

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

JORDAN M.- P.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2013080957

DECISION

Administrative Law Judge Jerry Smilowitz, State of California, Office of Administrative Hearings (OAH), heard this matter on November 1, 2013, in Alhambra, California, at the offices of Eastern Los Angeles Regional Center (ELARC or Service Agency).

Jordan (Claimant) was not present. He was represented by his mother.¹

Noriko Ikoma, Early Start Supervisor, represented the Service Agency.

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on November 1, 2013.

ISSUE

The parties agreed on the following statement of the issue to be decided: Shall the Service Agency fund a one-to-one aide in a facility willing to accept Claimant for out-of-

¹ Initials and titles are used to protect the privacy of Claimant and his family.

home (OOH) respite?

EVIDENCE RELIED UPON

Documents. Service Agency's exhibits 1- 9, Claimant's exhibits A – Z, A1 – R1.

Testimony. For Service Agency, Cruz Garcia, Placement Coordinator; for Claimant, his mother/representative.

FACTUAL FINDINGS

1. Claimant is an 11-year old boy who is eligible to receive services from ELARC because of a diagnosis of autism. He also is diagnosed as having an Attention-Deficit/Hyperactivity Disorder. Claimant lives at home with his mother. His biological father is not involved with Claimant at this time.

2. Claimant attends a Special Day Classroom in his school district. His last Individualized Education Program (IEP), dated March 14, 2013, concluded that "Claimant requires constant adult supervision and support throughout the school day to perform basic daily activities and routines," and "maximum adult assistance to sit in his chair, stay in line, attempt classroom tasks and take care of his self-needs." (Exh. R, p. 3) Constant supervision is also necessary for his general safety. If there is no adult around, Claimant runs off by himself. He does not comprehend what is considered to be dangerous behavior, like walking in the middle of the street, and stopping at corners. (*Ibid.*) The school district provides him with a one-to-one aide during the school day.

3. His daily needs are substantial. As described in his Individual Program Plan (IPP), dated March 25, 2013, he requires "complete assistance" with bathing, dressing, brushing his teeth, combing his hair, and using utensils. In order for him to eat, he has to be physically and verbally prompted, always needing the assistance of an adult as he tends not to eat on his own. He has no bowel/bladder control, and can use the toilet only with assistance. He sleeps only for a few hours a night, and his verbal communication is limited.

(Exh. 3.)

4. The exhibits introduced by both Claimant and the Service Agency are in accord that physicians, therapists, teachers, and service coordinators who have evaluated Claimant find that his needs are huge, and he must be closely supervised on a 1:1 basis. Cruz Garcia, the Placement Coordinator for ELARC, recognized that Claimant "reportedly requires complete assistance with all self-help tasks." He wears diapers at all times, and engages in maladaptive behaviors including tantrums, non-compliance, running/wandering away, property destruction, disrobing, smearing/eating feces, and a fascination with stoves. These acts constantly jeopardize his health and safety. (Exh. 9.)

5. Claimant's mother currently receives 30 hours of in-home respite services each month. She is enormously devoted to her son and constantly pursues his interests through both ELARC and the school district. She has not taken a long vacation for many years. Usually she goes away for just a couple of days, while her brother, a neighbor, and the respite worker look after Claimant when she is gone. She is entitled to receive up to 21 days of OOH respite (i.e., her son is placed in a supervised licensed home for a period of time).

6. As Claimant's mother explains, she would not be able to go on a vacation if she was worried that Claimant's extensive needs were not being met in her absence, particularly that he is in a secure and protective environment.

7. This is the second fair hearing to consider the mother's request for respite to enable her to take a short vacation. An earlier appeal was heard by Administrative Law Judge (ALJ) Joseph Montoya who issued a Decision on May 24, 2013 (OAH Case No. 2013040107). The issue presented in that fair hearing was, "Must the Service Agency provide in-home respite care (IH respite) in lieu of out-of-home respite care if Claimant's mother wishes to take a short vacation?" The mother had maintained, as she does now, that the funding of an IH respite worker would be more cost-effective than placing her son

in a facility while she was away on a short vacation. ELARC took the position that in-home respite would not be considered unless the out-of-home respite option was first examined.

8. ALJ Montoya noted that ELARC's Purchase of Service Guidelines provided that, "In home respite in lieu of out of home respite may be used only when there is no out of home respite arrangement available." (In this hearing, Exh. 5, p. 2.)

9. ELARC had identified a licensed care vendor who operated two homes that potentially could house Claimant. However, as ALJ Montoya found, there was apparently some confusion engendered by the temporary leave of Claimant's service coordinator, and the vendor's administrator did not fully appreciate how intensive were Claimant's needs. The administrator had not anticipated that Claimant required 1:1 supervision, requiring more staffing and funding from ELARC. Some miscommunication between Claimant's mother and her son's temporary service coordinator occurred. The latter had the impression that Claimant's mother did not want her son in the facility.

10. In reaching a decision to deny the appeal of Claimant's mother, ALJ Montoya largely relied upon California Code of Regulations (CCR), title 17, section 54342, subd. (a)(58)(E), which defines out-of-home respite as temporary care in a licensed facility which is used, in part to, allow a parent the opportunity for a vacation. As ALJ Montoya noted, "Thus, out-of-home respite is different from in home respite in two major respects: it is provided out of the home, and it is used for planned or emergency absences from the home. The Service Agency may therefore treat its use differently from traditional in home respite." Accordingly, "[t]he OOH respite service policy outwardly appears in compliance with the Lanterman Act."

11. However, ALJ Montoya suggested that ELARC "forward a clear and detailed written description of the consumer's behaviors and needs to potential facilities, along with a note to the effect that the boy needs around the clock one-to-one supervision. That communication should take place promptly, so that all parties are on the same page re-

garding the child's needs. Absent such clear communication, it might not be established that an appropriate facility is available. However, if a facility is found that can meet Claimant's needs, then his mother may examine it further to assure that it is suitable." This language was not included in the Order of that Decision.

12. As described by Ms. Cruz and ELARC's "Process Guide for In-Home Service Coordinators," (Exh. 6), an Out-of-Home Respite (OHR) must be initiated by Claimant's mother upon her execution of a Consent to Release Information. The service coordinator then completes an OHR Services Request Form which is forwarded, along with the Consent form and a packet of informative documents, including the IEP and ISP (i.e., the IPP), to Ms. Cruz, the Placement Coordinator. Vendors who operate homes provide ELARC with a monthly list of vacancies, and communicate with Ms. Cruz when a vacancy occurs. Outside liaisons visit a home and also monitor the facility on a monthly basis. Before the family can visit a potential facility, the service coordinator must get confirmation from the facility that it can meet the consumer's needs. If there is no intense behavioral or supervision issue, the process lasts approximately two weeks, and a little while longer if the consumer is in school.

13. The Service Agency categorizes facilities according to the degree of supervision provided. ELARC does not deal with any Level One homes. A Level Two facility accommodates high-functioning individuals who can be in the community on their own, and will return to the facility when told to do so at a given time. These consumers have good self-help skills. Those in Level Three homes are still high-functioning, but need more verbal prompting, and may or may not be able to be in the community on their own. A Level Four facility is for those consumers with moderate to severe behavioral issues. A behavioral consultant contracts with the facility as required by the Service Agency. Level Four facilities are further classified at sub-levels ranging from "A" through "I," with I providing 24-hour staffing. The next step above a Level Four I home is institutionalization.

14. Ms. Cruz views Claimant's needs as not being medically-based. Rather, he requires possible 1:1 supervision because of his aggressiveness, exhibition of tantrums, and lack of hygiene and bathing skills. There are facilities that can provide for persons like claimant, but only when there is support. ELARC would have to review the program, and its licensing restrictions, if any, and then determine if additional support is needed, and whether the facility will provide the level of supervision required. Further, ELARC must consider whether a particular placement would place too great of a strain on a particular facility.

15. If an appropriate facility does not have an opening within the catchment area, the Service Agency confers with the regional center for another catchment area to determine if there are suitable vendored facilities. This process can take up to a month. A difficulty arises from the availability of open placements at the time of a family member's scheduled vacation, which often cannot be ascertained until a short time before. An Acknowledgement/Disclaimer form (Exh. 8) is presented to the family member when a residential facility, which meets the needs of the consumer, is identified. This form encourages the family member to visit the facility as soon as possible, and to let the service coordinator know if it is acceptable. A possible future option occurs when a facility does not have a vacant bed but ELARC has determined that it is appropriate for the level of care it offers.

16. Ms. Cruz noted in a memo that, "Based on my comprehensive review of Jordan's needs, it is my opinion that his needs are most comparable to those who live in a mid to high level 4 children's facility. After out-of-home respite services are provided and if the residential facility and ID [Interdisciplinary] team feel his needs are beyond the regular staffing hours, then program support (one-to-one) can be explored." (Exh. 9.) This determination is made by the service team, and not through the IPP process. Ms. Cruz would not order 24-hour supervision because a consumer sleeps for part of the day. Further, if a

home is empty, there would be no need for 1:1 supervision. The number of hours for funding of additional staff by the facility is made on an individual assessment. Some facilities have devices that make a sound when a door or window is open, thus alerting the usual staff members. While vendors cannot restrain a consumer, their staff must have a special certification—Child Protective Intervention—that trains them on how to redirect consumers.

17. Claimant's mother is frustrated that she was invited to visit a home only a couple of days before commencement of her last scheduled vacation, which she did not take. She works part-time and has found it difficult to get in contact with her son's service coordinator. Because of her concerns that a facility would not be able to protect her son and meet his needs, she would prefer that additional respite be provided in her home where she has installed bars on the window and has modified other parts to accommodate her son's behavioral issues. She also believes that additional IH respite would be more cost-effective than placing her son in a facility.

18. ELARC is not categorically opposed to funding an aide or existing staff member to be with Claimant at a facility. However, it insists that the determination be made not in the IPP, but through the placement process. (Exhs. 3, O1).

19. In its Notice of Proposed Action, dated July 23, 2013, ELARC denied the request of Claimant's mother, as set forth in the last IPP, for the funding of an aide to be with her son on a 1:1 basis at any facility that would accept him. As ELARC stated, it will not "arbitrarily fund" for a 1:1 aide, which would side-step its placement process based upon an assessment of need in comparison of a facility's level of care.

CONCLUSIONS OF LAW AND DISCUSSION

1. Welfare and Institutions Code section 4646,² subdivision (a), provides, in part,

² All further statutory references are to the Welfare and Institutions Code unless

that, "It is the . . . intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources."

2. Section 4646.4, subdivision (a), directs a regional center to establish an internal process to ensure, when purchasing services and supports, conformance with the regional center's purchase of service policy, as approved by the Department of Developmental Services (DDS).

3. ELARC's Purchase of Service Guideline re: Out-of-Home Respite Services is consistent with the Lanterman Act, and particularly section 4646. It allows for participation by Claimant's mother in determining an appropriate facility by giving her the final say on whether her son would be placed in a particular facility for respite purposes, without losing her right to renew her request. She may visit any facility determined by ELARC as being appropriate in light of her son's needs. ELARC can authorize funding for OOH respite if no IH respite is available.

4. As a cost-cutting measure in 2011, the Legislature enacted section 4648.5 to set caps on the amount of OOH and IH respite. In subdivision (2), the statute prohibits a regional center from purchasing more than 21 days of OOH respite services in a fiscal year nor more than 90 hours of IH respite services. However, subdivision (3) allows for an exemption to these caps ". . . if it is demonstrated that the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home. . . ."

5. Absent a search by ELARC, it cannot be concluded at this time that no facility exists which can provide Claimant with the care and supervision he requires. The record

otherwise noted.

strongly suggests that the facility must be at Level Four and, most likely, an "I" home providing the highest degree of supervision short of an institution. Claimant will likely need 1:1 supervision for the entire day except for the short period when he sleeps. Nonetheless, these determinations cannot be made unless ELARC commences the process. Vendors will not likely misrepresent their capacity for dealing with Claimant since they would be governed by licensing requirements and subject to liability from a number of quarters. ELARC has already declared that it will weigh the ability of a facility to perform as expected. The earlier search focused on a vendor which the Service Agency mistakenly thought had fully considered the nature and extent of Claimant's disabilities. When its administrator learned of Claimant's needs and history, he decided not to participate in the arrangement unless there was additional funding to engage more staff at the facilities. In light of this miscommunication between the vendor and the temporary service coordinator, ELARC no doubt will inform potential facilities upfront of the need for intense supervision and care.

6. In the event ELARC is unable to locate a suitable facility, the issue would likely resolve to whether it should fund, as an alternative, additional IH respite pursuant to section 4648.5, subdivision (b), or provide additional funding to a facility that would be ideal for Claimant but needs funding to take on more staff or provide for more hours by existing staff. ELARC may conclude, as was determined by ALJ Montoya in the first hearing, that providing additional IH respite is probably more cost-effective. However, making these conclusions in this Decision is premature as the only issue raised in this hearing was whether ELARC should fund for a 1:1 aide to be with Claimant at any facility that is willing to accept him for a short time.

ORDER

The appeal of Claimant's mother for an order directing ELARC to fund a 1:1 aide at any facility that would accept him during such time as the mother takes a vacation is de-

nied. Claimant's mother should initiate the search process established by ELARC for identifying an appropriate facility. This Order does not preclude ELARC from providing a suitable vendor with additional funding to provide Claimant with 1:1 supervision if such is deemed to be warranted in light of his history and needs, or with additional IH respite.

Dated: November 18, 2013

A handwritten signature in black ink, appearing to read "Jerry Smilowitz", written over a horizontal line.

JERRY SMILOWITZ

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.