

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of the Fair Hearing Request of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL CENTER, Service Agency.

OAH No. 2021020876

DECISION

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on May 11 and June 2, 2021, via videoconference.

Jacob Romero, Fair Hearing Coordinator, represented Eastern Los Angeles Regional Center (ELARC or Service Agency). Claimant was represented by his Mother, who was assisted by Armida Y. Ochoa, a lay advocate. Susy Magana served as the interpreter during the first day of hearing, and Alex Zajdman served as interpreter during the second day of hearing.

Oral and documentary evidence was received. The record closed and the matter was submitted for decision on June 2, 2021.

ISSUE PRESENTED

Should the Service Agency be required to provide funding for day care services for Claimant?

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Claimant is a 10-year-old boy who receives services from ELARC pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.¹ He is eligible for services because he has Autism Spectrum Disorder (ASD). He also has Attention-Deficit Hyperactivity Disorder (ADHD) and anxiety.

2. On February 4, 2021, ELARC issued a Notice of Proposed Action (NOPA) which denied Claimant's request for three days of day care services per week. (Ex. 1.)

3. On February 22, 2021, Claimant's Mother executed and submitted a Fair Hearing Request (FHR), and she designated Ms. Ochoa to represent Claimant. In the FHR Claimant seeks day care services, five hours per day, three days per week. (Ex. 2.)

4. This proceeding ensued, all jurisdictional requirements having been met.

¹ All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

Claimant's Background

5. Claimant lives with his parents and his two siblings, ages 21 and 15, in the Service Agency's catchment area. His father works full time, outside of the home, and into the night. The older sibling has a job, and the younger sibling, still in school, is engaged in various extra-curricular activities. Mother at this time does not work outside of the home.

6. As noted above, Claimant has been diagnosed with ADHD in addition to ASD, and he was reportedly diagnosed with Social Communication Disorder prior to his diagnosis of ADHD. (Ex. 16, p. 78.)² In an assessment conducted in September 2020 by the firm that provides Claimant behavioral services, the Vineland-3 test of adaptive functioning was administered. Claimant's Adaptive Behavior Composite score was 56, placing him in less than the bottom one percent of those tested with the Vineland. (*Id.*, p. 79.) The scores on the three domains assessed by the Vineland-3 were similarly low: Communication score 49; Daily Living Skills score 62; Socialization score 42. The Daily Living Skills score place Claimant in the bottom one percent; the scores on the other two domains placed him in less than the bottom one percent. (*Id.* at p. 80.) Claimant is substantially disabled in terms of communication, daily living skills, and socialization.

7. Claimant can communicate with three-word sentences. His parents must assist with all his self-care needs; he will assist in dressing and self-care by helpful movements, but his parents brush his hair and his teeth. Claimant is toilet trained but

² Page citations are to the pagination applied by the parties to their exhibits, and not the particular or internal page of the exhibit unless otherwise noted.

needs help wiping himself; he has accidents both day and night, and his mother described that he will urinate on himself when outside the home. (Ex. 5.)

8. Claimant has inappropriate behaviors. He is easily frustrated and reacts poorly to change, or when he doesn't get what he wants. He will hurt himself by biting and peeling his nails or he pulls his hair. Claimant runs about the house and climbs on the furniture, a behavior seen in a video recording offered in evidence. He sometimes talks to himself. He cannot sleep alone, because he is scared of the dark and he reports seeing things. Claimant lacks safety awareness and must be closely attended when outside the house. He is not aware that he should not touch sharp objects or the stove when hot, and sometimes takes his seatbelt off. (Ex. 5.)

9. Claimant does not play with other children well. He may start playing along side other kids, but eventually will go and play by himself. He tends to prefer socializing with adults. Covid-19 has increased his isolation. Since the Covid-19 pandemic, he has been attending school through Zoom. (Ex. 5.)

Current Services

10. Claimant was enrolled in a special education fourth grade class and was receiving services responsive to his ASD and other conditions. For example, he was receiving recreation therapy, speech and language therapy, and behavioral interventions from his school district.

11. Claimant receives behavioral therapy, funded by Medi-Cal, and has quarterly visits to a psychiatrist who provides medications to help manage his anxiety and ADHD. The Service Agency is providing respite care, which was increased in the last Individual Program Plan (IPP). That IPP, made in January 2021, added personal

assistant services to help manage Claimant when he is attending school through remote learning. Those services are slated to end once Claimant's school re-opens.

12. Claimant receives social skills training, and a March 1, 2021 progress report shows improvements in some areas. The report recommends further interventions. (Ex. 6.)

13. ELARC is funding respite care and personal assistant services. Respite care services had been provided 30 hours per month, and an additional 20 hours per month were added during the Covid-19 pandemic. Personal assistant hours were added, four hours per day, to assist with on-line learning from the home. From February to May 2021, this amounted to 76 or 80 hours per month, but the personal assistant hours will drop to 32 in June 2021, as the school year runs down. (Ex. 7, p. 48.)

The Requested Day Care Services

14. Mother requested day care services, totaling 15 hours per week, so that she could work part-time outside of the family home. She provided evidence to the Service Agency that she had a job opportunity. (Exs. 8, 9, I.)

15. In January 2021, Claimant's service coordinator and her supervisor determined Claimant was not eligible for day care services due to his age. Mother requested that the service agency's clinical team review Claimant's "situation" to see if he qualified for an exception to the Day Care policy. (Ex. 7, p. 48.)

16. The clinical team was asked to review the case. Subsequently, Dr. Figuerroa, presumably a physician, informed the service coordinator that she does not routinely review for day care services, and that in any event she had no medical

records to review. Dr. Bienstock, a psychologist, was “consistent with Dr. Figueroa’s feedback, clinical review is not typically provided for Day Care requests.” (Ex. 7, p. 49, at February 2 entry.) According to the Interdisciplinary Notes—essentially chart notes—Dr. Bienstock noted that Claimant has considerable support and services, but that if there are behavioral issues, perhaps further behavioral services should be discussed. (*Id.*, pp. 49-50.)

17. The email between Dr. Bienstock and Claimant’s service coordinator is similar to the ID notes. However, Dr. Bienstock stated in the email that “I did read through the documents and it seems that [Claimant] has some rather significant behavioral difficulties that may be difficult for parent to manage especially with school being conducted virtually as well as having other children at home.” (Ex. 15.) Dr. Bienstock wondered if there was “something specific” that prompted the request for day care services, indicating that the issue of Mother’s desire for work was not clearly the basis of the request. (*Id.*)

18. Claimant’s service coordinator informed Mother, on February 2, 2021, that the ELARC clinical team believed considerable supports were being provided, but it might be helpful to contact the agency providing the ABA (behavioral) services about an increase in those services. It was further suggested Mother might apply for In Home Supportive Services—IHSS—which is a generic source of services to assist in and around the home. Mother did not want to increase the ABA services because it would overlap with the school program, and she was not interested in IHSS at that time. Mother wanted to appeal the matter. (Ex. 7, p. 50.)

19. During the hearing, Mother testified about her situation. Her family needs more income, but without day care for Claimant, it is impractical for her to work. Her income from her proposed part-time job would be offset by the costs of day care.

Claimant introduced a chart setting out the costs of a day care service in his area. That provider charges a daily rate of \$55, and an hourly rate of \$13, for children over five years of age; the costs increase for younger children. (Ex. G, p. 115.) And, given Claimant's behavioral issues, it is not clear that a typical day care service would accept him. While the Service Agency would provide an aide to assist Claimant's participation in a traditional day care where there are multiple children, the presence of an aide would have to be agreed to by the day care provider, which acceptance may not be forthcoming.

20. During the hearing, Mr. Romero pointed out that Mother could be paid by IHSS to provide care and services for Claimant, and that often occurs in cases such as this. However, Mother testified she does not have a social security number, so that avenue is barred. However, that does not foreclose the possibility of employing some other person to come into the house to provide care and supervision of Claimant while Mother worked outside the home.

The Directive by the Department of Developmental Services

21. The parties to this matter referred to a written directive by the Department of Developmental Services (DDS) issued March 30, 2020, in response to the state of emergency declared by Governor Newsom. (The Directive.) Claimant asserted the Directive supported her case; the Service Agency disagreed.

22. The Directive states that its purpose was to waive or modify portions of the Lanterman Act and the regulations that have been enacted to help carry out the Act. It stated that DDS recognized there may be instances where consumers, regional centers, and service providers need flexibility to receive and provide services. (Ex. 20, p. 120.)

23. However, the Directive pertains to cases where the consumers are using “participant direction” to coordinate services. The Directive points out that at the time it was issued, consumers could use participant direction to coordinate respite care, day care, transportation, nursing, and day services. The Directive added to the list of services which could be coordinated with participant direction, adding personal assistance, independent living skills, and supported employment to that list. (Ex. 20, p. 120.)

24. The Directive does not provide relaxed standards for when a consumer may receive day care services. A consumer can not obtain day care services simply because of his or her participation in participant direction; both the Lanterman Act and regulations pertaining to participant direction make it clear that the consumer’s family remains obligated to provide some part of the expense of day care, absent certain exceptions, discussed below.

Other Findings

25. ELARC has written service policies pertaining to provision of day care services. (Ex. 3.) In essence, the policy provides that as a general rule, the Service Agency will not fund day care services for children under age 13. In order to depart from the general rule, the IPP team must have exhausted all generic resources, and it must be determined that the family meets requirements of financial need or hardship. In turn, financial need will be determined by verifying the family’s income, which must be shown to be at or below the Federal Poverty Guidelines.

26. While Claimant has demonstrated some financial need for assistance with day care expenses, that was limited to the fact that the income from a part-time job would be offset by the costs of day care. The family income was not shown to be at or

below the Federal Poverty Guidelines. Further, it has not been demonstrated that day care services must be provided in order to keep Claimant in the family home. Finally, although Claimant's mother has pointed to some problems with obtaining IHSS services, that has not been foreclosed. As noted above, someone other than Mother might be hired with IHSS funding to come into the home to provide day care when Claimant is not in school and Mother is working.

LEGAL CONCLUSIONS

Jurisdiction

1. Jurisdiction was established to proceed in this matter pursuant to section 4710 et seq., based on Factual Findings 1 through 4.

General Rules Applicable to Resolving Service Disputes

2. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act mandates that an "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community." (§ 4501.) These services and supports are provided by the state's regional centers. (§ 4620, subd. (a).)

3. The California Legislature enacted the Lanterman Act "to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community . . . and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community." (*Association for Retarded*

Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 388; hereafter, *ARC v. DDS*.)

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

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

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

7. Section 4512, subdivision (b), provides a list of services that may be provided, in appropriate circumstances, to a consumer of regional center services. It includes day care as one of the available services. However, other statutes and regulations limit the provision of day care services.

8. Services provided must be cost effective (§ 4512, subd. (b)), and the Lanterman Act requires the regional centers to control costs so far as possible, and to otherwise conserve resources that must be shared by many consumers. (See, e.g., §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) To be sure, the obligations to other consumers are not controlling in the decision-making process, but a fair reading of the law is that a regional center is not required to meet a disabled person's every possible need or desire, in part because it is obligated to meet the needs of many people and families.

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

10. Pursuant to section 4646, subdivision (a), the planning process is to take into account the needs and preferences of the consumer and his or her family, "where appropriate." Further, services and supports are to assist disabled consumers in "achieving the greatest amount of self-sufficiency possible" In the planning process, the planning team is to give the highest preference to services and supports

that will enable a minor to live with his or her family, and an adult person with developmental disabilities to live as independently in the community as possible. Planning is to have a general goal of allowing all consumers to interact with persons without disabilities in positive and meaningful ways. (§ 4648, subd. (a)(1).)

11. In developing or modifying an IPP, a regional center is obligated to have a process that ensures compliance with applicable laws and regulations, and when purchasing services a regional center is to ensure that it is acting in conformity with its approved policies, that generic resources are being utilized where appropriate, and there must be compliance with section 4659. Finally, the process must consider the family's responsibility to provide similar services and supports to a minor child without disabilities, although it must consider the consumer's need for extraordinary care, services, supports and supervision. (§ 4646.4, subd. (a).)

12. The planning process includes the gathering of information about the consumer and "conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. . . . Assessments shall be conducted by qualified individuals Information shall be taken from the consumer, his or her parents and other family members, his or her friends, advocates, providers of services and supports, and other agencies." (§ 4646.5, subd. (a)(1).) Given that services must be cost effective and designed to meet the consumer's needs, it follows that assessments must be made so that services can be properly provided in a cost-efficient manner.

13. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each consumer's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a) & (b), 4648, subd.

(a)(1) & (a)(2).) The Lanterman Act assigns a priority to services that will maximize the consumer's participation in the community. (§§ 4646.5, subd. (2), 4648, subd. (a)(1) & (a)(2).) Under section 4640.7, each regional center is to assist consumers and families with services and supports that "maximize opportunities and choices for living, working, learning, and recreating in the community."

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

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

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

Other Law Applicable in this Case

17. Section 4685 pertains, generally, to home services and supports for children with developmental disabilities. It supports the policy of assisting in keeping disabled children in their homes and with their families, which benefits the children, and the State, as it can be cheaper to support a disabled child at home, than to provide an out-of-home placement.

18. However, section 4685, subdivision (c)(6), places limits on a regional center's ability to provide day care. That subdivision states:

When purchasing or providing a voucher for day care services for parents who are caring for children at home, the regional center may pay only the cost of the day care service that exceeds the cost of providing day care services to a child without disabilities. The regional center may pay in excess of this amount when a family can demonstrate a financial need and when doing so will enable the child to remain in the family home.

19. Regulations pertaining to participant directed services have provisions that mirror the provisions of section 4685, subdivision (c)(6). California Code of Regulations, title 17 (CCR), section 58886, subdivision (e)(1)(B) provides:

Participant-directed day care services for children shall only be authorized by regional centers for day care costs and/or hours exceeding the cost of providing day care services provided to a child without disabilities. The regional center may pay in excess of this amount when a family can

demonstrate a financial need and when doing so will enable the children to remain in the family home.

20. The ELARC purchase of services policy for day care is in substantial compliance with section 4685, subdivision (c)(6) and CCR section 58886, subdivision (e)(1)(B).

Dispositive Conclusions of Law

21. The Directive issued by DDS does not provide an avenue of relief for Claimant. It does not relax the rules pertaining to eligibility for day care service provided under the participant directed service model. It only allows other service types to be provided under that model. Even if Claimant was receiving services under the participant directed model, the Service Agency could not fund day care absent a showing of financial need and a showing that day care funding was necessary to keep Claimant in the home.

22. Leaving aside the ELARC service policies, the applicable statutes and regulations bar the regional centers from paying for day care services of the type provided for non-disabled children, absent a the showing of financial need, and the necessity of funding the services to keep the child in the family home.

23. The evidence does not establish financial need as defined by the statutes, and it does not establish that funding for day care services is necessary to keep Claimant in the family home.

24. It is fundamental that a regional center is the "payor of last resort," that generic services must be exhausted or unavailable before the regional center must pay for a service. That has not occurred, because IHSS services may be available, even if

Mother is not able to be employed under that program. Another trusted family member or friend might be employed to provide day care with IHSS funds, or perhaps a past or current provider of respite care or personal assistant services could be so employed. Such avenue has not been adequately explored.

25. In all of the circumstances, and based on all the foregoing, Claimant's appeal must be denied.

ORDER

Claimant's appeal regarding his request for day care services is denied, and ELARC shall not be required to pay for day care for Claimant.

DATE:

JOSEPH D. MONTOYA
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.