

**J.K., Plaintiff and Appellant, v. OFFICE OF ADMINISTRATIVE HEARINGS et al., Defendants and Respondents; INLAND REGIONAL CENTER, Real Party in Interest and Respondent.**

**E034431**

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,  
DIVISION TWO**

*2004 Cal. App. Unpub. LEXIS 10860*

**November 30, 2004, Filed**

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**PRIOR HISTORY:** APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION TWO APPEAL from the Superior Court of San Bernardino County, No. SCVSS088222. James A. Edwards, Judge.

**DISPOSITION:** Reversed and remanded with directions.

**COUNSEL:** Law Offices of Mark J. Warfel and Mark J. Warfel for Plaintiff and Appellant.

No appearance for Defendant and Respondent Office of Administrative Hearings.

Bill Lockyer, Attorney General, James Humes, Senior Assistant Attorney General, John H. Sanders, Lead Supervising Deputy Attorney General, Richard T. Waldow, Supervising Deputy Attorney General, and Cristina Felix-Carrasco, Deputy Attorney General, for Defendant and Respondent Department of Developmental Services.

Brunick, Battersby, McElhaney & Beckett and Leland P. McElhaney for Real Party in Interest and Respondent Inland Regional Center.

**JUDGES:** RICHLI, Acting P.J.; [\*2] GAUT, J., KING, J. concurred.

**OPINION BY:** RICHLI

**OPINION**

In the Lanterman Developmental Disabilities Services Act (hereafter the Lanterman Act, or simply the Act) (*Welf. & Inst. Code, § 4500*), California has given the developmentally disabled certain rights, including rights to make choices and rights to receive services. It has also taken on the responsibility of making sure that the services that meet their needs and choices are provided -- including, if necessary, the responsibility of paying for these services.

In a world of finite resources, however, translating any particular developmentally disabled person's needs and choices into a list of services to be provided is a messy job. The Legislature has delegated it to private, nonprofit regional centers, such as respondent Inland Regional Center (Center), which must act in agreement with the developmentally disabled person. When a regional center and a developmentally disabled person disagree, an administrative law judge (ALJ) gets involved; when either of them disagrees with the ALJ, the question is up to the courts.

J.K., a developmentally disabled young woman, claims that she needs round-the-clock care and supervision, provided mostly [\*3] in the home where she lives with her parents and provided by her parents (or by not more than two or three people chosen by them). She submitted a request for such services in the form of a proposed "Supported Living Plan." The Center denied her request on the ground that, under a regulation adopted by respondent Department of Developmental Services (the Department), it was prohibited from providing supported living services to a developmentally disabled person who lives with a parent.

J.K. contends this regulation does not apply to her because she leases space in her parents' home. She also contends the regulation is invalid because it conflicts with other regulations, with the Lanterman Act itself, and

with federal law, and because it violates equal protection. We will conclude that the regulation, on its face, does not violate the Lanterman Act; however, the regulation, as applied to J.K., does violate the Lanterman Act, because the services J.K. requested were not "supported living services" within the meaning of the Act. We therefore need not address J.K.'s other contentions.

## I

### STATUTORY BACKGROUND

The Lanterman Act gives developmentally disabled persons an entitlement [\*4] to free services and supports.<sup>1</sup> (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391, 393, 211 Cal. Rptr. 758.) Indeed, it has been said that "California is the only state that mandates access to services and supports for individuals with developmental disabilities and their families as an entitlement." (California State Council on Developmental Disabilities, 2002-2006 State Plan.<sup>2</sup>)

1 We will use "services" as shorthand for "services and supports" within the meaning of the Lanterman Act. The difference, if any, between a "service" and a "support" has eluded us.

2 Available at <[http://www.scdd.ca.gov/our\\_plan/Online\\_2002\\_Plan.htm](http://www.scdd.ca.gov/our_plan/Online_2002_Plan.htm)> (as of Nov. 9, 2004).

"The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community [citations], and to enable them to approximate the pattern of everyday living of nondisabled persons of [\*5] the same age and to lead more independent and productive lives in the community [citations]." (*Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d at p. 388.)

The Act begins by declaring that "the State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge." (*Welf. & Inst. Code*, § 4501.) It gives developmentally disabled persons a number of rights, including "[a] right to treatment and habilitation services and supports in the least restrictive environment." (*Welf. & Inst. Code*, § 4502, *subd. (a)*); see also *Welf. & Inst. Code*, § 4741.)

Services are to "assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices." (*Welf. & Inst. Code*, § 4648, *subd. (a)(1)*.) "An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities . . . to support their inte-

gration into the mainstream life of the community." (*Welf. & Inst. Code*, § 4501.) "Services and supports should be [\*6] available to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (*Ibid.*) "To the maximum extent possible, treatment, services, and supports shall be provided in natural community settings." (*Welf. & Inst. Code*, § 4502, *subd. (b)*.)

The Act also gives developmentally disabled persons "[a] right to make choices in their own lives, including, but not limited to, where and with whom they live, . . . and program planning and implementation." (*Welf. & Inst. Code*, § 4502, *subd. (j)*.) They "should be empowered to make choices in all life areas. These include promoting opportunities for individuals with developmental disabilities to be integrated into the mainstream of life in their home communities, including supported living and other appropriate community living arrangements. In providing these services, consumers . . . should participate in decisions affecting their own lives, including, but not limited to, where and with whom they live . . . . The contributions made by parents and family members in support of their children and relatives with developmental disabilities are important [\*7] and those relationships should also be respected and fostered, to the maximum extent feasible . . . ." (*Welf. & Inst. Code*, § 4501; see also *Welf. & Inst. Code*, § 4620.1.) Services are to "be flexible and individually tailored to the consumer<sup>3</sup> ] and, where appropriate, his or her family." (*Welf. & Inst. Code*, § 4648, *subd. (a)(2)*.)

3 "Consumer" means a person who has been determined to be developmentally disabled and hence eligible for services. (*Welf. & Inst. Code*, § 4512, *subd. (d)*; Regulations, 54302, *subd. (a)(16)*.)

The Act also obligates the state to secure and, if necessary, to pay for the services. The state does so by entering into contracts with private, nonprofit regional centers, which then actually perform these obligations. (*Welf. & Inst. Code*, §§ 4620, 4621, 4629, 4648, *subd. (a)*.) The state, however, is only "the payer of last resort." (2002-2006 California Developmental Disabilities State Plan, *supra*.) The regional center must "identify and pursue all possible sources of funding" [\*8] for services, including, but not limited to, "governmental or other entities or programs required to provide or pay the cost of providing services" and "private entities, to the maximum extent they are liable for the cost of services . . ." (*Welf. & Inst. Code*, § 4659, *subd. (a)*); see also *Welf. & Inst. Code*, §§ 4683, 4684.) Any funds collected from such sources "shall be applied against the cost of services prior to use of regional center funds for those services."

(*Welf. & Inst. Code*, § 4659, *subd. (b)*.) "Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." (*Welf. & Inst. Code*, § 4648, *subd. (a)(8)*.)

Once a person requests assistance and is found to be developmentally disabled (*Welf. & Inst. Code*, §§ 4642, 4643), an individual program plan must be prepared. (*Welf. & Inst. Code*, § 4646, *subd. (c)*.) The individual program plan is to be "centered on the individual and the family of the individual with developmental disabilities," to "take[] into account the needs and preferences of the individual and the family, where [\*9] appropriate," and to "promote community integration, independent, productive, and normal lives, and stable and healthy environments." (*Id.*, *subd. (a)*.)

"The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option." (*Welf. & Inst. Code*, § 4512, *subd. (b)*); see also *Welf. & Inst. Code*, § 4646, *subd. (a)*.)

The developmentally disabled person, "and where appropriate, his or her parents," are to "have a leadership role in service design" (*Welf. & Inst. Code*, § 4501) as well as "the opportunity to actively participate in the development of the plan." (*Welf. & Inst. Code*, § 4646, *subd. (b)*.) "Decisions concerning the . . . services and supports that will be included in the consumer's individual program plan . . . shall be made [\*10] by agreement between the regional center representative and the consumer or, where appropriate, the parents . . ." (*Id.*, *subd. (d)*.) Accordingly, the plan is "prepared jointly by a planning team" (*ibid.*) that includes the developmentally disabled person and a "service coordinator" employed or otherwise designated by the regional center (*Welf. & Inst. Code*, §§ 4512, *subd. (j)*, 4640.7, *subd. (b)*, 4647, *subds. (b), (c)*.)

The planning team must "give highest preference to those services and supports which would allow . . . adult persons with developmental disabilities to live as independently as possible in the community, and that allow all consumers to interact with persons without disabilities in positive, meaningful ways." (*Welf. & Inst. Code*, § 4648, *subd. (a)(1)*.) It also must "first consider services

and supports in natural community, home, work, and recreational settings." (*Id.*, *subd. (a)(2)*.)

The developmentally disabled person must "sign the individual program plan prior to its implementation." (*Welf. & Inst. Code*, § 4646, *subd. (g)*.) "If the consumer . . . does not agree with all components of the plan, [he or she] may indicate that disagreement on the plan, [\*11] " but "disagreement with specific plan components shall not prohibit the implementation of services and supports agreed to by the consumer . . ." (*Ibid.*) "If the consumer . . . does not agree with the plan in whole or in part" (*ibid.*), he or she is entitled to demand a "fair hearing" before an independent hearing officer. (*Welf. & Inst. Code*, §§ 4646, *subds. (f), (g)*, 4700-4716.)

The services potentially available "include, but are not limited to," treatment, therapy, training, care, education, recreation, and transportation. (*Welf. & Inst. Code*, § 4512, *subd. (b)*); see also *Welf. & Inst. Code*, §§ 4648, *subd. (a)*, 4686, 4687, 4688, 4689.) Other services, specifically including supported living services, "may be provided . . . when necessary." (*Welf. & Inst. Code*, § 4648, *subd. (a)(14)*.)

The Lanterman Act does not define supported living services. Nevertheless, they are the subject of *Welfare and Institutions Code section 4689*, which provides in pertinent part:

"The Legislature places a high priority on providing opportunities for adults with developmental disabilities . . . to live in homes that they own or lease with support available as often and for as long as it is [\*12] needed, when that is the preferred objective in the individual program plan. In order to provide opportunities for adults to live in their own homes, the following procedures shall be adopted:

"(a) The department and regional centers shall ensure that supported living arrangements adhere to the following principles:

"(1) Consumers shall be supported in living arrangements which are typical of those in which persons without disabilities reside.

"(2) The services or supports that a consumer receives shall change as his or her needs change without the consumer having to move elsewhere.

"(3) The consumer's preference shall guide decisions concerning where and with whom he or she lives.

"(4) Consumers shall have control over the environment within their own home.

"(5) The purpose of furnishing services . . . to a consumer shall be to assist that individual to exercise

choice in his or her life while building critical and durable relationships with other individuals.

"(6) The services . . . shall be flexible and tailored to a consumer's needs and preferences."

The Department has adopted regulations that define "supported living service" as ". . . any individually designed service [\*13] . . . which assists an individual consumer to:

"(1) Live in his or her own home, with support available as often and for as long as it is needed;

"(2) Make fundamental life decisions, while also supporting and facilitating the consumer in dealing with the consequences of those decisions; building critical and durable relationships with other individuals; choosing where and with whom to live; and controlling the character and appearance of the environment within their home." (Regulations, § 58614, subd. (a); see also Regulations, §§ 54302, subd. (a)(65), 54349, subd. (d).<sup>4</sup>)

4 These and all other citations to "Regulations" refer to the regulations implementing the Lanterman Act, *California Code of Regulations, title 17, sections 54000-58680*.

According to regulation, supported living services "include but are not limited to the following:

"(1) Assisting with common daily living activities such as meal preparation, including planning, shopping, cooking, and storage activities;

"(2) Performing routine household [\*14] activities aimed at maintaining a clean and safe home;

"(3) Locating and scheduling appropriate medical services;

"(4) Acquiring, using, and caring for canine and other animal companions specifically trained to provide assistance;

"(5) Selecting and moving into a home;

"(6) Locating and choosing suitable house mates;

"(7) Acquiring household furnishings;

"(8) Settling disputes with landlords;

"(9) Becoming aware of and effectively using the transportation, police, fire, and emergency help available in the community to the general public;

"(10) Managing personal financial affairs;

"(11) Recruiting, screening, hiring, training, supervising, and dismissing personal attendants;

"(12) Dealing with and responding appropriately to governmental agencies and personnel;

"(13) Asserting civil and statutory rights through self-advocacy;

"(14) Building and maintaining interpersonal relationships . . .;

"(15) Participating in community life; and

"(16) 24-hour emergency assistance . . ." (Regulations, § 58614, subd. (b).)

Last -- but, for our purposes, far from least -- section 58613 of the Regulations (section 58613) provides:

"(a) A consumer shall be eligible for [supported [\*15] living services] upon a determination made through the [individual program plan] process that the consumer:

"(1) Is at least 18 years of age;

"(2) Has expressed directly or through the consumer's personal advocate, as appropriate, a preference for:

"(A) [Supported living services] among the options proposed during the [individual program plan] process; and

"(B) Living in a home that is not the place of residence of a parent or conservator of the consumer."

## II

### FACTUAL AND PROCEDURAL BACKGROUND

J.K. is mildly mentally retarded; according to various tests, her IQ is between 52 and 77. She cannot cook, do laundry, drive a car or make change. She needs to be reminded to bathe and to brush her teeth. She gets lost easily. She has an additional mental or emotional problem -- diagnosed from time to time as autism, bipolar disorder, or intermittent explosive disorder -- that manifests itself in behavior such as assault, threats, property damage and self-injury.

J.K. lives with her father, D.K., and her stepmother, K.K. They are her primary caregivers. K.K. is "emotionally supporting, nurturing, [and] loving"; she has made amazing sacrifices to care for J.K. Accordingly, [\*16] as the ALJ did, we will refer to J.K.'s father and stepmother as her "parents."

J.K. receives Supplemental Security Income (SSI) benefits through the federal Social Security Administration. She also receives therapy and medication from the county Department of Mental Health. She is eligible for vocational training from the state Department of Rehabilitation. As J.K. alleged, and as respondents now con-

cede, she also receives 270 hours a month of in-home supportive services (see *Welf. & Inst. Code*, § 12300 *et seq.*) through the county; she obtained these after the ALJ's decision, but retroactive to a date before his decision.

One month before J.K. turned 18, she asked the Center to provide her with services pursuant to the Lanterman Act. After an intake assessment, she was found to be eligible. Meanwhile, she and her stepmother entered into a written lease, pursuant to which she leased a bedroom, den, and bathroom in her parents' house, with "full kitchen and laundry privileges."

J.K. and her stepmother met with Center representatives. The Center apparently regarded this as an individual program plan meeting, but J.K.'s stepmother was not told this. When she raised the issue of supported [\*17] living services, a Center staffer refused to discuss it, ended the meeting, and walked out.

Thereafter, the Center prepared a proposed individual program plan and mailed it to J.K.'s parents. It called for a Center counselor to advocate for J.K., to meet with her, and to monitor her progress. It also provided for J.K. to obtain certain services through Medi-Cal. Otherwise, it did not provide for any services whatsoever, although the counselor was to "help [J.K.] and her family explore appropriate support services and resources over the next year." Neither J.K. nor her parents signed this plan.

J.K.'s stepmother requested an individual program plan meeting. A Center staffer told her to submit her own proposed plan first. Accordingly, J.K.'s stepmother drafted and submitted a "Supported Living Plan." She prepared it in consultation with physicians and psychologists. It was to be "family-vendored." It provided that J.K. would continue to live in her parents' home and would receive constant supervision. Thus, two or three "support persons" would be hired and trained. They would provide J.K. with training and personal assistance for 9 hours on school days and 15 hours on nonschool days; [\*18] in-home supportive services would be obtained from the county to cover 9 hours of sleep time per day. It proposed a budget totaling \$ 78,431.80 per year.

The Center rejected J.K.'s proposed plan, for two reasons: (1) under section 58613, she was ineligible for supported living services because she was living with a parent; and (2) her plan essentially provided for a "self-determination grant," which was available solely under a pilot program that was not in effect in San Bernardino County.

After some further negotiations, the Center offered to provide social coaching, respite care, and one-time-only behavior modification and mobility train-

ing. If J.K. moved out, it would also provide transitional training. It suggested that she could receive additional services from the federal government, the Department of Rehabilitation, and the county Department of Mental Health. It did indicate that, if constant supervision was really necessary, it would place J.K. in either a board and care home or a family home agency home.

J.K.'s parents felt that this offer failed to meet her need for "a comprehensive[,] unified program." They felt that having multiple people come to their house to provide [\*19] services would be disruptive, not only for J.K., but also for their other children. J.K. herself objected to social coaching because it would require her to work with a stranger. J.K.'s parents did not object to respite care, but they felt that it failed to address her need for constant supervision. They declined behavior modification training because they could use the county's program, which was better. They declined mobility training because J.K. had proved unable to retain the training she had already received.

J.K. requested a fair hearing. The issues raised at the fair hearing included: (1) What were J.K.'s needs? (2) Was the Center responsible for funding J.K.'s proposed Supported Living Plan? (3) Was J.K. discriminated against in violation of the federal equal protection clause?

At the hearing, J.K. testified that she wanted to continue to live with her parents. She did not want to work with anyone she did not know. Meeting new people "scares" her. It takes her a long time to get to trust someone.

Dr. Monty Weinstein, an expert in family psychology and child development, testified that J.K. needed constant supervision "from people she can trust . . ." She could not be [\*20] left alone overnight. Receiving services from "multiple individuals rotating" would be traumatizing. She was not ready for independent living. "Any change in her existing environment would be . . . psychologically abusive." She could work toward independent living gradually.

Dr. Corinne Schroeder, a board-certified forensic psychologist, testified that J.K. needed 24-hour supervision. She was not able to deal with having too many new people in her life; "it would cause some confusion, interrupt her learning, interrupt her ability to function at her maximum level." If she was removed from her home suddenly, it would be traumatic; over time, she could be transitioned to living independently, provided that was what she wanted, although she would still need supervision.

Dr. Schroeder also testified that she herself had a developmentally disabled daughter, who lived on the

same property as she did, but in a different house; another regional center had accepted a plan for her daughter that was virtually identical to J.K.'s proposed plan.

The ALJ upheld the Center's determination that J.K. was not eligible for supported living services because she was living with a parent. He also upheld [\*21] its refusal to fund her proposed plan on that basis. He rejected her contention that this distinction was unconstitutionally discriminatory.

The ALJ found that the Center's proposed plan "met the mandates" of the Lanterman Act. Nevertheless, he also found that "it did not take into account J.K.'s fear of strangers and the need for as few strangers as possible [to] come into the family home. Greater coordination [of services] would have been helpful." He further found that J.K.'s desire to continue to live with her parents was "reasonable."

The ALJ concluded that, "since not all of [J.K.'s] goals were evident at the [individual program plan] conference . . . , and since the [individual program plan] was rejected in toto, a new [individual program plan] should be rescheduled . . . ." He ordered the Center to meet with J.K. and her parents and to revise her individual program plan "to meet the needs identified in this decision and to meet such other needs as may be expressed at the conference."

J.K. then filed a petition for writ of mandate, seeking to invalidate section 58613 and to compel the Center to adopt and to fund her proposed plan. The trial court denied her petition. [\*22] It ruled that: (1) Section 58613 is "entirely consistent with the statutory scheme of encouraging developmentally disabled adults who choose to do so to live independently in their own homes and control their own lives." (2) "The statutory scheme and the regulatory scheme precluding regional center funding of supported living services to adults who reside in a home occupied by one or more parents is not violative of the equal protection[] clause."

### III

#### THE DENIAL OF SERVICES TO J.K.

J.K. contends that section 58613 conflicts with the Lanterman Act. We conclude, as the ALJ and the trial court did, that section 58613, on its face, is consistent with the Lanterman Act. We further conclude, however, contrary to them, that section 58613, as construed and applied in this case, does conflict with the Lanterman Act.

##### A. Section 58613 on Its Face.

The Lanterman Act does not, in so many words, prohibit a developmentally disabled person who is living with a parent from receiving supported living services.

Nevertheless, the Department believes such a prohibition is implicit in the Act. Accordingly, it made this prohibition explicit in section 58613.

*Welfare and Institutions* [\*23] Code section 4689, concerning supported living services, opens with this preamble: "The Legislature places a high priority on providing opportunities for adults with developmental disabilities, regardless of the degree of disability, to live in *homes that they own or lease* with support available as often and for as long as it is needed, when that is the preferred objective in the individual program plan. In order to provide opportunities for adults to live in *their own homes*, the following procedures shall be adopted . . . ." (Italics added.) The Department and the regional centers are to "ensure," among other things, that "consumers shall have control over the environment within *their own home*." (*Id.*, subd. (a)(4), italics added.) As examples of supported living services, the Legislature specified "assistance in finding, modifying and maintaining a home . . . ." (*Id.*, subd. (c).) It also provided, "Assessment of consumer needs may begin before 18 years of age to enable the consumer to move to *his or her own home* when he or she reaches 18 years of age." (*Ibid.*, italics added.)

By stating that it was allowing "adults" to live in their own homes, the Legislature [\*24] necessarily implied that children do not live in their "own homes" (they live "at home" or "in the home"; see *Welf. & Inst. Code*, § 4685, subds. (a), (c)). The indication that a developmentally disabled person who reaches 18 may move into his or her "own home" confirms this. And, typically, it is the parent who owns or leases the home, not the child; this is all the more true when the child is developmentally disabled. This demonstrates that, when the Legislature referred to a developmentally disabled person's "own home," it intended to exclude the home of a parent.

Here, atypically, J.K. has leased space in her parents' home. However, this is evidently intended to make her eligible for supported living services (and/or to allow some of her SSI income to be used to defray her housing costs). It does not change the substance of her living arrangement; she is still not living in her own home, in the sense that the Legislature intended. Thus, the Department could properly make the presence of a parent controlling, with or without a lease.

##### B. Section 58613 as Applied.

Having held that section 58613 is consistent with the Lanterman Act, we must ask, is section 58613, as applied [\*25] in this case, consistent with the Lanterman Act? Before we can answer this, we must understand what supported living services are.

As already noted, the Lanterman Act does not define supported living services. Rather it discusses them in terms of their purpose: They "provide opportunities for adults to live in their own homes . . ." (*Welf. & Inst. Code*, § 4689.) But when it goes on to list examples, the nature of the listed services is not noticeably different from the nature of the services any developmentally disabled person may receive.

For example, the listed supported living services include "advocacy and self-advocacy facilitation . . ." (*Welf. & Inst. Code*, § 4689, *subd. (c)*.) However, the services generally available to every developmentally disabled person include "advocacy assistance, including self-advocacy training." (*Welf. & Inst. Code*, § 4512, *subd. (b)*.) Indeed, in this case, the Center offered to provide J.K. with advocacy services. Similarly, supported living services include "social, behavioral, and daily living skills training and support . . ." (*Welf. & Inst. Code*, § 4689, *subd. (c)*.) Every developmentally disabled person, however, is potentially entitled [\*26] to "social skills training," "daily living skills training," and "behavior training . . ." (*Welf. & Inst. Code*, § 4512, *subd. (b)*.) The same duplication is evident in almost every supported living service listed -- assessment, adaptive equipment and supplies, daily living skills training, facilitating circles of support, paid neighbors, paid roommates, and respite. (Compare *Welf. & Inst. Code*, § 4512, *subd. (b)* with *Welf. & Inst. Code*, § 4689, *subd. (c)*.)

There are a handful of supported living services that are *not* specifically listed as generally available services; still, we do not believe these are available *only* as supported living services. For example, "development of employment goals" is listed under supported living services, but not under services in general. Nevertheless, we believe that *any* developmentally disabled person can be provided with assistance in developing employment goals, depending on his or her needs and desires as determined in the individual program plan process.

Characterizing a service as a supported living service is not meaningless; it does have certain consequences. For example, a regional center can purchase supported living services [\*27] only from a supported living services vendor (Regulations, § 58610, *subd. (a)(1)*), who must meet certain requirements not applicable to other vendors. (Regulations, §§ 58611, *subd. (a)*, 58612, 58615, 58630-58632, 58640-58643, 58651-58654.) Also, in light of the state's financial crisis, payment rates for supported living services have been frozen. (*Welf. & Inst. Code*, § 4648.4, *subd. (b)(1)*.) But this has nothing to do with whether any particular service will be provided to any particular developmentally disabled person.

We conclude that the characterization of a service as a supported living service is based on its purpose, not its content, type, or nature. If a service is provided to help a developmentally disabled person live independently in his or her own home,<sup>5</sup> it is a supported living service; and if not, not.

5 We use "living independently" in its colloquial sense, not to be confused with the term of art, "independent living." (See *Welf. & Inst. Code*, §§ 4570, *subd. (c)*, 4648.1, *subd. (h)*); Regulations, § 54302, *subd. (a)(31)*.)

[\*28] The Department's regulations comport with this definition. They define supported living services as "those services and supports referenced in Section 54349(a) through (e), and specified as [supported living service] and support components in Title 17, Section 58614, which are provided by a [supported living services] vendor, paid for by the regional center, and support consumers' efforts to:

"(A) Live in their own homes, as defined in Title 17, Section 58601(a)(3);

"(B) Participate in community activities to the extent appropriate to each consumer's interests and capacity; and

"(C) Realize their individualized potential to live lives that are integrated, productive, and normal[.]" (Regulations, § 54302, *subd. (a)(65)*.)

This definition incorporates Regulations section 54349, subdivisions (a) through (e). Since July 1, 2000, however, subdivisions (a) through (c) no longer apply. Subdivision (e) merely allows a vendor to be paid for administrative services provided in support of the delivery of direct services. Thus, the only relevant provision is subdivision (d), and it (none too helpfully) provides that "a regional center shall classify a vendor as a provider of Supported [\*29] Living Service if the vendor provides services enumerated in Title 17, Section 58614."

So we look to Regulations section 58614. As relevant here, it provides: "Supported Living Service . . . shall consist of *any individually designed service* or assessment of the need for service, which assists an individual consumer to:

"(1) Live in his or her own home . . . ;

"(2) Make fundamental life decisions, while also supporting and facilitating the consumer in dealing with the consequences of those decisions; building critical and durable relationships with other individuals; choosing where and with whom to live; and controlling the character and appearance of the environment within their home." (Regulations, § 58614, *subd. (a)*, italics added.)

Thus, yet again, Regulations sections 54302, 54349, and 58614, taken together, define supported living services in terms of the purpose of the service.

Regulations section 58614, much like the Lanterman Act itself, goes on to list examples. Some of these services are ones that a developmentally disabled person living independently would be most likely to need, such as assistance in "settling disputes with landlords[.]" ( § 58614, subd. (b)(8). [\*30] ) Others, however, are ones that any developmentally disabled person might need, such as assistance in "asserting civil and statutory rights through self-advocacy[.]" (*Id.*, subd. (b)(13).) Once again, this is consistent with defining supported living services in terms of their purpose.

Earlier, the definition of supported living services in Regulations section 54302 also incorporated the definition of "home" in Regulations section 58601, subdivision (a)(3). That definition provides: "'Home' means, with respect to the home of a consumer receiving [supported living services], a house or apartment, or comparable dwelling space meeting community housing standards, which is neither a community care facility, health facility, nor a family home certified by a Family Home Agency, and in which no parent or conservator of the consumer resides, and which a consumer chooses, owns or rents, controls, and occupies as a principal place of residence." This definition follows, almost tautologically, from the definition of supported living services. Section 58613, limiting supported living services to adults who want to live in a home that is not the residence of his or her parent, likewise [\*31] follows from this definition.

In this light, it appears that J.K.'s parents made one fatal mistake -- they entitled their proposed plan "Supported Living Plan." Thus, the Center rejected it on the ground that J.K. was not eligible for supported living services. She was eligible, however, for the actual services proposed; these consisted largely of "training" and "personal assistance." Under the Lanterman Act, a developmentally disabled person is entitled to choose whatever services are to be provided, subject only to his or her needs, the cost-effectiveness of the service, <sup>6</sup> and the state's role as the payor of last resort.

6 Cost-effectiveness is not the same thing as cost. Thus, this does not mean the cheapest service always has to be used. If one service costs twice as much as another but is three times as effective (assuming some suitable measure of effectiveness), all else being equal, it is to be preferred.

Moreover, there was substantial evidence that J.K. needed the proposed services. The expert testimony [\*32] that she needed round-the-clock supervision was

uncontradicted. Caring for J.K. meant that J.K.'s parents could sleep only from 3:00 to 6:00 a.m. (plus naps during the day when she was at school). Indeed, the Center all but acknowledged that J.K. needed round-the-clock supervision -- it offered to provide it to her, but only if she moved out of her parents' home. J.K. did not want to have more than one or two service providers. There was evidence that more would be detrimental to her. Thus, the ALJ indicated that any plan for J.K. should "take into account J.K.'s fear of strangers and the need for as few strangers as possible [to] come into the family home."

The fact that the proposed plan provided for round-the-clock care does not mean that it necessarily provided for supported living services. Nothing, either express or implied, in the Lanterman Act makes a developmentally disabled person living with a parent categorically ineligible for round-the-clock care. Round-the-clock care is potentially available to other developmentally disabled persons who do not live in their own homes, such as those in a residential or nursing facility.

The fact that the proposed plan was family vendored [\*33] likewise does not mean that it provided for supported living services. The Department's regulations expressly permit a relative to be a vendor of supported living services (Regulations, § 58616, subd. (b)) but do not prohibit a relative from being a vendor of other services. (See Regulations, § 54314.) If they allowed a relative to provide a given service as a supported living service, but not otherwise, their validity would be open to question. Admittedly, a relative could not be a vendor of certain specialized services, such as nursing, unless he or she had the appropriate qualifications. (See Regulations, §§ 54310, subd. (e), 54342, subds. (a)(46), (a)(66).) We see no reason, however, why a relative could not be a vendor under the category of family home provider (see Regulations, § 56090, subd. (c); see also Regulations, §§ 56076, subds. (e)(5) & (e)(7), 56084, subd. (b)(6), 56087), homemaker, homemaker service, mobility training services agency (see Regulations, § 54342, subds. (a)(33), (a)(34), (a)(47)) or, after 120 hours of training, home health aide (see *Health & Saf. Code*, § 1736.1; Regulations, § 54342, subd. (a)(32); <<http://www.dhs.ca.gov/Inc/download/cert/CertFacts>. [\*34] pdf> (as of Nov. 9, 2004).) These categories appear to cover the services that J.K.'s parents were proposing to provide themselves.

In their briefs, respondents relied exclusively on section 58613. At oral argument, however, the Center pointed out that, when it rejected J.K.'s proposed plan, it also cited the provision limiting self-determination pilot programs to particular areas. (*Welf. & Inst. Code*, § 4685.5.) We did not understand it to be contending that we should affirm on that ground. In any event, absent a showing of good cause, a contention cannot be raised for

the first time at oral argument. (*Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 226.) We conclude that respondents waived such a contention.

Which is not to say that, if not waived, it would have merit. It fails for the same reason as their reliance on section 58613: The services J.K. was seeking were well within the scope of those otherwise available under the Act.

A self-determination pilot program may include:

"(1) Programs that provide for consumer and family control over which services best meet their needs and the objectives in the individual program plan.

"(2) Programs [\*35] that provide allowances or subsidies to consumers and their families.

"(3) Programs providing for the use of debit cards.

"(4) Programs that provide for the utilization of parent vendors, direct pay options, individual budgets for the procurement of services and supports, alternative case management, and vouchers.

"(5) Wraparound programs." (*Welf. & Inst. Code*, § 4685.5, *subd. (b)*).

The ALJ reasoned that "if existing law had authorized such control and provided for such programs, the pilot project would not have been necessary." Clearly, however, existing law already provides for "consumer and family control over which services best meet their needs . . ." Similarly, vouchers are already authorized under existing law (*Welf. & Inst. Code*, § 4648, *subd. (a)(4)*; Regulations, § 54355), and, as we have discussed, parent vendors are already allowed (although they may have to meet vendoring requirements). We cannot identify any service in J.K.'s proposed plan as one that could have been provided only through a self-determination program. Certainly respondents have not identified one.

Also at oral argument, the Center claimed that, although it had rejected J.K.'s proposed plan, it [\*36] had not denied her any of the services she was requesting. That is simply not so. J.K. wanted round-the-clock services; the Center refused to provide them unless she moved out of her parents' house. J.K. wanted all services provided by not more than two or three persons; the Center insisted on each service being provided by a separate vendor. J.K. wanted ongoing assistance with her behavior and mobility; the Center refused to provide behavior and mobility services beyond a limited, one-time-only period.

The Center pointed out that it did offer J.K. a new individual program plan meeting. In its view, this proves not only that it had not refused to provide any services, but also that J.K. was in an unseemly haste to litigate an

unripe claim. Again, we must disagree. The Act does not contemplate a prolonged period of negotiation. Once an individual program plan has been prepared and presented, if the consumer does not agree with any part of it, he or she has the right to demand a fair hearing. (*Welf. & Inst. Code*, § 4646, *subd. (g)*.) After a fair hearing has been demanded, there are provisions for informal negotiations, including mediation; however, these are voluntary, and if they [\*37] fail, the consumer is still entitled to a fair hearing. (*Welf. & Inst. Code*, §§ 4710.7, 4711.5.)

Part of the problem here is that the Center did not collaborate with J.K. the way the Act required it to. It drafted its own plan; when J.K. did not accept it, it insisted that her parents draft *their* own plan. J.K. would have been within her rights to demand a fair hearing at that point. Nevertheless, she and her parents tried to work with the Center. The record demonstrates that, on the key issues -- round-the-clock care and the number and the identity of service providers -- the negotiations had reached an impasse. The Center cannot postpone litigation indefinitely by refusing services, then adding, "but you can have a new individual program plan meeting." The consumer is entitled to a new meeting, on demand, at any time. (*Welf. & Inst. Code*, § 4646.5, *subd. (b)*.)

The Department also argues that J.K.'s proposed plan could not be implemented because it never became part of her individual program plan. But she never *had* an individual program plan. Just as her proposed plan never became *the* individual program plan because the Center never agreed to it, the Center's proposed [\*38] plan never became *the* individual program plan because J.K. never agreed to it. (*Welf. & Inst. Code*, § 4646, *subds. (d), (f), (g)*.) The major purpose of the fair hearing before the ALJ was to decide what J.K.'s plan should be. (*Welf. & Inst. Code*, §§ 4703.7, 4705, *subd. (a)*, see also *Welf. & Inst. Code*, § 4731, *subd. (e)*.)

In sum, applying section 58613 as the basis for rejecting J.K.'s proposed plan and for refusing to provide her with the services it called for violated the Lanterman Act. The Center did not give any other valid or potentially valid reason for rejecting the plan. Accordingly, the Center should have accepted it.

J.K. claims she is entitled to reimbursement for the services she should have received under her proposed plan. "Damages may appropriately be awarded in mandamus proceedings. [Citations.]" (*Warner v. North Orange County Community College Dist.* (1979) 99 Cal. App. 3d 617, 628, 161 Cal. Rptr. 1 [Fourth Dist., Div. Two].) The ALJ is empowered by statute to resolve "all issues concerning the rights of persons with developmental disabilities to receive services under [the Act] . . ." (*Welf. & Inst. Code*, § 4706, *subd. (a)*.) This [\*39] is

more than broad enough to encompass the issue of a right to retroactive benefits. The ALJ had the power to award retroactive benefits; accordingly, the trial court had the power to order the ALJ to award retroactive benefits. (*Tripp v. Swoap* (1976) 17 Cal.3d 671, 677-678, 131 Cal. Rptr. 789, overruled on other grounds in *Frink v. Prod* (1982) 31 Cal.3d 166, 180, 181 Cal. Rptr. 893.)

Even if J.K.'s plan had been accepted, however, it would have been subject to modification based on her "achievement or changing needs" at any time, and in any event within three years. (*Welf. & Inst. Code*, § 4646.5, *subd. (b)*.) It seems virtually certain that her needs have already changed. Among other things, she has obtained in-home supportive services from the county, and presumably she has graduated from high school. To the extent that she was actually provided with services, however, at her own or at her parents' expense, it seems likely that she did in fact need such services. Moreover, to the extent that her parents provided such services, they did not act as volunteers; as long as this litigation was pending, they had at least the hope of receiving retroactive [\*40] compensation.

We will therefore direct the trial court to issue a writ, commanding the ALJ to hold a further hearing to determine the fair market value of all unfunded and unreimbursed services actually provided to J.K. that met her needs at the time the services were provided and that either were consistent with her proposed plan, or that mitigated the failure to provide services consistent with her proposed plan through the date of the issuance of the writ, and to award this amount to J.K. No issue concerning services to be provided in the future is before us. We

leave all such issues to be determined in the ordinary course of the individual program planning process.

#### IV

#### DISPOSITION

The judgment is reversed. The matter is remanded with directions to grant a writ of mandate, commanding that the ALJ's decision be set aside, and further commanding the ALJ to hold a further hearing to determine the fair market value of all unfunded and unreimbursed services actually provided to J.K. that met her needs at the time the services were provided and that either were consistent with her proposed plan, or that mitigated the failure to provide services consistent with her proposed [\*41] plan through the date of the issuance of the writ, and to award this amount to J.K. The trial court also may conduct any proceedings ancillary to carrying out our directions, including, but not limited to, awarding costs.

The parties' respective requests for judicial notice are denied, without prejudice, on the ground that the matters to be noticed are irrelevant to the issues we consider dispositive.

J.K. shall recover costs on appeal against the Center and the Department.

RICHLI, Acting P.J.

We concur:

GAUT, J.

KING, J.

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