

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

In the Matter of the Fair Hearing Request of:

CLAIMANT,

vs.

SAN GABRIEL/POMONA REGIONAL CENTER,

Service Agency.

OAH No. 2023040162

DDS No. CS0004003

DECISION

Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on August 21, 2023, by video conference.

Claimant, who was not present, was represented by his Mother. Their names are not used in the interest of privacy.

San Gabriel/Pomona Regional Center (SGPRC or Service Agency) was represented by Daniel Ibarra, Manager of Appeals and Resolution.

Oral and documentary evidence was received. The record closed and the matter was submitted for decision on August 21, 2023.

ISSUE PRESENTED

Claimant originally requested funding for a one-to-one aide to assist him in a classroom in a private school, which Service Agency denied. At the outset of the hearing, the parties agreed the issue had changed to whether Service Agency should be ordered to reimburse Claimant's parents for the cost of the aide during a three-month period, in the approximate amount of \$2,500.

EVIDENCE RELIED ON

In determining this matter, the ALJ relied on Service Agency's exhibits 1 through 11 and Mother's testimony. The ALJ also took official notice of the OAH file in making Factual Findings 6 and 7.

FACTUAL FINDINGS

The Parties and Jurisdiction

1. Claimant is a nine-year-old boy who receives services from SGPRC pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act or the Act), California Welfare and Institutions Code, section 4500 et seq. (Further statutory citations are to the Welfare and Institutions Code unless otherwise noted.) He is eligible for services because he has Autism Spectrum Disorder (ASD), an eligible condition under the Act. (E.g., Ex. 11, p. A82.)

2. Service Agency is one of the 21 regional centers in California that are authorized to provide services to persons with developmental disabilities who are eligible under the Act.

3. By a letter to the Service Agency dated March 13, 2023, Mother requested the Service Agency's assistance in funding a one-to-one aide in Claimant's third-grade classroom at a private school. Mother related that the school gave the family one week to find an aide, or to leave the school, which would suddenly place the child mid-semester back in a public school general education classroom. (Ex. 3.)

4. On March 21, 2023, Service Agency issued a Notice of Action (NOA), a letter that denied the requested service of a one-to-one aide. The letter accompanied a form NOA. (Ex. 1.) In the letter, the Service Agency asserted, as the primary reason for service denial, that Claimant's public school district was an available generic resource, and that Claimant would have to avail himself of the school district's educational resources.

5. Mother filed a timely appeal and this proceeding ensued. (Ex. 2.) All jurisdictional requirements have been satisfied.

6. The hearing was set for May 31, 2023, by videoconference. On that day the parties agreed to continue the hearing, Claimant waiving the requirement that a decision be rendered within 90 days of the filing of the appeal. Claimant did not waive the requirement that a decision be issued within 10 business days of the hearing. The hearing was continued to July 13, 2023.

7. On July 12, 2023, Mother made a motion to continue the July 13, 2023 hearing, which motion was not opposed. The hearing was then continued to August 21, 2023, which as noted in the preamble, occurred on that date.

Claimant's Background

8. Claimant, an only child, lives with his parents in the Service Agency's catchment area. He will be 10 years old in October. According to Mother, Claimant was diagnosed with ASD when he was two years old, and received Early Start services. Claimant was provided with special education services by his school district (District) through the time he was in kindergarten; the District provided Claimant with occupational therapy, and speech and language services. For a time he had a one-to-one aide during the lunch period. Claimant received other services from other generic sources. For example, he received behavioral interventions through an insurer, but he is no longer receiving such services. Claimant received intensive eating therapy from Children's Hospital of Orange County when he was four years old. (Testimony of Mother; Ex. 10, p. A64; Ex. 6, pp. A14-A15.) The Service Agency is currently providing respite care so that Mother and Father can get a break from the rigors of raising a developmentally disabled child.

9. Claimant is relatively high functioning though not without challenges. His full-scale IQ was recently assessed at 106, at the top of the average range. (Ex. 6, p. A20.) After his school district performed an assessment of Claimant in March 2023, it was reported that he scored in the average to superior range on all subtests of the Woodcock Johnson Tests of Achievement, which indicates he is learning well in his classes. (Ex. 8, p. A58.) In his most recent Individual Program Plan (IPP) (meeting date February 15, 2023) he was described as demonstrating a high level of independence in his personal care task ability. (Ex. 10, p. A64.) He was deemed to have a reasonable sense of safety at home, though Mother related she is concerned with elopement in public settings, recounting a then-recent episode where he left her in a store. Claimant

is verbal and can communicate his wants and needs, though he does not provide narrative details. (*Id.*, p. A65.)

10. Mother reported, during the February 2023 IPP meeting, that while Claimant doesn't have issues with his speech, he demonstrates "major problems in his socialization" (Ex. 10, p. A66.) Claimant is friendly, but can't maintain friendships, and Mother informed the IPP team Claimant has no clue about social cues, boundaries, sarcasm, and jokes. He has problems maintaining conversations because he tends to talk about his own interests. (*Id.*)

11. According to the IPP, Mother reported Claimant is easily offended in daily interactions with his peers in class, overreacting to others' comments and showing impulsive behaviors. He responds to other students' comments with inappropriate words and by trying to grab other students' hands. (Ex. 10, p. A66.)

12. During the February 2023 IPP Mother described Claimant's placement in a private school for the 2022-2023 school year and how his academic performance had improved. However, his teacher informed Mother Claimant exhibited social skills deficits, including impulsive behaviors and temperamental behavior in the classroom. According to the IPP document, the school administration recommended social skills training should be instituted while Mother sought a one-to-one aide for the classroom. (Ex. 10, p. A72.) Mother reported she had requested, and Claimant was then undergoing, a psychoeducational evaluation by the public school district.

The March 2023 Psychoeducational Assessment

13. Claimant's District, unnamed here in the interests of Claimant's privacy, conducted a psychoeducational assessment of Claimant. It issued a report on March 1, 2023, labeled as a "Multi-Disciplinary Assessment Report" (Report). (Ex. 6.) Notes from

an IEP meeting held March 6, 2023, are found at Exhibit 8, and to some extent serve as a summary of the Report, which is 37 pages long.

14. The assessment process began in early January 2023, and concluded on March 2, 2023. The assessors used a broad number of testing instruments, including but not limited to the Wechsler Intelligence Scale for Children, Fifth Edition; the Test of Audio Processing Skills, Behavior Assessment System for Children, Third Edition (BASC-3), with both parent and teacher reporting; Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2), with parent and teacher reporting; and, the Woodcock Johnson Tests of Achievement, Fourth Edition. (Ex. 6, pp. A13-A14.)

15. District personnel performed three observations of Claimant at his private school. On January 20, 2023, he was observed for an hour and forty minutes in his classroom and while at recess. A classroom observation of 50 minutes was conducted in the mid-morning of February 2, 2023, and another observation of 45 minutes duration was conducted in the early afternoon of February 9, 2023. (Ex. 6, pp. A17-A20.) Claimant's behavior during the administration of a number of his tests was also reported.

16. District personnel did not observe significant behavior problems by Claimant at his school. Their observations tended to make them discount the result of test scores based on responses by Claimant's teacher, and some of the results on those test instruments tended to discount the teacher's feedback. For example, the District psychologist informed Mother that the low score derived from one of the tests based on the teacher's report would be expected for less than one percent of similar children. (Ex. 8, p. A57.)

17. Based on its assessment, the District determined that Claimant, although diagnosed with ASD, did not qualify for special education services at that time, concluding that the malady did not significantly impact his educational performance, and that special education services were not needed for Claimant to continue to make progress. (Ex. 8, p. A58.)

18. Mother testified she was told by District personnel that Claimant is smart enough to figure out his own issues. She filed for an independent assessment, but none had occurred as of the hearing in this matter.

The Private School Requires a Classroom Aide for Claimant

19. The record indicates that Claimant's school was pressing the issue of a classroom aide for him in March 2023. On March 7, 2023 school staff met with Claimant's parents. According to a letter of that date, which summarizes discussions during the meeting, Mother was told Claimant "must have a one-on-one aide or therapeutic companion as soon as possible." (Ex. 4.) Other actions were to be taken, such as to obtain a second assessment. The letter stated there would be another meeting on March 29, 2023, and Parents were told to be prepared to discuss the one-on-one aide.

20. On March 13, 2023, Mother wrote Service Agency, seeking help with funding the classroom aide. She wrote that Claimant's school was "now giving us a very short notice to find him a 1:1 aide or he will not be allowed to return to school. We are in shock and it is hard to explain to [Claimant] as none of these (*sic*) is his fault." (Ex. 3.)

21. As noted above, Service Agency issued its NOA denying the service on March 21, 2023. Claimant's appeal was opened on March 29, 2023. On March 30, 2023,

Claimant's school wrote a letter to Service Agency supporting Claimant's request, stating in part that "at this point [school] believes a behavioral interventionist is necessary for his continued enrollment." (Ex. 5.) There is an indication that the letter was not received until April 6, 2023, when Mother shared it with Mr. Ibarra. (Ex. 9, p. A60, at ¶ 9.)

22. At hearing Mother testified that there was an incident with her son and a classmate, where the classmate fell on Claimant while he was in the library, and he reacted, grabbing the other child's wrist. According to Mother, this occurred on a Wednesday, and Claimant was not allowed at school on the following Thursday and Friday. The school told Parents they needed to have an aide in place by the following Monday or Claimant could not return to the private school. Mother testified that Claimant could not understand why he was not allowed back to school on the day after the incident. Just where this incident and the suspension fit into the timeline described *ante* was not clear.

23. Mother searched for an aide, and located someone who wanted \$65 per hour, for what would be 20 hours per week. Then, she found someone who worked at the school in the afternoon and was able to hire them for \$20 per hour.

24. Mother believed and has contended throughout the process that suddenly moving her son back to the public school, essentially mid-semester, would be a bad move for him from a psychological point of view, given his reaction to being suspended. This would have likely placed him in a classroom with double the number of students as his private school classroom, without supports. Mother testified that after the incident and suspension Claimant showed signs of stress, in that he was going to the bathroom every half hour. A medical exam revealed no physical issues, supporting the conclusion the behavior was driven by stress.

25. Claimant was able to complete the spring semester at his private school. He is now re-enrolled in the public school, commencing fourth grade a few days before the hearing in this matter.

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 8.

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.) Therefore, Claimant bore the burden of proving entitlement to the requested services.

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*.) 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).)

5. Services provided under the Lanterman Act are to be provided in conformity with the IPP, per section 4646. 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 §§ 4646, subd. (i); 4705; 4706; 4707, subdivision (a)(3); 4710.5, subd. (a).)

6. 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); 4648, subd. (a)(6)(E).)

7. The purpose of the IPP is to identify services and supports “on the basis of the needs and preferences of the consumer or, when 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; 4648.) The 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); 4685, subd. (b)(5).) The IPP must be updated at least every three years. (§ 4646.5, subd. (b).)

8. 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, the consumers parents and other family members, the consumer’s friends, advocates, and authorized representative, if applicable, 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 such goals can be met in a cost-efficient manner.

9. 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.

10. Section 4512, subdivision (b) provides a list of services that may be provided, in appropriate circumstances, 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, running the gamut from diagnosis to advocacy to supported and sheltered employment to paid roommates. Respite care and education are among the services listed in section 4512, subdivision (b).

11. Other statutes, and regulations, may impinge upon the provision of the services set out in section 4512, subdivision (b). One rule that limits the obligation of a regional center to provide services is the general rule that the regional centers may not supply services and supports available from generic services. (§§ 4648, subd. (a)(8); 4659, subd. (a), (c).)

12. Services provided must be cost-effective (§§ 4512, subd. (b); 4640.7, 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; 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.

13. The IPP is to be prepared jointly by the planning team, and shall include 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).)

14. 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 and supports, 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, which requires regional centers to pursue generic resources.

15. 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 are to be selected on an individual basis. (*ARC v. DDS, supra*, 38 Cal.3d at 388.)

16. 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 Act. Regional centers are encouraged to employ innovative programs and techniques (see § 4630, subd. (b)); to find innovative and economical ways to achieve the goals in an IPP (§ 4651, subd. (a)); and to utilize innovative service-delivery mechanisms (§ 4685, subd. (c)(3)).

17. As noted in Legal Conclusion 11, 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 are generic sources.

18. There are other limits imposed on the planning process. First, 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)(4).)

Dispositive Legal Conclusions

19. In its position statement (Ex. 11) Service Agency relies mainly on the assertion that the public school offered placement in a general education classroom with embedded supports, albeit without a one-on-one aide, which the private school recommended, then demanded. It also asserted the general rule that parental responsibility must be considered when determining what services to provide. (See Legal Conclusion 18.)

20. It is true that the District is a generic resource, but in the unique circumstances of this case, it did not provide a solution for the need in question, that

is, a person to assist Claimant in the classroom for the balance of the second semester. As a practical matter, Claimant's parents could not challenge the District's determination that Claimant did not need special education services any time before the school year ended; indeed, the request for an independent assessment had not been acted on as of the actual hearing date.

21. Mother's concern that a sudden transfer out of the private school and into a general education classroom would be deleterious to Claimant's emotional and mental well-being is deemed legitimate. Experience teaches that autistic children often have trouble with transitions, and here there would have been an abrupt and jarring transition between two different environments.

22. The assertion that the one-to-one aide was a typical parental responsibility, one they would have to a non-disabled child, is not a sufficient reason to deny Claimant's request. Typical non-disabled children don't require a one-on-one aide to maintain placement in a classroom, private or public.

23. As noted, this case presents an unusual set of circumstances, where the generic resource was inadequate. Where a generic resource is not, for some reason, available, a regional center as payor of last resort, may provide the service. It is noted that the cost here is not especially high, and thus is a cost-effective solution to the need to avoid a traumatic transition for Claimant. In the unique situation here, the appeal should be granted.

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ORDER

Claimant's appeal is granted. Service Agency shall reimburse for the cost of the one-to-one aide upon Mother's submission of documentation of payment to the aide.

DATE:

JOSEPH D. MONTOYA

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Each party is bound by this decision. Either party may request a reconsideration pursuant to subdivision (b) of Welfare and Institutions Code section 4713 within 15 days of receiving the decision, or appeal the decision to a court of competent jurisdiction within 180 days of receiving the final decision.