

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Alen M.,

Claimant,

OAH No. 2012020681

and

EASTERN LOS ANGELES
REGIONAL CENTER,

Service Agency.

DECISION

Jennifer M. Russell, Administrative Law Judge with the Office of Administrative Hearings, heard this matter in Alhambra, California on March 19, 2012.

Lilia Ortega, Supervisor, represented Eastern Los Angeles Regional Center (ELARC or service agency).

Claimant Alen M.'s mother represented him.¹ Spanish language interpreter services were provided.

Testimonial and documentary evidence was received, the case was argued, and the matter was submitted for decision on March 19, 2012. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUE

Should the service agency continue to fund 21 days of in-home respite in lieu of out-of-home respite.

FACTUAL FINDINGS

1. Claimant is a 16-year-old consumer of ELARC based on is qualifying diagnosis of autism. He resides with his parents and two siblings. Claimant's mother is his primary care taker.

2. Claimant's most current Individual Program Plan (IPP), dated April 5, 2011, indicates that claimant takes several medications and that he requires assistance

¹ Initials are used to preserve confidentiality.

with his medications. He requires a gluten and casein free diet. He requires assistance with his self-help needs. He has maladaptive behaviors and is aggressive when frustrated. He requires constant supervision at home and in the community. His speech is difficult to understand. He requires pictorial prompts and reminders.

3. ELARC funds 30 hours per month of family-provided in-home respite service and 21 days per fiscal year of out-of-home respite service for claimant.

4. ELARC's Out of Home Respite Purchase of Services Policy & Procedure, effective May 2, 2011, states that "Out-of-home respite service means intermittent or regularly scheduled temporary care provided outside of the consumer's home by a vendored service provider. Providers in this category include adult day care centers, child care centers, residential facilities serving either adults or children, Intermediate Care Facilities/Developmentally Disabled-Habilitative and Intermediate Care facilities/Developmentally Disabled-Nursing. Out-of-home respite services are intended to assist the family in securing temporary outside support in providing appropriate care and supervision of the consumer." The purchase of service policy and procedure further states that "[i]n-home respite in lieu of out-of-home respite may be used only when there is no out-of-home respite arrangement available."

5. The credible hearing testimony of claimant's service coordinator, Adriana Roman, establishes that the availability of an out-of-home arrangement is determined after careful assessment of a consumer's level of care, a facility's level of services, a facility's location in relation to a consumer's residence, and vacancy at a facility. In addition, consumers and their representatives are afforded an opportunity to meet with a facility's administrators to discuss whether and how a consumer's specific needs are to be met. Only in the event that an appropriate out-of-home arrangement cannot be made for a consumer, does ELARC grant to a consumer in-home respite in lieu of out-of-home respite.

6. On prior occasions and as recent as January 13, 2012, when claimant's mother had to travel, ELARC funded in-home respite in lieu of out-of-home respite for claimant without conducting any of the assessments set forth in Factual Finding 5 as an "exception" to its purchase of service policy and procedure.

7. By Notice of Proposed Action (NOPA), dated January 18, 2012, ELARC advised claimant's parents that it would "no longer fund 21 days of in-home respite in lieu of out[-]of[-]home respite per fiscal year as set forth in your Individual Program plan without abiding to its Out of Home Respite Purchase of Services Policy & Procedure."

8. There was no specific request from claimant for ELARC to fund in-home respite in lieu of out-of-home respite at the time ELARC issued its January 18, 2012 NOPA.

9. In response to the NOPA, Claimant's mother filed a timely Fair Hearing Request expressing her "disagree[ment] with the changes in the 21 days of in-home respite in lieu of out-of-home respite." Thereafter, these proceedings ensued.

10. Claimant's mother is uncomfortable leaving claimant in an out-of-home facility. She expressed concerns about a facility's ability to meet claimant's dietary needs, whether claimant could take his favorite rocking chair and other comfort items with him, and whether the facility staff's staff would appropriately prompt and remind claimant to attend to the daily living needs.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disability Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.), which 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 of life in the community." (Welf. & Inst. Code, § 4501.) Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Regional centers are responsible for taking into account individual consumer needs and preferences, and for ensuring service cost effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

2. The services and supports to be funded for a consumer are determined through the individualized program planning process, which involves collaboration with the consumer and service agency representatives. Services and supports for persons with developmental disabilities are defined as "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 rehabilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives." (Welf. & Inst. Code, § 4512, subd. (b).) Services and supports include out-of-home care, for which section 4686.5, subdivision (a)(2), authorizes up to 21 days in a fiscal year.

3. When purchasing services and supports a regional center must conform to its purchase of service guidelines. (Welf. & Inst. Code, § 4646.4, subd. (a)(1).) The Lanterman Act requires the Department of Developmental Disability (Department) to review the guidelines "to ensure compliance with statute and regulation." (Welf. & Inst. Code, § 4434, subd. (d).) Reflecting the Department's interpretation of statute and regulation, the purchase of service guidelines are not entitled to the deference given to a regulation; rather, the purchase of service guidelines are entitled to a degree of deference that is dependent on the circumstances in which the agency has exercised its expertise. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-15.) Most important, a regional center's implementation of its purchase of service guidelines must account for a consumer's individual needs when making determinations regarding the appropriateness of particular

services. (See *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

4. In this case, ELARC has already authorized funding for 21 days per fiscal year of out-of-home respite services for claimant. Implementation of ELARC's purchase of service policy and procedure for out-of-home respite requires a placement assessment (see Factual Finding 5), which in the past did not occur for claimant. On a going forward basis, without the required placement assessment, ELARC cannot determine the existence of any out-of-home arrangement to meet claimant's individual needs. Nor can ELARC determine whether in-home respite in lieu of out-of-home respite is an appropriate alternative.

5. On each occasion that claimant has a need for temporary outside support to provide for his care and supervision claimant must undergo an individualized assessment set forth in Factual Finding 5 to determine his eligibility for in-home respite in lieu of out-of-home respite in accordance with the service agency's governing purchase of service policy and procedure. Claimant cannot simply decline to use the 21 hours per fiscal year of out-of-home respite service that has been authorized and opt instead for in-home respite service to meet his temporary needs. It has not been established that claimant is entitled to an exemption from ELARC's purchase of service policy and procedure. Nor has it been established that ELARC's purchase of service policy and procedure is unworthy of deference.

6. Cause does not exist under these circumstances for Eastern Los Angeles Regional Center to fund 21 days of in-home respite in lieu of out-of-home respite by reason of Factual Findings 1 through 10, inclusive, and Legal Conclusions 1 through 5, inclusive.

ORDER

Claimant Alen M.'s appeal is denied.

DATED: April 5, 2012

JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.