

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

In the Matter of the Fair Hearing Request of

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2022050085

DECISION

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on October 26, 2022 by videoconference. It was heard along with the case brought by Claimant's twin sister, OAH Case No. 2022050081; the cases involve the same issues. However, separate decisions shall issue, one for each case.

Claimant was represented by her Mother and their advocate, Armida Ochoa. Westside Regional Center (WRC or Service Agency) was represented by Ron Lopez, Executive Director's Designee. (Titles are used to preserve confidentiality.)

Oral and documentary evidence was received. The record was held open until November 3, 2022, so that Mother could file a written statement, and so that the Service Agency could respond to that closing statement.

Mother submitted her written statement which is identified and made part of the record as exhibit J. WRC did not respond to the closing statement, the record closed, and the matter submitted for decision on November 3, 2022.

On November 4, 2022, Mother submitted two documents to OAH. The first was a letter to the ALJ, dated November 4, 2022, informing him that Mother and Ms. Ochoa had met with Mr. Lopez, and they were transmitting a copy of a letter to WRC. The second document was a copy of a letter to WRC, also dated November 4, 2022, addressed to Mr. Lopez and other WRC personnel. The ALJ did not read the letter to WRC in its entirety, as he discerned that it tended to memorialize discussions by Mother and Claimants' advocate on the one hand, and WRC representatives on the other, about ongoing issues between the parties, which might implicate the cases under submission to the ALJ. Later that day, Mother submitted another letter to the ALJ by filing it with OAH. As with the other two letters, it was not filed with Case Center, the digital evidence platform. The third letter was apparently in response to a letter from Mr. Lopez to the ALJ, dated November 4, 2022, which the ALJ had not reviewed. The ALJ stopped reviewing the letter after the first paragraph.

On November 7, 2022, the ALJ issued an order that gave notice to WRC of Mother's potential ex parte contact, because it was not evident that she had copied her November 4, 2022 submissions to WRC. The ALJ ordered the record re-opened until November 14, 2022, so that WRC could respond to the letters from Mother.

The ALJ, in his Order reopening the record, ordered that Claimant was not to file any other correspondence pertaining to the cases without the express permission of the ALJ, and not submit correspondence to the ALJ about any other matters pending with OAH, with the express permission of the ALJ.

On November 9 and 10, 2022, WRC submitted several documents to OAH, primarily including a copy of Mr. Lopez's November 4, 2022 letter, and proofs of service, along with an Objection to Documents Submitted by Claimant's Ex Parte Contact. Claimant's Mother submitted further documents on November 9 and 10 in response to the ALJ's order, without obtaining the ALJ's permission.

The Service Agency's objections are sustained. The three submissions by Claimant filed November 4, 2022, shall not be marked or considered in determining this case, nor shall the filings made by her on November 10, 2022, in contravention of the ALJ's order.

The record was closed on November 14, 2022, and the matter again submitted for decision.

The ALJ hereby makes his factual findings, legal conclusions, and order.

ISSUE PRESENTED

May WRC terminate learning support hours/distance learning support hours of services, on the grounds that Claimant has returned to in-person school?

EVIDENCE RELIED ON

Exhibits 1-9 and A-1 to J; testimony of Mother.

A Note About Exhibit Labels

Claimant submitted exhibits labelled with letters and in turn those exhibits were often subdivided, and labelled with numbers, i.e., exhibit A-3, exhibit E-2. Claimant's exhibits total 45 items in Case Center, the digital evidence platform. The exhibits were not in order when loaded into the digital evidence management platform. Prior to the hearing, the ALJ endeavored to place Claimant's exhibits in order, so that the list submitted by Claimant may differ in description from that in the final evidence bundle.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Claimant is a twelve-year-old boy who receives services from WRC pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act or the Act), California Welfare and Institutions Code, section 4500 et seq. (All statutory references are to the Welfare and Institutions Code.) He is eligible for services because he has Autism Spectrum Disorder (ASD) and Mild Intellectual Disability, both eligible condition under the Act. (Ex. 6, p. A20.) Other conditions affect his day-to-day activities.

2. On April 11, 2022, the Service Agency issued a Notice of Proposed Action (NOPA). The NOPA stated the proposed action was to terminate remote learning support hours/distance learning support hours. The reason stated in the NOPA was

Claimant had returned to school in person on March 21, 2022, and was no longer attending school remotely. (Ex. 3, p. A14.)

3. A letter accompanied the NOPA (NOPA Letter), which slightly expanded on the NOPA. The NOPA Letter noted that Mother had stated Claimant returned to school on March 21, 2022, and because remote learning hours, also known as distance learning support hours, were provided on a time limited basis while schools were closed due to the Covid-19 pandemic. Thus, it was the Service Agency's position that there is no longer a need for remote learning services. (Ex. 3, p. A13.)

4. Mother filed a Fair Hearing Request (FHR) on April 6, 2022, before the NOPA and NOPA letter were issued. Apparently, WRC had informed Mother of its position on further remote learning services before issuing the NOPA, as she references in the FHR, WRC's "March 30, 2022 decision to decline to fund the Distance Learning Service." (Ex. 3, p. A12.)

5. The matter was submitted to OAH to schedule a hearing. As noted above, a similar case was opened for Claimant's twin sister, and the two cases were calendared together for hearing. The hearings were twice continued, the first time at Claimant's request, and the second time at WRC's request. Mother waived time to conduct and complete the hearing process when she moved for a continuance in June 2022.

6. All jurisdictional requirements have been met.

Services Provided to Claimant

7. Per Claimant's Individual Program Plan (IPP), the Service Agency is providing 35 hours per month of respite care, and Mother has filed an appeal for

another seven hours per month. Mother is also in the appeal process for 27 hours per month of specialized supervision. The distance learning at issue here encompasses another 20 hours per week of specialized supervision. (Ex. 6, p. A35.) As authorized by a directive from the Department of Developmental Services, the services had been provided during the Covid-19 pandemic to assist families whose children were living at home. (Ex. 5.) Social skills training has been provided in the first part of 2022 but it is not clear that the service was re-authorized. (Ex. 6, p. A38.)

8. Mother testified that Claimant receives 115 hours per month of In-Home Support Services (IHSS), with Mother acting as the provider. Claimant's sister receives the same amount of IHSS hours.

9. In her closing statement, Mother asserted that WRC is providing the distance learning hours as "gap" funding, and she points to an email from WRC's Director of Client Services to the effect that the twins were receiving such as gap funding. (Ex. D-1, p. B142.) Mother wants the gap funding written into the IPP, seemingly pursuant to sections 4648, subdivision (g), and 4647, subdivision (a), as well as general provisions found in section 4501. (Ex's. D-5, J.)

Claimant's Background

10. Claimant was one of premature triplets, born at 26 weeks, which led to delays in his development. (See Ex's. G-3, p. B286.) One of his siblings has passed away. Claimant lives with his twin sister within the Service Agency's catchment area along with his mother and his female cousin, and until recently her father lived with him as well. In November 2016 Mother became guardian of Claimant's cousin after her brother, the child's father died. (Ex. E-4, pp. B185-186.) Claimant's young cousin has disabilities including Attention Deficit Hyperactivity Disorder (ADHD) and a learning

disorder, but is not a regional center consumer. As noted previously, Claimant's twin sister is a consumer of the Service Agency. The twins have many disabilities in common.

11. Claimant's father spent many years working for a local fire department. In October 2022, he relocated to Northern California to work for a fire department, as a mechanic. The start date for his new job was October 17, 2022. (Ex. E-3, p. B184.)

12. According to his Individual Program Plan (IPP), Claimant also suffers from Spastic Diplegic Cerebral Palsy, a history of seizures, chronic constipation and chronic lung disease. (Ex. 6, p. A20.) A report by a pediatric neurologist indicates Claimant also suffers from ADHD, inattentive type. (Ex. G-3, p. B286.) That same neurologist, Nicole Cobo, M.D., reported that a psychological evaluation from October 2021 found Claimant has a full-scale IQ of 67. He had a general adaptive composite score of 48, less than in the 0.1 percentile. (*Id.*)

13. Like his sister, Claimant has visual impairments. According to his optometrist, he suffers from Saccadic Dysfunction, Deficient Smooth Pursuit, Accommodative Infacility, and Binocular Dysfunction. The optometrist, Elizabeth Nace, OD, FAAO, opines that these conditions are contributing to Claimant's learning problems. He has trouble recognizing forms and remembering them correctly, which can lead to reading problems, and may impinge on his ability to navigate. Claimant is seen in her office once per week for visual processing therapy and he completes 20 minutes of home therapy each day. Dr. Nace reports he is also engaged in Occupational Therapy (OT) on a weekly basis. (Ex. G-1, p. B285.)

14. According to Claimant's IPP, he is ambulatory and verbal; he speaks in four- or five-word sentences, though the words are not always clear. Mother reported

Claimant needs assistance with all activities of daily living, including dressing. He needs help in bathing, brushing his teeth, and he is not completely toilet trained. He suffers from chronic constipation, and he starts a clean out process on Friday. Claimant needs help feeding himself. Claimant lacks safety awareness, and he is easily distracted. He struggles with multi-tasking and has no concept of money. (Ex. 6, pp. A20-A21.)

Education

15. Claimant is eligible for special education services on the basis of Other Health Impairment. (Ex. F-1, p. B210.) His most recent Individualized Education Plan (IEP) review occurred on September 6, 2022. A number of goals were shown as not met, due to non-attendance. This appears to be the result of Parents placing Claimant in a non-public school other than the one in which the school district placed him. (See Ex. 6, p. A26 [Mother reported on September 1, 2022 Claimant changed schools].)

16. Per Claimant's IPP, he was receiving speech therapy, occupational therapy, physical therapy, and vision therapy. (Ex. 6, p. A38.) Whether he is receiving those services in his current school placement is not clear. The IEP did refer to speech and language services, noting he was receiving 60 minutes per week of such services during the regular school year. He was described as compliant during therapy, but needed repetition of directions. He was not yet independently formulating questions for the therapist. (Ex. F-1, pp. B216-B217.)

17. Claimant could use school provided computers to access assignments, and he used a speech-to-writing function. He was described as a cooperative child. (Ex. F-1, p. B217.) He was otherwise described as a happy boy who was ready to learn and engage in activities. (*Id.* at p. B215.)

18. The IEP notes that Woodcock Johnson achievement tests showed that Claimant's scores were low. For example, his spelling score was 44, writing sample score was 54, and sentence language fluency was 41. (Ex. F-1, p. B214.) Math facts fluency and calculation scores were below 40. (Id., p. B213.) These scores are at least three standard deviations below the mean.

Household Issues

19. As noted above, Claimant lives with his disabled sister and cousin. Father is now living in Northern California. Additionally, Mother helps in the care of her aged parents. Mother does not work outside the home and is not a student. The household circumstances present significant challenges for Mother.

20. Claimant's sister shares many of his disabilities, as she suffers from ASD, Borderline Intellectual Disability (full scale IQ of 82), Spastic Diplegia Cerebral Palsy, and ADHD, inattentive type. Her general adaptive composite score of 47, is less than in the 0.1 percentile. (Ex. G-5, p. B289.) She is eligible to receive special education services under the category of autism. (Ex. F-2, p. B253.) Her Woodcock Johnson Achievement scores were significantly better than Claimant's, many of them falling in the low average to average range.

21. Mother utilizes many of the IHSS hours at night, partly because Claimant or his sister will have toileting accidents at night, necessitating a change of clothing and bedding. Further, she testified the twins have respiratory issues that sometimes demand her attention at night.

22. Claimant's school is far from the family home. According to the Google map provided by Claimant, his commute one way to school is approximately one hour, a trip of approximately 40 miles. (Ex. H-2, p. B293.) The IEP does not disclose why

transportation is not being provided by the school district, but that may be explained by the fact Claimant is attending a non-public school of his parents' choice, and not the non-public school placement offered by the school district.

23. Claimant's twin attends a school 28 miles from the family home, with an estimated drive time of 45 minutes each way. (Ex. H-6, p. B299.) Mother testified the school district does not have enough bus drivers, but the IEP indicates that Claimant's sister attends a magnet school which may provide transportation, but such services are not part of the her IEP. Claimant's parents disagreed with the school district's position, urging home-to-school transportation. (Ex. F-2, p. B282.)

24. Claimant's cousin attends a third school. The travel time to that school is not made clear by the record.

25. Mother testified she needs more help in her household, especially after her husband's relocation. She is not using her respite hours to get a break from the rigors of caring for two regional center consumers, instead using it for other purposes. Getting the children ready for school and getting them to school (and back) is an especial challenge. There are other demands on Mother's time and resources, such as medical or therapy appointments, and care for her parents.

26. According to a document generated by Mother, "Personal Schedule [Sister]," Mother "work[s]" from 7:30 a.m. to 2:30 p.m., caring for her parents Monday through Friday, a total of 35 hours per week. (Ex. E-5.) The document does not show Mother performing such work on the weekend, and how her parents are cared for then is not disclosed by the record. Mother indicates on the Personal Schedule that she needs added support when Claimant is not in school.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. Jurisdiction was established to proceed in this matter pursuant to section 4710 et seq., based on Factual Findings 1 through 6.

2. Where a change in services is sought, the party seeking the change has the burden of proving that the change in services is necessary, by a preponderance of the evidence. (See Evid. Code, §§ 115 & 500.) Preponderance of the evidence means evidence that has more convincing force than that opposed to it. (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324.) Because a change in services is sought by the Service Agency, it should bear the burden of proving that the change is necessary.

General Rules Applicable to Resolving Service Disputes

3. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The 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).)

4. 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*.)

5. 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 establish such terms. (See § 4710.5, subd. (a).)

6. 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.)

7. 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).)

8. Section 4512, subdivision (b), defines "services and supports for persons with developmental disabilities" broadly, as meaning:

specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of an independent, productive, and normal life.

9. Section 4512, subdivision (b), provides a list of services that, in appropriate circumstances, may be provided to a consumer of regional center services. The services and supports that may be provided are not limited to those set out in the statute. The list is extensive.

10. There are limits on provision of the services set out in section 4512, subdivision (b). One limit is the general rule that the regional centers may not supply services and supports available from generic resources. (§§ 4648, subd. (a)(8); 4659, subd. (a), (c).)

11. Services provided must be cost-effective (§ 4512, subd. (b)), and the 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.) 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.

12. The IPP is to be prepared jointly by the planning team. (§ 4646, subd. (d).) The planning team 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).)

13. When purchasing services and supports for a consumer, a regional center shall ensure the following: (1) conformance with the regional center's purchase of service policies, as approved by the Department of Developmental Services pursuant to section 4434, subdivision (d); (2) use of generic services and supports when appropriate; (3) use of other services and sources of funding as contained in section 4659; and (4) consideration of a family's responsibility for providing similar services and supports for a minor child without disabilities. (§ 4646.4, subd. (a).)

14. 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 is plain that assessments must be made by the regional centers so that the IPP team can plan appropriate services.

15. One important mandate included within the statutory scheme is the flexibility necessary to meet unusual or unique circumstances. 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. As set forth previously, the regional centers are to pursue generic services as part of service coordination. The core rule has long resided in section 4648, subdivision (a)(8), which provides that "Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." Traditionally, generic services or agencies were defined as those described above, agencies using public funds to serve members of the general public. Hence, public schools were and are generic sources.

17. Section 4659 has long provided that the regional centers shall identify and pursue all possible sources of funding for consumers receiving services. Section 4659 underwent substantial revision in 2009. The statute retained its mandate for the regional centers to pursue sources of funding for their consumers, such as generic resources (school systems, Medi-Cal, etc.). The statute now provides that the regional centers shall not purchase services that could be obtained by the consumer from traditional generic resources, as well as "private insurance, or a health care service plan when a consumer or family meets criteria of this coverage but chooses not to pursue that coverage." (§ 4659, subd. (c).)

18. As previously noted, the regional centers are obligated to assure that IPP's conform to the regional center's purchase of service policies as approved by the Department of Developmental Services. (§4646.4, subd. (a)(1).) Further, the regional center must consider the "family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting. In this determination, regional centers shall take into account the consumer's need for

extraordinary care, services, supports and supervision, and the need for timely access to this care.” (§ 4646.4, subd. (a)(2).)

Legal Conclusions Dispositive of the Case

19. The Service Agency may terminate the social distance/learning hours. They were provided for a particular need, to assist the family in educating their children from the home, instead of in school. That particular need no longer exists and should not be an IPP goal. Further, the services were time-limited in that they were to be provided until school reopened. In light of section 4512, subdivision (b), requiring that services be provided for consumer needs, and section 4646.5 requiring time limitations on services, the Service Agency has proved a change of circumstances that justifies a change in services.

20. This does not establish that other services and supports are not needed. As discussed in the hearing, parents of three non-disabled children have a task ahead of them every morning when trying to get their children ready for school and then to the gates of the school, ready for learning. It is plain that Claimant, his sister, and his cousin, given their disabilities and enrolled in three different schools, “create [the] need for extraordinary care, services, supports and supervision, and the need for timely access to this care.” (§ 4646.4, subd. (a)(4).)

21. Mother has taken the position, with some justification, that her family’s unique circumstances should control over the definition of services, set out in statutes or service policies, that tend to constrict what the Service Agency can provide. For example, because she does not work outside of the home, or is not enrolled in school, she is denied day care services that otherwise may be justifiable. The ALJ cannot

simply ignore the conditions set out in statutes, which conditions determine whether a service can be offered.

22. The record does not support the order of other services at this time, although they appear necessary, and could perhaps be ordered under the rubric of personal assistance. Mother's position that services should be treated as "gap" services—services to fill a gap in between other services—is problematic, in the sense that DDS and the regional centers have a service classification system designed to manage the resources allocated to the regional centers, and there is no evidence that system encompasses "gap" services. At the same time, the ALJ is aware that the parties have other open cases, that are pending mediation and fair hearing. The parties can take up a creative approach to further assisting the family at that time.

ORDER

Claimant's appeal is denied, and the Service Agency may terminate the learning support hours/distance learning support hours.

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.