

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2018120862

DECISION

Eileen Cohn, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, heard this matter on March 18, 2019, in Whittier, California. Jacob Romero, Fair Hearing Coordinator, represented the Eastern Los Angeles Regional Center (Service Agency, or ELARC.) Claimant, a minor, was represented by his mother who was accompanied by his grandmother and day care provider (grandmother).¹ A Spanish-language interpreter was present to assist claimant's mother and grandmother throughout the hearing.

Oral and documentary evidence was received. Claimant produced further exhibits the morning of the fair hearing; the Service Agency waived its right to request a continuance to review claimant's newly-provided exhibits which were admitted into evidence. At the conclusion of the hearing the record was left open until March 29, 2019 for the parties to submit written closing argument. On

¹ Names are omitted to protect the privacy of claimant and his family.

March 27, 2019, the ALJ issued an order extending the deadline, one week, until April 5, 2019, to provide the parties sufficient time to further specify and clarify the evidence about the hours, hourly rate and amount of reimbursement or payment claimed as owed to claimant for day care services, to meet and confer to explore agreement on claimant's outstanding claims for reimbursement or payment, and to respond to the ALJ's request for official notice pursuant to Government Code section 11515 of the document published by the Department of Developmental Services (DDS) dated December 21, 2018, entitled "Subject: Financial Management Services" (FMS). The DDS publication was marked as Exhibit ALJ-1. The parties did not object to the request for official notice, and Exhibit ALJ-1 was admitted into evidence. The ALJ's order of March 27, 2019, was marked for identification only as Exhibit ALJ-2. The parties timely submitted their written closing arguments and additional evidence. Claimant's closing statement was marked as Exhibit C-12 (and admitted only to the extent it included additional evidence on hours, payments, purchases, hourly rate and meet and confer). Claimant's supplemental Exhibits have been marked and admitted as follows: Exhibit C-13, Declaration of Wally Rivera is marked and admitted; Exhibit C-14, meet and confer correspondence (with the exception of statutes and regulations) is marked and admitted. The Service Agency's written closing argument is marked and admitted in part as Exhibit RC-20A (with certain sections considered only as closing argument, and additional evidence of reimbursement, hourly rates, meet and confer and payments admitted). The Service Agency's supplemental Exhibits have been marked and admitted as follows: Exhibit RC-20, Minimum Wage City of Whittier and Department of Industrial Relations, Official Notice of Industrial Welfare Commission Order No. 15-2001, identified and admitted for reference to the prevailing local and state hourly wage; Exhibit RC-

21, marked and admitted only as to the Service Agency's prevailing rate increases for service providers effective July 1, 2016; Exhibit RC-22, payment agreement for service provider, contract and various communications, marked and admitted.

The matter was submitted for decision on April 5, 2019.

SUMMARY

The parties dispute whether the Service Agency is obligated to pay for agreed-upon day care services, which due to the Service Agency's admitted mistakes and delays, remain unpaid for the period beginning 2016 through the date of the hearing. Service Agency maintains that it is required to comply with regulations governing reimbursement, and unless claimant has paid for the services and retained appropriate documentation, it is not obligated to pay for day care services rendered that remain unpaid.

The parties also dispute the hourly rate for day care services and total amount of hourly services rendered, paid or unpaid, for which the Service Agency is potentially obligated to pay.

Based upon a thorough review of the evidence presented and the governing law, the Service Agency is required to within 30 days of this decision (1) pay claimant's mother, either directly, or through a Financial Management Services, or under a new payment code 024/Purchase Reimbursement, unpaid day care services for the period of 2016 through March 2019, with the exception of June 2016, at the rate of \$11.13 an hour until the state rate changes, for the day care services provided by Claimant's grandmother, and at the rate of \$15 an hour, for the day care services provided by the ABA-trained day care provider, and (2) secure a Financial Management Services provider for claimant for payment of day care services for the period beginning not later than April 2019.

ISSUE

The parties stipulated to the following issues:²

1. Whether claimant's mother should receive payment from the Service Agency for day care services provided by a caregiver, for the period beginning in 2016, whether or not the services were paid by claimant's mother at the time they were provided.
2. What hourly rate is the Service Agency required to pay for day care services for the years 2016 through the present?
3. What is the total amount of money owed by the Service Agency (after identifying hours, rates and years, paid and unpaid) to either claimant or a specific service provider, if it is determined that the Service Agency is required to pay?

EVIDENCE³

Documents: Service Agency Exhibits RC-1 to RC-22; claimant Exhibits C-1 to C-14; Order, Exhibit ALJ-2, Official Notice of DDS FMS bulletin.

Sworn Testimony: For Service Agency, Jacob Romero, Jessica Carlos, Service Coordinator, Lilia Ortega, Supervisor. For claimant, Michelle Morales.

² Claimant's fair hearing request did not reflect the current status of the Service Agency's agreement to fund day care through 2021. The parties entered into a stipulation to resolve the current remaining disputes over reimbursement.

³ All exhibits and testimony were reviewed and considered in the factual findings. References to specific exhibits in this decision are not intended to dismiss other relevant exhibits and testimony which may reference the same information.

FACTUAL FINDINGS

PARTIES, JURISDICTION AND BACKGROUND INFORMATION

1. (a) Claimant is an 11-year-old male client of the Service Agency with a diagnosis of Autism. Claimant resides at home with his mother, who is a single parent. Claimant attends a private school and is provided significant supports through private insurance, In-home Support Services (IHSS) and the Service Agency to address his behavioral and other challenges each day. There is no dispute that claimant has a developmental disability which requires extensive supports and services.

(b) The Service Agency agrees that claimant requires day care services. Claimant can never be left alone. Claimant requires day care as defined under the Purchase of Service (POS) Guideline as "care and supervision for a child who is residing at home and is unable to care for her or himself when both parents or a single parent (primary care-provider) is employed full/part time outside the home or for the parent(s) to attend an educational program directed toward gainful employment." (Ex. RC-3.) Day care services are generally limited to consumers over 13 years of age, but the Service Agency at the outset of this service in 2016, considered claimant to meet the exception to this limitation. (Ex. RC-6.)

2. On October 24, 2018, claimant filed a complaint pursuant to Welfare and Institutions Code section 4731⁴ concerning the Service Agency's

⁴ All references shall be to the Welfare and Institutions Code unless otherwise stated.

extreme delay in addressing issues related to the provision of day care services, including payment for these services.⁵

3. On November 15, 2018, Service Agency issued a Notice of Proposed Action and declined claimant's request for day care services.

4. On December 7, 2018, claimant's mother signed a Fair Hearing Request (FHR) on the issue day care services "that had been requested since 2016 when reauthorization lapsed," and claimant's mother's payment of these services along with "IOU's" to the provider for the years 2016, 2017 and 2018. All jurisdictional requirements have been met for this matter to proceed.

5. (a) On December 20, 2018, the Service Agency provided claimant an amended response to her section 4731 complaint.⁶ Felipe Hernandez, Chief of Consumer Services, admitted on behalf of the Service Agency, that there were problems in follow through of the vendorization process necessary to fund services, including day care, finalization for the exception required for day care hours pending from May 2016, and responses to claimant's request for a notice of proposed action. Three IPP's reviewed were incomplete. The Service Agency acknowledged that due to its failure to timely address claimant's mother's request for day care services in an IPP so that claimant could exercise his due

⁵ Claimant's mother represented him in all communications with the Service Agency. Claimant shall be used interchangeably with claimant's mother when referencing her contacts with the Service Agency on his behalf.

⁶ Day care services were not the only services addressed in the Service Agency's response; however, it is the only issue in dispute in this action, and as such the findings are limited to day care services.

process rights, claimant has not waived his right to file a FHR for day care service payments going back to 2016.

(b) In June 2016 claimant's mother, as the parent vendor, and the Service Agency executed a payment agreement for services from January 2016 through May 26, 2016 in the amount to \$10 per hour. The Service Agency had also agreed to provide day care services for five additional years and committed to sending another payment agreement for that additional period. (Exs. RC-7, RC-8, RC-12.) In July 2016, the parties executed an additional payment agreement for \$10 per hour, through June 30, 2021. The Service Agency at a later time, in January 2019, modified the hourly rate to \$11.13, effective July 1, 2016, to the present. (*See* Exs. RC-15 & RC-16.)

DAY CARE SERVICES AND APPROVED HOURS

6. (a) As a result of claimant's section 4731 complaint, the Service Agency's failure to expressly address claimant's request for ongoing day care services in an IPP, including the most recent IPP of November 14, 2018, the details of the payment agreements executed in 2016, and further investigation of Service Agency staff, the Service Agency reaffirmed its agreement to extend claimant's day care services to 2021 at the same number of hours it approved in 2016, rounded to 88 hours monthly (Ex. RC-11).

(b) Claimant's mother stated in her testimony that the hours may vary when school is not in session, but confirmed the basic agreement.

(c) Service Agency witnesses attested to the mistakes made and confirmed the decision to continue day care services until 2021. Exhibits submitted demonstrate that there was an understanding regarding the duration of day care services, but confusion within the Service Agency regarding the retention of an oversight service provider, known as a Financial Management

Services (FMS) provider, explained in more detail in the findings below. (Ex. RC-10.)

7. (a) There is no dispute as to appointing claimant's mother as the vendor. Claimant's mother was designated as a claimant's vendor in the two payment contracts executed by the parties in 2016, also referred to as the Participant Directed Services (PDS) Day Care Family Member under the service code 455 designated in the payment agreements.

(b) The rate of pay and payment for a program designed for the PDS Day Care Family Member, referred to as the Self-Determination Program (SDP), is processed through FMS. SDPs are required by section 4685.8, subdivision (d)(3)(E), to use an FMS to, among other things, help the SDP "manage the budget and pay for services, including paying employees, assist in hiring employees, and make sure providers are qualified to deliver services," and "ensuring all employer-related labor and tax laws are followed." (Ex. ALJ -1.) The Service Agency is responsible for identifying FMS providers. (*Ibid.*) After claimant's mother's appointment as a PDS, the Service Agency was required to provide information regarding her responsibilities, including information regarding using an FMS for the purposes noted above. (Cal. Code. Regs., tit. 17, § 58886.)

(c) During 2016, for day care services rendered between approximately January 2016 and May 26, 2016, the Service Agency assisted in securing an FMS vendor for claimant which processed all payment requests from claimant's mother and/or her day care provider, claimant's grandmother. (See Ex. RC-13.) Claimant's mother used a form to document the hours worked by the provider, and the FMS issued the payment. The FMS was not established until much later so payments to the day care provider were delayed for many months.

Nevertheless, because she used the FMS, claimant's mother was not required to directly pay for any day care services authorized by the Service Agency. Time cards were submitted to the FMS and the FMS paid for the day care on behalf of the Service Agency.

PAYMENTS MADE, REIMBURSEMENT AND AMOUNT OUTSTANDING

8. Through the FMS, for the period of January 30, 2016 through May 30, 2016, claimant's mother and/or her service provider were paid a total of \$3,760 for day care services. (Ex. RC-14.) The FMS vendor retained for 2016 accepted time cards, or FMS forms, as proof of hours worked and issued a check based upon these time cards or FMS forms.

9. (a) The Service Agency made no payments to claimant's mother after the involvement of the FMS ended. After the first payment agreement expired, on or about May 26, 2016, due to the Service Agency's failure to assist claimant in securing another FMS vendor, claimant's mother was solely responsible for payment of claimant's day care.

(b) Claimant's mother did not have the financial resources to advance payment for day care services. Claimant's mother met the criteria for financial need based upon her W2 forms which she submitted to the Service Agency. Claimant's mother credibly estimated during the hearing that if she were to timely pay for claimant's day care, it would amount to upwards of 40 percent of her current annual gross salary of \$35,000.

(c) For the period 2016 through 2018, claimant's grandmother was the sole day care provider. (Exs. C-4, C-4-A, C-5-A, C-12, C-13 & C-14.) Due to her inability to advance all payments, claimant's mother maintained that she did not pay claimant's grandmother most of her hours. (Exs. C-4, C-4-A, C-5-A, C-12, C-13 & C-14.) Instead, when she could, claimant's mother made purchases for

claimant's grandmother. Claimant's mother provided the receipts for purchases she claimed she made on behalf of claimant's grandmother instead of paying for day care, and seeks reimbursement for these purchases. Claimant's grandmother provided a statement under penalty of perjury confirming that these purchases were made "in lieu of partial payment" for her day care services, and "included payments and purchases of groceries, gas and Amazon.com, but there were also random things there like paying my cable bill or taking my dogs to the groomer." (Ex. C-13.) These payments will not be considered; there is no evidence that they were discussed or authorized in any IPP or payment contract and there is insufficient evidence that they have a direct relationship to claimant's day care needs.

(d) The Service Agency expressed concern and questioned claimant's mother's credibility about her financial need in its post-hearing submission, upon its discovery from reviewing claimant's mother's recent bank statements of a bulk payment to claimant's grandmother on March 16, 2019, in the amount of \$15,000, two days before the hearing. (Exs. RC-12, C-11.) This bulk payment was not raised during the hearing to support any claim for reimbursement of specific day care hours, and we do not know the source of the funds. Unlike other bank records which identify monies paid to claimant's grandmother as payments, this payment is identified only as a "transfer," (Exhibit C-12). Claimant's mother set forth with specificity day care hours paid and unpaid, and did not specifically refer to the \$15,000 to support her request. As such, this transfer of funds to claimant's grandmother shall not be considered in determining paid or unpaid day care service hours for the years 2016 through 2019.

10. (a) Service Agency does not disagree with claimant's representation of the hours worked, but does not stipulate to the total number of

hours claimed that exceed the 88 hours per month set forth in the payment agreements. (Ex. RC-20-A.) The Service Agency agrees that it is generally flexible with increasing day care hours where the situation warrants an increase, such as extended school breaks; in that case the service coordinator would authorize the increased time and memorialize it in writing. Mother credibly and convincingly stated that she was forthcoming about claimant's day care needs with the Service Agency over the years. As set forth in her supplemental exhibit (Ex. C-12), claimant's day care schedule currently varies: during school he requires 85.5 hours a month; during school breaks, 11 hours daily. Claimant's mother's testimony regarding summer day care hours during 2017 and 2018 are supported by her communications with the Service Agency, (Exhibit C-2A); however, there is insufficient support for increasing the hours for 2016 above 88 hours a month, or from an annualized amount of 1,056.

(b) In 2016, Claimant's grandmother worked 1,082 hours. For the period beginning in late January 2018 through May 2016, Claimant's mother was paid for 376 hours and received a total of \$3,760. (Exs. RC-7, RC-20A.) Claimant's mother was not paid for day care services provided by claimant's grandmother for a total of 706 hours in 2016. (Ex. C-4-A.)⁷ In June claimant's grandmother

⁷ Claimant's mother claimed in her supplemental filing that she was not paid for 714.5 hours, (Ex. C-12), but failed to reconcile this higher total with the earlier exhibit which included calendars executed by claimant's grandmother, the day care provider (Ex. C-4A), the total calculation of monies owed for 2016 should not be affected because it is based upon the contracted annualized hours of 1,056, reduced by the claimant's estimate of excess hours worked in June 2016 (Exhibit C-11.).

worked 119 hours and should have been paid \$10 an hour, or \$1,190 (Exhibit C-11). For the remainder of the year, beginning July 1, 2016, Service Agency agreed to pay an hourly rate of \$11.13. Claimant's grandmother worked a total for 587 hours the remainder of the year, for a total of \$6,533.31, at \$11.13 an hour. The total amount of unpaid day care hours for 2016 for the period of June through December 2016, is \$7,723.31 (gross). However, this amount is reduced by 26 hours at a rate of \$10 dollars an hour awarded for the month of June, or a total of \$260. The total amount of unpaid day care services provided to claimant in 2016 for which the Service Agency is obligated is \$7,463.31

(c) In 2017, claimant's grandmother worked a total of 1,057.5 hours, which is 1.5 hours in excess of the total annualized amount of day care services authorized (Exhibit C-4A.). The total amount of unpaid day care services in 2017, at an hourly rate of \$11.13, is \$11, 769.97 (gross). The Service Agency is obligated to pay this total amount based upon the extra hours of day care required during claimant's summer schedule.

(d) In 2018, claimant's grandmother worked a total of 1131 hours, which is 81 hours in excess of the total annualized amount of authorized day care services (Exhibit C-4A.) Based upon her many notifications to the Service Agency of the need for increased hours, the 81 hours are authorized. The total amount of unpaid day care services in 2018, at an hourly rate of \$11.13, is \$12,588.03.

11. For the period beginning in June 2016 through 2018, the total amount of unpaid day care services is \$31,821.31. This amount excludes the Service Agency's payment of \$3,760 and all unpaid hours over the approved

annualized hours of 1,056 for 2016.⁸ This amount may need to be adjusted based upon any miscalculations.

12. (a) Claimant's mother added a day care provider in 2019. The Service Agency and claimant's mother are in agreement that claimant requires a day care provider skilled in applied behavior analysis (ABA) to better support claimant's day care needs. The Service Agency normally contracts with a vendor, but claimant's mother had already found an individual skilled in ABA techniques. The individual also works with regional centers through the Service Agency's vendor, but the vendor would not make the individual available because she works in an office assigned to a different regional center. There is no dispute that the individual is competent to provide day care services.

(b) If the Service Agency contracted through the vendor for the services of the individual ABA day care provider, it would pay the vendor an hourly rate of \$28. The vendor pays its ABA-trained day care providers an hourly rate of \$14 to \$16 (Ex. C-5A). Claimant's mother has been funding the ABA-trained day care provider at an hourly rate of \$15. The Service Agency will only agree to reimburse claimant's mother at a rate of \$11.13.

⁸ This amount was calculated from the exhibits supplied by the parties; particularly the claimant's grandmother's timesheets (Exhibit C-4A). It should be a close, if not exact, calculation of the total dollars owed, paid and unpaid, when the hourly rate and total number of hours are considered. Particularly with the 2016 calculations, some minor adjustments may be required to correct for any inadvertent mathematical errors or misreading of the claimant's mother's calendar, or the number of hours paid by the Service Agency.

(c) In addition to the ABA-trained day care provider, claimant's mother continued to use the services of claimant's grandmother. For the period January through March 2019, for which records were provided, claimant's grandmother provided 219.75 hours in services (Exhibit C-12); at an hourly rate of \$11.13, the total amount claimant's mother incurred for the day care services of claimant's grandmother during this period is \$2,445.82.

(d) For the period of January 2019 through March 2019, the ABA-trained day care provider worked with claimant, for a total of 64.5 hours, of which claimant's mother has paid for 200.50 hours, at an hourly rate of \$15, or \$3,007.50. (Ex. C-12.) At an hourly rate of \$15, the total hours worked cost \$4,263.75. The total amount of compensation already paid by claimant's mother is \$2,231.56. At an hourly rate of \$11.13, the total amount incurred by claimant's mother for the day care services of the ABA-trained provider from January through March 2019 is approximately \$3,163.70.⁹

13. (a) For the period beginning June 2016 the Service Agency has agreed to pay, on a reimbursement basis only, compensation for which claimant's mother can demonstrate through bank statements or other documentation that she paid for the service. Service Agency maintains that, despite the mistakes it made, it is bound by the Lanterman Act to only reimburse an individual for

⁹ After the hearing, claimant's mother added documentation for the month of March 2019, and also a payment in April 2019. From the supplemental submissions, the Service Agency considered claimant's records for day care payments in March, but it is uncertain if these are all the payments accrued as day care hours in March. (See Ex. C-11.) It did not review the payment in April 2019, in its decision to reimburse claimant's mother.

she paid for the service. Service Agency maintains that, despite the mistakes it made, it is bound by the Lanterman Act to only reimburse an individual for services paid, and only if the payment is supported by adequate records, which include, among other things, check registers, canceled checks, bank statements. (Ex. RC-20-A, citing § 4648, subdivision (a)(3)(B); Cal. Code Regs, tit. 17, § 50602.) Claimant's mother provided ledgers for all hours worked, which would have been sufficient if an FMS was established and operating, but was determined by the Service Agency to be insufficient on a reimbursement only basis.

(b) In response to the administrative law judge's post-hearing order, the parties did meet and confer regarding payment for day care services, and based upon its review of the records provided by claimant, including bank statements, contained in Exhibit RC-16 and Exhibits C10-6, and C10-7, the Service Agency agreed to pay a total of \$6,584.67, based upon an hourly rate of \$11.13. (Ex. RC-20-A.)¹⁰

(c) The Service Agency does not question claimant's report of the hours of day care services provided by either claimant's grandmother or the ABA-trained day care provider. Claimant's mother had previously provided timesheets to the FMS provider in 2016; and thereafter when there was no FMS provider had claimant's grandmother sign calendars and other documents confirming the hours worked.

¹⁰ The Service Agency did not consider the transaction from claimant's mother's account, dated March 16, 2019, to claimant's grandmother in the amount of \$15,000. This transaction was never mentioned by claimant's mother during the hearing, and was not explained as a method of payment for claimant's mother's hourly day care services, or support for reimbursement.

HOURLY RATE

14. For the period in January 2016 through June 30, 2016, the Service Agency agreed to pay a rate of \$10 an hour. After July 1, 2016, through the present, the Service Agency agreed to pay a rate of \$11.13 an hour for both day care providers. (Exs. RC-15, RC-20.) Claimant maintains that the hourly rate for services provided by claimant's grandmother, as of July 2016 and through June 2017 should be \$10.50, and from September 2017 through 2019, \$12, based upon the local minimum wage rate. Claimant maintains that the hourly rate for services provided by her ABA-trained day care service provider should be \$15.

15. (a) There is insufficient evidence to support claimant's position that the hourly rate for claimant's grandmother's day care services should be increased to \$12, over the Service Agency's agreement to pay an hourly rate of \$11.13. There is substantial evidence to support paying the ABA-trained provider an hourly rate of \$15.

(b) The Service Agency provided convincing evidence that it established the correct hourly pay rate for Claimant's grandmother's day care services at \$11.13, beginning July 2016. The Service Agency based its pay rate, as it is required to do, on the state requirements for the hourly minimum wage which was increased from \$10 by 1.13 percent to \$11.13 by a formula set forth in the Service Provider Reimbursement Rate Increase Ledger and confirmed in the Day Care Individual Providers rate sheet for vendors such as claimant who are identified by the number 455. (Exs. RC-15, RC-20, RC-20-A, and RC-21.) Claimant's established hourly pay rate of \$10.50 for the period of July 2016 through June 2017 is lower, and as such, is disregarded. (Ex. C-11.)

(c) Regarding claimant's grandmother, claimant failed to provide evidence that another day care service provider could not be found for \$11.13

dollars an hour. Claimant's mother maintains she had to pay a higher rate, based upon what the local minimum hourly wage rate. Claimant's mother maintains the most recent wage rate of \$15 for the County of Los Angeles should apply in 2019, but for earlier years, she also maintains that the local minimum wage rate for the City of Whittier, where she resides, supports a minimum wage rate of \$12 an hour. However, her position is not supported by the evidence. Before January 2019, the hourly wage for small employers, employers in Whittier with under 25 employees, was \$10.50; after January 1, 2019, the hourly rate increased to \$11. (Ex. RC-20.)

(d) Claimant provided substantial and convincing evidence that an ABA-trained provider could not be found for less than an hourly rate of \$15. Claimant's mother searched, advertised (Exhibit C-5), and worked with the Service Agency, which was ready to retain a vendor for an hourly rate of \$28 (staffed with ABA-trained personnel who receive an hourly wage between \$14 and \$16). As such, Service Agency is obligated to pay \$15 an hour for the current individual ABA-trained day care provider.

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. An administrative hearing to determine the rights and obligations of the parties, if any, is available by an appeal of a regional center decision to deny a service. (Code, §§ 4710-4714.) Claimant timely requested a hearing following the Service Agency's denial of requested services, and therefore, jurisdiction for this appeal was established.

2. (a) The standard of proof in this case is the preponderance of the evidence, because no law or statute requires otherwise. A preponderance of the evidence requires the trier of fact to determine that the existence of a fact is more probable than its nonexistence. (*Katie V. v. Superior Court* (2005) 130

Cal.App.4th 586, 594.) When a party seeks government benefits or services, he bears the burden of proof. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) However, with minor exceptions, claimant is not seeking a new service but compliance with the Service Agency's commitment to fund an existing day care service. Accordingly, Service Agency has the burden of proof to establish that the funding it agreed to does not have to be paid unless claimant complies with regulations governing reimbursement for Service Agency-approved services, including paying for the services, and providing bank statements or similar documentation as proof of payment. (See Evid. Code, §§ 115 and 500.) Service Agency also has the burden of proof that the agreed-upon hourly rate of no more than \$11.13 is the appropriate hourly rate where an exception does not apply, i.e., for day care services provided by claimant's grandmother.

(b) On an issue related to the amount of reimbursement, claimant bears the burden of proof with regard to the reimbursement of day care hours over and above the agreed-upon 88 hours of day care monthly, or 1,056 hours of day care annually. Claimant met his burden of proof as to the hours exceeding the agreed upon amount for 2018, but failed to meet his burden of proof for hours exceeding the agreed-upon amount for 2016 and 2017.

(c) On the issue of the hourly rate over the \$10 and \$11.13 that the Service Agency agreed to pay, regardless of which party bears the burden of proof, there was insufficient evidence to support an exception to the payment of the state hourly rate, but there was substantial evidence that an exception is necessary to secure an ABA-trained day care provider at an hourly rate of \$15 beginning in January 2019.

COORDINATION OF SERVICES AND FLEXIBILITY

3. There is no dispute that as a person with a developmental disability, claimant is eligible for services under the Lanterman Act, and that the day care services agreed to for claimant are consistent with the Service Agency's obligation under the Lanterman Act. (§ 4512, subd. (b); § 4685, subd. (c)(6).)

4. The governing law favors collaboration and flexibility in order to provide necessary services to eligible consumers and supports to their families. Regional centers are charged with the responsibility of carrying out the state's responsibilities to the developmentally disabled under the Lanterman Act, (§ 4620, subd. (a); *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384), and are responsible for assisting persons with developmental disabilities and their families in securing those services and supports which "maximize opportunities and choices for living, working, learning, and recreating in the community." (§ 4640.7, subd. (a).) The Lanterman Act directs regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP states the consumer's goals and objectives and delineates the services and supports the consumer needs in order to achieve the goals set forth in the Lanterman Act. (§§ 4646, 4646.5, and 4648.) These goals and objections are to take into account the individual needs of the client, and are aimed at "maximize[ing] opportunities for the consumer to develop relationships, be part of community life in the areas of community participation, housing, work, school, and leisure, increase control over his or her life, acquire increasingly positive roles in community life, and develop competencies to help accomplish these goals." (§ 4646.5, subds. (a)(2) & (d).) The IPP may be modified as necessary in response to changes in the underlying circumstances, and no less often than every three years. (§ 4646.5, subd. (b).)

5. The Lanterman Act obligates the regional centers to work closely with families “on a service coordination model in which each consumer shall have a designated service coordinator who is responsible for providing or ensuring that needed services and supports are available to the consumer.” (§ 4640.7, subd. b.) The Legislature’s intent is that an IPP should address the needs and preferences of the consumer and the family, through a collaborative process, in order to provide consumers with the opportunity to live independent, productive, and normal lives in a stable and healthy environment. (§§ 4646, and 4646.5.) Planning has a general goal of allowing all consumers to interact with persons without disabilities in positive and meaningful ways. (§ 4648, subd. (a)(1).) The planning process for the IPP includes gathering information including a “schedule of the type and amount of services and supports to be purchased by the regional center or obtained from generic agencies or other resources in order to achieve the individual program plan goals and objectives, and identification of the provider or providers of service responsible for attaining each objective, including, but not limited to, vendors, contracted providers, generic service agencies, and natural supports.” (§ 4646.5, subd. (a)(4).) The services and supports are to be flexible and individually tailored to the consumer and, “where appropriate,” his or her family. (§§ 4646, subd. (b), and 4648, subd. (a)(2).) Meeting the needs and honoring the choices of persons with developmental disabilities “requires information, skills and coordination and collaboration between consumers, families, regional centers, advocates and service and support providers.” (§ 4511, subd. (a).)

6. One important mandate included within the statutory scheme is the flexibility necessary to meet unusual or unique circumstances, which is expressed

in many different ways in the Lanterman Act. The Lanterman Act recognizes the importance of developing uniformity in the provision of services to improve cost-effectiveness, but also recognizes that exceptions may be required, e.g., to avoid "out of home placement or institutionalization." (See § 4620, subd. (f).) Services and supports provided by regional centers should be flexible and creative in meeting the unique and individual needs of families as they evolve over time, including the cultural preferences, values and lifestyles of families. (§ 4685, subd. (b).) Regional centers are encouraged to employ innovative programs and techniques (§ 4630, subd. (b)); to find innovative and economical ways to achieve the goals in an IPP (§ 4651); and to utilize innovative service-delivery mechanisms (§§ 4685, subd. (c)(3), and 4791).

COST-EFFECTIVENESS

7. The Lanterman Act also emphasizes cost-effectiveness in the provision of services. (See, e.g., §§ 4512, subd. (b), 4646, subd. (a), 4648, subd. (a)(11), and 4685.) Section 4691.9 requires that regional centers not pay an existing service provider for services at a rate higher than the rate in effect for such services, unless the regional center demonstrates that approval of the higher rate is necessary and has written authorization from DDS. The Lanterman Act requires the regional centers to control costs as far as possible, seek other resources to provide services when required, and to otherwise conserve resources that must be shared by many consumers. (See, e.g., §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.)

8. The Lanterman Act has in place measures that support the goal of cost-effectiveness by providing standards for payment, including reimbursement to vendors.

(a) The Lanterman Act provides for payment to service vendors or by contract, including the family, for the provision of necessary services to the consumer, also provides for regulations governing the vendorization process. (§ 4648, subd. (a)(3).) The regional center may reimburse an individual for services or support if the individual has, e.g., entered into a contract with the regional center. The director shall develop regulations governing vendorization. (§ 4648, subd. (a)(3)(B).)

(b) Regional centers are responsible for ensuring that vendors are paid for services provided, and generally rely upon vendors submitting records as defined by regulation. Records include "any book or document evidencing operational, financial, and service activities of a service provider or regional center pertaining to the service program and/or the provision of services to persons with developmental disabilities. Examples include books of account, general ledgers, subsidiary ledgers, check registers, canceled checks, contracts, correspondence, financial statements, internal reports, bank statements, standard cost statements, consumer files, purchase of service authorizations, and documents evidencing consumer services." (Cal. Code Regs. tit. 17, § 50602, subd. (m).)

9. The record requirements for reimbursement to vendors differ from the record requirements for SDP's who use FMS's. Claimant is vendored as an SDP under code 455. With support from regional centers, SDP's generally have access to an FMS to assist them with the distribution of funds for services, as set forth in factual finding 7, sections 4685.7, and 4687.7, subd. (i)(4)(E), and California Code of Regulations, title 17, section 58886. The vendor retained for 2016 accepted time cards, or FMS forms, as proof of hours worked and issued a check based upon these time cards or FMS forms.

10. Service providers are paid the “usual and customary rate” for services. (Cal. Code Regs., tit. 17, § 57300, subd. (e).) This rate is one that is regularly charged by a vendor that is used by both regional center consumers and where at least 30 percent of the recipients of the given service are not regional center consumers. (Cal. Code Regs., tit. 17, § 57210, subd. (a)(19). As set forth in the Findings, the DDS, based the hourly rate upon the state minimum wage: Its Service Provider Reimbursement Rate Ledger, which incorporates rate increases authorized by the state legislature, has established the rate of \$11.13, for day care services. This rate is reasonable; however, based upon the rate the Service Agency pays a vendor for ABA-trained day care providers, through an hourly charge of \$28, and the local reasonable charge for the same service of \$15, the Service Agency must pay an hourly rate of \$15 for ABA-trained day care providers.

DISCUSSION

11. With regard to the first issue, the Service Agency is obligated to pay claimant’s mother for paid and unpaid hours of service provided by the day care provider.

(a) This dispute presents a unique circumstance where the technical rules generally governing the process of reimbursing a consumer for expenditures made for services authorized, if applied, would conflict with the goals and purpose of the Lanterman Act. As set forth in the Legal Conclusions, the Lanterman Act mandates collaboration and flexibility in service of the primary goal of supporting consumers and their families. At the inception of complainant’s day care services in 2016, the Service Agency had satisfied its obligations, including assisting claimant’s mother with securing an FMS to process payments for day care services. By its own admission, the Service Agency,

shortly after approving day care services, failed to ensure that day care services were provided and the family was supported in the process, as it had for a short time in 2016, with an FMS.

(b) Overall, the Findings establish that the Service Agency failed in its statutory obligation to collaborate with claimant's mother to ensure the delivery of the agreed-upon day care services, and the cost of the day care services provided can reliably be ascertained by reference to the parties' agreement, the hourly rate, and the existing documentation, whether or not the provider was paid or is owed payment. Most likely, if the day care service provider was not claimant's grandmother, the day care services would have terminated years ago because without payment no one else would agree to work. At no time after the FMS was terminated is there evidence that the Service Agency provided any advice to claimant's mother as to an alternative method of repayment, such as reimbursement, and any obligation on her part to maintain records in any manner other than that which had been provided to the FMS. As a consequence of claimant's filing a section 4731 complaint, the Service Agency fully investigated the problem, and stipulated to the provision of day care services through 2021. However, Service Agency insisted that despite claimant's mother's history of using an FMS, it would reimburse claimant's mother only for monies she actually paid to her day care provider. Service Agency's inflexible approach to payment is inappropriate, especially where the payment is for an agreed-upon day care service, the provider of the service is the same as the provider who was paid through the FMS, and the Service Agency admitted it was responsible for the delay in payment.

12. With regard to the second issue, based upon the Findings and Legal Conclusion 10, the Service Agency shall pay day care services provided by

claimant's grandmother at a rate of \$11.13, beginning in July 2016, and a rate of \$15 for an ABA-trained day care service provider. This rate structure furthers the goal of the provision of cost-effective services set forth in the Legal Conclusions.

13. With regard to the third issue, the Service Agency is required to pay claimant's mother the following amounts: \$31,821.31 for the years 2016 through 2018; for the period of January through March 2019, \$2445.82 for claimant's grandmother, and \$3,163.70 for the ABA-trained day care service provider. All the calculations may be adjusted for mathematical errors; the calculations for 2019 shall be adjusted upwards by the hours that were not submitted and/or considered in the calculations.

ORDER

1. Claimant's appeal of the Service Agency's denial of reimbursement for day care services from 2016 through March 2019 is denied in part and granted in part, with the conditions for the grant of claimant's appeal set forth below.

2. Service Agency shall pay for 1,056 hours per year for the years 2016, 1057.50 hours for 2017 and 1131 hours for 2018 at the following hourly rate for services provided by claimant's grandmother: for the month of June 2016 at an hourly rate of \$10; for time period July 2016 through 2021 at an hourly rate of \$11.13, adjusted upward consistent with payment guidelines followed by DDS. The amounts paid should be consistent with the Findings. For the year 2019, the amount shall be adjusted to account for hours in March and April which were not submitted or considered prior to the close of the record.

3. Service Agency shall fund ABA-trained day care services for claimant at a minimum hourly rate of \$15 pay beginning in January 2019, adjusted upward only in the event the current ABA-trained day care service

provider is employed by a vendor retained by the Service Agency, the parties agree to another vendor, or another service provider cannot be located at that hourly rate. The amounts paid should be consistent with the Findings. For the year 2019, the amount shall be adjusted to account for hours in March and April which were not submitted or considered prior to the close of the record.

4. Service Agency shall not fund less than 1,056 hours per year of day care beginning in 2019 through 2021. Service Agency shall convene an IPP within 60 days of this decision to collaborate on the number of hours required during school, after school, and when school is in recess during 2019, and shall convene an IPP for the same purpose each subsequent year of the contract for day care services.

5. Within 30 days of this decision, Service Agency shall refund to claimant's mother all monies claimant's mother paid for day care services, shall refund to claimant's mother or claimant's grandmother, all outstanding and unpaid day care service claimant's grandmother provided from 2016 through March 2019, shall refund directly to claimant's mother all monies claimant's mother paid for the ABA-trained day care provider in 2019 and shall refund to claimant's mother or the day care provider directly any outstanding and unpaid day care service through at least March 2019, based upon the hourly rate authorized and the total number of hours calculated in Order numbers 2 and 3 above.

6. Within 30 days of this decision, claimant's mother shall cooperate with the Service Agency to enter into a new payment agreement under service code 024/Purchase Reimbursement, or alternatively set up an FMS for payment of services for the years 2016 through at least March 2019, or prepare and/or execute any other form required for claimant's mother to obtain reimbursement

for paid day care services, and for claimant's grandmother and the ABA-trained day care provider to obtain payment for unpaid day care services.

7. Within 30 days of this decision, Service Agency in collaboration with claimant's mother shall set up an FMS for payment of day care services beginning no later than April 2019.

DATED:

EILEEN COHN

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.