

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

CLAIMANT,

vs.

ALTA CALIFORNIA REGIONAL CENTER,

Service Agency.

OAH No. 2018090988

DECISION

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter on December 17, 2018, and March 13, 2019, in Sacramento, California.

Attorney Wendy Dumlao represented claimant. Ms. Dumlao, claimant, and claimant's parents appeared in person on the first day of hearing. Certified interpreters Josh McHolt and Shelby Helms translated the proceedings into American Sign Language for claimant. On the second day of hearing, Ms. Dumlao appeared by telephone and claimant's mother appeared in person. Neither claimant nor her father appeared on the second day of hearing, and Ms. Dumlao waived an interpreter for that day.

Robin Black, Legal Services Manager, represented Alta California Regional Center (ACRC). Tanya Nalley, Client Services Manager, also appeared on behalf of ACRC on the first day of hearing only.

Evidence was received, and the record was left open to allow the parties to submit simultaneous closing briefs. ACRC's closing brief is marked as Exhibit 20, and

claimant's closing brief is marked as Exhibit S. The record was closed, and the matter was submitted for decision on March 27, 2019.

ISSUES ON APPEAL

There are two issues on appeal: 1) is ACRC required to continue funding claimant's placement in The Arc of Placer County's Studio 700 Center for the Arts program; and 2) is ACRC required to fund personal attendant services to provide claimant 1:1 assistance while attending Studio 700?

FACTUAL FINDINGS

BACKGROUND

1. Claimant is a 32-year-old young lady determined by Inland Regional Center (IRC) to be eligible for regional center services based on a diagnosis of autism, which causes deficits in communication skills, learning, self-care, and self-direction. In addition to her qualifying diagnosis, she has been diagnosed with Obsessive Compulsive Disorder, Kyphoscoliosis and Scoliosis, Congenital Malformation, and Charge

Association Syndrome.¹ She has a severe allergy to amoxicillin, nuts, and sesame oil, and it has been recommended that she avoid milk, wheat, chicken, and turkey because they cause irritation.

2. Claimant has profound hearing loss and nerve damage in both ears. She can walk independently, but can be unsteady and has difficulty maintaining her balance at times. Someone usually walks next to her to prevent her from falling if she loses her balance, and someone usually holds her arm or hand when walking at night or in poor lighting conditions.

3. Claimant lives at home with her parents, who are also her court-appointed conservators. Her most recent Individual Program Plan (IPP) says the following about her activities of daily living:

[Claimant] is able to complete her personal care tasks with prompting and supervision to ensure the tasks are completed correctly and thoroughly, as she can become stuck or have long pauses between task steps and she will

¹ Kyphoscoliosis is a deformity of the spine characterized by abnormal curvature of the vertebral column in the coronal and sagittal planes. It is a combination of kyphosis (an excessive outward curvature of the spine, causing hunching of the back) and scoliosis (an abnormal lateral curvature of the spine). Congenital malformation is a physical defect present at birth that can involve many different parts of the body, including the brain, heart, lungs, liver, bones, and intestinal tract. Charge Association Syndrome is a rare disorder that arises during early fetal development and affects multiple organ systems. Common deficits include hearing loss and difficulties with balance, difficulties with swallowing, paralysis of one side of the face, and poor growth.

need prompting to move on to the next step. [Claimant] is able to use the bathroom independently, but requires prompting to ensure that she cleans herself and to ensure that she doesn't use too much toilet paper. [Claimant] is able to dress independently and is able to tie her shoes and use zippers and buttons. However, she needs prompting to ensure that she finishes dressing completely. [Claimant] can prepare tea, which she loves to drink, but her food is prepared by her parents. [Claimant] also qualifies for IHSS and receives protective supervision. [Claimant's] parents are her chore worker [sic].

[Claimant] is deaf and she is fluent in ASL. [Claimant] can also communicate by utilizing her tablet. [Claimant] is able to read and write basic sentences and she is able to communicate her needs and wants when she is given a choice among options. [Claimant] can also point and make sounds to communicate. [Claimant] does not initiate communication with others. [Claimant] requires constant supervision in all settings in order to prevent injury or harm. [Claimant's] family reports that [she] lacks basic safety skills and she is not able to recognize potentially dangerous situations

PRIOR SERVICES AT IRC

4. IRC's planning team met on February 22, 2016, to update claimant's IPP. At the time, claimant was not attending an adult day program because there were none in

her geographical area that could meet her communication needs. During the previous year, claimant's service coordinator contacted several programs, and none had staff fluent in ASL. Additionally, none of the participants in the programs contacted used ASL as his or her main method of communication, which caused claimant's parents concern since they wanted their daughter to work on her interpersonal skills.

5. Due to the difficulty with finding an adult day program capable of meeting claimant's communication needs, claimant was referred to Pathways Community Activities Support Service for assistance with finding a program that would assist her with accessing the community in a manner that would help her learn vocational skills. Pathways Community Activities Support Service agreed to hire Yolanda Vollmar, an ASL language assistant familiar with claimant and her communication needs, to serve as claimant's one-to-one aide. Claimant's service coordinator contacted two potential programs, but one would not allow Ms. Vollmar to accompany claimant due to insurance and safety concerns. The other program was exploring the possibility of allowing Ms. Vollmar to accompany claimant with its insurance company at the time of the IPP meeting.

6. Claimant's mother also discussed at the team meeting an increase in claimant's disruptive behaviors, and requested Applied Behavioral Analysis (ABA) services. She explained that the disruptive behaviors had increased during the previous six months, including claimant's obsessive-compulsive behaviors. Claimant was displaying physical aggression at least once a month, but she had not injured anyone in the past year. She would grab and pinch others when upset, and her physical aggression was usually toward her parents. She attempted to run or wander away at least once a week, and her mother explained claimant always needed someone close by to prevent her from running away. Claimant was displaying self-injurious behavior on a daily basis, which required first aid. This behavior was documented in the IPP as follows:

[Claimant] requires constant supervision in all settings in order to prevent injury/harm. [Claimant] has wandered off in the past/and has ran in the street. [Claimant] will attempt to wander or run away at least once a week, her family monitors her closely and also has alarms on their doors. [Claimant] also has very limited safety skills and is not aware of her surroundings. [Claimant] has been approved for protective supervision hours through IHSS.

7. At the conclusion of the planning meeting, IRC agreed to provide the following services to claimant:

In-Roads Creative PRS [preferred provider respite] 30

hrs/month

Pathways Adaptive Skills

ABA Services w/Pedro Villa

Day Program

8. IRC's planning team held an annual review of claimant's IPP on February 13, 2017. Claimant's service coordinator was still unable to locate an adult day program capable of meeting claimant's communication needs. Therefore, claimant's mother decided to work with In-Roads Creative Programs, Inc.'s, Personal Assistant Program. Claimant was assigned a preferred personal assistant named Amanda, who was familiar with claimant and fluent in ASL. Amanda assisted claimant with participating in community activities, structured classes, and attending social events and support groups by providing transportation and communicating claimant's needs.

9. Claimant's disruptive behaviors continued to interfere with her social participation. In addition to displaying extreme obsessive-compulsive behaviors, she became very resistive when her parents tried to correct her behavior. She continued to

display physical aggression when she did not get her way or became upset, usually toward her parents. Her behavior was documented in her IPP as follows:

[Claimant] requires constant supervision in all settings in order to prevent injury/harm. [Claimant] has wandered off in the past/and has ran in the street. [Claimant] will attempt to wander or run away at least once a week, her family monitors her closely and also has alarms on their house doors. The Personal Assistant, through In-Roads, provides supervision for [claimant] when they accesses [sic] the community. [Claimant] also has very limited safety skills and is not aware of her surroundings. [Claimant] has been approved for protective supervision hours through IHSS.

CLAIMANT'S TRANSFER TO ACRC'S CATCHMENT AREA

10. According to ACRC's Consumer I.D. Notes, claimant transferred to ACRC's catchment area on July 26, 2017. Prior to transferring, claimant's mother researched adult day programs in ACRC's catchment area to find one that would serve her daughter's needs. Claimant had not participated in an educational program for her last eight years at IRC, and began asking her parents to attend "school" on a daily basis.

11. Claimant's mother found The Arc of Placer County, a private nonprofit corporation that operates multiple adult day programs in Roseville and Meadow Vista. She visited The Arc of Placer County, and toured its Studio 700 Center for the Arts program. Studio 700 provides clients the opportunity to develop their fine motor skills, personal interactions, ability to follow direction, and time management skills with the ultimate goal of creating art, including photography, ceramics, greeting cards, letterhead for local businesses, animated music videos, paintings, various three-

dimensional works, wearable arts and clothing lines, and short films and theatre performances. All creations are available for purchase by the public, and the artists retain 50 percent of the sales of their work with the other 50 percent going to the program for the purchase of supplies.

12. Claimant's mother was impressed with Studio 700, in particular its vocational aspect. She added her daughter's name to the enrollment waiting list.

13. ACRC's planning team met to review claimant's IPP from IRC on August 10, 2017. They discussed the possibility of claimant attending Studio 700, and her service coordinator, Barbara Van Ingen, agreed to explore that possibility.

14. On January 22, 2018, ACRC drafted an IPP reflecting the discussions at the August 10, 2017 IPP planning meeting. The IPP identified the following objective for claimant: "Given day program support, [claimant] will enhance her artistic skills in order to achieve goals as specified in her ISP, through 8/2018." The parties agreed upon the following schedule of services and supports to help claimant reach her objective:

- 4.1 ACRC service coordinator to request POS funding for two days a week (max of 23 days per month) participation at Studio 700, as per ACRC Services Policies, through 8/2018.
- 4.2 Studio 700 staff to assist [claimant] in assessing, developing and implementing ISP goals.
- 4.3 Studio 700 staff to provide semi-annual progress reports on ISP goals.
- 4.4 Studio 700 to provide services in accordance with Title 22 regulations (applies to site based programs only), Title 17 regulations and their program design.
- 4.5 ACRC Services Coordinator to be available for ISP meetings and consultations as requested.
- 4.6 Amanda, live in aide, to be a source of support with [claimant] and Studio 700.

4.7 ACRC Service Coordinator to monitor POS activity and prepare all required adjustments.

STUDIO 700 CENTER FOR THE ARTS PROGRAM

15. The Client Handbook for Studio 700 Center for the Arts describes the program as follows:

Studio 700 Center for the Arts serves adults with intellectual and developmental disabilities who are interested in working in an art studio that emphasizes the value of the professional artist and his/her work. Adults who attend the program will develop skills taught by professional artists and mature in the disciplines of concentration, following through, and delayed-gratification. Through their art they will gain consideration for others, practical teamwork experience, basic life skills, and feel the excitement and joy that comes with creative expression. Anyone who joins the art center will achieve a greater level of self-confidence and will ultimately produce quality artwork. All individuals served by the program are adults 18 years of age or older and have been diagnosed with an intellectual and/or developmental disability.

16. The Arc of Placer County has identified the following eligibility criteria for participants in its Studio 700 program:

1. Eligible for and referred by Alta CA Regional Center.
2. Must not be violent or harmful to self or others.
3. Must be able to communicate his/her needs.

4. Must participate in program activities 50% of the time.
5. Must demonstrate potential and need for developing self-help skills.
6. Must be able to benefit from community based [sic] activities.
7. Must arrive at program neat, clean, odor free and appropriately dressed for age and season.
8. The consumers [sic] support team must be willing to receive and implement training in non-aversive behavior management.
9. The applicant and/or representative must complete the application packet and meet the request for specific reports as prescribed.
10. All requirements for entrance should be met and maintained throughout the term of the consumers [sic] participation in the program. Admission to the program will be made when above criteria are met.

And it has adopted the following exit criteria for program participants:

1. A determination is made by the planning team that the consumer would be more appropriately served by another program.
 2. Mutual agreement that the placement is no longer in the best interest of the consumer.
 3. Consumer displays behavior which is a threat to property or the safety of persons at ARC.
 4. Severe or prolonged illness which precludes attendance.
 5. Consumer achieves skills adequate for vocational rehabilitation/habilitation referral for supported employment.
 6. Consumer request [sic] termination.
17. Sometime after the planning team's August 10, 2017 meeting, Ms. Van Ingen received an email from Studio 700 stating there was an opening for claimant on

Mondays and Wednesdays. She called Studio 700, spoke with Marie Wecker, the program's director, and explained that Studio 700 may not be able to meet claimant's needs as described in the IPP from IRC. Ms. Wecker requested a copy of the IPP to review.

18. After reviewing the IPP from IRC, Ms. Wecker contacted Ms. Van Ingen and explained she did not believe Studio 700 could provide the support claimant needs in terms of walking, behaviors, reading, and toileting. She inquired about whether Amanda, claimant's personal attendant, would attend Studio 700 with claimant and provide the necessary support in those areas.

19. Ultimately, Studio 700 agreed to accept claimant into the program two days a week with the understanding that a personal attendant would attend with claimant, the personal attendant was responsible for all of claimant's personal needs, and the instructors were responsible only for class activities. ACRC agreed to fund claimant's attendance at Studio 700 two days a week through September 30, 2018, and she started the program on October 23, 2017. However, ACRC was unwilling to pay Amanda to be claimant's personal attendant because she lived with claimant and her family, and claimant's parents were required to pay for Amanda's services out of pocket.

20. An Individual Service Plan (ISP) Cover Page prepared by Studio 700 after a 30-day ISP meeting on November 29, 2017, identifies the following accomplishments by claimant during the ISP report period:

In the **Fiber Art** class, [claimant] is off to a wonderful start! She chose a stuffed owl for her first project. After giving her the pattern and fabric, she made quick work of cutting out the pieces of material. [Claimant] is about 2/3 of the way done now. Her stitch work is solid and of good quality. She only seems to need assistance with obtaining class supplies,

the remainder of the time she is self-sufficient. Keep up the great work, [claimant]!

In the **Bead Art** class, [claimant] is doing very well. She has already completed a butterfly mobile, a bracelet and necklace. She works well throughout the day and catches on to new techniques quickly. [Claimant] seems to have prior knowledge of wire work or just a natural talent. She has picked her own butterfly color and palette and choose beads to make a pattern. I really enjoy having [claimant] in class.

(Bold original.)

The Cover Page also indicates that Studio 700 is able to effectively meet claimant's needs as specified in her IPP.

21. A Six-Month Progress Report prepared by Studio 700 indicates the following:

Goal #1: [Claimant] will choose and create art show quality work for each art show.
Objective #1: [Claimant] will advocate for artistic choices. Current Status: Achieved
Objective #2: [Claimant] will gather resources for her project. Current Status: Achieved
Objective #3: [Claimant] will ask for assistance/communicate with staff if there is a problem or need. Current Status: Achieved
Objective #4: [Claimant] will work on her current project. Current Status: Achieved
Objective #5: [Claimant] will clean-up space and put her materials

away.

Current Status: Achieved

Identified Barriers: [Claimant] is deaf, so she attends program with her one on one staff who helps her communicate with her instructors.

Identified Motivators/Enhancers: [Claimant] enjoys being in the program.

(Bold original.)

The Six-Month Progress Report indicates claimant completed her first goal.

22. The Six-Month Progress Report also indicates the following:

Goal #2: [Claimant] will communicate with staff and peers.

Objective #1: [Claimant] will initiate a conversation with a peer or staff.

Current Status: Ongoing

Objective #2: [Claimant] will work with her one on one staff to help identify common interests with other clients.

Current Status: Ongoing

Objective #4: [Intentionally left blank]

Current Status: [Intentionally left blank]

Objective #5: [Intentionally left blank]

Current Status: [Intentionally left blank]

Identified Barriers: [Claimant] is deaf, so she attends program with her one on one staff who helps her communicate with her instructors and peers.

Identified Motivators/Enhancers: [Claimant] enjoys being in the program.

(Bold original.)

The Six-Month Progress Report indicates claimant is continuing with her second goal.

23. On August 27, 2018, a one-year ISP meeting was held at Studio 700. The ISP Cover Page for that meeting indicates the following about accomplishments during the ISP report period:

In the **Fiber Art** class, [claimant] continues to create very high quality pieces. She has recently completed a butterfly mobile which came out beautifully. [Claimant] really enjoys sewing and often works through part of each break time. Having [claimant] in my class has helped me learn a little sign language and she has opened up to me and other clients as well. She occasionally holds conversations with other clients who know sign language and that is very special to see. [Claimant] is a lovely young lady and having her in class is a joy.

In the **Bead Art** class, [claimant] has some of the most creative and unique beadwork on wire. She made a frog eating a honey bee and an ice cream cone. [Claimant] is able to choose projects that are challenging but not impossible and she completes most things at art show quality. She and I are still developing our communication but she reads my written directions/suggestions and expresses her excitement or dissatisfaction with choices. [Claimant] chooses the colors of thread, beads and fabric that she works with. She comes in excited to work on her projects and works continuously

throughout the day. I really enjoy having [claimant] in my class.

(Bold original.)

The Cover Page also indicates that Studio 700 is able to effectively meet claimant's needs as specified in her IPP.

NOTICE OF PROPOSED ACTION

24. On December 20, 2017, ACRC issued a Notice of Proposed Action "denying [claimant's] request to fund Personal Attendant (PA) services for [her], as well as [her] request that ACRC pay an individual who resides in the client's home to provide [claimant's] PA services." Claimant requested a fair hearing challenging the Notice of Proposed Action.

25. The Notice of Proposed Action was ultimately resolved at mediation on April 12, 2018, with the parties agreeing to the following:

1. Alta California Regional Center (ACRC) agrees to continue to fund the day program (Studio 700) for claimant for up to three days/week until October 31, 2018.
2. ACRC does not agree to pay for personal assistant hours for claimant.
3. Claimant withdraws her request for a fair hearing in this matter, without prejudice.
4. Claimant shall undergo an assessment, conducted by ACRC, to determine claimant's necessary level of care for adult day services. Said assessment shall be completed, and the results of which communicated to claimant, no later than June 15, 2018.

26. The planning team met August 27, 2018, to discuss implementing the agreement reached at mediation. The IPP adopted as a result of that meeting provides:

Current Status: [Claimant] is currently attending Placer ARC's Studio 700 and has been attending the program since October 2017. Studio 700 is located at 700 Douglas Blvd. Roseville 95678. Marie Wecker is the program director and can be reached at (916) 781-6911. [Claimant] is attending the program on Mondays and Wednesdays and is participating in fiber arts and bead art classes. [Claimant] is working on developing skills necessary to create art show quality pieces. [Claimant] is also working on increasing her communication with staff and peers.

[Claimant's] health and safety needs currently exceed Studio 700's program design. [Claimant's] parents are currently private paying for a 1:1 aide to accompany [claimant] in order to participate in the Studio 700's [sic] program. [Claimant] requires an aide at program to help facilitate communication, to assist her in the bathroom and to assist her mitigating her choking risks and with coming in contact with nuts. [Claimant] can also display rigid behaviors that include long pauses, perseveration, and physical resistance and requires [sic] redirection when these behaviors occur. [Claimant's] aid [sic] assists [claimant] when these episodes occur. [Claimant] also requires an aide to ensure that she is

being safe in the community due to her lack of community safety skills.

[Claimant] and her parents are currently in disagreement with ACRC's assessment that Studio 700 is not able to meet [claimant's] current health and safety needs. There is also disagreement with the request for ACRC funding for personal attendant at Studio 700.

Objective #3: Given day program support, [claimant] will learn art techniques and communication skills in order to achieve goals as specified in her ISP, through October 2018.

Schedule of Services and Supports:

3.1 ISP will be developed jointly by planning team participants.

3.2 Studio 700 will be responsible for implementation of ISP including care/supervision during established program hours.

3.3 SC will request continued ACRC funding for up to a maximum of 10 days per month (2 days a week) of day program services for [claimant] at the Studio 700 through October 2018 per mediation agreement.

3.4 Studio 700 will provide services in accordance with Title 22 regulations (applies to site-based programs only), Title 17 regulations and their program design.

3.5 Studio 700 will provide ACRC SC with semiannual reports documenting consumer progress in accordance with Title 17, Section 56720(c), and will coordinate ISP meetings annually.

3.6 Studio 700 will submit SIRs in accordance with Title 17, Section 54327(b).

3.7 Studio 700 will participate in program activities to accomplish goals/objectives established on her ISP documents.

3.8 SC will review progress annually.

(Bold original.)

27. On September 12, 2018, ACRC issued a Notice of Proposed Action “proposing to terminate funding for Studio 700 day program services for [claimant],” and “denying your request to fund personal attendant services to provide [claimant] 1:1 assistance at the Studio 700 day program.” Claimant requested a fair hearing challenging the Notice of Proposed Action.

HEARING TESTIMONY

28. Ms. Van Ingen, claimant’s original service coordinator with ACRC, did not testify at hearing, but claimant’s current service coordinator, Joseph Wilds, did. Mr. Wilds has been claimant’s service coordinator since August 27, 2018, the date of her most recent planning team meeting. He did not see claimant between that meeting and the first day of hearing.

29. Mr. Wilds assisted with drafting the August 27, 2018 IPP, but none of the information he documented regarding claimant’s current status was based on his own personal observations. Instead, such information was based on observations by others relayed to him, including the observations of a Studio 700 representative who attended the IPP and reported that claimant was doing well and was enjoying the program. Additionally, Mr. Wilds obtained information from claimant’s prior IPPs.

30. Mr. Wilds confirmed that claimant’s parents and claimant want claimant to continue participating in the Studio 700 program because she has an interest in art, she enjoys it, and she learns vocational skills through the selling of her artwork. However, he

opined that the program is inappropriate for her because it is unable to meet her needs in terms of behaviors, bathroom, and communication. He agreed that ACRC did not deem the Studio 700 program inappropriate for claimant until her most recent IPP.

31. At hearing, Mr. Wilds was unable to identify any adult day program in claimant's geographical area that focuses on making art and selling it that could meet her communication needs.

32. Tanya Nalley is a client services manager with ACRC, and is Mr. Wilds's immediate supervisor. She explained at hearing that ACRC completed an assessment of claimant pursuant to the mediation agreement, and determined her needs could be met at an Adult Development Center type program. In its closing argument, however, ACRC conceded no assessment was actually performed:

Rather, ACRC estimates that Claimant requires a day program such as an Adult Development Center or a Behavior Management Program, both of which require a 1:3 or 1:4 staffing ratio pursuant to regulations. [Citations.] This estimate is based upon all of the documentation and information ACRC has obtained regarding Claimant's skills and functioning. [Citation.] Although this is an estimate, the best way to determine what level of support Claimant needs would be to have her assessed by an Adult Developmental Center or Behavior Management Program, which would invite her for a trial at program and observe Claimant to see what support she requires. [Citation.]

(Emphasis added.)

33. On June 8, 2018, Ms. Van Ingen, claimant's prior service coordinator, forwarded the names of seven Adult Development Center day programs to claimant's parents for consideration. No evidence of the entrance criteria for any of those programs was introduced at hearing, and Ms. Nalley did not explain whether claimant met the entrance criteria for any of the programs. Furthermore, Ms. Nalley was unable to identify any program that focuses on creating and selling artwork and maintains the necessary staff for communicating with clients who are deaf or hard of hearing.

34. Carol Wilhelm is a client services manager in ACRC's Supportive Living Service and Deaf Services Unit. She has never met claimant, and is unfamiliar with claimant's disabilities and needs.

35. Ms. Wilhelm explained at hearing that there are "probably" three adult day programs that focus on serving the deaf and hard of hearing. They either hire staff fluent in ASL or hire people who are deaf who communicate through ASL. She did not testify to the entrance criteria for any of those three programs, and did not identify any programs capable of serving deaf or hard of hearing clients that focus on making and selling artwork.

36. Chelsea Lydell is deaf, and is fluent in ASL. She has served as claimant's personal attendant since two months prior to hearing, and attends Studio 700 with her. She assists claimant with interpreting, using the bathroom, making sure she walks safely, making sure she is not exposed to cross-contamination with allergens during lunch, and in the classroom.

37. Ms. Lydell explained that her assistance with interpreting extends beyond simply translating spoken words to ASL and vice versa. She also helps claimant socialize with the other consumers at Studio 700. She explained claimant lacks social awareness, and Ms. Lydell assists claimant by explaining to her when someone is talking to her and asking claimant whether she would like to respond. For example, another consumer

complimented claimant's Halloween costume. Ms. Lydell called the compliment to claimant's attention, asked if she liked the person's costume as well, and prompted her to compliment the person's costume in return. Ms. Lydell opined that claimant would miss out on such interactions without a person fluent in ASL.

38. Ms. Lydell also explained she has seen claimant in a 1:3 ratio at Studio 700 due to absences, and staff was still unable to meet her needs because no one was fluent in ASL. Additionally, claimant has no concept of her own personal safety, and is incapable of navigating the streets safely on her own. Therefore, she believes claimant needs a personal assistant, regardless of the staff-to-consumer ratio of her adult day program.

39. Claimant's mother is a retired speech pathologist, and explained that the ability to communicate effectively is important for everyone. She believes it is even more important for those who are disabled and have various special needs, such as her daughter.

40. Claimant's mother also explained that her daughter has some facial paralysis as a result of her disabilities. That condition, in combination with the behaviors associated with claimant's autism, results in her sometimes putting too much food in her mouth and choking. The concern with choking combined with claimant's food allergies has led claimant's mother to believe her daughter needs constant monitoring when eating.

41. Several incidents that occurred when claimant was participating in various programs have led her mother to conclude she needs constant monitoring when out in the community as well. Claimant participated in a camp for autistic children when she was six years old. One day, claimant began frantically signing the word "red," albeit not very well. The teacher perceived claimant as flailing her arms, thought she was having a meltdown, and sat on her in an effort to calm her. Later that day during lunch, someone

wondered out loud where claimant's red backpack which contained her feeding tube was. It was later learned that claimant was trying to communicate to others that she could not find her red backpack when the teacher mistakenly thought she was having a meltdown earlier in the day.

42. Another incident occurred when claimant was taken shopping at Target. When walking from the car to the store, she became excited and ran in front of a truck. Fortunately, an aide was able to grab claimant before she was hit by the truck.

DISCUSSION

Regional Center Funding for Studio 700

43. ACRC has the burden of proving claimant is no longer entitled to regional center funding for Studio 700. ACRC's argument in support of terminating funding is three-fold: 1) Studio 700 admitted it cannot meet claimant's needs; 2) applicable regulations and Studio 700's program design prohibit Studio 700 from serving claimant; and 3) other appropriate adult day programs are available to claimant. None of ACRC's arguments are persuasive.

44. Ms. Van Ingen, claimant's original service coordinator with ACRC, and Ms. Wecker, the director of Studio 700, initially had concerns about whether Studio 700 could meet claimant's needs. Ultimately, it was determined that claimant's needs could be met if she was accompanied by a personal attendant, and ACRC has been funding claimant's attendance in the program (but not her personal attendant services) since October 23, 2017. Subsequent ISPs issued by Studio 700 have indicated that "the Arc of Placer County services effectively meet[s] the needs of the Client as specified in the ACRC Individual Program Plan."

45. ACRC contends claimant does not meet the entrance criteria articulated in the program design for Studio 700 because she was not referred by ACRC, she is unable to

communicate her needs to staff, and “arguably is not able to demonstrate potential for developing self-help skills.” Such argument is disingenuous because there has been no change in claimant’s needs and abilities since ACRC began funding her attendance at Studio 700, and ACRC articulated no concerns with the program’s ability to meet claimant’s needs until the most recent planning team meeting on August 27, 2018. For the same reasons, ACRC’s argument that claimant’s needs exceed Studio 700’s approved staffing ratio is also disingenuous and not persuasive.

46. Besides, ACRC’s contention that claimant self-referred to Studio 700 rather than being referred by ACRC is one of form over substance. Regardless of the manner in which Studio 700 was discovered, the proper procedure for obtaining regional center funding for the program was followed. ACRC’s contention that claimant is not able to communicate her needs to staff is belied by the Six-Month Progress Report from Studio 700, which indicates claimant “achieved” her third objective of being able to “ask for assistance/communicate with staff if there is a problem or need.” The argument that claimant “is not able to demonstrate potential for developing self-help skills” is not supported by any persuasive evidence.

47. Also, California Code of Regulations, title 17, section 56748, subdivision (a), provides for an exception to the general rule that a consumer may not attend an adult day program when her needs exceed the level of service provided by the program. Grounds for such an exception exist because, contrary to ACRC’s argument, the persuasive evidence established there is no alternative placement available that is more appropriate than Studio 700.

48. Claimant was unable to attend a day program during her last eight years with IRC because none was able to meet her communication needs. Even after IRC funded a personal attendant, IRC’s service coordinator continued having difficulty finding a day program willing to accept claimant and her personal attendant. After

claimant moved to ACRC's catchment area and discovered Studio 700, there were initial concerns with the program's ability to meet her needs. But upon further consideration, it was determined that Studio 700 could meet claimant's needs if she is accompanied by a personal attendant.

49. Claimant and her parents like Studio 700 because it allows her to produce artwork that she can later sell to the public. ACRC produced no evidence of any other program with similar features. Nor did ACRC produce evidence that any of the programs it recommended for claimant is capable of meeting her needs and that she meets the program's entrance criteria.

50. The persuasive evidence established that Studio 700 provides the least restrictive environment for claimant. The evidence further established that her continued placement in the program will not jeopardize her health and safety so long as she is accompanied by a personal attendant.

Regional Center Funding for Personal Attendant

51. Claimant has the burden of proving she is eligible for regional center funding for a personal attendant while attending Studio 700. The persuasive evidence established she requires a personal attendant while attending the program in order to keep her safe. She has a documented history of needing extra supervision while in the community to keep her safe, and has been approved for protective supervision hours through IHSS since at least her February 22, 2016 IPP with IRC. Her mother provided persuasive testimony about prior incidents regarding her daughter's safety in the community that led her to conclude claimant requires a personal attendant.

52. The persuasive evidence also established claimant requires a personal attendant while attending Studio 700 in order to facilitate communication between her and program staff and her and other consumers. Ms. Lydell's testimony persuasively

established that she plays a vital role in calling various social cues to claimant's attention and helping facilitate claimant's ability to communicate with other consumers.

53. ACRC's estimate "that Claimant requires a day program such as an Adult Development Center or a Behavior Management Program, both of which require a 1:3 or 1:4 staffing ratio pursuant to regulations," is not based on the observations of any of its staff, but is instead based solely on second-hand information it has obtained regarding claimant's skills and functioning. Mr. Wilds met claimant only once prior to hearing, and he admitted he prepared her most recent IPP based solely on information provided by others and that which he gleaned from prior IPPs. Ms. Wilhelm conceded she has never met claimant and knows nothing about her disabilities or needs. Ms. Nalley did not state whether she has any personal knowledge of claimant's skills and functioning.

54. ACRC had an opportunity to have claimant's skills and functioning assessed, and in fact agreed to do so when it executed the April 12, 2018 mediation agreement. But it failed to have claimant assessed for reasons that were not explained.

55. ACRC's remaining arguments were considered, and were not persuasive.

SUMMARY

56. When all the evidence is considered, ACRC did not meet its burden of demonstrating it is entitled to discontinue funding claimant's attendance at Studio 700. ACRC did not produce persuasive evidence that: 1) Studio 700 cannot meet claimant's needs when she is accompanied by a personal attendant; 2) applicable regulations and Studio 700's program design prohibit Studio 700 from serving claimant; and 3) other appropriate day programs are available that can meet claimant's needs. Furthermore, the persuasive evidence established claimant meets the criteria for an exception to Studio 700's entrance criteria and approved staffing ratio. Specifically, Studio 700 provides the least restrictive environment for claimant, her continued placement in Studio 700 with a personal attendant will not jeopardize her health and safety, she and

her parents are agreeable to her continued placement in Studio 700, and no other adult day programs that can meet her needs are available. Therefore, ACRC is responsible for continuing to fund claimant's placement at Studio 700 Center for the Arts.

57. When all the evidence is considered, claimant met her burden of demonstrating her eligibility for personal attendant services funded by ACRC while attending Studio 700. The persuasive evidence established such services are necessary for claimant to maintain residency in the community, and to ensure her safety and well-being while in the community. The evidence further established that personal attendant services will not be duplicative of any services already being purchased by ACRC or any other public entity. Therefore, ACRC is responsible for funding personal attendant services while claimant attends Studio 700.

LEGAL CONCLUSIONS

APPLICABLE BURDEN/STANDARD OF PROOF

1. A party seeking to change a service in a consumer's IPP typically has the burden of demonstrating that the proposed change is correct. (*In re Conservatorship of Hume* (2006) 140 Cal.App.4th 1385, 1388 [the law has "a built-in bias in favor of the status quo," and the party seeking to change the status quo has the burden "to present evidence sufficient to overcome the state of affairs that would exist if the court did nothing"].) ACRC has the burden of establishing it is no longer required to fund claimant's placement at Studio 700 Center for the Arts. However, claimant has the burden of establishing she is entitled to regional center funding for personal attendant services while she attends Studio 700.

2. The applicable standard of proof in this matter is preponderance of the evidence. (Evid. Code, § 115 [the standard of proof is preponderance of the evidence, unless otherwise provided by law].) This evidentiary standard requires ACRC (or claimant

with regard to the issue of personal attendant services) to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, ACRC must prove it is more likely than not that it is no longer required to fund claimant's placement at Studio 700, and claimant must prove it is more likely than not that she is eligible for regional center funding for personal attendant services while she attends Studio 700. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

APPLICABLE LAW

3. Under the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.), the State of California accepts responsibility for persons with developmental disabilities, and pays for the majority of the "treatment and habilitation services and supports" in order to enable such persons to live in the least restrictive environment possible. (Welf. & Inst. Code, § 4502, subd. (a).) The state agency charged with implementing the Lanterman Act is the Department of Developmental Services, which is authorized to contract with regional centers to provide developmentally disabled individuals with access to the services and supports best suited to them throughout their lifetime. (Welf. & Inst. Code, § 4520.)

4. In order to determine how an individual consumer is to be served, regional centers are directed to conduct a planning process that results in an individual program plan (IPP) designed to promote as normal a lifestyle as possible. (Welf. & Inst. Code, § 4646; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389.) Welfare and Institutions Code section 4646 provides, in relevant part:

(a) It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with

developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

(b) The individual program plan is developed through a process of individualized needs determination. The individual with developmental disabilities and, where appropriate, his or her parents, legal guardian or conservator, or authorized representative, shall have the opportunity to actively participate in the development of the plan.

(c) An individual program plan shall be developed for any person who, following intake and assessment, is found to be eligible for regional center services. These plans shall be completed within 60 days of the completion of the assessment. At the time of intake, the regional center shall inform the consumer and, where appropriate, his or her parents, legal guardian or conservator, or authorized representative, of the services available through the local area board and the protection and advocacy agency

designated by the Governor pursuant to federal law, and shall provide the address and telephone numbers of those agencies.

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

5. Once the regional center and individual consumer have gone through the planning process and developed an IPP, the regional center must obtain the services and supports necessary for implementing the IPP. Welfare and Institutions Code section 4648 provides, in pertinent part:

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

(a) Securing needed services and supports.

(1) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. The regional center shall secure

services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan, and within the context of the individual program plan, the planning team shall give highest preference to those services and supports which would allow minors with developmental disabilities to live with their families, adult persons with developmental disabilities to live as independently as possible in the community, and that allow all consumers to interact with persons without disabilities in positive, meaningful ways.

6. Regional centers are required to adopt internal policies regarding the purchase of services for consumers. (Welf. & Inst. Code, § 4646.4, subd. (a).) The Department of Developmental Services is required to review those policies prior to implementation by the regional centers, and "shall take appropriate and necessary steps to prevent regional centers from utilizing a policy or guideline that violates any provision of" the Lanterman Act or any regulation adopted pursuant to it. (Welf. & Inst. Code, § 4434, subd. (d).) But regional centers may not deny necessary services based on the application of a rigid, inflexible policy. (*Williams v. Macomber* (1990) 226 Cal.App.3d 225, 232.) Final decisions regarding the consumer's IPP depends upon consideration of all relevant circumstances, and shall be made pursuant to Section 4646. (Welf. & Inst. Code, § 4646.4, subd. (c).)

7. Vendors of services to regional center consumers are required to adopt entrance and exit criteria to assist planning teams with determining whether a particular program can meet the needs outlined in an individual consumer's IPP. California Code of Regulation, title 17, section 56714, subdivision (a), provides:

The vendor shall have written entrance and exit criteria that shall be used by a consumer's ID Team to determine the appropriateness of the vendor's program for meeting the objective(s) of an individual consumer's IPP. The criteria shall include all of the following:

- (1) Ages of consumers to be served;
- (2) Any other prerequisites required for participation in the program; and
- (3) The level of skills and ability development which would indicate that placement in the vendor's program may no longer meet the consumer's needs.

8. California Code of Regulations, title 17, section 56716, subdivision (b), prohibits a consumer from being placed in a program unless all of the following conditions are met:

- (1) The consumer or authorized consumer representative consents to the placement;
- (2) The regional center concurs that the placement is appropriate;
- (3) Consumer's needs can be met with the staffing ratio approved for the program pursuant to section 56756 or 56772 of these regulations;
- (4) The consumer meets the vendor's entrance criteria; and

(5) The vendor agrees to the consumer's placement in the program.

9. California Code of Regulations, title 17, section 56756 requires the Department of Developmental Services to approve staffing ratios for adult day programs, in relevant part, as follows:

(d) Activity centers shall provide a direct care staff-to-consumer ratio of 1:8.

(1) The vendor is authorized to request Department approval for modification of the staffing for an Activity Center to an overall direct care staff-to-consumer ratio of 1:7 or 1:6. A written request and justification shall be submitted to the Department by the regional center which documents the findings pursuant to the criteria listed below. The overall direct care staffing ratio shall be determined by averaging the specific staff-to-consumer ratio needed for each individual consumer. The regional center shall consider whether the activity center meets at least one of the following criteria for modification of the direct care staffing ratio of 1:8:

(A) The activity center is providing community integration or employment training in natural environments to groups of three or fewer consumers for at least two hours in duration on a daily basis.

1. If each group of consumers receives at least one two-hour session per week, then the staffing ratio shall be 1:7.

2. If each group of consumers receives at least two-hour sessions per week, then the staffing ratio shall be 1:6.

(B) The activity center is providing services to consumers whose IPPs include an objective to modify behaviors that may represent a threat to the individual, others, and/or property.

1. If consumers require intermittent spontaneous/unplanned behavior intervention to prevent or minimize disruption of activities or injury to persons or property, the staffing ratio shall be 1:7. For purposes of this paragraph and (d)(1)(C)1. below, "intermittent" means more often than once a week, but less than once per day.

2. If consumers require frequent spontaneous/unplanned behavior intervention to prevent or minimize disruption of activities or injury to persons or property, the staffing ratio shall be 1:6. For purposes of this paragraph and (d)(1)(C)2. below, "frequent" means at least once per day.

3. Such behaviors may include:

a. Physical aggression resulting in physical injury to others;

b. Displays of self-injurious behavior that could result in serious injury;

- c. Causing severe damage to property;
- d. Running or wandering away;
- e. Smearing of feces;
- f. Displays of inappropriate sexual behavior.

(C) Additional staffing assistance is required in meeting consumer personal needs, specifically:

1. If consumers require intermittent, as defined in (d)(1)(B)1. above, assistance or supervision in eating, toileting or caring for their personal hygiene needs, then the staffing ratio shall be 1:7.

2. If consumers require frequent, as defined in (d)(1)(B)2. above, assistance or constant supervision in eating, toileting or caring for their personal hygiene needs, then the staffing ratio shall be 1:6.

(2) If a given consumer meets more than one criterion as specified in (d)(1)(A) through (d)(1)(C) above, the staffing ratio which provides the most direct care staff for the vendor shall prevail.

(3) Modifications approved under (d)(1) above shall be reviewed at least annually by the regional center to assure that the condition on which the modification was approved continues.

(e) Adult development centers shall provide a direct care staff to-consumer ratio of 1:4.

(1) The vendor is authorized to request Department approval for modification of the staffing for an Adult Development Center to an overall direct care staff-to-consumer ratio of 1:3. A written request and justification shall be submitted to the Department by the regional center which documents the findings pursuant to the criteria listed below. The overall direct care staffing ratio shall be determined by averaging the specific staff-to-consumer ratio needed for each individual consumer. The regional center shall consider whether the Adult Development Center meets the following criteria for modification of the direct care staffing ratio of 1:4.

(A) The Adult development center is providing community integration or employment training in natural environments to groups of three or fewer consumers for at least two hours duration on a daily basis with each group of consumers receiving at least two two-hour sessions per week; and

(B) The consumers receiving community integration or employment training require constant assistance and constant supervision. For purposes of this section, "constant assistance" means providing direct physical aid and help with self-care needs at all times during service hours. For purposes of this section "constant supervision" means

maintaining visual or physical proximity to an individual consumer during all service hours.

(2) Modifications approved under (e)(1) above, shall be reviewed at least annually by the regional center to assure that the conditions on which modifications were approved continue.

(f) Behavior management programs shall provide a direct care staff-to-consumer ratio of 1:3.

10. A consumer remains eligible for placement in an adult day program notwithstanding her needs exceeding the program's approved staffing ratio or her not meeting the program's entrance criteria as follows:

(a) Notwithstanding sections 56716 (b)(3) and/or (4) of these regulations, a consumer shall be eligible for placement in an adult day program pursuant to a determination of the ID Team that, while the consumer's needs exceed the level of service provided by the program, the IPP objective(s) can be addressed in such program. The ID Team shall include all of the following as documentation for the determination:

(1) The factual basis and rationale leading to the decision for the alternate placement including a statement that a more appropriate program is not available;

(2) The duration of the alternate placement; and

(3) A statement that:

- (A) The program provides the least restrictive environment;
 - (B) The health and safety of the consumer and others will not be jeopardized by the alternate placement;
 - (C) The consumer and/or authorized consumer representative agree to the alternate placement; and
 - (D) The conditions specified in (b) below are met.
- (b) When a placement pursuant to paragraph (a) above occurs:
- (1) A copy of the documentation shall be:
 - (A) Placed in the consumer's regional center record; and
 - (B) Provided to the vendor who shall maintain the copy in accordance with section 56728 of these regulations.
 - (2) The consumer's IPP shall be reviewed by the ID Team no less than once every six months to determine the continued appropriateness of the alternate placement.

(Cal. Code Regs., tit. 17, § 56748.)

RELEVANT POLICIES

11. ACRC's Service Policy Manual provides the following regarding adult services:

Alta California Regional Center (ACRC) shall provide service opportunities for adult consumers seeking participation in programs that offer training, skill development and

community integration. ACRC believes and supports service options that value consumers as productive and contributing members in their community. ACRC recognizes that age and/or health issues may determine the most appropriate day program needs for some consumers. Adult Day Health Centers, mental health day treatment programs and senior citizen programs shall be considered as service options.

ACRC promotes smaller, individualized environments within service options ranging from a variety of day programs, behavior management programs, adult education and employment-focused providers. Adult services shall provide support in developing skills in one or more of the following areas:

- Self-advocacy; such as communication skills training and client rights understanding
- Employment training; such as pre-vocational training, volunteering and employment exposure
- Community integration to increase proficiency in navigating and accessing one's own community and relationship building
- Customized employment; such as micro-enterprise
- Educational opportunities through adult education, community college, regional occupational programs and other public education and training programs
- Behavior management in the least restrictive environment when applicable

The ACRC Executive Director may review and authorize an exception(s) if warranted by individual circumstances.

12. ACRC's Service Policy Manual provides the following regarding personal attendant services:

Alta California Regional Center (ACRC) recognizes that some consumers require additional support for medical and/or daily living skills in order to participate in age appropriate [sic] and community based activities. When natural supports and/or generic resources are insufficient to minimize the risk to the health and safety of a consumer, ACRC may provide payments for personal assistance through attendant care services. Consideration shall be given to the following:

- The services necessary to maintain residency in the community.
- The critical needs to be met by the assistance of attendants shall be clearly identified. ACRC places a high priority upon preserving the dignity of independence and promoting least restrictive alternatives. The concept of lowest level of care necessary shall guide the frequency, duration and intensity of the service provided.
- These services shall not duplicate those already being purchased by ACRC or other public entities.

The ACRC Executive Director may review and authorize an exception(s) if warranted by individual circumstances.

CONCLUSION

13. ACRC is obligated under the Lanterman Act to fund an adult day program capable of meeting claimant's needs outlined in her August 27, 2018 IPP. The persuasive

evidence established that The Arc of Placer County's Studio 700 Center for the Arts is the most appropriate adult day program that is available and able to meet those needs when she is accompanied by a personal attendant for the reasons discussed in Factual Findings 55 and 56. Therefore, ACRC shall continue funding claimant's placement in Studio 700, and shall fund personal attendant services to provide claimant 1:1 assistance while attending Studio 700.

ORDER

1. Claimant's appeal from Alta California Regional Center's September 12, 2018 Notice of Proposed Action is SUSTAINED.

2. Alta California Regional Center is responsible for the continued funding of claimant's placement in The Arc of Placer County's Studio 700 Center for the Arts program.

3. Alta California Regional Center is responsible for funding personal attendant services to provide claimant 1:1 assistance while attending Studio 700.

///

4. A planning team shall convene at least once every six months to determine the continued appropriateness of claimant's placement in Studio 700.

DATED: April 9, 2019

COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Judicial review of this decision may be sought in a court of competent jurisdiction within ninety (90) days.