

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

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL CENTER,

Service Agency.

OAH No. 2021050262

DECISION

Irina Tentser, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on March 18, 2022.

Jacob Romero, Fair Hearing and HIPAA Coordinator appeared on behalf of East Los Angeles Regional Center (ELARC or Service Agency).

Claimant's grandmother, V. C., acted as Claimant's representative at hearing. Claimant's mother was present throughout hearing. (The family members first and last name initials are used to protect privacy.)

Testimonial and documentary evidence was received. The record was left open until March 24, 2022 for parties to file closing briefs. The record closed and the matter was submitted for decision on March 24, 2022.

ISSUE

Should Service Agency be required to reimburse Claimant's mother \$2,000 for the cost of a privately funded psychological evaluation of Claimant?

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-12; Claimant's exhibits A through C and H through L.

Testimonial: Jacob Romero; Claimant's grandmother and representative and mother (Mother).

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a four-year-old boy. Prior to turning three years old, Claimant received services from Service Agency under the California Early Intervention Services Act, commonly referred to as Early Start. (Gov. Code, §§ 95000 et seq.)

2. By letter dated April 6, 2021 (NOPA), Service Agency notified Mother of its determination that Claimant will not be eligible for regional center services under

the Lanterman Developmental Disabilities Act (Lanterman Act) after his third birthday, and that Claimant's Early Start services will terminate at his third birthday.

3. On April 29, 2021, Mother filed a fair hearing request (FHR), on Claimant's behalf, to appeal Service Agency's determination that Claimant is not eligible for services under the Lanterman Act. Mother indicated the reason for requesting a fair hearing was that Service Agency's appointed psychologist performed a non-clinical evaluation of Claimant based only on progress notes, which caused Claimant's "ineligibility" for regional center services after age three. (Exh. 2.) Mother requested that Service Agency continue Claimant's status as a regional center client with all active services and reimburse her for the cost of a psychological evaluation she privately funded, as discussed below.

4. In August 2021, while Claimant's fair hearing request was pending, the parties notified OAH that the issue of Claimant's eligibility for regional center services had been resolved. (Exh. 6.) As a result, the sole remaining issue to be decided by the Administrative Law Judge at hearing would be Mother's request for reimbursement for the cost of the privately funded psychological evaluation.

Early Start

5. The Early Start program provides services for infants and toddlers from birth up to age three. (See Gov. Code, § 95014; Cal. Code Regs., tit. 17, §§ 52020, 52022.)

6. Service Agency is required to assess Early Start at least three months prior to their third birthday to determine the client's eligibility for regional services under the Lanterman Act after age three. (Cal. Code Regs., tit. 17, § 52112.)

Evaluation by Dr. Beinstock

7. Three months prior to Claimant's third birthday, Service Agency referred Claimant to Dr. Randi Beinstock for a psychological evaluation to assist in determining Claimant's eligibility for ongoing regional center services under the Lanterman Act.

8. On March 3 and 10, 2021, Dr. Beinstock conducted a psychological evaluation of Claimant. Due to COVID-19 restrictions in effect at the time, including a stay-at-home order, Dr. Beinstock's evaluation was conducted virtually through Zoom.

9. The evaluation included review of Claimant's initial Early Start Intake Assessment report dated February 28, 2020; review of Claimant's therapeutic progress reports from Speech and Occupational Therapies as well as Infant Stimulation interventions; an approximately 15-minute clinical observation of Claimant via Zoom; and administration of autism rating scales with Mother as informant. Dr. Beinstock prepared a written report which summarized her findings and conclusions (Exh. 3.)

10. Dr. Beinstock concluded that her evaluation of Claimant "did not result in any concerns related to a possible diagnosis of Autism Spectrum Disorder." (Exh. 3, p. 19.) However, Dr. Beinstock acknowledged the limitations of interactive video in performing the evaluation and recommended that a follow-up in-person evaluation of Claimant be conducted writing once the Covid stay-at-home order is lifted. In her written report, Dr. Beinstock explained:

However, there are clearly limitations regarding the use of interactive video. In addition, due to the continued restrictions as a result of the Covid-19 pandemic, an in-person follow-up session could not be scheduled prior to [Claimant's] third birthday. Overall, a DSM-5 diagnosis of

Autism Spectrum Disorder is not believed to be warranted at this time. Again, while current observations and review of prior information do not indicate that [Claimant] displays characteristics of behaviors consistent with Autism Spectrum Disorder, *a follow-up session or re-evaluation should be conducted in person, once the Covid-19 Stay at Home order is lifted.* This will allow for further evaluation, observation and direct testing related to reported characteristics of Autism Spectrum Disorder.

(Exh. 3, p. 19 (emphasis added).)

11. On April 1, 2021, Lana Lopez, Early Intervention Service Coordinator II, notified Mother by email that Dr. Beinstock's psychological evaluation had been received and that "[B]ased on the findings, [Claimant] did not qualify for continued regional services after the age of 3." (Exh. H.) As mentioned above, Service Agency's April 6, 2021 letter also notified Mother of this determination.

12. On April 13, 2021, Mother sent Ms. Lopez an email stating that she disagreed with Dr. Beinstock's evaluation and that she would be seeking a private evaluation. Mother also indicated she would be filing a fair hearing request, and requested that Service Agency continue Claimant's services, based on information that regional center services were to be extended six months because schools were not fully in session and pending the hearing. (Exh. H.)

13. On April 14, 2021, Ms. Lopez sent Mother an email response. Ms. Lopez, in her email, stated she would provide Mother the documentation necessary for an appeal and clarified that regional center service extensions were being offered until

May 11, 2021, for those children who have not had an Individualized Education Program (IEP) with their school district. (Exh. H.) Ms. Lopez also informed Mother she would ask her supervisor about Mother's request for an extension of Claimant's services during the appeal process. (*Ibid.*) In another email on April 14, 2021, Ms. Lopez notified Mother that her supervisor indicated that services for claimant could continue during the fair hearing process. (*Ibid.*)

Parent-Funded Evaluation by Dr. Freeman

14. Service Agency did not offer Mother the option of an in-person psychological re-evaluation after Mother notified ELARC that she intended to appeal the April 6, 2021 determination that Claimant ineligible for services under the Lanterman Act. As a result, Mother believed she would be responsible for obtaining an in-person psychological evaluation for Claimant's appeal.

15. Mother contacted her private insurance to identify a psychologist, in network, familiar with Autism Spectrum Disorder and who specialized in performing evaluations for young children. Mother found that none of the in-network choices specialized in doing evaluations for children Claimant's age and/or were available to perform an in-person evaluation.

16. After conducting further research, Mother chose B.J. Freeman, Ph.D., a licensed clinical psychologist who specialized in Autism Spectrum and Related Developmental Disorders, to conduct an in-person evaluation of Claimant. The evaluation was scheduled for June 3, 2021, which was the earliest date available with Dr. Freeman.

17. On May 7, 2021, Jacob Romero emailed Claimant's representative. (Exh. 7.) In the email, Mr. Romero notified Claimant's representative that ELARC would be

reopening to the public on June 7, 2021 and suggested "having [Claimant] come back to regional center to have the in-person evaluation instead of going through the extra expense [of a private psychological evaluation]." (*Id.*) Prior to Mr. Romero's email, Service Agency had not offered Mother the option of an in-person evaluation.

18. Mother did not pursue the option of an in-person evaluation with Service Agency offered in Mr. Romero's May 7, 2021 email. Mother believed Service Agency's follow-up in-person assessment would be with Dr. Beinstock. Mother disagreed with Dr. Beinstock's prior psychological evaluation, which was the basis for Service Agency's decision that Claimant was ineligible for services. Mother disagreed with Dr. Beinstock's prior evaluation based on its quality and findings. For example, throughout her written report, Dr. Beinstock incorrectly identified Claimant's gender as female and used feminine rather than masculine pronouns. (See Exh. 3.) Further, Mother had already scheduled a definite date, i.e., June 3, 2021, for an in-person psychological evaluation by the time ELARC started the discussion of an in-person psychological evaluation with Dr. Freeman, and Covid-19 restrictions make scheduling any in-person services extremely challenging.

19. On June 3, 2021, Dr. Freeman conducted an in-person psychological evaluation of Claimant. (Exh. 2.) Based on Dr. Freeman's evaluation, Claimant received a diagnosis of Autism Spectrum Disorder, Level 2. (*Id.*) On June 3, 2021, Mother was billed \$2,000 for the cost of Dr. Freeman's evaluation. Mother paid the total amount due (\$2,000) on July 10, 2021.

Record Review by Dr. Ballmaier

20. On August 20, 2021, Heike Ballmaier, Psy.D., BCBA-D, performed ELARC's psychologist record review of Claimant. Dr. Ballmaier wrote:

Overall, it appears that concerns had been present about developmental and Autism symptoms since [Claimant] started ES [Early Start] services. Such concerns were later confirmed during formal testing by Dr. Freeman. [Claimant] is thus eligible for Regional Center services under Autism.

(Exh. 5.)

21. Claimant and Service agency executed a Notification of Resolution (NOR), dated August 23 and 25, 2021, notifying OAH that the issue of Claimant's eligibility for regional center services had been resolved. (Exhibit 6.) The NOR stated that the matter had been resolved based on the following:

Dr. B.J. Freeman conducted an in-person assessment on 6/03/21, which diagnosed the claimant with Autism Spectrum Disorder. Subsequent regional center Psychologist Record Review dated 08/20/21 from Dr. Heike Ballmaier found the finding in Dr. Freeman's report valid. Claimant is eligible for regional center services under the diagnosis of Autism [*sic*] Spectrum Disorder.

(*Id.*)

Request for Reimbursement

22. At hearing, ELARC's Fair Hearing Coordinator, Jacob Romero testified that Service Agency is not required to reimburse Claimant for the \$2,000 cost of Dr. Freeman's psychological assessment. According to Mr. Romero, Claimant should bear the cost of the private evaluation because Claimant rejected Service Agency's offer to

have one of its vendors perform an in-person psychological evaluation at no cost to Claimant.

23. In the alternative, Mr. Romero testified that if ELARC is required to reimburse Claimant for the cost of the private psychological evaluation, the reimbursement be limited to the maximum rate Service Agency can pay a vendor for a psychological evaluation under California Code of Regulations, Title 17, section 57332, of \$644.19.

24. Claimant's representative argues, in relevant part, that because ELARC failed to schedule an in-person assessment prior to finding Claimant ineligible for Lanterman Act services thereby necessitating a private evaluation to be arranged by Claimant, used Dr. Freeman's report to find eligibility for regional center services, and because Claimant should have been found provisionally eligible, reimbursement of the \$2,000 cost of the assessment is warranted.

25. The contention that Claimant should have been found provisionally eligible is without legal support. The amendment to Welfare and Institutions Code section 4512 allowing provision eligibility did not become effective until July 2021, and, therefore, was not in effect at the time Mother filed the FHR. Nothing in the amended section 4512 indicates it applies retroactively.

LEGAL CONCLUSIONS

1. Service Agency is generally not required to fund for a non-vendored private psychological evaluation. However, based on equitable principles and the circumstances presented by the evidence in this case, Claimant's mother is entitled to

a partial reimbursement in the amount of \$644.19 of the \$2,000 total amount she paid for Dr. Freeman's psychological evaluation of Claimant.

2. The Legislature has determined that there is a need to provide appropriate early intervention services individually designed for children under the age of three years, who have or are at risk of having disabilities, to enhance their development and to minimize the potential for developmental delays. (Gov. Code §§ 95001, subd. (a)(1) and 95014, subd. (a); Cal. Code Regs., tit. 17, § 52020, subd. (a).)

3. Each eligible child shall have an IFSP, which will identify all required early intervention services necessary to meet the unique needs of the child. Each child shall be provided a service coordinator who will be responsible for facilitating the implementation of the IFSP and for coordinating with other agencies and persons providing services to the family. The service coordinator will also be responsible to inform the child's parents of the availability of additional non-required services which may provide assistance to the family. (Gov. Code §§ 95018 and 95020, subd. (a); Cal. Code of Regs., tit. 17, §§ 52106, subd. (b)(6), 52108, subd. (a)(1), 52120, subd. (a)(1) and (2), and 52121, subd. (a)(4).)

4. A purchase of service authorization (POS) shall be obtained from the regional center for all services purchased out of center funds. The authorization shall be in advance of the provision of service, except regarding emergency services. The emergency services exception requires *both* that services are rendered at a time when authorized regional center personnel cannot be reached *and* that the service was necessary and appropriate. (Cal. Code Regs., tit. 17, § 50612, subs. (a) and (b).) "Services" are, however, to be distinguished from a "funding source" or "purchase" of the services. (Cal. Code of Regs., tit. 17, §§ 52000, subd. (b)(12), 52106, subs. (b)(6) and (7) and (d), 52108, subd. (a)(1).) Accordingly, the requirement that services be

authorized in advance does not apply to the method of payment or the funding source for such services.

5 The maximum rates of reimbursement by regional centers for non-residential services, such as a psychological evaluation, is based on the schedule of maximum allowances or the vendor's usual and customary rate. (Cal. Code of Regs., tit. 18, § 57332.) In this case, the Medi-Cal Schedule of Maximum Allowances (SMA) rate for a regional center vendored psychological evaluation is \$644.19.

6. It is undisputed and has been found above that Claimant was at all relevant times eligible for early intervention services, that an in-person psychological evaluation was necessary to evaluate Claimant's eligibility for regional center services under the Lanterman Act to ensure that Claimant received timely and critical services appropriate to meet his developmental needs, that both of those services were explicitly identified as required services by Dr. Beinstock in March 2021.

7. For unknown reasons Service Agency failed to perform the in-person psychological re-evaluation of Claimant in a timely manner prior to finding him ineligible for services under the Lanterman Act. In accordance with the intent, purpose, and policies underlying EISA and based on the exigent circumstances presented by scheduling in-person evaluations in a timely manner during the Covid-19 pandemic to ensure Claimant received critical and timely services as a developmentally disabled child, equity demands reimbursement of the cost of Claimant's private psychological evaluation at the regulatory maximum rate of \$644.19.

8. Claimant's argument regarding ELARC's failure to follow Dr. Beinstock's recommendation to perform a follow up in-person re-evaluation prior to finding Claimant ineligible for services has merit. Further, the fact that ELARC relied on Dr.

Freeman's June 3, 2021 private evaluation in reversing its determination of ineligibility is supported by the credible evidence.

9. Based on the totality of the circumstances, equity requires ELARC to reimburse Claimant for the cost it would have paid for an in-person re-evaluation of Claimant had Service Agency properly followed Dr. Beinstock's recommendation and conducted an in-person evaluation of Claimant prior to finding Claimant ineligible. Claimant's mother notified ELARC prior to filing the FHR in April 2021 that she would be pursuing a private evaluation. Service Agency took no steps at that time to schedule an in-person evaluation with one of its vendors.

10 The May 2021 email from Mr. Romero provided no specific date prospective date for an in-person evaluation, including a general statement that Service Agency would reopen as of June 7, 2021. Because Claimant's FHR was already pending as of May 2021 and that an in-person re-evaluation was definitively scheduled with Dr. Freeman on June 3, 2021 during times when the Covid-19 pandemic made scheduling in-person evaluations challenging, Claimant's course of securing a private assessment was reasonable and necessary to ensure Claimant, who is developmentally disabled, received critical and timely regional center services.

11. By reason of Factual Findings 1 through 25 and Legal Conclusions 1 through 10, Service Agency shall be required to reimburse Claimant in the amount of \$644.19.

ORDER

1. Claimant's appeal regarding the Service Agency's obligation to reimburse the family for the cost of Dr. Freeman's June 3, 2021 psychological evaluation is granted in part and denied in part.

2. Service Agency shall reimburse Claimant's mother in the amount of \$644.19 of the \$2,000 paid by her for Dr. Freeman's June 3, 2021 psychological evaluation of Claimant within 90 days of the date of this decision.

DATE:

IRINA TENTSER

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.