

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MARTIN C.

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH Case No. 2011100950

DECISION

Michael A. Scarlett, Administrative Law Judge (ALJ) Office of Administrative Hearings, State of California, heard this matter at the Eastern Los Angeles Regional Center, in Alhambra, California, on November 16, 2011.

Elizabeth Ornelas, Fair Hearing Coordinator, represented Eastern Los Angeles Regional Center (ELARC or the Service Agency). Carmen V., Claimant's mother (mother), represented Martin C. (Claimant).¹ Paola Gazzaneo, court interpreter, translated the proceeding from English into Spanish on behalf of mother.

Oral and documentary evidence was received and the record was closed and the case was submitted for decision on November 16, 2011.

ISSUE

The parties agreed that the following issue is to be decided by the ALJ:

May the Service Agency deny Claimant's request to continue funding community integration training (CIT) provided by Designated Exceptional Services for Independence (DESI)?

¹ Claimant and his family are referred to by their initials or family titles to protect their confidentiality.

FACTUAL FINDINGS

1. Claimant is a 16 year-old boy who lives at home with his family. Claimant's mother is his primary caregiver. He was found eligible for ELARC services based upon a diagnosis of mild mental retardation. Claimant also has been diagnosed with attention deficit hyperactivity disorder (ADHD), epilepsy, and a bicuspid aortic valve disorder. He is fully ambulatory and was described in the May 24, 2011 Individual Program Plan (IPP) as being in "stable health" condition. There are concerns that Claimant is prone to choking because of his tendency to eat his food rapidly, necessitating prompting and supervision when eating. Claimant requires significant daily assistance and supervision, and requires assistance with completing self-help tasks, obtaining necessary medical care, accessing social and recreational activities, and maintaining socially appropriate behaviors. Claimant also exhibits significant challenges in the area of community integration and safety awareness. He has limited safety skills and requires constant supervision in familiar and unfamiliar settings. There have been instances where Claimant has ventured or wandered out the family's home unbeknownst to family members, although these occurrences have been less frequent due to security measures taken by the family in the home. Claimant is unable to safely cross a public street, to make store purchases, or order a meal in a restaurant without assistance.

2. Service Agency funds Claimant 24-hours per-month of in-home respite with Premier Healthcare Services, and 21 days of out-of-home respite per fiscal year. Claimant also had been receiving five hours per week/20 hours per month, of community integration training services from DESI until March 2011, when the Service Agency stopped funding the service pending receipt of a progress report from the vendor. The progress report was not received from the vendor until July 2011, at which time Service Agency determined that funding for the DESI CIT services would not be continued. Claimant also receives 188 hours per month of In-Home Supportive Services (IHSS) and between \$300 to \$500 per month in Social Security Income (SSI).

Jurisdiction

3. On August 11, 2011, Service Agency sent Claimant a Notice of Proposed Action (NOPA), notifying Claimant's Mother that it was denying funding for DESI CIT services effective August 11, 2011. Service Agency stated that the services were either duplicative of services provided in Claimant's Individualized Education Program (IEP) with his school district, and/or the services were social recreation activities that could no longer be funded due to the suspension of Service Agency's authority to purchase "social recreational services" pursuant to Welfare and Institutions Code section 4648.5.

4. On September 21, 2011, Claimant filed a Fair Hearing Request (FHR) appealing the Service Agency's denial of funding for the DESI CIT services, with mother stating she did not agree that DESI's CIT services were duplicative of services provided by the school district. Although the FHR request was filed more than 30 days after receipt of

the NOPA from the regional center, Service Agency stipulated that the FHR would be considered timely, and thus, jurisdiction to proceed was established.

5. It is not clear from the record whether the DESI CIT services were subject to the provisions of Welfare and Institutions Code section 4715, requiring the regional center to continue providing services pending a final administrative decision resolving the disputed service. Service Agency did not consider the DESI CIT services an “aide paid pending” service because the service was terminated in March 2011, due to DESI’s failure to provide a progress report in a timely manner and because the service was originally funded for a finite period of time. Because DESI did not provide a progress report in March 2011, the funding for the service was not renewed at that time. The May 24, 2011 IPP indicates that mother requested continued funding for DESI CIT services at the IPP, but Service Agency made continued funding contingent upon DESI submitting a progress report to determine the “appropriateness” and frequency of the CIT services.

6. Neither party submitted any documentation, other than the May 24, 2011 IPP, to establish the nature of the funding for the DESI CIT services prior to March 2011. Thus it can not be determined whether the service was originally funded for a specific period of time, pending new assessments or evaluations after March 2011. However, even had the DESI CIT services been funded for a specific period of time which was scheduled to expire in March 2011, Service Agency was required to notify Claimant prior to the termination of the service that the funding would not be continued. Service Agency’s assertion that the CIT service was terminated in March 2011 because a progress report was not received from the vendor is not defensible. Claimant was still entitled to notice of a change in services pursuant to Welfare and Institutions Code section 4710, subdivision (a). That does not appear to have occurred in this case.

7. However, Claimant did not assert, either at the May 24, 2011 IPP or in the September 21, 2011 FHR, Service Agency inappropriately terminated the DESI CIT services in March 2011, and that Claimant was entitled to these services on an “aide paid pending” basis. The May 24, 2011 IPP clearly set forth that continued funding of the DESI CIT services was contingent upon receipt of a progress report from the vendor. Claimant’s mother signed the IPP, and merely requested that funding for the DESI CIT services be continued. She did not file a FHR in March 2011 when the services were terminated or in May 2011 after the IPP. Thus, Claimant’s September 21, 2011 FHR, which did not assert services were terminated inappropriately in March 2011, is the operative pleading and is interpreted as an appeal of the denial of the request for funding of the DESI CIT services. Additionally, Claimant did not file the September 21, 2011 FHR within the required 10 days after receipt of the August 11, 2011 NOPA to preserve any right that may have existed for continue services on an “aide paid pending” basis. (Welf. & Inst. Code, § 4715, subd. (a).) Therefore aide paid pending would not have been appropriate in this case.

DESI Community Integration Training Services

8. In July 2011, DESI submitted a progress report to Service Agency for Claimant's CIT program. The progress report described Claimant's limitations in his abilities to travel or navigate within his local community, as well as his limitations with verbal and social communication skills. DESI indicated that Claimant had severe limitations in his ability to verbally communicate in a community or social setting and that these limitations often resulted in the probability of Claimant "shutting down" and being unable to acquire or give out pertinent information to persons he would encounter within his community. It was noted that Claimant's communication limitations were a "definite safety and well-being hazard." The DESI CIT services were primarily intended to assist Claimant in learning how to navigate through his local community by familiarizing him with public transportation and to involve him with community based peer group activities.

9. An "educator" or aide was assigned to Claimant to assist in training him in the desired objective of the program. The mobility training component of the program was to teach Claimant functional skills such as how to map a bus route, keep to a schedule, money management, and time management. These skills are reinforced by having Claimant travel with his educator/aide to various important sites within his local community, such as the library, police department, local mini-mart, and community center. The educator used different communication tools to improve Claimant's ability to effectively communicate with people he came in contact with in the community. DESI began the use of an assistive technology "I-PAD" to improve Claimant's ability to effectively communicate. Claimant has been able to "semi-successfully" use the I-PAD. DESI is also planning to enroll Claimant in future communication workshops to further assist Claimant in becoming verbally expressive and to improve verbal communication skills. DESI also employed the use of a "Face Card" book, a collection of pictures of people whom Claimant would typically encounter, with basic information about how they are involved and what relationship they had in Claimant's life. This tool was instituted because DESI believed that Claimant was not aware or cognizant of the world around him and was unable to develop relationships with persons outside of his home.

10. The DESI educator/aide assisted Claimant in achieving basic independent living skills such as purchasing items from a local store, instructing him regarding basic math and money counting skills. DESI also had Claimant join a YMCA basketball team to help him develop coping skills and reduce some of the anger and anxiety he has been prone to exhibit, and to ultimately encourage positive peer relationships.

11. The DESI CIT services were essentially designed to assist Claimant in navigating through his local community using public transportation, to encourage and foster positive peer relationships within his community by involving Claimant in community-based peer groups, and to assist Claimant in developing effective, functional communication skills to improve his ability to access services he will need to thrive within his community.

12. Although Service Agency contends that Claimant's school district program is effectively meeting Claimant's community integration and independent living skill needs, a review of his educational program does not support this contention. Claimant is currently enrolled in an 11th grade Special Day Class (SDC) at California High School in the Whittier Union High School District (WUHSD). He attends four SDC classes and two general education classes. The SDC classes include an "Independent Living Skills" class that has a vocational education component, the "Prep for Work" program that provides Claimant vocational and functional skills instruction twice per month, for about one hour each session, or approximately six hours of vocational counseling per school semester. He also participates in a "WorkSkills" program where he is able to gain job experience working at a community site (Dollar Tree) once per week. The school district provides Claimant speech and language therapy twice per week, in a combination of small group and individual sessions as needed. WUHSD has developed a Transition Program for Claimant that is anticipated to begin when he reaches 18 years of age and graduates from high school.

13. In an attempt to clarify the educational services that are currently being provided to Claimant by WUHSD, on October 9, 2011, Anthonng Truong, Ph.D., Program Specialist for WUHSD-Student Services, wrote a letter stating that Claimant received services "related only to his education at his school site campus," except that twice per month he is taken "off-campus for job exposure." Dr. Truong specifically indicated that Claimant did not participate in any community-based program and independent living skills services outside of the California High School campus within the instructional school day. He reiterated that, upon completion of high school, Claimant would be enrolled in the WUHSD Transition Program that would provide community-based instruction and services related to independent living. Consequently, the independent living skills and community integration components of the WUHSD's Transition Program were not being provided to Claimant at the time of the hearing.

14. Although WUSHD appears to be providing a limited vocational training and functional skills program designed to provide Claimant some job experience, his educational program does not focus on the community integration and independent living skills that the DESI CIT services were providing. Significantly, the WUSHD program currently in effect does not address Claimant's severe limitations in being able to safely navigate the local community in which he lives or to improve independent living skills to better able him to perform basic functions such as going to a grocery store or library, or to access community based programs to foster positive peer relationships.

15. Consequently, Service Agency's assertion that the DESI CIT services are duplicative of the services currently being provided by WUSHD was not established. In fact, the evidence established that the community integration and independent living skills components of the WUSHD's Transition Program will not be implemented until Claimant reaches 18 years of age and completes his high school education.

LEGAL CONCLUSIONS

1. Claimant's appeal of the Service Agency's decision to deny funding for community integration training was timely filed and thus proper jurisdiction to proceed with this hearing was established.

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.) The Service Agency seeks to terminate a service it previously funded and therefore has the burden to demonstrate that its decision is correct. Service Agency has the burden to show by a preponderance of the evidence that the reduction of community integration services for Claimant was appropriate. (See Evid. Code, § 115.)

3. Claimant's appeal is governed by the Lanterman Developmental Disabilities Services Act (Lanterman Act.) (Welf. & Inst. Code, §§ 4500 et seq.)² Under the Lanterman Act, the Service Agency is required to secure services and supports that meet the needs of a person found eligible for services based upon a qualifying developmental disability. (Welf. & Inst. Code, § 4501.) Sufficient services and supports should be established to meet the needs and choices of the consumer, regardless of age or degree of disability, to support their integration into the community. (*Id.*) In providing these services, consumers and their families, when appropriate, should participate in decisions affecting their own lives, including the planning and implementation of services provided by the Service Agency. (*Id.*)

4. The service and support needs of the consumer are determined through the IPP process and "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, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments." (Welf. & Inst. Code, § 4646, subd. (a).) The Service Agency's provision of services to the consumer should "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." (*Id.*; see also § 4512, subd. (b).) "The individual program plan is developed through a process of individualized needs determination. The individual with developmental disabilities and, where appropriate, his or her parents, legal guardian or conservator, or authorized representative, shall have the opportunity to actively participate in the development of the plan." (Welf. & Inst. Code, § 4646, subd. (b); see also § 4512, subd. (b).) "Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer's goals, objectives, and services and supports that will be included in the consumer's individual program plan and purchased by the regional center or obtained from generic agencies shall be made by agreement between the regional center representative and the consumer or, where appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting." (Welf. & Inst. Code, § 4646, subd. (d).)

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

5. Section 4646.4, subdivision (a) states, in pertinent part:

Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

- (1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.
- (2) Utilization of generic services and supports when appropriate.
- (3) Utilization of other services and sources of funding as contained in Section 4659.
- (4) Consideration of 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.

(Welf. & Inst. Code § 4646.4, subd. (a).)

6. Section 4648.5, enacted July 1, 2009, and effective August 1, 2009, for consumers with existing services falling within the scope of the provision, states in pertinent part that:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional center's authority to purchase the following services shall be suspended pending implementation of the Individual Choice Budget and certification by the Director of Developmental Services that the Individual Choice Budget has been implemented and will result in state budget savings sufficient to offset the costs of providing the following services:

- (1) Camping services and associated travel expenses.
- (2) Social recreation activities, except for those activities vendored as community-based day programs.
- (3) Educational services for children three to 17, inclusive, years of age.

(4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

(b) For regional center consumers receiving services described in subdivision (a) as part of their individual program plan (IPP) or individualized family service plan (IFSP), the prohibition in subdivision (a) shall take effect on August 1, 2009.

(c) An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs.

(Welf. & Inst. Code § 4648.5.)

7. Service Agency asserts that it was justified in terminating Claimant's DESI CIT services because the services were duplicative of services being provided by the WUSHD, and/or because the Legislature has suspended regional center funding for social recreational activities, which Service Agency believes includes the DESI CIT services.

DESI CIT Services Are Not Duplicative

8. Service Agency's contention that the DESI CIT services were duplicative of services provided by WUHSD was not supported by the evidence. The evidence established that WUHSD was not providing independent living skills or community integration services to Claimant. Although the school district has developed a Transition Program for Claimant, the program does not take effect until Claimant reaches the age of 18, or when he graduates from high school. The school district confirmed that Claimant was currently being provided some vocational training services, but that independent living skills training and/or community integration services would not be made available to Claimant until the actual Transition Program is implemented upon Claimant's high school graduation or when he turns 18 years of age. Service Agency presented no evidence that the DESI CIT services were educational in nature. The DESI CIT services are designed to assist Claimant in accessing his local community through the provision of independent living skills that will help him safely navigate his community using public transportation, improve or enhance his ability to effectively communicate with persons he may encounter within his community, and to foster development of peer relationships through involvement in community activities. Consequently, the services are not duplicative of any service being provided by WUHSD, and Service Agency may not terminate Claimant's DESI CIT services based upon that assertion.

DESI CIT Services Are Not Social Recreation

9. The DESI CIT services are also not social recreation activities as asserted by Service Agency. The California Code of Regulation, Title 17, section 54302, subdivision (64) provides that “‘Social Recreation Program’ means a community-based day program which provides community integration and self-advocacy training as they relate to recreation and leisure pursuits.” Section 54302, subdivision (16) of the regulations provides that “‘Community-based Day Programs’ means those programs which provide services to individuals on an hourly or daily basis, but less than a 24-hour basis in the community rather than at a developmental center. Only the following types of services are community-based day programs: activity centers, adult development centers, behavior management programs, independent living programs, infant developmental programs and social recreation programs.” Section 4648.5, subdivision (a), terminates funding for social recreation programs, but specifically excepts “community based-day programs” from this category of social recreation programs. Finally, section 54302, subdivision (17) of the regulations provide that “‘Community Integration’ means presence, participation and interaction in natural environments.”

10. The DESI CIT services may not be appropriately defined as a “social recreation program” because the program is not designed to provide community integration for purposes of “recreation and leisure pursuits,” as social recreation is defined in section 54302, subdivision (64) of the regulations. To the contrary, the DESI CIT services are designed to promote or enhance independent living skills for Claimant for the specific purpose of assisting him in accessing his surrounding community environment in a safe and functionally effective manner. Claimant’s developmental disability, mental retardation, presents significant deficiencies in his ability to effectively communicate verbally, or to appreciate the dangers and hazards that are presented when he attempts to perform basic activities such as going to the grocery store, the local community center, or the library. Claimant’s May 24, 2011 IPP specifically noted that Claimant presented with significant challenges when trying to access his community environment. The IPP noted that Claimant had limited safety skills and required constant supervision in both familiar and unfamiliar settings to maintain his safety. While in the community, Claimant is unable to safely cross a street without assistance, and is unable to make a store purchase or order a meal in a restaurant independently. The IPP further noted that Claimant was only able to communicate his desires and needs by “verbalizing a few words although his speech was difficult for others to understand. He communicates primarily using facial gestures, informal hand signs, and incomprehensible verbalizations.”

11. Claimant’s mother requested continued funding of the DESI CIT services to specifically address deficiencies caused by Claimant’s mental retardation, not for the purpose of providing social recreation or leisure. The IPP indicated that the DESI CIT services would be considered for the purpose of increasing community integration and safety skills, upon receipt of the Progress Report from DESI. There is no indication that the DESI CIT services were anticipated as being, or had been vendored as, a social recreation activity by

the Service Agency. The DESI CIT services were being provided as a community based-day program designed to promote independent living skills for Claimant to help him safely and effectively, to the best of his functional ability, integrate into his local community environment. Accordingly, Service Agency inappropriately denied funding of the DESI CIT services based upon the services being improperly considered as social recreation activities for which funding was suspended by the Legislature pursuant to section 4648.5.

DESI CIT Services Are Entitled To Exemption

12. Even had the DESI CIT services been vendored or considered as a social recreation activity, the evidence established that extraordinary circumstances exists such that Claimant would be entitled to an exemption under section 4648.5, subdivision (c). Section 4648.5, subdivision (c), provides that where a service is “a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer’s developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer’s needs,” the Service Agency may purchase the service. Here, as discussed above, the DESI CIT services were designed to promote independent living skills and to assist Claimant to integrate into his community. The CIT services addressed or were intended to ameliorate the deficiencies that existed as a result of Claimant’s mental retardation, i.e, his inability to effectively communicate verbally, his inability to safely navigate street crossings, his inability to perform basic functions such as purchasing items at a grocery store, counting money, and accessing public transportation. The DESI CIT services were designed to help Claimant to function independently in his community and enable him to remain in his home as he reaches the age of adulthood. As such, there is sufficient evidence to conclude that even had the DESI CIT services been subject to the section 4648.5 funding suspension, extraordinary circumstances exists to warrant an exemption from the funding suspension.

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ORDER

Claimant Martin C.'s appeal of the Service Agency's decision to deny funding for Claimant's DESI CIT services is granted. Service Agency shall reinstate funding for DESI CIT services at the previous level of five (5) hours per week, 20 hours per month.

IT IS SO ORDERED.

DATED: April 23, 2012

MICHAEL A. SCARLETT
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5, subdivision (a). Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.