

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

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL CENTER,

Service Agency.

OAH No. 2019100573

DECISION

Administrative Law Judge Chantal M. Sampogna, Office of Administrative Hearings (OAH), State of California, heard this matter on November 21, 2019, in Whittier, California.

Jacob Romero, Fair Hearing Representative, represented Eastern Los Angeles Regional Center (ELARC or Service Agency).

Mother¹ appeared on behalf of claimant, who was not present.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on November 21, 2019.

¹ Titles are used to protect claimant and his family's privacy.

ISSUE

Whether Service Agency must fund Progressive Resources to provide claimant with an additional 80 hours per month of Adaptive Skills Training and an additional 20 hours per month of Adaptive Skills Training Transportation.

EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1 through 11; Claimant's exhibits A through D, G, and I through K.

Testimony: Anita Magana, Veronica Valenzuela, Mother.

Jurisdictional Matters

1. Claimant is a 25-year-old man who resides with his parents. Claimant is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.)² based on his diagnosis of Autism Spectrum Disorder (ASD). (§ 4512, subd. (a).) He has been a consumer of services funded by the Service Agency for over 22 years. Claimant's mother is his conservator.

2. In a Notice of Proposed Action dated September 18, 2019, Service Agency denied claimant's request for Service Agency to fund 80 hours per month of

² Statutory references are to the Welfare and Institutions Code, unless otherwise specified.

Progressive Resources Adaptive Skills Training (AST) and 20 hours per month of Progressive Resources AST Transportation because it was not cost-effective.

3. Mother filed a Fair Hearing Request on September 25, 2019.

Claimant's Service Needs

4. Claimant is ambulatory and has no hand use limitations. Claimant can utter one or two words, but without the support of Facilitated Communication (FC) he is not able to communicate his needs, thoughts, or emotions. Claimant's ability to communicate is further limited by his anxiety, reticence to receive support from unknown individuals, and his significantly limited attention span. In addition, claimant's behaviors, which include aggression, self-injurious behaviors, elopement, and his consistent and rigid need for routine, further exacerbate claimant's struggles with maintaining the focus and emotional regulation necessary for him to communicate.

5. FC is a form of alternative and augmentative communication in which people with communication impairments express themselves by pointing at pictures, letters, or objects, or by typing. Achieving the ability to type to communicate promotes the individual's access to social interaction, academics, and participation in the community. The facilitator may provide the individual with emotional encouragement and communication supports, such as monitoring to make sure the individual looks at the keyboard and checks for typographical errors, and a variety of physical supports to slow and stabilize the individual's movement, or to inhibit impulsive pointing or to initiate pointing. The facilitator's physical support may include supporting the individual's fingers, arm, or elbow. The goal of FC is for the individual to type

independently, and the process includes goals toward reducing the individual's reliance on FC.

6. Outcome number six of claimant's August 15, 2019 Individualized Program Plan (IPP) provides that claimant will participate in social activities within the community. To achieve this goal, ELARC funds 10 hours per month of AST through Progressive Resources home program (PR) and 10 hours per month of AST transportation through PR. PR provides claimant with FC. PR Progress reports over the past few years demonstrate claimant has consistently improved in his ability to engage in reciprocal communication with different communication partners and in various settings. When he first began with PR, claimant's level of reciprocal communication was "developing," but he has consistently improved. Claimant's communication has now progressed to the level of "emerging." (Ex. 7.)

7. Outcome number four in claimant's August 15, 2019 IPP provides that claimant will receive appropriate education that will meet his educational goals and vocational goals through July 2020. To achieve this goal, ELARC will fund for: the REACH day program, supplemental program support services, and transportation services, Monday through Friday, at a rate of six hours per day; REACH day program transportation services, Monday through Friday, round trip transportation; and an alternative day program through PR, to include transportation with a trained facilitated communication component, at six hours per day or four hours per day, to support safety issues. The parties agree that though the IPP provides that ELARC will fund for both REACH and PR, the intention of the parties was that claimant would continue to attend REACH until funding was approved for claimant to receive increased services through PR, in lieu of the REACH day program. The REACH program costs \$74.21 per

day, approximately \$12 per hour for claimant's one-to-one aide, and approximately \$11 per day for transportation.

8. Though claimant has attended REACH since May 2016, for at least the past six months, REACH has not met claimant's service needs. Among other deficiencies, REACH consistently cancels service provision on a frequent basis. On one occasion, while claimant was pacing because REACH staff was late to pick him up, REACH called mother and told her there was no staff available for that day. This disruption in service provision now occurs approximately twice per week and causes claimant anxiety because it disrupts his schedule. In addition, REACH staff has left claimant unattended while out in the community, and has taken claimant on personal errands, once with a staff member's dog in the vehicle. Claimant has a fear of dogs and being near dogs causes claimant to become anxious and to engage in negative behaviors. As well, REACH staff has a high turnover rate, which impedes claimant's receipt of services because he does not easily establish a rapport with new individuals. Finally, REACH does not provide FC to claimant, thereby profoundly limiting claimant's ability to express himself while attending his day program.

9. A. On August 25, 2019, PR submitted a request for additional hours for three months to increase its provision of services to claimant by an additional 80 hours of AST at a rate of \$145.14 per hour, and an additional 20 hours of AST transportation, at a rate of \$11.03 per hour. PR noted in this request that, "People often misinterpret [claimant's] sensory motor challenges as an indicator of low cognition, and an inability to communicate When he receives support with regulation of his anxiety, he is an excellent communicator (using specific strategies) Using individualized, best practice strategies, [claimant] successfully uses an IPAD

[sic] to type/communicate with support at the elbow with trained and supervised facilitators [Claimant] is fully cognitive.” (Ex. H.)

B. PR’s communication goal for claimant is to have daily dialogue with staff as to his needs, preferences, thoughts and feelings through structured and unstructured interactions using his iPad. Further, claimant would join his peers weekly to discuss current events and his personal development, and claimant would have regular communication with his adult sister, with whom he is close but who is currently away from home attending college. General conversations would be saved to document daily communication or would be kept private.

10. Mother submitted an example of claimant’s ability to communicate without FC and with FC. The video of claimant attempting to engage in a conversation with Mother without FC showed him to have a short attention span, to give one or two word responses, and to engage in echolalia rather than communication. The print-out of claimant’s portion of a conversation he had about his experience with FC included him communicating the following: “It makes me angry and sad; I want to tell the supervisors how important it is to [use] FC with their non verbal [sic] clients; there are too many non verbal [sic] clients with voices that need to be heard and not enough staff who practice FC; I want to advocate for all the non verbal [sic] clients like me who are not getting their voice heard.” (Ex. 10.)

11. Training staff at other day programs to use FC was considered by Service Agency and claimant. However, at the time of hearing, Service Agency had not identified an alternative program that was currently able to meet claimant’s service needs.

LEGAL CONCLUSIONS

Jurisdiction

1. The Lanterman Act governs this case. An administrative fair hearing to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal a denial of his request to have Service Agency fund claimant's increased PR hours. Jurisdiction was established. (Factual Findings 1-3.)

Burden and Standard of Proof

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that claimant requires the requested service. (Evid. Code, §§ 115, 500.)

Regional Center Responsibilities

3. The state is responsible to provide services and supports for developmentally disabled individuals and their families. (§ 4501.) Regional centers are "charged with providing developmentally disabled persons with 'access to the facilities and services best suited to them throughout their lifetime' and with determining "the manner in which those services are to be rendered." (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389, hereafter *ARC*, quoting from § 4620.)

4. A regional center must provide specialized services and supports toward the achievement and maintenance of the consumer's independent, productive, and normal life that allows the consumer to "approximate the pattern of everyday living available to people without disabilities of the same age." (§ 4501.)

5. Regional centers are responsible for conducting a planning process that results in an IPP, which must set forth goals and objectives for the consumer. (§§ 4512, subd. (b), 4646.5, subd. (a).)

6. To achieve the stated objectives of a consumer's IPP, the regional center must secure the consumer with needed services and supports which assist the consumer in achieving the greatest self-sufficiency possible, and with exercising personal choices which allow the consumer to interact with persons without disabilities in positive, meaningful ways. (§ 4648, subd. (a)(1).)

7. Though regional centers have wide discretion in how to implement the IPP, "they have no discretion in determining whether to implement: they must do so." (*ARC*, 38 Cal.3d at p. 390, citing § 4648, subd. (a).)

Service Requirements

8. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each consumer's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4512, subd. (b), 4640.7, subd. (a), 4646, subds. (a) & (b), 4648, subd. (a)(1) & (a)(2).) The Lanterman Act assigns a priority to services that will maximize the consumer's participation in the community. (§ 4646.5, subd. (a)(2).)

9. Section 4512 provides the following:

A. Services and supports for persons with developmental disabilities means "specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability" or toward the consumer's achievement and maintenance of an independent, productive, and normal life. (§ 4512, subd. (b).)

B. The IPP team determines a consumer's necessary services and supports on the bases of the consumer's needs and preferences, and must consider a range of service options proposed by IPP participants, the effectiveness of each option in meeting the IPP goals, and the cost-effectiveness of each option. (§ 4512, subd. (b).)

C. Services and supports may include training, education, community integration services, social skills training, and advocacy assistance, including self-advocacy training, facilitation and peer advocates. (§ 4512, subd. (b).)

D. Facilitation means "the use of modified or adapted materials, special instructions, equipment, or personal assistance by an individual, such as assistance with communications, that will enable a consumer to understand and participate to the maximum extent possible in the decisions and choices that affect his or her life." (§ 4512, subd. (g).)

10. Service coordination includes those activities necessary to implement an IPP, including securing, through purchasing or by obtaining from generic agencies or other resources, services and supports specified in the consumer's IPP. (§ 4647.)

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11. A service or support provided by an agency or individual may not be continued unless the consumer, or conservator, is satisfied and the regional center and the consumer, or conservator, agree that planned services and supports have been provided, and reasonable progress toward objectives have been made. (§ 4648, subd. (a)(7).)

Consideration of Costs

12. Although regional centers are mandated to provide a wide range of services to implement the IPP, they must do so in a cost-effective manner, based on the needs and preferences of the consumer, or where appropriate, the consumer's family. (§§ 4512, subd. (b), 4640.7, subd. (b), 4646, subd. (a).)

13. When selecting a provider of consumer services or supports, the regional center and the consumer, or conservator, must, pursuant to the IPP, consider the following: a provider's ability to deliver quality services or supports that can accomplish all or part of the consumer's individual program plan; and a provider's success in achieving the objectives set forth in the individual program plan. "The cost of providing services or supports of comparable quality by different providers, if available, shall be reviewed, and the least costly available provider of comparable service, ... who is able to accomplish all or part of the consumer's individual program plan, consistent with the particular needs of the consumer and family as identified in the individual program plan, shall be selected." (§ 4648, subd. (a)(6).)

14. If a needed service or support cannot be obtained from another source, a regional center must fund it. (*ARC, supra*, 38 Cal.3d at p. 390.) Generic resources shall be utilized first. A regional center is the provider of last resort.

Analysis

15. The following was established by a preponderance of the evidence:

A. Claimant's unique service needs include his level of cognition, his limited verbal skills, and his ability to utilize FC to achieve his IPP communication goals. Claimant's ability to communicate using FC far exceeds his ability to communicate without FC. FC, by its nature, is a service which is intended to decrease over time, and PR's request to provide services identified a three-month duration for the services sought.

B. As provided in claimant's IPP, claimant's IPP team determined that PR, which provides FC, was the identified and appropriate alternative program to REACH, which does not provide FC to claimant. Further, the REACH day program has repeatedly failed to meet claimant's IPP goals and service needs, and REACH is not capable of providing the services needed for claimant to achieve IPP goal number four.

C. Service Agency did not identify an alternative service that was ready and available to meet claimant's identified IPP service need. While it is true that PR will cost significantly more than REACH, it is also true that REACH is not able to deliver quality services or supports that can accomplish all or part of the claimant's IPP goals, and no alternative program was identified. Service Agency must implement claimant's IPP and so it must fund claimant's service request. (Factual Findings 4-11.)

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ORDER

Claimant's appeal is granted for a three-month period. ELARC is ordered to fund an additional 80 hours per month of Adaptive Skills Training and an additional 20 hours per month of Adaptive Skills Training Transportation to be provided by Progressive Resources for three months from the effective date of this Decision or a start date agreed upon by the parties.

DATE:

CHANTAL M. SAMPOGNA
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.