

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,
vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No: 2018070769

DECISION

Thomas Y. Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 29, 2018, in Alhambra, California.

Jacob Romero, Fair Hearing Coordinator, represented the service agency, Eastern Los Angeles Regional Center. Mother represented the claimant consumer (family members' names are omitted to preserve confidentiality).

Oral and documentary evidence was received. The record was left open for claimant to submit documents by August 31, 2018, and for the service agency's response by September 5, 2018.

Claimant timely submitted a January 17, 2018 Individualized Education Program (IEP) report, which was marked Exhibit A, and email correspondence between mother and the service agency, marked Exhibit B. The service agency had no objection to Exhibits A and B, which were admitted into evidence.

The service agency timely submitted as its response: an August 17, 2011 Psychological Evaluation performed by Randi Elisa Bienstock, Psy.D., which was marked as Exhibit 13 and admitted into evidence subject to Government Code section 11513,

subdivision (d); and Mr. Romero's September 5, 2018 letter, marked for identification as Exhibit 14.

The matter was submitted for decision on September 5, 2018.

ISSUE

Should the Service Agency fund personal assistance for claimant's toileting?

FACTUAL FINDINGS

1. In May 2018, claimant asked the service agency to fund personal assistance (PA) of three to five hours per day. The service agency denied the request in a June 7, 2018 Notice of Proposed Action (NOPA). Claimant timely appealed.

2. Claimant is 13 years old. His biological parents have joint custody. Claimant usually lives with his father, especially on school days. The school provides claimant a one-to-one aide.

3. Claimant has spina bifida, a birth defect from malformation of the spine. The more precise medical term is myelomeningocele, a severe form of sacral spina bifida, with hydrocephalus, shunted to drain accumulated fluid. At hearing, the parties were especially concerned about claimant's problems with bladder and bowel control, and whether he has cognitive abilities to deal with incontinence and related practical problems.

4. Claimant is eligible for services under what is known as the fifth category, covering conditions "found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. . . ." (Welf. & Inst. Code, § 4512, subd. (a).)

5. Exhibit 13 is Dr. Bienstock's psychological evaluation, performed at the service agency's behest on August 17, 2011, when claimant was six years old. Dr. Bienstock noted improvements in claimant's condition since March 17, 2008, when a psychological evaluation by another service agency psychologist found claimant to be at

risk for mental disability and had given a provisional diagnosis to that effect:

The current findings reveal that [claimant's] overall cognitive skills are within the average range. Although a diagnosis related to Mental Retardation is clearly not warranted, [claimant] does present with possible learning disabilities with regard to his visual motor skills and possible Dyslexia. [Claimant] also continues to present with . . . significant adaptive deficits. It is not clear how much his adaptive deficits are a function of his medical and motor deficits and how much is due to behavioral compliance issues. . . . Overall, [claimant] does seem to continue to require supports and interventions that are similar to individuals with a diagnosis of Mental Retardation.

6. An Individualized Education Program for claimant was prepared on January 19, 2017 (2017 IEP). Among the assessment data, under the heading, "Adaptive/Daily Living Skills," the 2017 IEP notes:

[Claimant] is able to feed himself. He requires toileting assistance from the Staff. He needs numerous diaper changes throughout the day, as many as 5-6 times.

(Exhibit 7, p. 8.)

7. A January 17, 2018 IEP (2018 IEP) has a note similar to that found in the 2017 IEP (cited in Factual Finding 6) regarding claimant's adaptive or daily living skills. It is preceded by a brief discussion of claimant's ability to socialize and to some extent to fend for himself:

[Claimant] thrives off of socializing and working with his peers and teachers. [Claimant] has great behavior and gets along with all his peers and staff around him. . . . [Claimant] is able to advocate for himself when he needs help with varying issues.

[¶] . . . [¶]

[Claimant] is able to get his food and feed himself. He requires toileting assistance from the staff and he needs numerous diaper changes throughout the day, as many as 5-6 times some days.

(Exhibit A, p. 8.)

8. Regarding claimant's safety, the 2018 IEP states that: "When given a variety of safety scenarios, [claimant] is able to answer what he could do and/or say in the situation with 20% accuracy." (Exhibit A, p. 18.) The 2018 IEP states goals to improve claimant's safety and response to scenarios.

9. A few reports on claimant's physical and medical status were prepared in early 2017, including a January 17, 2017 Medical Management Status Report prepared by California Children's Services (CCS). CCS indicates that claimant was receiving Occupational Therapy to help him with hygiene at home. (Exhibit 11.)

10. A January 19, 2017 "Triennial/Annual Review" from claimant's middle school commented on his difficulties with toileting:

[Claimant] had some struggles when first transitioning into Middle School. He was unable to be mainstreamed into at least one other General Education class because [claimant]

needs toileting assistance from one Staff member at least once every hour to hour and a half. [Claimant] often missed approximately 15-20 minutes of class time each hour every day. He struggled with being able to walk to the restroom and often needed the assistance of a walker. These were all for medical reasons and not for avoidance issues.

Despite that, when [claimant] is in the classroom with his peers, he does the work and aims to please the Staff by doing a good job. [Claimant] often misses some parts of a lesson or core part of the instructions due to his frequent bathroom usage.

[¶] . . . [¶]

[Claimant] goes to the restroom 5-6 times a day and because of his difficulty walking to the restroom, the entire bathroom experience often takes 15-20 minutes an hour to complete. Because of this, [claimant] is often playing "catch-up" when completing assignments in comparison to his peers.

(Exhibit 8.)

11. The middle school's January 19, 2017 Adapted Physical Education (APE) Report concerns claimant's skills in locomotor movement and object control. The APE Report estimated that claimant's skills in each of these two areas had an age equivalence below three years. The APE Report concluded:

[Claimant] attempted to perform the different skills from the TGMD-2 [Test of Gross Motor Development-2] but his overall movement and performance was affected by his medical diagnosis of Spina Bifida and weight issues. He had difficulty with overall movement It is recommended that [claimant] participate in the Adapted Physical Education Program twice a week, thirty minutes per session, in a group setting.

(Exhibit 9.)

12. Claimant's May 23, 2018 Individual Program Plan (IPP) states, regarding self-care:

[Claimant] requires assistance with some of his self-care needs. He can eat with his fingers without assistance. Due to his condition, he has to wear diapers all day and night. He is not toilet or habit trained. He has no control of either bladder or bowel. Performs personal care activities but needs assistance. Dresses self but needs assistance. He cannot tie his shoes.

(Exhibit 3, pp. 4-5.)

13. In a May 24, 2018 email, mother sought PA for claimant:

[Claimant] is a 13 year old. In school he has an 1:1 aide for safety and supervision and independence. [Claimant] should be able to enjoy after school programs but is not able to cause the school won't provide a 1:1 for safety and

supervision and independence. For him to have that opportunity he needs a personal aid. Even as he gets older he needs to be able to time for his own [sic] but can't do this because he needs the assistance of a personal aide. He is at the age that having a parent with him is embarrassing him when he was to be a teenager. So I am asking regional center for a personal aide for [claimant] so he can be independent in the community and at after school programs and personal independent times. Please grant this request.

(Exhibit 6, p. 14.)

14. In a May 30, 2018 email, mother explained the request for PA further:

[Claimant] doesn't have the cognitive ability to be left alone anywhere. If hes[sic] left alone he will get scared and try to find his way back to class or where he thinks his class may be. . . . He also cant use the bathroom alone cause he will wander leave the restroom without finishing or even completely cleaned up.

(Exhibits 5 and 6, p. 12.)

15. In response to an inquiry from Martin Valdez, claimant's Service Coordinator, mother clarified in a second May 30, 2018 email that claimant sought three to five hours per day of PA because: "it depends on activity really. Cuz for example if it's just to go to like movie it could be two and a half to three hours but if it was like go to disneyland for the day that would be anywhere from 8 to 10 hours a day."(Exhibit 6, p. 10.) As set out above, the service agency's June 7, 2018 NOPA denied the request.

16. Claimant receives in-home supportive services (IHSS). On August 1, 2018, IHSS hours increased for some activities, such as assistance with dressing and ambulation, while some IHSS hours decreased. As stated in a Notice of Action regarding IHSS: "The reassessment of your needs done on 07/10/2018 found that your condition has changed and/or that you now need less assistance in these areas . . . : Bowel & Bladder Care.

17. Meeting notes in the 2018 IEP state:

Teacher – asked [claimant] if he has a goal of using the restroom by himself because [claimant] mentioned having that Mom stated at home using the restroom by himself with supervision, but at school for time aides will help more with it

(Exhibit A, p. 23.)

18. Gerard Torres is a Case Management Supervisor at the service agency. He supervises Mr. Valdez, who made him aware of mother's and Mr. Valdez's email communications regarding the request for PA. Mr. Torres's testimony demonstrated that he is familiar with claimant and the services he has had over the years, not only those funded by the service agency, but by others as well.

19. Mr. Torres convincingly testified that in responding to mother's request for PA, the service agency has sought to identify services that would be helpful in developing claimant's skills so that he is more independent. As Mr. Torres stated, providing claimant a personal assistant who might clean claimant and take charge of claimant's toileting needs would not promote claimant's development and independence. The service agency therefore offered to fund an adaptive skills assessment meant to assess how well claimant might be able to clean himself after bowel movements. It also offered to fund two hours of PA per week, so that claimant could participate in an after-school program called Think

Pink. (Exhibit 12.)

20. Mother acknowledged at hearing that claimant has much of the skill necessary to care for himself after relieving his bladder. He continues to need assistance relating to bowel movements. In mother's view, claimant lacks cognitive skills that complicate his caring for himself without PA. Hence mother stressed before and to some extent during the hearing that claimant has trouble remembering and taking notice of details that might impact his safety and even affect how others, especially peers, perceive him and whether they treat him well or badly. He might forget at times, for instance, to clean himself thoroughly. Mother is concerned that claimant might not notice tripping hazards, such as floor mats. There have been instances when claimant left the restroom at school with soiled clothes, unaware that he had not adequately cleaned up. Mother is likewise concerned that without a person by his side claimant might get lost after using a restroom.

LEGAL CONCLUSIONS

1. The burden of proof is on claimant, the party seeking to change the status quo. The evidentiary standard is proof by a preponderance of the evidence. (Evid.Code, §§ 115 and 500.) Claimant did not meet that burden in this case.

2. It is a service agency's responsibility to implement the Lanterman Act, Welfare and Institutions Code section 4500 et seq. The Lanterman Act describes "a comprehensive statutory scheme . . . to provide a 'pattern of facilities and services ... sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life.'" (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388, quoting Welf. & Inst. Code § 4501.)

3. Because the scheme is meant to be comprehensive, service agencies are authorized to provide many services and supports. Among them, under Welfare and

Institutions Code section 4512, subdivision (b), is "adaptive equipment and supplies." Welfare and Institutions Code section 4512, subdivision (b), states further that, "The determination of which services and supports are necessary for each consumer shall be made through the [IPP] process."

4. A service agency, when taking account of the needs of both the consumer and the consumer's family, must be mindful of conserving public resources. As stated in Welfare and Institutions Code section 4646, subdivision (a):

It is the intent of the Legislature to ensure that the [IPP] and provision of services and supports . . . is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate . . . [and] the cost-effective use of public resources.

5. Welfare and Institutions Code section 4648, subdivision (a)(1), states in pertinent part:

It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices.

6. The service agency has worked with claimant and his family through the IPP process. The IPP and the IEP's in evidence do not support a conclusion that claimant's toileting challenges and safety depend upon one another to any significant extent. The evidence does not establish that claimant should have PA because otherwise he might lose

his way or encounter some other safety issue. In addition, claimant is already receiving assistance with safety, as indicated in the 2018 IEP.(Finding 8.)

7. The weight of the evidence does not establish that claimant's delayed development, and such cognitive issues as he has, would be ameliorated or somehow lessened by PA. The evidence rather shows that claimant has cognitive and other skills that enable him to deal with toileting. Because of claimant's incontinence, he must deal with toileting more frequently than others. Because of claimant's limited mobility and motor skills, his time in a restroom is frequently significantly longer than the time others take for such needs. PA might reduce the time devoted to toileting, but with two significant drawbacks: PA could make claimant more dependent on others, and it would be more costly financially. Both drawbacks are contrary to the goals of the Lanterman Act, to help persons with disabilities, such as claimant, to achieve a measure of self-sufficiency (Welf. & Inst. Code, § 4648, subd. (a)(1)), and to do so in a cost-effective manner (Welf.&Inst. Code,§ 4646, subd. (a)).

8. The service agency has consistently worked and regularly communicated with mother regarding claimant's IPP's and the services and supports identified in the IPP process, including materials and assistance for claimant's toileting needs, in accordance with the Lanterman Act. Emerging from these joint efforts was the service agency's proposal for an adaptive skills assessment of claimant and two hours of PA per week. The proposal is reasonable because it would avoid making claimant more dependent on others, and would be more in conformity with the goals of the Lanterman Act than simply assigning claimant hours of PA.

ORDER

Claimant's appeal is granted in part and denied in part. The service agency shall arrange for an adaptive skills assessment of claimant focused on the extent he is able to attend to his toileting needs and whether and how his ability to do so may be improved. Until the assessment is completed, the service agency shall fund two hours per week of Personal Assistance. The number of hours of Personal Assistance funded by the service agency may be decreased depending upon the results of the assessment.

DATED:

THOMAS Y. 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.