

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

In the Matter of:

CLAIMANT,

vs.

NORTH LOS ANGELES COUNTY REGIONAL CENTER,

Service Agency.

OAH No. 2021040874

DECISION

Thomas Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by telephone and videoconference on August 12, 2021. Stella Dorian, Fair Hearings Representative, appeared on behalf of the Service Agency, the North Los Angeles County Regional Center (NLACRC). Claimant's mother represented claimant. Names of claimant and her family are omitted to protect privacy.

This matter is governed by the Lanterman Act, that is, the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code sections 4500 through 4885. Testimony and documents were received in evidence. The record was closed, and the matter was submitted for decision at the conclusion of the fair hearing.

STATEMENT OF THE CASE

During the COVID-19 pandemic from March 2020 through June 2021, the Service Agency partially funded services it characterized as daycare for claimant. Her parents were working from home and, like others during the health care crisis, were deemed to need assistance with claimant's care while they worked. Claimant disputes that the services should be considered daycare or, however they are characterized, parents should not be required to bear any part of the costs of the services.

ISSUE

Whether claimant's in-home services are properly categorized as daycare or whether rather they should be re-characterized so that parents need not share the cost of such services.

SUMMARY OF DECISION

Like much else during the pandemic, services funded by the Service Agency were modified to preserve safety and productivity. Daycare was one such service. Typically provided as assistance for parents to be able to work safely outside the home, daycare has been reconfigured to assist parents confronted with the novel challenge of working remotely while providing care for a disabled child at home. But the services are nevertheless daycare. There was no credible evidence to support a recharacterization of the services, such as labeling them personal assistance. The Service Agency properly assessed parents with part of the cost of the services.

FINDINGS OF FACT

1. With a Fair Hearing Request dated April 16, 2021, claimant timely appealed the Service Agency's April 6, 2021, Notice of Proposed Action, Exhibit 1.
2. Claimant, nine years old, is eligible for services under the Lanterman Act based on a diagnosis of autism spectrum disorder (ASD). Claimant lives with her parents, a younger brother, and her mother's parents.
3. Claimant's November 5, 2020, Individualized Program Plan (IPP), Exhibit 9, notes that claimant has certain behavioral excesses which are described as mild. Tantrums occur weekly and claimant shows repetitive body movements. Claimant has some tendency to elope. She requires close supervision in and outside the home. At the time of the IPP, there was a decrease in claimant's maladapted behaviors, and it was determined that behavioral intervention services were not needed.
4. Unusual circumstances caused by the COVID-19 pandemic affected claimant as reflected in March 2020 Interdisciplinary (ID) Notes. Claimant's Consumer Services Coordinator (CSC) Victoria Velasco, among other Service Agency personnel, prepare ID Notes to record their activity and communications on matters of significance to consumers and their families. As set out in CSC Velasco's March 16, 2020, ID Note:

CSC received email from mother requesting more respite hours due to school closures. In email mother stated that she needs respite hours while she works from home. CSC replied and stated that because she will be working it is

considered to be in home daycare instead of respite. CSC emailed her a list of daycare copayment schedule.

Claimant's In-Home Daycare

1. The Service Agency has employed Jennifer Thrum for 19 years. She worked as a CSC for six years. Afterwards and currently she has supervised a unit of CSC's, including CSC Velasco. Ms. Thrum's duties include ensuring compliance with the Lanterman Act, review of requests for the purchase of services (POS), and general personnel issues.

2. Ms. Thrum described how the Service Agency established a need for In-Home Daycare services for claimant and her family during the COVID-19 pandemic. Mother requested the services due to school closure, as noted in a March 19, 2020, addendum, Exhibit 4, to claimant's December 2017 IPP. Though mother typically worked outside the home, she was working from home because of the pandemic and needed help while working to attend to claimant's needs. The Service Agency provided funding for 40 hours per week of In-Home Daycare with a \$2 per hour parental share of cost beginning March 20, 2020.

3. As Ms. Thrum testified, the amount of the parental share of cost for In-Home Daycare is based on the 2019 U.S. Department of Health and Human Services Poverty Guideline. She referenced more specifically a Service Agency document, the Procedure for Determining Financial Assistance for Daycare Co-Payment, based on 2019 Poverty Guideline Effective January 11, 2019, Exhibit 11, which includes a family fee schedule scaled to family size and monthly income level. The Service Agency's procedure is further clarified by a publication of the ASPE (the Office of the Assistant

Secretary for Planning and Evaluation), the 2019 Poverty Guidelines, Exhibit 12, which are used to determine financial eligibility for certain federal programs.

4. At first claimant's In-Home Daycare services were funded for short periods, about a month. Thus, an April 28, 2020, addendum, Exhibit 5, to claimant's December 2017 IPP, reflects that mother sought an extension of the In-Home Daycare services. Later addenda, Exhibits 6 and 7, reflect similar extension requests.

5. The Service Agency was taking a measured approach to claimant's family's needs as developments relating to the pandemic unfolded. Thus, as set out in a September 17, 2020, addendum, Exhibit 8:

The IPP team convened to review the current family support plan in place related to the school closures due to the COVID-19 pandemic. The team reviewed the current school schedule and supports being provided by the school district as well as the generic and natural resources that are available to the family.

Based on the above, the IPP team is in agreement to continue the current family support plan. The team further agrees that should school reopen for in-person learning prior to the end of the current semester, then the currently authorized services will terminate on the date of reopening. Should schools reopen under a modified or hybrid model that includes both in-person and online teaching, the team will reconvene to determine appropriate adaptations to the current plan.

6. Taking into account family need and the circumstances of the health care crisis caused by the pandemic, the Service Agency ultimately agreed to extend claimant's In-Home Daycare services to June 30, 2021.

Dispute over Parental Share of Cost of Daycare

7. The NLACRC Service Standards, Exhibit 14, which the Department of Developmental Services (DDS) approved on November 16, 2018, define and distinguish between day care services and personal assistant services:

A. In-Home Daycare is generally provided, as set out in Exhibit 14, pages 24 and 25, when a parent cannot attend to a disabled child for work-related reasons:

Day care services mean services that provide appropriate non-medical care and supervision, while a parent is engaged in employment outside of the home and/or educational activities leading to employment, to ensure the consumer's safety in the absence of family members. Day care services will attend to the consumer's basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by the family member.

B. Personal assistant services are for exceptional circumstances, when one person alone cannot care adequately for the disabled child, as set out in Exhibit 14, page 26:

Personal assistant services are to assist with bathing, grooming, dressing, toileting, meal preparation, feeding and protective supervision is a typical parental responsibility for minor children. Personal assistant services for minor children will be considered on an exception basis when the needs of the consumer are of such a nature that it requires more than one person to provide the needed care. There may be exceptional circumstances as a result of the severity and/or intensity of the developmental disability that may impact the family's ability to provide specialized care and supervision while maintaining the child in the family home.

8. Under the definition of Daycare services in the NLACRC Service Standards, quoted above, the services have not been available if a parent, like claimant's mother, is not kept from home by work or education or training meant to lead to work. But the definition was made more flexible to adapt the services to circumstances brought on by the pandemic. As set out in a March 20, 2020, Directive, Exhibit 13, from DDS to service agencies, the governor on March 12, 2020, issued Executive Order N-25-20, under which DDS waived and modified:

certain [Lanterman Act] requirements . . . and/or certain provisions of . . . the California Code of Regulations The Department recognizes that to ensure the health, welfare and safety of regional center consumers and the general population, there may be instances where consumers,

regional centers, and service providers will need flexibility to receive and provide services and supports.

The March 20, 2020, Directive specifically waived certain costs that families had been assessed, but not those relating to Daycare services:

Any requirements related to the Family Cost Participation Program (FCPP) pursuant to Welfare and Institutions (W&I) Code section 4783, and the Annual Family Program Fee (AFPF) pursuant to W&I Code section 4785, are waived.

9. Mother told CSC Velasco in late 2020 that she believed her family should not be required to share any costs for In-Home Daycare. As stated in CSC Velasco's December 14, 2020, ID Note:

CSC received email from mother to state that she was recently informed that because I have the medical waiver, it will waive the share of cost and does not need to pay share of cost for my respite and covid hours. CSC emailed her to explain that FCPP is waived but not the share of cost for in home daycare.

10. In January 2021, as CSC Velasco reported to Ms. Thrum in a January 21, 2021, email, Exhibit 13, mother had sent her the DDS Directive of March 20, 2020, on which mother was basing her assertion that there should be no cost to the family for In-Home Daycare.

11. CSC Velasco responded to mother's January 21, 2021, email regarding cost sharing as reflected in CSC Velasco's January 25, 2021, ID Note, Exhibit 10: "CSC

explained that letter [the DDS Directive] pertains to FCPP and AFPP. Also, that daycare is part of parental responsibility.”

12. After Service Agency personnel informed mother that the \$2 assessment for In-Home Daycare had not been waived, she inquired whether the services might be converted to or considered personal assistance, or some other service that would not require cost-sharing.

13. At hearing, mother proffered at first no evidence to support her appeal of the Service Agency’s decision that the services the family was receiving and for which a \$2 assessment was deemed appropriate were In-Home Daycare. She modified this testimony, however, stating that an assessment was not fair, that there should be some way of considering the services so that no monetary amount need be assessed.

14. Mother then stated that caring for claimant requires more than one person. For this reason, she stated, the appropriate services should be considered personal assistance. But mother was not insisting on personal assistance, Her belief, based on the toll that care for claimant takes on the family and on persons sent to help with care, should be considered services, however they might be characterized legally, for which no assessment should be imposed.

PRINCIPLES OF LAW

1. Welfare and Institutions Code section 4685, subdivision (c)(6), provides:

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.

2. Welfare and Institutions Code section 4783 established the FCPP, the Family Cost Participation Program that is a subject of CSC Velasco's December 14, 2020, ID Note, quoted above. As the Code section 4783 states, the FCPP's purpose is to assess "a cost participation to parents" for children receiving services, such as claimant.

ANALYSIS

1. The Service Agency must follow the Lanterman Act in all particulars. It is the law that created service agencies and governs how they function. The Lanterman Act prescribes the types of services that service agencies may fund and how they may fund them.

2. A service about which the Lanterman Act is quite specific is daycare. Under Welfare and Institutions Code section 4685, subdivision (c)(6), daycare may be only partially funded. The Service Agency may not disregard the specific provisions of this law to fund daycare without cost participation by parents.

3. There are policy reasons for parental cost participation in daycare, including the policy to respect and foster relationships.

A. The policy may not be explicitly stated in Welfare and Institutions Code section 4685, but any reasonable interpretation of the law brings it to light. This requires little more than considering the statute in its context, the intent of Lanterman Act as a whole. As stated in Welfare and Institutions Code section 4501, services for those with developmental disabilities should:

support their integration into the mainstream life of the community. . . . The contributions made by parents and family members in support of their children and relatives with developmental disabilities are important and those relationships should also be respected and fostered, to the maximum extent feasible, so that consumers and their families can build circles of support within the community.”

B. Parents’ cost participation in daycare ensures that working parents are not removed from responsibility, including financial responsibility, for their children. It is a way to respect and foster the relationship between parent and child.

C. At the same time, a service agency’s partial funding of daycare ensures that a community resource, daycare, is available to help parents with their responsibility.

D. With daycare and parents’ cost participation in daycare, both the parents and the community are, as intended by the Lanterman Act, maintaining relationships with the developmentally disabled.

4. Another policy reason for parental cost participation in daycare is the Lanterman Act’s mission, again as articulated in Welfare and Institutions Code section 4501, to enable persons with developmental disabilities “to approximate the pattern of

everyday living available to people without disabilities of the same age.” Parents who work outside the home may have a child in daycare, and if so, it is part of everyday living that the parents pay for daycare. Parents of the developmentally disabled should be in the same position. A subsidy from a service agency to pay in part for daycare eliminates the extra cost that care for a developmentally disabled child may impose, putting all parents, whether or not their children have developmental disabilities, in approximately the same position to work and to arrange at the same time for care for the needs of their children during the day. In this way parents of the developmentally disabled are, also as stated in Welfare and Institutions Code section 4501, “empowered to make choices” without being unduly encumbered by financial concerns.

5. The \$2 assessment for In-Home Daycare services that the Service Agency calculated is a simple form of the cost participation that the Lanterman Act and its policies promote. This cost participation in daycare is not the same cost participation established by the FCPP under Welfare and Institutions Code section 4783. DDS waived the FCPP cost participation, as indicated in DDS’s March 20, 2020, Directive. DDS did not waive the separate cost participation for In-Home Daycare. If mother’s assertion that the family should not pay the \$2 assessment is based on the March 20, 2020, Directive, this is a misinterpretation of the directive and a mistaken assertion.

6. Mother’s testimony at the fair hearing was honest and direct. She urged that hardship for her family in caring for claimant should be a sufficient basis for waiver of the cost participation the Service Agency has mandated. In some contexts, mother’s argument would be correct. Hardship may modulate policy. The waiver of FCPP cost participation is itself an illustration. With the extra hardships brought on by the pandemic, DDS judged that a hardship should be removed, and so waived FCPP cost participation to alleviate hardship during the current health crisis. But the

argument is not appropriately extended to the \$2 assessment for In-Home Daycare services.

7. The Service Agency, as already stated, must follow the law. The law, as currently enacted, does not provide for removing cost participation in daycare by parents on the basis of hardship alone. Parents, whether or not their children are developmentally disabled, endure some hardship, in the form of financial sacrifice, to send their children to daycare. The Lanterman Act already allows for the removal of some of that hardship by subsidizing daycare for the developmentally disabled, so that, as stated above, it is roughly equivalent in cost for all families.

8. The Service Agency, moreover, does not have the powers that DDS holds. Rather it is DDS that is empowered by the Legislature to oversee service agencies, as provided, for instance, in Welfare and Institutions Code sections 4510 and 4511. Thus, the NLACRC Service Standards, as set out above in Finding of Fact 11, were subject to DDS's approval. So also, DDS was empowered to order that service agencies waive FCPP cost participation, because DDS is empowered to promulgate, and does promulgate, policies and procedures for service agencies. DDS has not promulgated a policy or procedure such as mother argues should be in place for claimant and her family. The Service Agency has not the power to promulgate such a policy.

9. Mother urged in the alternative that the Service Agency should not be required to assess any amount for services her family receives for claimant's care while mother is working. A way to arrive at this conclusion would be to consider the services something other than daycare. Mother was not arguing that the services must be characterized as personal assistance or be put in any other category of services. She urged that, whatever the label put on the services, the family should not be required to share in their cost. This argument, however, disregards the specifics of the statutory

scheme under which service agencies operate, as discussed above. It impermissibly substitutes vagueness for the distinct policies for fostering relationships and the like that the Lanterman Act is in place to promote.

10. Mother provided some testimony that, if the services at issue are categorized, they could be considered personal assistance. In support of this position, mother stated that more than one person is needed during the day to attend to claimant's needs. That is, while mother is working, claimant could not be left with only one caregiver, but must have the care of at least two people. This testimony by mother was not credible, however. Claimant's IPP's describe her and her care and her progress toward goals in a way that indicates her care is generally manageable by a single caregiver. Indeed, mother declined services because, as set out above in Finding of Fact 3, mother has observed a decrease in claimant's maladapted behaviors.

CONCLUSIONS OF LAW

Claimant's in-home services are properly categorized as daycare, or In-Home Daycare. They should not be re-characterized. The Service Agency properly assessed parents with a share of the cost of the services.

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ORDER

Claimant's appeal is denied.

DATE:

THOMAS LUCERO

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.