

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2015060697

DECISION

Administrative Law Judge Angela Villegas, State of California, Office of Administrative Hearings, heard this matter on July 29, 2015, in Alhambra, California.

Judy Perez, Fair Hearing Coordinator, represented Eastern Los Angeles Regional Center (ELARC).

Victoria Baca, Educational Consultant and authorized representative, represented claimant.¹ Also present were claimant's mother, and interpreter Bernadette Buckley.

Evidence was received, and the matter was submitted on July 29, 2015.

ISSUES

1. Whether ELARC must provide claimant with compensatory speech therapy (ST) services for the periods during summer 2014 when he did not receive such services from his school district.

2. Whether ELARC must provide claimant with ST services for the periods during summer 2015 when he is not receiving such services from his school district.

¹ Claimant's name and the name of claimant's parent are not disclosed, in order to protect their privacy.

EVIDENCE RELIED UPON

Documentary: ELARC's exhibits 1-15. Testimonial: Judy Perez, Fair Hearing Coordinator, ELARC; Veronica Valenzuela, Consumer Services Supervisor, ELARC; claimant's mother; Victoria Baca, claimant's authorized representative.

FACTUAL FINDINGS

1. Claimant is an 18-year-old male who qualifies for regional center services based on diagnoses of autism spectrum disorder and apraxia. He lives with his mother and brother. Claimant has serious communication difficulties. According to his Individual Program Plan (IPP) (ex. 3), claimant "uses a few simple words. . . only understood by those who know him well[,]" and "sporadically but effectively" uses a DynaVox device to communicate.

2. On May 26, 2015, ELARC sent claimant a Notice of Proposed Action (NOPA) "denying [his] request to fund speech therapy during the summer of 2015 due to consumer's parent not following the notification of resolution (DS 1804) that ELARC and claimant have agreed to on 05/14/2014." (Ex. 1.) On June 9, 2015, claimant filed a Fair Hearing Request (FHR) seeking the services set forth in the "Issues" section, above. This proceeding followed.

3. Claimant will enter the 11th grade this fall at the Elliott Institute. While attending school, claimant receives special education services, including two hours per week of ST, 90 minutes individually and 30 minutes in a group. The services are funded by Los Angeles Unified School District (LAUSD).

4. Claimant attends school during the regular school year, and also during an extended school year (ESY) for 20 school days (four weeks) during the summer.² The ESY does not cover the entire summer. At the end of the regular school year, before ESY begins, and at the end of ESY, before the new school year begins, there are periods (summer gaps) during which claimant does not attend school. The evidence did not disclose the dates on which the regular school year and ESY began or ended in 2014 or 2015, except that the 2015 ESY ended on July 30, and the 2015-2016 regular school year is scheduled to begin on August 10 or 15, 2015.³

5. During the summer gaps, claimant does not receive school-district funded ST; indeed, he does not receive ST at all. As a result of lapses in ST, claimant's ability to communicate, already highly compromised because of his disabilities, regresses. (Testimony

² Under California Code of Regulations, title 5, section 3043, subdivision (d), 20 days is the minimum ESY that can be provided. The regulation does not specify a maximum.

³ August 10, 2015 is a Monday; August 15, 2015 is a Saturday.

of claimant's mother.) A speech pathologist who saw claimant on July 15, 2015 noted his difficulty "retaining and generalizing his communication skills" and recommended "that [he] receive continuation of speech and language services through the summer recess period to maintain and generalize his skills." (Ex. 10.) From these factors, and from the school district's provision of ST for claimant, it can be inferred that claimant needs continuous ST, during the school year, the ESY, and the summer gaps.

6. Claimant seeks to recover six weeks' worth of compensatory ST services from summer 2014, and for summer 2015, he seeks an award of five weeks of ST. Claimant concedes he is not entitled to ELARC-funded ST while he is attending school and receiving ST through LAUSD. The evidence did not disclose how or when compensatory ST service hours, if awarded, would be used, and claimant did not offer evidence showing exactly how many hours of ST he missed during summer 2014.

7. In the past, ELARC has funded ST for claimant during the summer gaps, but has not done so consistently or unreservedly. Consequently, the parties have long disagreed over ELARC's responsibility to provide claimant with ST during the gaps. They have entered into two settlement agreements regarding the summer-gap ST issue—one on June 28, 2012, and another on May 14, 2014—and they have gone to hearing at least once, on October 17, 2013. In 2012, ELARC funded ST services for claimant during the summer gaps.

8. Nevertheless, ELARC has consistently taken the position that claimant must exhaust LAUSD as a resource for claimant's summer ST, including pursuing appeals, and claimant has consistently agreed to do so. The parties' agreements and understandings are reflected not only in their settlement agreements (exs. 5 and 8), but also in claimant's IPP (exs. 3 and 4).

9. The parties' most recent settlement agreement, dated May 14, 2014 (NOR), governs claimant's summer-gap ST for 2014 and 2015. It provides as follows:

1. Claimant agrees to provide ELARC with a copy of the IEE⁴ for both psycho-educational and speech/language.
2. Claimant will invite ELARC to the IEP⁵ which is expected to be scheduled before school is out for the summer (June 18, 2014).
3. Claimant agrees to provide ELARC with a copy of the final signed IEP 2014.
4. Part of parent[']s request to the school district is funding for ESY for a total of 55 days. Currently the school is willing to offer only 20 days. If school district does not agree to extend ESY to 55 days, parent will appeal this decision with the school by filing a hearing

⁴ IEE stands for Independent Educational Evaluation.

⁵ IEP stands for Individualized Education Plan.

with the OAH. Parent will provide ELARC with the appeal to prove that a hearing for this issue has been filed.

5. If the Fair Hearing is denied (for 55 days of ESY which is to include speech therapy) ELARC will request a review through the ELARC clinical team to determine if there is a need for [claimant] to receive speech therapy during the summer 2015 funded by ELARC.
6. Speech therapy during 2014 summer gap (8 weeks) will be funded by ELARC. The number of hours will be as written in his IEP. Currently the hours are 90 minutes per week. However, this number may change pending the outcome of the upcoming IEP (expected to be scheduled before June 18, 2014). Claimant agrees that if ELARC funds speech therapy summer 2014 it will be through an ELARC vendor and at the Medi-cal rate.

(Ex. 5.)

10. With regard to the 2014 summer gaps, the parties disagree as to their obligations under the NOR. ELARC contends its duty to fund ST for claimant was conditioned on claimant's first providing the two IEE reports, inviting ELARC representatives to the June 2014 IEP meeting, and providing ELARC with a copy of the resulting IEP. Claimant, by contrast, contends ELARC agreed to fund ST during the summer 2014 gaps unconditionally, in return for his promise to perform the obligations set forth in paragraphs 1 through 5 of the NOR in the future.

11. The NOR's language, the circumstances surrounding its formation, and the parties' subsequent conduct support claimant's contention that ELARC's promise with regard to the 2014 summer gaps was unconditional.

12. The sentence, "Speech therapy during 2014 summer gap (8 weeks) will be funded by ELARC[.]" denotes an unconditional promise. ELARC points to paragraph 6 of the NOR—specifically, the phrase, "*if* ELARC funds speech therapy summer 2014 it will be through an ELARC vendor and at the Medi-cal rate" (emphasis supplied)—as evidence that its promise to fund ST during summer 2014 was conditional. While the word "if" creates some ambiguity, the more reasonable reading of the NOR, in light of the circumstances, is that any doubt over whether ELARC would fund summer 2014 ST concerned its ability to secure a vendor in time to do so (see Factual Finding 14)—not that its promise was conditional.

13. Furthermore, at the time of the NOR, claimant had already commenced and settled a due process proceeding with LAUSD, a circumstance of which ELARC had been made aware, and which informed the parties' negotiation of the NOR. In the settlement, LAUSD agreed to provide claimant with the 20-day ESY and the two IEEs referenced in paragraphs 1 and 4 of the NOR. Claimant's plan was to use the results of the IEEs to support a renewed request for LAUSD to provide a 55-day ESY, and, if necessary, an appeal of LAUSD's response to that request. Such a plan made sense in the context of the promises

claimant made in the NOR, and would have supported an unconditional promise on ELARC's part to fund ST during the 2014 summer gaps, since the plan represented progress toward claimant's exhausting LAUSD as a resource.

14. (a) In addition, ELARC's interdisciplinary (ID) notes from June through August 2014 (ex. 6) show that claimant's service coordinator made efforts to find a vendor to provide claimant with ST services during that period. ELARC contends the service coordinator was merely trying to line up a vendor so that services could be commenced without delay, if and when claimant's mother provided the promised documentation.

(b) ELARC's contention was not entirely credible. The ID notes also show the service coordinator had considerable difficulty lining up a vendor, and failed to do so in time for claimant to obtain services. This was consistent with the testimony of claimant's mother, who understood that the service coordinator was unable to secure a vendor because vendors were already booked for the summer 2014 period. Thus, the more reasonable explanation for ELARC's failure to provide 2014 summer gap ST was that it was too difficult to secure a vendor in the time available to do so. (See Factual Finding 12.)

15. ELARC did not actually fund ST for claimant during the 2014 summer gaps. ELARC contends this was because claimant's mother failed to fulfill claimant's obligations under the NOR. The evidence showed, however, that claimant's mother attempted to fulfill those obligations as best she could.

16. LAUSD provided a psycho-educational IEE for claimant in May 2014, though the evaluator's report was not released until October 9, 2014, well after the 2014 summer gaps had ended. Claimant's mother provided ELARC with a copy of the psycho-educational IEE report in February 2015, shortly after she received it. LAUSD has not yet provided claimant with a speech/language IEE.⁶

17. Claimant's most recent signed IEP dates from 2013; ELARC has a copy of that IEP. No revised IEP was prepared during 2014. The June 2014 IEP meeting referenced in the NOR did not occur, and claimant's mother so informed ELARC on June 30, 2014. (Ex. 6.) The IEP meeting was rescheduled for October 16, 2014, and claimant's mother invited claimant's ELARC service coordinator, but that meeting was canceled because assessments were not ready. The IEP meeting was tentatively rescheduled for November 2014, and claimant's mother invited the ELARC service coordinator, but that meeting did not take place, either.

18. Claimant's IEP team finally met on May 27, 2015. Claimant's mother invited claimant's ELARC service coordinator to that meeting also, but no one from ELARC attended. Claimant's IEP could not be finalized at that meeting, due to LAUSD's failure to invite the psycho-educational evaluator and provide claimant with the promised

⁶ The speech/language consultation claimant had on July 15, 2015 (see Factual Finding 5) was not the speech/language IEE that LAUSD had promised.

speech/language IEE. Claimant's IEP team expects to reconvene sometime after school resumes in the fall.

19. With regard to 2015 summer-gap ST, the NOR expressly conditions ELARC's promise to consider funding such services on claimant's pursuit of a 55-day ESY, first through LAUSD, and then through the administrative appeal process. ELARC has not funded ST for claimant during the 2015 summer gaps.

20. Claimant has not sought funding for his ST through medical insurance, but was unaware until the fair hearing, of any need to do so. Claimant's mother expressed a willingness to explore this option.

LEGAL CONCLUSIONS

1. Claimant had the burden to prove, by a preponderance of the evidence, his entitlement to have ELARC provide him with compensatory ST services for the 2014 summer gaps, and ST during the 2015 summer gaps. (Evid. Code, §§ 115; 500.) Claimant carried his burden with regard to any remaining gap in 2015, but not as to 2014.

2. The Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code [WIC], §§ 4500 et seq.), recognizes a public responsibility to provide services and supports for individuals with developmental disabilities. Regional centers are principally responsible for coordinating those services and supports, through the IPP process. (WIC, §§ 4620 et seq.)

Issue 1: Whether ELARC Must Provide Claimant with Compensatory ST Services for the Periods During Summer 2014 When He Did Not Receive Such Services from His School District.

3. No authority was cited to, or discovered by, the administrative law judge that requires a regional center to provide "compensatory" services if agreed services are not received.⁷ Consequently, with regard to Issue 1, the FHR seeks relief that cannot be granted in the present proceeding.

4. Furthermore, even if an award of compensatory services could be made, claimant did not establish the number of ST hours missed as a result of ELARC's failure to pay for ST during summer 2014, or how and when those hours would be used if awarded as "compensation." (Factual Finding 6.) Hence, claimant cannot prevail on his claim for

⁷ *White v. State of California* (1987) 195 Cal.App.3d 452, at page 467, determined in the special education context that "children can be supplied with compensatory [educational] services to make them whole." No corresponding statutory, regulatory, or case law was found extending this concept to regional centers under the Lanterman Act.

compensatory 2014 services. This is true even though claimant's reading of the NOR is the more reasonable one. (Factual Findings 10-14.) Issue 1 is decided against claimant.

Issue 2: Whether ELARC Must Provide Claimant with ST Services for the Periods During Summer 2015 When He Is Not Receiving Such Services from his School District.

5. ELARC must fund claimant's ST during any remaining 2015 summer gap,⁸ even though the condition precedent to its performance under the NOR has not occurred.

6. The NOR presupposed that an updated IEP would be signed in 2014 and that claimant would soon receive both of the IEEs that LAUSD had promised (Factual Findings 9-13), and obligated claimant to appeal a subsequent decision by LAUSD to provide him with less than a 55-day ESY. (Factual Finding 9.) An administrative decision denying claimant's appeal would trigger ELARC's obligation to "request a review through [its] clinical team to determine if there is a need for [claimant] to receive speech therapy during the summer 2015 funded by ELARC." (*Id.*)

7. Hence, under the NOR, claimant's unsuccessful appeal of an adverse LAUSD decision was an express condition precedent to ELARC's obligation to assess claimant's need for, and possibly provide, ST during the 2015 summer gaps. (Factual Findings 9 and 19.)

8. That condition was not fulfilled. There has been no unsuccessful appeal of an adverse LAUSD decision, because no such decision has been made yet. (Factual Findings 9-18.) The reason no such decision has been made is that the 2014 IEP process was delayed, due to circumstances beyond claimant's control, and the IEP process that recommenced on May 27, 2015 has not yet resulted in a final updated IEP—again, due to circumstances beyond claimant's control. (Factual Findings 16-18.) During the 2014 and 2015 IEP processes, claimant's mother consistently invited ELARC personnel to participate, and she provided ELARC with the documentation promised in the NOR as she received it. (Factual Findings 17 and 18.) Accordingly, claimant made a good faith effort to perform under the NOR, and the non-occurrence of the condition precedent was not his fault. (Factual Findings 15-18.)

9. This being the case, and in light of the remedial purposes of the Lanterman Act (see Legal Conclusion 2), the condition precedent to ELARC's performance is excused. To the extent ELARC protests that it is unfair not to honor the letter of the NOR, claimant's needs (Factual Findings 1 and 3-5) override contractual fastidiousness.

⁸ At the time of the fair hearing (July 29, 2015), claimant was about to conclude his ESY, and was scheduled to return to school for the 2015-2016 academic year in 12 to 17 days. (Factual Finding 4.) Since compensatory services cannot be awarded, this decision is applies only to the remaining days of summer 2015 during which claimant is not attending school.

10. Indeed, even without the NOR, the Lanterman Act alone is sufficient to oblige ELARC to provide claimant with ST during the 2015 summer gaps—as it has done, albeit reluctantly, in the past. (Factual Findings 7 and 8.) The Lanterman Act requires regional centers to fund needed services and supports in a cost-effective manner, as the payer of last resort, after generic resources have been maximized. (E.g., WIC, §§ 4646; 4646.5; 4647; 4648, subd. (a); 4659.)

11. Claimant needs continuous ST, both while he is attending school and during the summer gaps. (Factual Findings 1 and 3-5.)

12. The ST services claimant seeks do not go beyond those proposed in the NOR. Such services are cost-effective, because the NOR provides ELARC will provide such services only in the amount specified by claimant’s IEP (i.e., two hours per week), through ELARC’s own vendor, and at the Medi-Cal rate. (Factual Finding 9.)

13. Moreover, ST for claimant during the summer gaps is not currently being funded by any generic resource. He is simply not receiving ST during the gaps. (Factual Finding 5.)

(a) If claimant fails to fulfill his obligation under the NOR to maximize the ESY, and/or fails to provide ELARC with the agreed documentation, then that may impact ELARC’s obligation to fund ST during future summer gaps. But as matters currently stand, claimant is not in a position to take further action against LAUSD or provide documentation that does not yet exist. (Factual Findings 16-18.)

(b) Likewise, if claimant is able to obtain ST during future summer gaps by using his medical insurance, then ELARC’s obligation to fund ST will be reduced or possibly eliminated. But as of the fair hearing, claimant had not been provided with the information necessary to pursue that option, and it was undisputed that medical insurance was not paying for claimant’s ST during the summer gaps. (Factual Findings 5 and 20.)

(c) Hence, at present, generic sources of funding have been maximized, such that ELARC’s support is necessary for claimant to continue receiving the ST he needs during any remaining 2015 summer gap.

14. In sum, claimant is entitled to have ELARC fund ST services for him at the rate of two hours per week for the remainder of the 2015 summer gap. Given the late date and claimant’s impending return to school (Factual Finding 4), ELARC may not insist on evaluating claimant’s need for ST before providing him with it. To that extent, Issue 2 is decided for claimant.

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ORDER

1. Claimant's appeal is granted in part and denied in part.
2. ELARC is not required to provide claimant with compensatory speech therapy services for the periods during summer 2014 when claimant did not receive such services from his school district.
3. ELARC is required to provide claimant with speech therapy services, in the amount of two hours per week, using an ELARC vendor, and at the Medi-Cal rate, for any remaining portion of summer 2015 during which claimant is not receiving such services from his school district.

Dated: August 4, 2015

/s/
ANGELA VILLEGAS
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.