

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Request to Decrease
the Supported Living Services for:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016070521

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on August 25, 2016.

Margie Thompson, Supervisor, Independent Living Systems, Inc., represented claimant who was present for the hearing, as was claimant's husband and young son.

Leigh-Ann Pierce, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

The matter was submitted on August 25, 2016.

ISSUE

Shall IRC be permitted to reduce claimant's supported living services (SLS) from 43 hours per month to 33 hours per month?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On June 23, 2016, IRC issued a Notice of Proposed Action advising claimant that IRC proposed reducing her supported living services from 43 hours per month to 33 hours per month. Claimant appealed that decision and requested a fair hearing.

SERVICES CURRENTLY PROVIDED

2. Claimant is a 39-year-old female diagnosed with mild intellectual disability. She currently receives 43 hours per month of SLS funded by IRC. Claimant resides in her home with her husband, also an IRC client, and her toddler son, an early start IRC client. Claimant's mother has custody of claimant's older son, age 14, who is also an IRC client.

DOCUMENTS INTRODUCED AT HEARING

3. Claimant's May 19, 2016, Individual Program Plan (IPP) documented that claimant "loves doing things with her husband, her children with her immediate family. She has a strong desire to learn how to do things right, she is proud to share that she is very independent with her house tasks." Claimant was described as a loving mother who enjoys playing with her young son and has a very strong natural support system. Claimant was noted to be "becoming more and more independent as she has been observed calling, without assistance, doctor's offices on her and her son's behalf." The tasks claimant was able to perform included cooking, cleaning, and outings in the community. The IPP noted that claimant "is not interested in attending a day program, getting a job or going to school, her priority is being home and raising her children." The IPP further noted that claimant "enjoys being on Facebook, playing games on her tablet and listening to music."

Disruptive behaviors identified in the IPP included screaming and cursing at her husband "because she does not like to be told what to do." She was noted to calm down "by taking a walk and having a cigarette." Claimant had tried therapy in the past but did not continue. She had a history of physical aggression towards others, including a conviction for domestic violence and a conviction for substance abuse, as well as "a history of habitual lying." The majority of the IPP documented claimant's independence, ability to live on her own, and her ability to vocalize her choices. In fact, the IPP suggested that claimant was very assertive in her choices. The IPP documented that claimant's mother and sister play a large role in her life on a continuous basis. The IPP noted tremendous family support, a generic resource. However, claimant and her witnesses disputed that family support as noted below. Claimant's evidence was more persuasive on this issue.

4. Claimant's Client Development Evaluation Report (CDER) was consistent with her overall presentation documented in her IPP. The CDER is a form that evaluates an individual's current status, level of functioning and identifies areas of needs. Individuals receive a score between one and five, with five being the highest score. Claimant received a 5 on the practical independent section; a 4.5 on both the personal social skills and the well-being level sections; and a 4.0 on both the challenging behavior and integration level sections. IRC asserted that the CDER supported its decision to reduce claimant's SLS.

5. The IRC Consumer I.D. notes identified the objectives on which claimant was working, and her progress/results. Those notes also documented claimant's independence and ability to state her desires.

6. A Department of Developmental Services Supported Living Services Standardized Assessment Questionnaire dated May 19, 2016, prepared by claimant's IRC Consumer Service Coordinator (CSC) Minerva De La Rosa, provided claimant's responses

and/or the CSC's observations to 23 support questions. This form documented claimant's preferences, ability to express her desires, and the supports she receives. The responses listed on this form were consistent with both the IPP and the CDER.

7. Progress reports from Independent Living Systems, Inc., written for the periods between 2014 and 2016, outlined the program's objectives and claimant's responses. The reports documented the instructor's redirections of behaviors, repeated teachings of tasks and areas of improvement. Of note, there were issues regarding claimant's young son and her refusal to allow him to be assessed resulting in services for him being delayed. The reports also documented marital issues, claimant's aggressive behavior, and claimant's strong will. The reports also noted that claimant was making choices, sometimes in a very strong way.

A reading of the documents suggested that claimant's skills have improved as a result of her SLS. The 2016 report documented that barriers to progress consisted of claimant's marginal budgeting skills, meager banking abilities, lack of follow-through, poor verbal comprehension/reading abilities, temperamental tendencies and inadequate understanding of child development. The report from 2014-2015 indicated that claimant's family assists her, but the 2016 report did not reference that support. Most notably, the reports documented claimant's choices and demonstrated her ability to express her preferences, sometimes strongly so, and illustrated her reliance upon her SLS instructors.

8. An application for In Home Support Services (IHSS) indicated that claimant's May 17, 2012, application was denied because she withdrew her application. It was unclear why she withdrew this application. Margie Thompson, Supervisor, Independent Living Systems, Inc., testified that claimant re-applied for IHSS services after withdrawing her first application and her request was denied. No evidence refuted Ms. Thompson's testimony.

9. IRC's Purchase of Service Policy outlines IRC's duties and responsibilities regarding the purchase of services. The portion of the policy regarding SLS states that IRC "may purchase services that promote learning independent living skills for adult consumers through training." Further, "SLS training is a comprehensive training program directed toward assisting an individual to . . . remain in self-sustaining or supported living situations in the community. Development of circles of support is a component of independent living skills training services. These services should allow the individual to make fundamental life decisions while supporting and facilitating the consumer in dealing with the consequences of those decisions and the choice to control the character and appearance of their home."

The policy notes that SLS services shall include training and habilitation whose "goals are intended to increase the consumer's desire and ability to meet his/her needs without assistance, establish and maintain age-appropriate relationships, and increase participation in the community." SLS services also include personal support whose "goals address assistance with common daily living and routine household activities due to the nature or severity of the consumer's physical or developmental challenges." If the consumer cannot demonstrate reasonable success in training and habilitation goals, and no generic resources are available to meet the consumer's needs, supports may be addressed as maintenance goals through personal support. However, the "decisions are based upon the recognition of the consumer's right to make choices regarding the conditions under which he/she will live." Accordingly, a consumer need not live in an immaculate home, if the consumer chooses to have a messy home, that is the consumer's choice. Most importantly, the policy noted, "In keeping with the Lanterman Act, the purchase of [SLS] shall be based upon demonstrated progress towards meeting the goals and objectives in the IPP and Individual Service Plan."

10. A July 14, 2016, letter from Tammy L Hunt, LCSW, SAS, ADS, at Clarity for Life's Transitions, to IRC indicated that claimant has been receiving services since June 17, 2016. Claimant was "diagnosed with F31.32.¹" The letter also stated that claimant was referred to a psychiatrist for "a med evaluation." Ms. Hunt "will be working in conjunction with the psychiatrist to monitor and help reduce [claimant's] symptoms." Claimant "experienced symptoms due to anxiety, anger, and depression."

WITNESS TESTIMONY

11. Maria Lawrence, IRC Program Manager, testified that she participated in the decision to reduce the SLS hours. The decision was based upon her review of the case and discussions with CSC De La Rosa. Ms. Lawrence explained that claimant's CDER scores demonstrated that claimant has extremely high skill levels and a low level of needs. Ms. Lawrence testified that IRC must look to generic resources first before funding services. Here, IHSS is a generic resource that would meet claimant's needs and because she withdrew her application, IRC is required to look to that service first before funding SLS. Ms. Lawrence was not aware of another occasion when claimant applied for IHSS and was denied. Ms. Lawrence was asked many questions about the types of services IHSS provides, for example, only assisting individuals with physical limitations, and testified that she did not agree with claimant's assertion regarding her being ineligible for IHSS. Insufficient evidence was introduced to support claimant's position regarding IHSS limitations.

12. CSC De La Rosa testified about her meetings with claimant, the SLS instructors, and her observation of claimant's family members. Based upon her observations, it is her understanding that claimant's family is very involved in her care

¹ No evidence explaining that diagnosis was introduced at hearing.

and was unaware of instances where the family refused to assist claimant. However, even assuming CSC De La Rosa was incorrect in her assumptions regarding claimant's family's level of involvement, her testimony regarding her observation of claimant's independence and ability to perform tasks was credible and supported by the documents.

13. Tracy Alderson is claimant's current SLS instructor. She has been working with claimant for approximately one year, working with her once per week, sometimes twice a week for a full day. She refuted IRC's assertion that claimant's family is very involved and credibly explained that claimant has no family support. In fact, Ms. Alderson was with claimant on one occasion when claimant's child was sick and the family refused to help. Ms. Alderson explained in detail the services she provides, stating that often claimant waits for her to arrive before performing various tasks. Ms. Alderson testified that claimant's young child was recently been deemed eligible for IRC early start services and there is concern that he may have autism. Ms. Alderson explained the various medical appointments she takes claimant to, including doctor visits for her young son. Ms. Alderson explained that things must be repeatedly explained to claimant and, although she will say she understands, she does not. Claimant has difficulty understanding medical instructions, including providing medications to her son. Claimant has recently been diagnosed as bipolar and will be undergoing treatment for her condition. In the past, claimant has refused to take her medications or complete her prescribed therapy.

Ms. Alderson's testimony further bolstered the impression that claimant is strong-willed, over-relies upon her SLS instructors, and relies upon her SLS instructors to perform tasks for her instead of developing the ability to meet her needs without assistance, and that her SLS provider has fostered that dependent relationship.

14. Cathy Galloway is claimant's husband's SLS instructor. She described the work that she and Ms. Alderson have tried to do together with claimant and her husband, but stated they learned that it was better to separate them for grocery shopping. Ms. Galloway explained that claimant's husband is involved "very little" with caring for their child and performing household chores, although he has begun to get more involved in the past few months. He has sleep apnea and sleeps most of the day, staying awake most of the night. Ms. Galloway drives claimant's husband to his numerous medical appointments. Ms. Galloway echoed Ms. Alderson's testimony regarding claimant's abilities and lack of family support. Ms. Galloway also testified about concerns regarding claimant caring for her young son given claimant's inability to follow medical instructions and described a recent occasion when claimant put Neosporin in her son's ear thinking that was what she should do for an ear infection. Ms. Galloway also described the messy condition the house gets in when the SLS instructors are not present.

As with Ms. Alderson, Ms. Galloway's testimony also painted a picture of claimant being dependent upon SLS as opposed to SLS helping claimant become independent.

15. Claimant testified about her family's support, stating that family members told her they would help (her) but "I took over my baby," explaining that she felt her sister had grown too attached to her son. Claimant testified that SLS is there to direct her if she needs help as she tends to forget. When asked if she would be interested in applying for IHSS, claimant testified that she did not want that service because "I would not trust the person, I don't want them cleaning my house," explaining that her husband would be sleeping in the bedroom and she would not want the IHSS person going in there. When pressed, claimant acknowledged that IHSS could give her help "but not the help I get from you guys [referring to her SLS instructors]." Claimant testified about how she wants to continue her SLS hours at their present level, explaining that she trusts her

SLS worker enough to be around her husband, her baby and herself and that, "I feel Tracy knows me better than I know myself."

As with the SLS instructors' testimony, claimant's testimony demonstrated that she is strong-willed, able to make choices, and is dependent upon her SLS providers.

LEGAL CONCLUSIONS

BURDEN AND STANDARD OF PROOF

1. "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court; except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.) In this matter, IRC had the burden of establishing that claimant's SLS services should be decreased.

THE LANTERMAN ACT AND REGIONAL CENTERS

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (the Lanterman Act) which is found at Welfare and Institutions Code section 4500 *et seq.*

3. The Lanterman Act provides a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. 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, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

4. The State Department of Developmental Services (the DDS) is the public agency in California responsible for carrying out the laws related to the care, custody

and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.) In order to comply with its statutory mandate, the DDS contracts with private non-profit community agencies, known as "regional centers," to provide the developmentally disabled with "access to the services and supports best suited to them throughout their lifetime." (Welf. & Inst. Code, § 4620.)

5. A regional center's responsibilities to its consumers are set forth in Welfare and Institutions Code sections 4640-4659.

6. Welfare and Institutions Code section 4646, subdivision (a), provides in part:

It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system 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. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families 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.

7. Welfare and Institutions Code section 4512, subdivision (b) defines "services and supports" as:

[S]pecialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. 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 . . . Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.

Welfare and Institutions Code section 4512 "services and supports" include supported living services. The section also defines "natural supports" for purposes of determining who is required to provide the service.

8. Welfare and Institutions Code section 4648 states in part:

In order to achieve the stated objectives of a consumer's individualized program plan, the regional

center shall conduct activities including, but not limited to all of the following:

- (a) Securing needed services and supports.
 - (1) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. The regional center shall secure services and supports that meet the needs of the consumer, as determined by the consumer's individual program plan. . .
 - (2) . . . Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family.
 - (3) A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer . . . which the regional center and consumer or, where appropriate, his or her parent, legal guardian, or conservator, or authorized representatives, determines will best accomplish all or any part of that consumer's program plan."

[¶] . . . [¶]

- (6) The regional center and the consumer, or where appropriate, his or her parents, legal guardian, conservator, or authorized representative . . . shall, pursuant to the individual program plan, consider all the following when selecting a provider of consumer services and supports:
 - (A) A provider's ability to deliver quality services or supports which can accomplish all or part of the consumer's individual program plan.
 - (B) A provider's success in achieving the objectives set forth in the individual program plan.
 - (C) Where appropriate, the existence of licensing, accreditation, or professional certification.

- (D) The cost of providing services or supports of comparable quality by different providers, if available, shall be reviewed, and the least costly available provider of comparable service, including the cost of transportation, who is able to accomplish all or part of the consumer's individual program plan, consistent with the particular needs of the consumer and family as identified in the individual program plan, shall be selected. In determining the least costly provider, the availability of federal financial participation shall be considered. The consumer shall not be required to use the least costly provider if it will result in the consumer moving from an existing provider of services or supports to more restrictive or less integrated services or supports.
- (E) The consumers, or, where appropriate, the parents, legal guardian, or conservator of a consumer's choice of providers.

[¶] . . . [¶]

- (8) Regional Center funds shall not be used to supplant the budget of any agency which has the legal responsibility to serve all members of the general public and is receiving public funds for providing those services.

LAWS APPLICABLE TO SLS ISSUE

9. Welfare and Institutions Code section 4689 states that the Legislature places a high priority on providing opportunities for adults with developmental disabilities, regardless of the degree of disability, to live in homes 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 IPP, subject to certain procedures which are enumerated in the section. Regional centers are required to monitor the SLS and change it as the consumer's needs change and must determine whether the SLS is having the desired effects.

10. California Code of Regulations, title 17, section 58601, subdivision (a)(3), defines "home" for purposes of consumers receiving SLS, as a "house or apartment, or

comparable living space . . . 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 resides, and in which a consumer chooses, owns or rents, controls, and occupies as a principal place of residence.”

LAWS APPLICABLE TO GENERIC RESOURCES

11. Welfare and Institutions Code section 4646.4 requires the regional center to consider generic resources and the family’s responsibility for providing services and supports when considering the purchase of regional center supports and services for its consumers.

12. Section 4659 of the Welfare and Institutions Code provides in part:

- (a) Except as otherwise provided in subdivision (b) or (e), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:
 - (1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.
 - (2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer.
- (c) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional centers shall not purchase any service that would otherwise be available from Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, In-Home Support Services, California Children's Services, private insurance, or a health care service plan when a consumer or a family meets the criteria of this coverage but chooses not to

pursue that coverage. If, on July 1, 2009, a regional center is purchasing that service as part of a consumer's individual program plan (IPP), the prohibition shall take effect on October 1, 2009.

[¶] . . . [¶]

- (e) This section shall not be construed to impose any additional liability on the parents of children with developmental disabilities, or to restrict eligibility for, or deny services to, any individual who qualifies for regional center services but is unable to pay. . .

13. Welfare and Institutions Code section 4689.05, subsection (b), as required by Welfare and Institutions Code section 4648, subdivision (8), provides that a regional center shall not purchase supported living services for a consumer to supplant IHHS.

EVALUATION

14. A preponderance of the evidence established that claimant's condition has improved since her SLS hours were set at 43 hours per month. Moreover, the evidence established that rather than being services that train claimant to become independent, she has become dependent on her SLS providers, so much so that she relies upon them to an unhealthy extent. The overwhelming impression at hearing was that claimant has come to view them as extended family members, and they seem to have facilitated that dependent relationship. The evidence did not establish that claimant was unable to perform various tasks; she just preferred not to do them or preferred to have her SLS workers present when she performed them. The evidence established that the 33 hours proposed by IRC was sufficient to meet claimant's needs. Arguments to the contrary that her husband's or her son's condition required her SLS hours to remain as set were not persuasive as both of those individuals are also regional center clients and their needs can be met by their own program plans. Similarly, the evidence did not demonstrate that claimant's "recent" bipolar diagnosis and the medical visits it may require cannot be

met by the 33 hours proposed by IRC. In sum, claimant introduced insufficient and unpersuasive evidence to demonstrate that her SLS hours should remain at 43 hours per month.

Although Welfare and Institutions Code section 4659, subdivision (c), prohibits regional centers from purchasing services available from generic resources, including IHSS, "when a consumer or family meets the criteria of this coverage but chooses not to pursue this coverage," IRC offered no evidence to refute claimant's contention that she attempted to pursue that service and was denied. Thus, the IHSS issue, although contested at this hearing, was not a determining factor in this decision. Because the evidence demonstrated that 33 hours per month was sufficient to meet claimant's needs, IRC's request to decrease her services to that amount shall be granted.

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ORDER

Claimant's appeal from the Inland Regional Center's determination to decrease her supported living services from 43 hours per month to 33 hours per month is denied. IRC shall immediately decrease those services to 33 hours per month.

DATED: September 1, 2016

_____/s/_____

MARY AGNES MATYSZEWSKI

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 ninety days.