

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH Case No. 2016020266

OAH Case No. 2016010268

DECISION

Administrative Law Judge John DeCure heard these matters on January 28, 2016, at the Eastern Los Angeles Regional Center in Alhambra, California. (Claimant) was represented by his mother, E.P. (Mother).¹ Eastern Los Angeles Regional Center (ELARC; Service Agency) was represented by Jesse Valdez, Manager for ELARC.

OAH Case No. 2016020266

Initially, two matters were scheduled to go forward. Office of Administrative Hearings (OAH) Case No. 2016010266 involved Claimant's request for a fair hearing to determine whether ELARC's denial of Mother's request for in-home day care services during hours Claimant should be in school was appropriate. Just before the hearing, the parties met and conferred privately and reached an agreement resolving this issue. When the hearing began, the parties stated they had resolved the disputed issue to their mutual satisfaction and therefore had no need to proceed with a fair hearing to resolve the matter. By oral stipulation of the parties, Mother's request for a fair hearing was withdrawn.²

¹ Claimant's and his family's names will be kept confidential to preserve his privacy rights.

² The parties did not submit a Notice of Resolution.

As a result, only OAH Case No. 201610268, which was still in dispute, was heard. After receiving documents and hearing testimony and oral argument by both parties, the record was closed, and the case was submitted for decision.

OAH Case No. 2016010268

ISSUES

1. Should the Service Agency offer funding to ELARC vendors of up to \$15 per hour to provide day care, in-home respite, and parent coordinated personal assistance for Claimant?
2. Should the Service Agency fund day care services provided by Claimant's maternal uncle at a rate of \$15 per hour?
3. Should the Service Agency apply to the Department of Developmental Services (DDS) for a health and safety waiver requesting DDS to grant a service rate increase to \$15 per hour for day care, in-home respite, and parent coordinated personal assistance services provided to Claimant?

FACTUAL FINDINGS

1(a). On November 30, 2015, ELARC sent a Notice of Proposed Action to Mother notifying her that it was denying her request for a health and safety waiver for service providers for Claimant to be paid at a rate of \$15.00 per hour. The health and safety waiver is an application process available to regional centers to obtain written authorization from DDS for a rate increase for services subject to the rate limitations imposed on regional centers. In other words, a successful application would result in DDS granting permission to a regional center to fund services at a higher rate than the pre-set norm.

1(b). In its notice, ELARC further stated it was currently willing to pay \$11 per hour for day care, \$11.88 per hour for in-home respite, and \$11 per hour for parent coordinated personal assistance. These hourly figures are the current set rates for services ELARC is authorized to pay in keeping with the Legislature's mandate, set forth in the Lanterman Act (Welfare and Institution Code (WIC) sections 4700 - 4716, and California Code of Regulations, Title 17, sections 50900 - 50964), that regional centers provide funding for necessary client services in the most cost-effective manner possible.

1(c). The notice informed Mother of her right to appeal ELARC's decision by requesting a fair hearing. Mother signed a request for a fair hearing on December 16, 2015.

2. Claimant's present request for a health and safety waiver and a \$15 per hour service rate is because Claimant's medical condition, actual needs, and care required have made it impossible to locate service providers to provide care for a lesser hourly rate. Yet, this rate exceeds the amounts provided by the Service Agency. To understand why these higher costs are necessary requires information on Claimant's condition, the care provided to him, the costs of that care, and ELARC's attempts to secure services through its vendors.³

3. Claimant is a 13-year-old child. At two years and nine months old, he was diagnosed with autism, attention deficit hyperactive disorder (ADHD), and deferred Axis II diagnosis due to lack of engagement during his assessment. He became eligible for regional center services in 2005. In March 2015 he was diagnosed with Methicillin-resistant Staphylococcus Aureus (MRSA), a type of staph bacteria resistant to antibiotics that can cause skin and other infections. MRSA can be spread through direct contact with an infected wound or by skin-to-skin contact or sharing personal items that have touched infected skin. To avoid becoming infected, a person caring for an MRSA patient must be vigilant about wearing gloves, constantly washing his or her hands, frequently laundering the patient's sheets, towels, and clothes, and keeping the patient's wounds covered.

4. Claimant lives at home with Mother. He requires total care, 24 hours per day, seven days per week, to maintain his safety and well-being. Claimant is five feet five inches tall, weighs nearly 200 pounds, and is extremely physically active, constantly seeking to escape, jumping on furniture, raiding the refrigerator, and flopping on the floor when he has tantrums. He is also significantly developmentally delayed. In a 2014 psychological evaluation in which his developmental disabilities were assessed, Claimant scored "low" in every test category, including adaptive behavior, daily living skills, receptive and expressive communication, written communication, interpersonal relationships, play and leisure time, and coping skills.

5. Mother describes Claimant as extremely delayed in all aspects. He constantly attempts to escape the home, strips his clothes off, suffers from incontinence, smears and sometimes eats his own feces, and swallows objects. He needs help with bathing, personal hygiene, eating, and every other facet of daily living activities. Claimant sleeps only two to four hours per night. Because he cannot care for himself and lacks the judgment to live safely, he cannot be left alone when he is awake. Mother bears the primary burden of caring for him, so she is typically exhausted from lack of sleep and overwork. Claimant's MRSA infection requires constant laundering of his sheets, towels, and clothes and as a result, Mother never stops doing laundry in their home. Due to Claimant's heavy-set physique and his constant physical movement, he sweats profusely and has developed painful, raw skin rashes in his groin area.

³ There is no controversy over Claimant's need for these services, or the monthly hours ELARC has approved for each service.

6. When Claimant is in public he tends to “bulldoze” others by physically invading their personal space. (Mother’s testimony.) He is obsessed with cellular telephones and tries to take them away from other people, even strangers, when he sees them in use. Because he constantly tries to elope, Mother must be extremely vigilant whenever they go out of the home.

7. Caring for Claimant has left Mother feeling deeply depleted and physically worn out. If she, and ELARC, cannot find service providers to help care for Claimant, she will seek placement for Claimant outside the family home.

8. Mother has sought caregiver support for Claimant but has had no success. Once caregivers learn of Claimant’s needs and requirements and that he also has MRSA, they have little interest. Mother has received such scant interest that she has not yet advanced to negotiation with a single potential service provider regarding the hourly wages Mother, or ELARC, can pay. Mother has recently placed an advertisement on Care.com, a web site that posts biographies and pay-rates for individual caregivers specializing in caring for special needs children. No one has responded. Mother conducted an online search on Care.com for a suitable caregiver for Claimant. Twelve of the 15 potential caregivers offered by Care.com posted minimum pay scales of \$15 per hour or higher for their services. Mother has also inquired of various caregivers and spoken to other people related to the service-providing industry. She has learned that \$15 per hour is a general minimum hourly wage for those caring for a demanding special needs child.

9. ELARC Service Coordinator Lillian Gonzales’s testimony lent credence to Mother’s contention that no one is willing to care for Claimant for wages in the range of \$11 per hour. Service Coordinator Gonzales has made at least 20 attempts to secure in-home services for Claimant through ELARC vendors, with no success. Vendors cannot legally force their staff members to work with Claimant due to Claimant’s MRSA. None have offered services. Although Service Coordinator Gonzales would not be the person at ELARC to determine the hourly pay rate for services, the topic has never come up with potential vendors because none have expressed interest as yet in working with Claimant.

10. Mother’s brother, L.C., currently provides part-time day care services to Claimant. He has been paid \$11 per hour since 2006 and considers Claimant to be very demanding and requiring constant supervision. L.C. is concerned about the risk he runs in contracting MRSA and believes \$11 per hour is not in keeping with that risk and the demands of caring for Claimant. However, he knows Mother is dealing with major stress because she cannot secure respite and personal assistant services, and if she cannot find help, she may consider placement for Claimant outside the home. L.C. wants to continue providing services to help resolve Mother’s dilemma, but not for less than \$15 per hour.

11. Service Coordinator Gonzales has not sought a health and safety waiver for Claimant because DDS only grants waivers in rare, exceptional cases involving, for instance, clients with extreme behaviors or extreme medical needs. Jessica Barba, ELARC's Community Services Supervisor, testified that if ELARC applies for a health and safety waiver, DDS will likely take up to 9 months deliberating over the request before denying it. Waiver requests are notoriously difficult and are rarely successful. ELARC estimates that a health and safety waiver on Claimant's behalf would fail.

12. Mother established that the extent of effort and commitment a service provider must bring to the task of caring for Claimant is unusually high. As a result, it is extremely hard to obtain qualified personnel who want to undertake the job. Mother is also concerned about losing her brother, the only other current care provider for Claimant, because her brother is underpaid at \$11 per hour.

13. The Service Agency provides services to its consumers in accordance with printed service policies. These service policies are designed to express the provisions of the Lanterman Developmental Disabilities Services Act as found in the Welfare and Institutions Code.

14. The Service Agency's Service Policy states:

Eastern Los Angeles Regional Center (ELARC) may purchase services and supports for a consumer when services and supports will:

- 1) Prevent a developmental disability [WIC Sec. 4644(a)],
- 2) Prevent or minimize the institutionalization and dislocation of the individual from family and community or,
- 3) Enable the individual to approximate the pattern of everyday living of a nondisabled person of the same age leading to a more independent, productive and normal life in the community and promote integration into mainstream community life [WIC Sec. 4648].
- 4) Assist individuals with developmental disabilities, in achieving the greatest self-sufficiency possible and exercising personal choice.
- 5) Allow individuals to interact with persons without disabilities in positive meaningful ways [WIC 4648].

APPLICABLE LAW

15. Various portions of the applicable law, the Lanterman Act, apply to Claimant's request. For example, Welfare and Institutions Code⁴ section 4648 requires the Service Agency to secure services to carry out the Legislative intent for clients to achieve the greatest self sufficiency possible, and to meet the needs of the consumer as identified in the consumer's individual program plan. The Service Agency is directed to pay for services at a rate that ensures the provider can meet the consumer's special needs and “provide quality services and supports in the least restrictive setting.”

16. Throughout the applicable statutes and regulations, the state level fair hearing is referred to as an appeal of the Service Agency's decision. In this matter, where the Claimant's family is challenging the Service Agency's denial of a requested service, the burden is on the Claimant to demonstrate that the Service Agency's decision is incorrect.

17. Section 4501 states, in part, that the complexities of providing these services require coordination of many state and community agencies, and that a consumer and family “shall have a leadership role in service design” and should be “empowered to make choices in all life areas.” Further, the Legislature specifically found that the mere existence and delivery of services was not enough; those agencies must “produce evidence that their services have resulted in consumer or family empowerment.”

18. Services and supports provided by a regional center shall be flexible and individually tailored to the consumer and family. (Section 4648, subdivision (a)(2).) The regional centers must consider whether the consumer and his family are satisfied with the services being offered, and whether reasonable progress is being made. (Section 4648, subdivision (a)(7).)

19. It is the intent of the Legislature that regional centers provide family support services that respect and support the decision-making authority of the family; are flexible and creative in meeting the unique and individual needs of families as they evolve over time; and are designed to meet the cultural preferences, values, and lifestyles of families. (Section 4685, subdivision (b).)

20. The statutory scheme also includes the direction to the Service Agency to accomplish its goals in a cost-effective manner. See, for example, sections 4646, 464, subdivision 8(a)(11), 4660.2, subdivision (b), 4669.2, subdivision (b) and 4685. Section 4691.9 requires that regional centers not pay an existing service provider for services at a rate higher than the rate in effect for such services, unless the regional

⁴ All citations are to the Welfare and Institutions Code, unless otherwise indicated.

center demonstrates that approval for the higher rate is necessary and has written authorization from DDS.

21. Section 4690 requires DDS to establish an equitable process to set rates for payment for such services in a manner that assures their high quality.

22. Interpreting the purpose and intention of the lawmakers in passing the Lanterman Act, the Court in *Association of Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 393, concluded that the Act “grants the developmentally disabled person the right to be provided *at state expense* with only such services as are consistent with its purpose.” (Emphasis added.)

LEGAL CONCLUSIONS AND DISCUSSION

1. Claimant established that in-home services for Claimant cannot reasonably be secured at the current rates of \$11 per hour for day care, \$11.88 per hour for in-home respite, and \$11 per hour for parent coordinated personal assistance. ELARC’s service coordinator’s diligent efforts to secure service providers have been to no avail, underscoring this dilemma. Although ELARC is offering to pay for services at its current rates in an attempt to be lawful and cost-effective, the unfortunate reality is that no caregivers are available at that rate, Mother’s brother no longer agrees to work for \$11 per hour, and Mother is exhausted and nearing a personal breaking point.

2. The Lanterman Act charges the regional centers with the responsibility to deliver important services to the disabled, yet they must also ensure those services are provided in a cost-effective fashion. Claimant and Mother established that the services provided are encompassed within the Act and that it is necessary to pay amounts beyond what is currently provided by the Service Agency to obtain those services. Based on the reasoning of the *Association of Retarded Citizens* case (see Applicable Law, paragraph 22) that required services should be provided at state expense, the Service Agency should pay up to \$15 per hour for any day care, in-home respite, or parent coordinated personal assistance for Claimant.

3. In pursuing her claim, Mother bears the burden of proving that these services should be paid at a higher rate of up to \$15 per hour. Mother met that burden.

4. Service Agency has been commendably dedicated to finding services through its vendors for Claimant. It has not endeavored to apply for a health and safety waiver from DDS because it does not foresee a positive result. Because the order set forth below resolves the issue of authorization to pay a higher rate for Claimant’s services, the value of achieving a waiver is diminished. The most critical, pressing issue for both Claimant and Mother is obtaining service providers who can

meet Claimant's need while providing Mother long overdue respite and relief. Claimant will be better served if ELARC focuses its energies on finding such services.

ORDER

The Service Agency shall fund services for Claimant at a rate of up to \$15 per hour for day care, in-home respite, and parent coordinated personal assistance.

The Service Agency shall fund services for Claimant at a rate of \$15 per hour for day care, in-home respite, and parent coordinated personal assistance as provided by Claimant's uncle, L.C..

The Service Agency is not required to apply for a health and safety waiver.

DATED: February 8, 2016.

_____/s/_____
JOHN E. DeCURE
Administrative Law Judge
Office of Administrative Hearings

NOTICE TO THE PARTIES

THIS DECISION IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER. BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THE DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY DAYS OF THIS DECISION.