties reached an impasse on a proposed budget, also discussed in more detail below. Because service agency staff did not agree with all aspects of the proposed budget, the service agency refused to submit an H&S waiver request to DDS for the proposed SLS program.

CLAIMANT'S CURRENT SITUATION

33. Claimant's current situation is most succinctly described in the "Sample Referral Information" document the service agency recently prepared and submitted to a newly established SLS provider in the northern San Luis Obispo County area, Novelles Developmental Services (Novelles). (Ex. RC 46.) The summary is repeated verbatim below, except where indicated.⁶

34. "This individual is a young adult male (mid 20's) who is eligible for regional center services on the basis of an autism diagnosis.... [Claimant] currently lives in his

⁶ For reasons explained in more detail below, the service agency was unable to have Novelles conduct its own SLS assessment of claimant; so it asked Novelles to opine whether it could provide an SLS program to claimant based on the summary contained in the Sample Referral Information.

own home with family nearby. [Claimant] has been there for two years. [Claimant] has had a unique in-home support program in place for about six years.” (Ex. RC 46, p. B.)

35. “[Claimant’s] in-home program combines behavioral services; in-home support services (IHSS), and direct care support staff. This system utilizes direct support staff in 1:1 ratio at home and 2:1 ratio in the community. Most of the support staff have worked with this young man for 5 years or more. This system is designed to help [claimant] develop daily living skills; build his communication skills, social skills, and vocational skills so that he can participate in his community safely. [Claimant’s] behavioral and in-home support programs are braided together, with the behavioral services supervisor [Mr. Hatchell] also serving as the in-home support services supervisor. One of the main goals of this young man’s support program is to reduce/extinguish challenging or unsafe behaviors that limit his ability to interact with others in his community. These behaviors currently include physical aggression (e.g., grabbing or slapping others), self-injurious behaviors (e.g., biting his thumb), property destruction (e.g., turning over furniture), and elopement (e.g., leaving his home without communicating with anyone else and exiting (or attempting to exit) a vehicle-even if it is still in motion). These behaviors initially occurred at least once- if not several times- per day. However, since 2012, these behaviors have gradually decreased in frequency and intensity. Some behaviors, such as property destruction and elopement, occur rarely- less than once per month, and sometimes not for multiple months. Others, such as physical aggression, occur infrequently- about once per month. Self-injurious behavior occurs multiple times per month. This young man may also exhibit other challenging, unusual, or unsafe behaviors, including but not limited to: emotional outbursts/yelling, removing his clothes when anxious or upset (including public places), non-compliance, impulsive behavior, very specific food preferences, and poor sleep hygiene (e.g., staying

up late and waking up in the middle of the night, then engaging in preferred activities, such as computer usage)." (Ex. RC 46, p. B.)

///

36. "[Claimant's] living environment has been setup to provide him with what he needs while limited access to certain things that result in impulsive behavior and poor sleep hygiene. This young man is non-verbal, although he does understand what other people are saying and he is very sensitive when others speak about himself or his family. [Claimant] may have a very negative reaction if over hearing a conversation about him or his family. He occasionally experiences shoulder/arm pain due to a prior injury, and has difficulty communicating when he is in pain or discomfort. His support staff must be able to carefully read his body language and other signs to determine when he is calm and when he is agitated, and respond accordingly based on his behavior plan. [Claimant] does not currently take medications due to various side effects, and experiences extreme anxiety around doctors due to prior experiences. It is important to note that [claimant] experienced a traumatic injury as part of a behavior event while in a previous placement. While his behavior has always been difficult to manage, this heightened the extent of his behavior and could be a factor in his anxiety of his feelings regarding closeness to family. Where possible [claimant's] anxiety is being addressed through a gradual program of systematic desensitization. Anxiety also is experienced or heightened when his routine is disrupted, something happens that is not expected, or [he] experiences fear." (Ex. RC 46, pp. B & C.)

37. "[Claimant] has other sensitivities that must be considered and some may not be currently understood. [Claimant] must exercise regularly and maintain a healthy, well-balanced diet to maintain weight and blood-sugar levels (diabetes). [Claimant's] current program is set up such that he has regular routines with some flexibility built in. [Claimant] is responsible for helping to clean, organize, and maintain his own home

(with support). He participates in community outings with his support staff, which are generally private (i.e., no friends or peers present), and may include hikes, walks, or beach trips. He has a work program in which he completes some simple jobs at a few community locations, and [claimant] can currently work for up to 15 minutes before he needs to stop. These are well controlled environments when he goes. However, [claimant] is able to go to less controlled environments with some success." (Ex. RC 46, p. C.)

38. "[Claimant] is rather large.... Because of the risk to himself and others and history, he only rides in a car which is provided by his family. The vehicle is equipped with a plexi-screen which prevents [claimant] from getting to the driver behaviorally when seated in the back seat. He also cannot exit the vehicle without staff opening his door." (Ex. RC 46, p. C.)

39. "Noted above the current support staff have had tremendous consistency and are well behaviorally trained in meeting his needs. Adding support staff has been difficult and going about that is a concern. Lack of familiarity will increase anxiety in this individual and could result in behavior escalation. The current staff support provided allows for [claimant] to get into a community setting on most weekdays with overlapping support staff for safety. The IHSS support worker is currently a family member and no replacement has been able to be identified. The residence of this individual is about 15 minutes' drive from city center of a community of about 40,000, but the residence is definitely 'out of town.' " (Ex. RC 46, p. C.)

40. "Other supports currently provided include: Behavior services by a vendored ABA provider -10 hrs/week direct and supervision. This service provides the behavioral structure for the ongoing supports; [t]racking device in case of elopement; [a]nd the home has a fence built around it which will deter elopement while not

preventing. [*Sic.*] The home also has an alarm system which is monitored by his family.” (Ex. RC 46, p. C.)

OTHER IMPORTANT FACTS ABOUT CLAIMANT’S CURRENT SITUATION

41. Claimant is a unique consumer who presents a unique situation. (Test. of Donofrio.) As ALJ Montoya described him in his Decision, claimant is an outlier, who requires innovative services and supports. (Ex. RC 6, p. 18.)

42. As of March 2018, claimant’s ILS program was staffed as follows. Claimant’s brother has provided most of the overnight awake supervision and support (using IHSS funds), with claimant’s mother filling in for him when necessary. During the daytime, Mr. Hatchell and Billy provide most of the support. However, John Aimes (not a relative) now works full-time. As discussed in more detail below, Billy’s fiancée, Jordan, was also hired to provide support during some weekdays and weekends. (Ex. RC 29.) Due to an illness, however, Jordan is no longer on staff.

43. A. Because of the severity of claimant’s disability, his large physical presence, and his propensity for physical violence against himself and others, it has been difficult to find staffers willing to work for claimant’s program. Many individuals hired, even those with extensive schooling and work experience with the developmentally disabled, quit shortly afterward due to claimant’s demanding behaviors, the commuting distance, and/or injuries caused by claimant. (Test. of mother; Hatchell.)

B. Claimant’s mother has attempted to hire local residents to work with claimant. The fact that claimant lives in a remote area exacerbates the situation. Service agency services and supports manager, Joe Hoeflich, agreed in his testimony that historically all providers have had a difficult time finding staff in the area, due to the low unemployment rate and the high cost of living there. Claimant’s service coordinator, Justin Sutton, agreed in his testimony that SLS providers in the entire county generally have a hard time finding staff. Claimant’s mother has interviewed many local people, but

Mr. Aimes is the only person considered to be a “local” who has agreed to work with claimant. Claimant’s mother ran Craigslist ads locally with no success. (Test. of mother; Hatchell.)

C. The service agency presented evidence of ads run by north county developmental service providers soliciting staffers in that area at rates between \$12 and \$14 per hour. (Exs. RC 33 – RC 36.) The service agency argues those ads show local residents can be hired to work with claimant. However, there was no evidence presented indicating any individual was hired as a result of any of those ads or hired at the advertised pay rates.

///

D. It is critical to claimant’s program that staffing be consistent, with little turnover, because of the cost and time associated with training staff and the fact that staff will only be successful if they are around claimant long enough to become familiar to and with him. (Test. of Hatchell.)

E. It is important for claimant to become familiar and comfortable with female staffers, because most staffers of SLS providers are women. The parties agree that, in the future, claimant’s SLS program should be run by a stand-alone, independent provider. If so, claimant must be able to work with women. Until recently, claimant’s program has only been staffed by men. To help claimant become familiar with women, claimant’s mother hired Billy’s fiancé, Jordan, who had become familiar with claimant socially when accompanying Billy while he was with claimant. The service agency objected to such an arrangement, essentially viewing it as a sort of guaranteed employment program for claimant’s relatives. However, the use of Jordan as a staffer was appropriate, given all of the above circumstances. As discussed above, Jordan is no longer with the program.

44. Mr. Donofrio persuasively testified that the most successful strategy for a future SLS program will be to grow the current staff by adding several more individuals. That will give current staffers more leeway in terms of scheduling, allow claimant's mother to be phased out as a staffer, and let new staffers learn from current staff while gradually becoming familiar with claimant.

45. Claimant's mother has decided to work more shifts in her son's program without pay in order to cover the costs of the program. (Test. of mother.) Claimant's overnight hours are compensated by IHSS funding, which is essentially minimum wage and therefore much less than ILS or SLS hourly rates. Claimant has no overnight staff other than his mother and brother, because they are the only people willing to work for the IHSS rate.

46. Claimant's program has been a success. His quality of life has improved, valid goals have been established, reasonable success in meeting those goals has been achieved, and claimant's behavior has continued to improve. Both parties agree claimant's current program is the least restrictive environment for him, and far superior to placing claimant in a group home or even a day program. Claimant's service agency service coordinator, Mr. Sutton, agrees claimant's program staffing cannot be rapidly transitioned or replaced; adding or replacing staff must be done carefully and slowly. Mr. Sutton also agreed in his testimony that the current program should continue operating until a transition can be properly executed; and an H&S waiver is needed in order to support the costs of the program. Mr. Sutton also agreed that the current program would be very difficult to maintain if driving time and mileage were not funded.

47. Cessation of the current program would have catastrophic results for claimant. Without staff familiar with claimant's needs and routines, and staff members whom claimant has come to know and trust, claimant's behaviors would no doubt spiral

out of control and perhaps worsen. His progress at home and in the community would come to a complete halt. He would be at risk of significant regression in his behaviors and abilities, which would be very difficult to stop and reverse. Such an event would jeopardize the ability to reestablish a program resembling claimant's current one, making it more likely that claimant would have to be placed in a more restrictive environment, which itself could have disastrous consequences to claimant's health and safety. (Test. of Hatchell.)

48. A. The service agency has been unable to find a company capable of running or staffing claimant's program, either ILS or SLS.

B. In September 2018, approximately one month before the hearing of these consolidated matters, the service agency requested claimant's mother to allow an SLS assessment by Novelles. Claimant's mother rejected the request because Mr. Donofrio had already provided an SLS assessment (as an expert agreed to by the parties) and the close proximity of the hearing, which were reasonable concerns under the circumstances.

C. During the hearing, claimant's mother and Mr. Hatchell expressed sincere interest in working with Novelles in the future to determine if it can provide additional staffing for claimant's program or, perhaps, gradually take over an SLS program.

D. In response to the aforementioned Sample Referral Information document, Novelles opined it could operate claimant's program. (See ex. RC 46, p. A.) However, Novelles indicates it cannot use claimant's specialized vehicle for transportation into the community, which would pose problems because it is clear that the specialized vehicle is the safest and least restrictive way to transport claimant and his 2:1 community support staff. In any event, the document alone is insufficient to establish Novelles, at this time, could take over claimant's program.

CLAIMANT'S TRAVEL AND MILEAGE FUNDING INCREASE REQUEST

49. Claimant's request for additional travel and mileage funding was twofold. First, under the ILS contract, mileage reimbursement for claimant's support staff is capped at 20 cents per mile. Because claimant's mother has been paying staff the federal rate (54.5 cents per mile), she has been spending her own money on part of the mileage reimbursement. (Ex. C 26.) Claimant's mother therefore requested the reimbursement rate under ILS to be increased from 20 cents to 54.5 cents per mile (or the federal rate). Second, after ALJ Montoya's Decision, Billy went from part-time to full-time in the program, which increased his hours substantially. Because Billy was commuting from a long distance, claimant's mother requested that he be compensated for his driving time, just as Mr. Hatchell has been compensated. (Ex. C 39, pp. 276-277.) She fears Billy will leave the program if not compensated for his driving time.⁷

50. The service agency has calculated that Billy drives an average of 17.85 hours per week now that he is working full-time, and that compensating him for his driving time will increase the travel costs of the program by \$639.74 per week, \$2,750.89 per month, and \$33,010.68 per year. (Ex. RC 45.)

51. A. In its June 2017 Notice of Proposed Action denying this funding request, the service agency argued ALJ Montoya's Decision only contemplated the travel and mileage expenses as a temporary solution until an ILS program could be vendored on an emergency basis which, if done, would internally cover these costs.

⁷ Claimant's mother also requested Billy's fiancée, Jordan, receive similar mileage reimbursement and compensated driving time. As discussed above, hiring Jordan was an effort to begin introducing claimant to the future prospects of working with female program staffers. However, funding Jordan's travel expenses is moot since she no longer works for the program.

B. However, ALJ Montoya did not so state in his Decision. Nowhere in his Decision is the word “temporary” used. Nothing indicates staff driving time and mileage reimbursement was only meant to be temporary. Instead, it is clear that ALJ Montoya intended the staff driving time and mileage reimbursement to continue unimpeded. The various procedural steps enumerated in ALJ Montoya’s Order, i.e., emergency ILS vendorization, ILS vendorization, SLS assessment, and a possible SLS vendorization, were not an evolutionary, mutually exclusive course of funding, but rather a list of tools that should be used, together or individually, in order to meet claimant’s unique needs and goals.

C. It must also be noted that ALJ Montoya only ordered driving time compensation for Mr. Hatchell because he was the only staffer receiving that compensation at the time. He made no conclusion as to the propriety of Billy being so compensated.

52. A. In its June 2017 Notice of Proposed Action denying the travel funding request, the service agency also argued ALJ Montoya intended claimant’s home program to use local residents as staffers, which would eliminate or reduce travel expenses.

B. ALJ Montoya did not order claimant’s mother to use local support. In fact, several times in the Decision ALJ Montoya acknowledged the difficulties of claimant’s mother in finding local staff. Although claimant’s mother has attempted to use local support, she has been unable to hire any local residents, with the limited exception of Mr. Aimes. This has been the situation as long as the program has operated, predating when the service agency began providing its funding. The credibility of claimant’s mother in this regard is also bolstered by the facts she has paid some mileage reimbursement out of her own pocket, worked shifts herself without pay, and used IHSS hours for overnight staffing. It is hard to believe claimant’s mother would short-change

herself and jeopardize the financial viability of her son's program merely out of a preference to use relatives or out-of-towners as staffers.

C. As discussed above, the service agency failed to establish there are other local residents who would be willing and able to work in claimant's program for the pay rate available, and no evidence was presented indicating the service agency has offered claimant's mother any assistance in locating such residents.

///

53. In denying this funding request, the service agency also intimated that driving time and mileage reimbursement would no longer be compensable once claimant's mother became an ILS vendor. Yet service agency "ID notes" in claimant's file indicate otherwise. On August 30, 2016, Ms. Apolinar contacted a DDS employee concerning whether ILS staff could be paid driving time and mileage reimbursement. (Ex. C 39, p. 310.) The DDS employee, identified as "Denise," informed Ms. Apolinar that ILS staff could be paid for driving time and reimbursed 20 cents per mile. (*Ibid.*) Ms. Apolinar was also advised that if more than 20 cents per mile reimbursement was needed, an H&S waiver request should be submitted. (*Ibid.*) This advice from DDS is consistent with ALJ Montoya's Order number 1, in which he directed the service agency to pay Mr. Hatchell for his driving time and to reimburse both Mr. Hatchell and Billy for their mileage.

54. The service agency argued, but failed to establish, that the increased travel costs are not warranted because claimant's behavior has improved and Novelles represents a local vendor willing and able to staff claimant's program. However, it was established that claimant's behavior has improved due to the efficacy of the program, which is vitally dependent on the continued presence of familiar staffers, such as Mr. Hatchell and Billy. Such improvement would immediately stop, and most likely reverse itself, if either staffer left the program due to funding shortfalls without adequate

replacement. As explained above, it was not established that Novelles is ready to staff the program at this time.

CLAIMANT'S REQUEST FOR THE HEALTH AND SAFETY WAIVER EXEMPTION

Health and Safety Waiver Exemptions Generally

55. The various services and supports available to consumers under the Lanterman Act are subject to rate caps established by regulations.

56. A. In a letter dated January 6, 2017, DDS provided guidance to regional centers statewide concerning the H&S waiver process. DDS cited various provisions of the Lanterman Act authorizing it to approve rates for services above the regulatory maximum "for the purpose of mitigating risks to consumer health and safety." (Ex. RC 18, p. 1.)

B. The letter enumerates several factors that need to be specified in a waiver request, including the health and safety risk for the involved consumer; program costs; detailed description of the existing services; cost-effectiveness; availability of alternative, comparable, local resources to meet the needs of the consumer; verification of whether alternative services have been considered; and the agreement and signature of the requesting regional center's executive director. (*Id.*, pp. 1-2.)

C. Regional centers were also advised that SLS providers with a separately vendored administrative service must not include administrative costs within their rate for direct care services if doing so would result in duplication of administrative costs; and that the waiver process was not meant "for making a provider's business viable." (*Id.*, pp. 3-4.)

57. A. In a letter dated September 13, 2018, DDS updated the prior instructions for H&S waiver requests described above. Changes include a new template

format introduced to make the process more standardized. The instructions from the January 2017 letter noted above remain.

B. However, regional centers are now advised to submit waiver requests to DDS “no later than 30 days after the regional center receives the request from the provider. If the regional center does not have all the necessary information for the H&S request within 30 days, the regional center must notify the Department of the missing information and the expected date the information will be received by the regional center from the provider.” (Ex. 43, p. 3.) Once submitted, DDS “will review the request and respond to the regional center within five working days.” (*Ibid.*) “It is the regional center’s responsibility to monitor the necessity for increases in rates on an ongoing basis, based upon the services and supports required by the consumers in question, and to notify the Department if the need for an exemption changes.” (*Ibid.*)

C. The DDS letter of September 2018 was issued after the service agency had already issued its funding request denials and claimant’s mother had submitted her two Fair Hearing Requests.

Proposed Budgets for Claimant’s SLS Program

58. The first proposed budget for claimant’s SLS program was that attached to Mr. Donofrio’s SLS assessment report issued in June 2017. As explained above, Mr. Donofrio included a budget because he knew many of the services and supports he included in his SLS assessment were at rates above the regulatory maximums. The fact the assessment contained a budget surprised service agency staff, also as described above. Therefore, there was not much discussion initially between the parties concerning Mr. Donofrio’s budget, other than the comment that, because Mr. Donofrio’s budget had the CHOICES letterhead on it, service agency staff believed DDS would reject it.

59. Beginning around July 2017, claimant's mother and Mr. Hatchell began working on, and later submitting, various budgets to the service agency for claimant's SLS program. Mr. Donofrio's budget was used as the template. The service agency objected to several components of each budget and rejected them all. The objections mainly centered on the costs in question either being above the regulatory maximum rates or prohibited by the regulations. Claimant's mother and Mr. Hatchell responded to the initial objections by eliminating or reducing some of the objectionable items. However, by August 2018, claimant's mother believed the remaining budget items objected to by the service agency could not be eliminated without jeopardizing the program. The service agency would not relent and it refused to submit to DDS an H&S waiver request for the SLS program with the objectionable items in it. The parties reached an impasse.

///

60. At hearing and in her closing brief, claimant's mother requests the budget attached to Mr. Donofrio's SLS assessment report be used in an H&S waiver request sent to DDS. The service agency argues that an H&S waiver request based on that budget should not be submitted to DDS because doing so would be a waste of time, in that DDS is sure to reject it because of the objectionable items.

61. Although many versions of a proposed budget were circulated among the parties, only one was adequately reflected in the record, i.e., the budget attached to Mr. Donofrio's SLS assessment. It consists of a "Staffing Worksheet," "Current Schedule," and "Program Cost Worksheet" (budget). (Ex. RC 42, pp. 3-5.) The budget includes the following major components:

Behavioral Support team (wages for program leads Billy & Hatchell, including their driving time)	\$ 7,673.27
Community Staff (wages for other staff)	\$22,978.29

Program Costs (recruiting, phone, consultants, training, insurance, office supplies, mileage reimbursement at the federal rate for staffers, etc.)	\$ 2,103.00
	=====
Total Gross Monthly Costs	\$32,754.56

62. Based on Mr. Donofrio's budget, service agency staff created a "Rate Determination Worksheet for SLS" (worksheet). (Ex. RC 42.) The worksheet is a spreadsheet with a number of columns and rows depicting the various components of Mr. Donofrio's budget, which also includes the service agency's objections to some of the components. (Ex. RC 42, pp. 1-2.) It appears that some of the objectionable cost amounts were removed from the worksheet, resulting in lower sub- and grand totals than in the budget. For example, driving time is removed, but mileage reimbursement remains. Unlike the budget, the worksheet also includes a deduction for IHSS funding, which lowers the total program cost. The worksheet enumerates the following major components of the budget:

Salaries & Wages (for program leads Billy & Hatchell)	\$ 7,866.80
Community Staff (wages for all other staff)	\$ 6,498.00
Community Care Staff Payroll Taxes, Workers Compensation & Fringe Benefits	\$ 5,301.00
Program Costs (recruitment, phone/security, consultants, training, insurance, transportation, staff mileage, etc.)	\$ 6,314.56
General, Administrative and Management Overhead (15%)	\$ 2,068.92

Total Gross Monthly Costs	\$28,049.28
Deduction for IHSS funding received by claimant	- \$ 3,353.55
	=====

Total Net Monthly Costs

\$24,695.73

(Ex. RC 42, pp. 1-2.)

Service Agency Objections to Budget Components

63. Budget Created by Another. The service agency complains that the budget is problematic because Mr. Donofrio created it, as opposed to claimant's mother, the vendor of claimant's SLS program. However, the service agency cited no statute or regulation prohibiting such a practice. While it is true that the second and third pages of the budget contain CHOICESS letterhead (ex. RC 42, pp. 3-4), that situation can be easily remedied. In addition, it is clear from the testimony of claimant's mother and Mr. Hatchell that they have adopted Mr. Donofrio's budget as their own. Refusing to submit the budget to DDS for this reason would elevate form over substance.

64. SLS Contract Terms. The SLS vendor contract between the service agency and claimant's mother contains provisions in which the vendor (claimant's mother) agreed to absorb program administration costs, such as staff recruitment and training (ex. RC 9, pp. 17-18), travel designation, and communication with the service providers as necessary for and directly associated with administrative functions. (*Ibid.*) Both claimant's mother and Mr. Hatchell acknowledged in their testimony that training and hiring of staff is part of Mr. Hatchell's duties, but there are insufficient funds to hire and train new staff because of how much time must be devoted to caring for claimant. Claimant's mother also testified that when she entered into the SLS contract, which is written on the service agency's template, she did not understand these types of administrative costs. Moreover, the contract was executed after Mr. Donofrio's budget was circulated. The budget clearly split-off into separate costs staff recruitment, training, travel, and communications, which should have been known to the service agency. Yet, there is no evidence indicating the service agency attempted to educate or counsel claimant's mother that the SLS contract it was asking her to sign had lumped all those

costs into the administrative category, which would prevent those costs from inclusion in the budget. It would not be fair to exclude these costs from the budget simply because claimant's mother relied on the service agency.

65. Assessment Validity. The service agency complains the budget is stale because it was created by Mr. Donofrio in May 2017 and since then claimant's behavior has continued to improve. However, Mr. Donofrio maintained on cross-examination that those facts did not change his opinions about claimant's level of need. Moreover, the age of the budget is not particularly concerning, especially considering the length of time the parties have been negotiating the budget and the lack of other resources in claimant's area. Put more starkly, the service agency has not located an adequate alternative provider, nor has it shown the assessment is no longer valid due to its age.

66. Service Duplication. In the Program Costs section of the budget, Mr. Donofrio included as "consultant" costs line items for behavioral consultants, a nursing consultant, and a communication consultant. The service agency points out that HCSI is already paid for providing 10 hours per week of behavioral services (provided by Mr. Hatchell) and that paying for additional behavioral services provided by Mr. Hatchell would be "double dipping." Mr. Donofrio conceded that point in cross-examination. Mr. Donofrio also conceded in cross-examination, to an extent, that the other line items for nursing and communication consultants could be stricken from the budget if those items were covered under separate service codes or provided to claimant by health insurance. It was not established by a preponderance of the evidence that any of these three line items are necessary for claimant's health and safety. Therefore, removing these three cost components from the budget submitted to DDS is warranted.

67. Use of IHSS Funding.

- A. The budget does not include use of IHSS hours, because claimant's mother and Mr. Donofrio believe nobody will be willing to work with claimant for the

lower rate of IHSS compensation than what a staff member is paid under either the ILS or SLS contracts executed by claimant's mother.

- B. The service agency believes IHSS funding should be used to cover some of the shifts. It points out that Novelles believes it can use IHSS funding to cover some shifts if it were to run claimant's SLS program. Currently, claimant's brother and mother are the only people willing to cover the overnight shifts at the IHSS rate. This is an unworkable solution for the long-term, because claimant's mother and brother cannot be expected to provide the overnight shifts indefinitely. In order to get other staff members to cover those shifts, which require them to be awake to anticipate an attack from or behavioral disturbance by claimant, other staffers would have to be compensated at a greater rate.
- C. The service agency points out that ALJ Montoya expressly ordered the service agency should not pay for "services paid by IHSS." (Ex. RC 6, p. 27.) However, there was no argument presented in that case concerning problems paying staff members to work with claimant at the IHSS rate. The service agency also points to section 4689.05, subdivision (b), which provides that the service agency may not fund SLS for a consumer that will supplant IHSS. However, section 4689.05, subdivision (d), allows a regional center to waive this provision if extraordinary circumstances warrant it. As explained in detail above, this is an extraordinary situation. Therefore, the fact that IHSS hours are not part of the budget should not prevent an H&S waiver request from being submitted to DDS, which undoubtedly will have its own view on how to use the IHSS funding.

68. Program Success. The service agency complains that the requested rate increases are not justified because the current program has not been completely

successful, to the extent it has not led to new contacts or community involvement. The service agency concedes that claimant has several jobs that put him into the community. And all parties agree the current program is the least restrictive one for claimant presently available. The only alternative cited by the service agency is a day program run by Novelles, but it was not established that Novelles has a day program that can accommodate claimant; even claimant's service coordinator, Mr. Sutton, agrees it does not make sense at this time to change claimant's program.

///

69. Other Facilities. The service agency offered evidence concerning what are known as "CCL facilities," which are highly specialized homes designed to meet the individual needs of the person served, provide enhanced staffing and supports, and have a median rate of \$18,000 per month, which is much less than claimant's program. Some consumer placements from state developmental centers have been made to such facilities. The service agency argues that California Code of Regulations, title 17, section 58617 prohibits a regional center from funding an SLS program if it costs more than what it would to place the individual served into an appropriate level of home in the community. However, the scant evidence presented on this topic fails to establish that there is any particular CCL facility in claimant's area that can accommodate him, given his special circumstances.

70. Necessity. The service agency argues claimant has failed to present sufficient evidence of the need for the budget in order to protect his health and safety, particularly as the budget requires using familiar staff and paying them for driving time and reimbursing their mileage. As explained above, claimant established by a preponderance of the evidence that claimant's health and safety are at risk should the current program fail and not be adequately replaced, which warrants going forward with an H&S waiver request. (See, e.g., Factual Findings 13-22 & 33-54.) The service agency

failed to establish that there is a more cost-effective alternative program currently in place that can adequately replace claimant's program such that an H&S waiver should not be pursued.

LEGAL CONCLUSIONS

JURISDICTION AND EVIDENTIARY STANDARDS

1. The Lanterman Act governs this case. (§ 4500 et seq.) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Claimant's mother timely submitted fair hearing requests to appeal the service agency's proposed denials of her funding requests. Jurisdiction in this case was thus established. (Factual Findings 1-12.)

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.)

3. A. When one seeks government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) However, a regional center seeking to terminate or reduce ongoing funding provided to a consumer has the burden to demonstrate its decision is correct, because the party asserting a claim or making changes generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.)

B. In this case, claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the additional travel and mileage funding, because he is requesting new, higher levels of funding not before ordered or provided.

C. However, the same is not the case concerning the H&S waiver request. ALJ Montoya ordered the service agency to submit such a waiver request to DDS, provided

the SLS assessment came back in claimant's favor, which it did. This situation should therefore be viewed as the service agency seeking to terminate or reduce a service already approved or provided, with the service agency bearing the requisite burden of persuasion. In any event, the holder of the burden in the second case is not important, as claimant has established by a preponderance of the evidence that he is entitled to favorable orders concerning that issue.

GENERAL PRINCIPLES FROM THE LANTERMAN ACT APPLICABLE TO THIS CASE

4. This case stems from ALJ Montoya's 2016 Decision. Much of the evidence presented concerned his Decision and its application to subsequent events. Neither party argues any of ALJ Montoya's legal reasoning or conclusions were wrong or erroneously applied to this unique consumer and his situation. In any event, the undersigned agrees with all of ALJ Montoya's Legal Conclusions in his Decision (ex. RC 6, pp. 18-27), and therefore those Legal Conclusions are incorporated and adopted herein by this reference.

5. A. The Legal Conclusions from ALJ Montoya's 2016 Decision that have particular application to this case are as follows.

B. "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.'" (Ex. RC 6, p. 23.)

C. "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).)" (*Id.*, p. 27.)

D. "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 [Hatchell] 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 [his assistant]." (*Ibid.*)

HEALTH AND SAFETY WAIVER EXEMPTION REQUESTS

6. A. Section 4648.4, subdivision (b), provides:

Notwithstanding any other provision of law or regulation, except for subdivision (a), no regional center may pay any provider of the following services or supports a rate that is greater than the rate that is in effect on or after June 30, 2008, unless the increase is required by a contract between the regional center and the vendor that is in effect on June 30, 2008, or the regional center demonstrates that the approval *is necessary to protect the consumer's health or*

safety and the department has granted prior written authorization. (Emphasis added.)

B. SLS programs (§ 4648.4, subd. (b)(1)) and ILS programs (§ 4648.4, subd. (b)(11)) are listed as among “the following services and supports.”

C. Sections 4681.6, 4684.55, 4689.8, 4691.6, and 4691.9 contain language similar to section 4648.4. As DDS stated in its letters of instruction to regional centers (Factual Findings 56-57), these provisions of the Lanterman Act authorize DDS to approve exemptions to rate caps for the purposes of mitigating risks to consumer health and safety. This means that DDS can approve through the H&S waiver process paying higher rates for SLS and ILS programs than authorized by regulations if it determines doing so is necessary to protect a consumer’s health and safety.

7. While these provisions require regional centers to demonstrate the necessity of the waiver, that language should not be construed to mean a regional center can unilaterally prevent DDS from receiving a waiver request simply because it disagrees with a consumer on the necessity of the waiver or its cost components. To do so would render the consumer ultimately powerless from an important IPP team process, which would be anathema to that central tenet of the Lanterman Act. (See, e.g., § 4646.5, subds. (a) & (b).) Moreover, such an interpretation would eviscerate the general principle of the Lanterman Act that, when a dispute arises between a consumer and a regional center, and a fair hearing is timely requested and convened, the involved ALJ steps into the place of the IPP team or the regional center, where necessary, and makes the decision for the parties. (See, e.g., § 4646, subd. (g).) Based on the above, if a regional center refuses to submit to DDS an H&S waiver request, the consumer or his family should have the right to request an order that it do so as a result of the fair hearing process, as in the instant case.

///

CLAIMANT'S TRAVEL AND MILEAGE FUNDING REQUEST

8. In its June 2017 Notice of Proposed Action denying the request for increased driving time compensation and mileage reimbursement, the service agency cited to California Code of Regulations, title 17, section 54326, subdivision (a)(10), which provides, in part, that all vendors shall "[b]ill only for services which are actually provided to consumers and which have been authorized by the referring regional center." It is not clear how this regulation supports denial of the requested funding increase. The travel and mileage costs relate to the ILS program provided by claimant's mother. DDS has told the service agency that driving time and mileage reimbursement can be paid to staff, and the service agency has been providing such funding since ALJ Montoya's 2016 Decision, meaning there has been an authorization for the funding.

9. As a factual matter, the service agency's reasons for denying this funding request were not established. For example, the service agency erroneously argued that ALJ Montoya's order for driving time and mileage reimbursement was meant to be temporary and that such costs were not separately compensable to staffers. The service agency also erroneously argued ALJ Montoya based his order on the understanding that only local residents would be hired as staffers. Finally, the service agency contended but failed to establish that claimant's improved behavior no longer warranted having familiar staffers who commute from long distances, or that Novelles was currently able to staff claimant's program. (Factual Findings 49-54.)

10. A. On the other hand, claimant established by a preponderance of the evidence that funding driving time for Billy is necessary to retain him as a staffer. This conclusion is based on the above-cited provisions of the Lanterman Act making the service agency the payer of last resort; requiring the service agency to be innovative in coordinating and funding services and stretching the contours of ILS when necessary; as well as the *Harbor Regional Center* case, which acknowledged there are rare cases when

services must exceed regulatory limits in order to fulfill the mandates of the Lanterman Act.

B. Billy now works full-time for the program, and is the most significant ILS staffer beside Mr. Hatchell. No reason was presented for compensating Mr. Hatchell for his driving time but not Billy. Claimant's mother has been unsuccessful in finding local residents to work for the program, other than Mr. Aimes. If Billy were to leave the program for similar pay closer to where he lives, it is hard to imagine claimant's mother would be able to replace him with someone who would not have a commute. If Billy were to leave without adequate replacement, the program would be in jeopardy, which could have a catastrophic impact on claimant. Therefore, it was established that maintaining the current staff is necessary to protect claimant's health and safety. DDS has already advised the service agency that driving time is compensable to staffers, so that benefit should be extended to Billy. While it is true that will increase the program's overall cost by \$33,000 each year, it is also true that the service agency has come up with no viable alternatives. (Factual Findings 13-54.)

11. For the same reasons, the additional mileage reimbursement rate should be increased to the federal rate for both Mr. Hatchell and Billy. Understanding that such rates exceed the regulatory cap for mileage reimbursement in an ILS program, an H&S waiver request should be submitted by the service agency for that funding increase. This is necessary because sections 4648.4, 4681.6, 4684.55, 4689.8, 4691.6, and 4691.9 indicate such a waiver request should be submitted to DDS when a cost exceeds the regulatory cap. The service agency should begin providing the requested mileage reimbursement increase forthwith, and continue it unless and until it files an H&S waiver request and DDS determines the funding increase should be modified or discontinued. Such an order would give the service agency an incentive to timely submit such a waiver, as well as protect the integrity of the program by providing the requested

funding until DDS decides otherwise, which will protect the health and safety of claimant.

12. It should be understood that these funding increases apply only to Mr. Hatchell and Billy, because they have proven their value to the program and the likelihood of jeopardy to claimant's health and safety should either individual leave the program without adequate replacement. This decision should not be construed to allow driving time or the federal mileage reimbursement rate to any and all program staffers; instead, that must be decided on a case-by-case basis, as was the situation in the *Harbor Regional Center* case.

HEALTH AND SAFETY WAIVER EXEMPTION REQUEST

13. A. As discussed above, sections 4648.4, 4681.6, 4684.55, 4689.8, 4691.6, and 4691.9 provide that the maximum regulatory rates for services can be exceeded if DDS agrees that doing so is necessary to protect the consumer's health or safety.

B. The parties did not cite a statute or regulation providing any further guidance on the process of requesting such a waiver or what DDS considers in determining one, nor is the ALJ aware of any.

C. However, the DDS letters of January 2017 and September 2018 describe in detail the following factors DDS will consider in reviewing such requests: health and safety risk for the involved consumer; program costs; a detailed description of the existing services; cost-effectiveness; availability of alternative, comparable, local resources to meet the needs of the consumer; a verification of whether alternative services have been considered; and the agreement and signature of the requesting regional center's executive director. While the contents of the DDS letters are not law, the enumerated factors should be considered in this case where a central issue is whether an H&S waiver request should even be sent to DDS.

14. A. The first issue to be determined is whether the service agency can be ordered to submit an H&S waiver request when its executive director does not agree to do so. This issue is based on the language of section 4648.4, subdivision (b), requiring that the "regional center demonstrates" the necessity of such a waiver request, as well as the two DDS letters providing that a waiver request must include "the agreement and signature of the requesting regional center's executive director." The service agency's refusal to do so is the reason claimant's mother filed one of the appeals involved in this case.

B. But, as discussed above, the service agency should not be allowed to unilaterally dictate when a waiver request is submitted to DDS. While the language of section 4648.4 and the DDS letters nods to a regional center's duty as a "gate keeper" in such instances, it cannot also mean a consumer has no right to appeal a regional center's refusal to open the gate when warranted. The fair hearing process should be available to a consumer to challenge a regional center's refusal to submit a waiver request to DDS.

C. Also as discussed above, the fair hearing process often involves an ALJ making decisions for the parties or a regional center that would be made during the course of creating an IPP but for a disagreement between the parties. In such a case, a fair hearing can result in an ALJ ordering a regional center to fund a service or support it had previously refused. By extension, a regional center can be ordered by an ALJ to submit a waiver request to DDS where it had initially refused to do so.

15. A. Next, the service agency argues it refused to submit an H&S waiver request to DDS because doing so would be futile, in that the service agency believes DDS will reject one containing the various cost components the service agency finds objectionable.

B. Yet, as a matter of fact and law, the service agency only demonstrated one component of the proposed budget that was not established to be necessary to protect claimant's health and safety, i.e., "consultant" cost line items for behavioral consultants, a nursing consultant, and a communication consultant. (Factual Finding 66.) The service agency failed to establish that any of its other objections warrant refusing to submit an H&S waiver request to DDS. This is not to say that those objections are without merit. But it is clear that DDS is the final decision-maker in the waiver request process; the ALJ is not empowered to make final decisions on whether a particular waiver request should be granted. In the final analysis, claimant is willing to take the risk of presenting a waiver request to DDS with "objectionable" items included. The evidence established, with one exception, that the items in dispute are not meritless requests, and that claimant should be entitled to a platform to discuss or negotiate the issues with DDS. (Factual Findings 13-70.)

C. In addition, claimant established that the factors articulated in the two DDS letters describing the waiver request process can be met. For example, claimant's health and safety is implicated if his current program fails without adequate replacement. Analysis of the cost-effectiveness of the program is driven by the lack of any available alternative, comparable, local resource, and the service agency's failure in the past many years to find one. Put another way, alternative services have been considered, but none have been identified. As discussed above, the agreement and signature of the service agency's executive director is replaced by the ALJ's orders below. Again, DDS will have the final decision on whether these factors have been met for purposes of it deciding whether to grant the waiver request. But enough evidence has been presented here to establish that a waiver request should be submitted to DDS for that consideration. (Factual Findings 13-70.)

16. The service agency shall prepare the H&S waiver request in conformity with the DDS letter of September 2018, including using the new template format described in that letter, and submitting the waiver request to DDS within 30 days from the effective date of this Decision. The waiver request shall include the costs delineated in Mr. Donofrio's budget, with the exception of the line items for behavioral consultants, a nursing consultant, and a communication consultant. Where the service agency's executive director is to indicate his agreement with the request and provide his signature, he may write that he is required to provide them by order of the undersigned, and he may include a copy of this Decision.⁸ (Factual Findings 13-70.)

17. Finally, there is the question whether an SLS program can include driving time and mileage reimbursement. Such costs are contained in Mr. Donofrio's budget, but the service agency objects to them and apparently has requested they be removed from the budget. The parties did not thoroughly brief this point and the evidence is not entirely clear on whether they are allowable in an SLS program. But, as discussed above, such costs relate to maintaining Billy and Mr. Hatchell in the program, which is vital to

⁸ In its closing brief, the service agency requests that it "be allowed to complete its due diligence, including conducting an assessment to discern if another vendor or service might be appropriate." (Ex. RC 47, p. 21.) Presumably this request involves Novelles conducting an SLS assessment. Such a request cannot be honored for several reasons. First, the service agency has had since at least 2016 to discern the situation. Second, a request to have Novelles conduct an SLS assessment is not before the ALJ as an issue in these consolidated matters. Third, there is no way the timeline established by DDS in its September 2018 letter can be met if such an assessment is conducted. The parties are encouraged to negotiate this among themselves. If a dispute arises after such negotiations, the fair hearing process can be used to resolve it.

the success of the program in the immediate future. Such costs should remain in the budget for purposes of an H&S waiver request related to claimant's SLS program, which will allow DDS to decide the issue. It is clear that such costs can be part of an ILS program. In the spirit of ALJ Montoya's 2016 Decision, both SLS and ILS can be used as tools, separately or braided together, to maintain claimant's program. If the travel and mileage costs cannot be part of claimant's SLS program, they shall continue to be compensated under claimant's ILS program. (Factual Findings 13-70; Legal Conclusions 4-12.)

ORDER

Claimant's appeals are granted.

///

In OAH case number 2018050535, Billy shall be compensated for his driving time as part of claimant's ILS program. Both Billy and Guy Hatchell shall be reimbursed their mileage at the prevailing federal rate, also as part of claimant's ILS program. Such funding shall be provided by the service agency forthwith, and continue unless and until the service agency submits a Health and Safety Waiver Exemption request under claimant's ILS program to the Department of Developmental Services and the Department modifies or discontinues that particular funding.

In OAH case number 2018080893, the service agency shall submit to the Department of Developmental Services a Health and Safety Waiver Exemption request under claimant's SLS program within 30 days of the effective date of this Decision. The waiver request shall conform to the requirements of the Department's letter of September 2018 and the discussion contained in Legal Conclusion number 16.

DATED:

ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

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