

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER

Service Agency

OAH No. 2019051052

REVISED DECISION¹

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on July 8, 2019, in San Bernardino, California.

¹ On July 24, 2019, IRC requested a correction to the original Decision. Specifically, IRC requested that the IRC representative's name be corrected and the job title of witness Daisy Ventura be corrected. The requested corrections are deemed clerical, and IRC's request is granted. The changes are reflected in bold font. No other changes were made in this Revised Proposed Decision.

Keri Neal, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant's mother appeared on behalf of claimant, who was not present.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on July 8, 2019.

ISSUE

Is claimant entitled to make permanent the temporary increase of 17 respite hours per month currently in place from May 1, 2019, to August 31, 2019?

FACTUAL FINDINGS

Background

1. Claimant is an eight-year-old girl who qualifies for regional center services based on a diagnosis of Autism Spectrum Disorder, mild intellectual disability, and cerebral palsy.

2. Claimant lives at home with her mother and two older siblings. Claimant receives 195 hours of In-Home Supportive-Services (IHSS) and claimant's mother is the provider. Claimant receives in-home applied behavioral analysis therapy (ABA therapy) Monday through Friday for two hours each day. Claimant is not attending summer school at the moment, but when she returns to school in August 2019, she will attend from approximately 8:00 a.m. to 2:30 p.m. She will have a 1:1 aide at school. Claimant's

mother has inquired about after school programs, however, she does not feel any of the programs are appropriate for claimant because they do not offer a 1:1 aide.

3. Claimant currently receives 48 hours per month of ongoing respite. However, those hours were increased by 17 hours per month (to 65 hours per month) from October 1, 2018, through April 30, 2018, and again from May 1, 2019, to August 31, 2019, when claimant's mother requested the additional hours due to the need to attend medical appointments. This increase was based on documentation claimant's mother provided to IRC, showing claimant's mother would need to attend various therapies and medical appointments during those time periods to attend to her health. Claimant's mother understood that the increases were temporary.

4. At an Individual Program Plan (IPP) meeting that took place on April 19, 2019, claimant's mother requested that the temporary increase be made permanent.

5. On May 1, 2019, IRC served claimant's mother with a Notice of Proposed Action, denying claimant's request to make the temporary increase of 17 hours of respite permanent.

6. On May 10, 2019, claimant's mother filed a fair hearing request contesting IRC's decision.

7. On June 11, 2019, claimant's mother and representatives from IRC met to discuss the requested increase in respite. Following the meeting, IRC adhered to its decision. This hearing ensued.

Evidence Presented at Hearing

8. The following documents were reviewed: claimant's April 16, 2018, Individual Program Plan (IPP); Claimant's April 16, 2018, IPP addendum; claimant's

client development evaluation report (CDER) dated April 16, 2018; claimant's IPP dated April 17, 2019; claimant's June 6, 2019, IPP addendum; claimant's CDER dated April 19, 2019; various e-mail communications regarding claimant's mother's request; and consumer identification notes ranging from April 8, 2019, through June 10, 2019. None of the documents reviewed show that claimant's level of care has changed over the past year.

9. An informal meeting letter dated June 11, 2019, which involved claimant's mother and IRC representatives, detailed discussions regarding why claimant's mother was requesting the 65 hours of respite be made permanent. Claimant's mother indicated that she is a single parent and has a medical condition that requires her to attend physical therapy two times per week through August 31, 2019, and also goes to the gym two to three times per week for "health reasons." Claimant's mother did not indicate during the meeting that her medical appointments were permanent.

10. Daisy Ventura is claimant's **consumer services coordinator** and testified at the hearing. The following is a summary of her testimony. Claimant is hyperactive, experiences sleep problems, and requires support for self-care. Claimant is very "clingy" to her mother and will wander off at times. Claimant has demonstrated progress with communication over the past year and her health is stable. Claimant was attending summer school until June, but summer school has ended. Claimant will begin attending regular school in August.

11. Millee Martin-Walton is a Program Manager at IRC. Ms. Martin-Walton testified at the hearing. The following is a summary of her testimony. Respite care means temporary and intermittent care for a short period of time in order to give someone a break from having to care for a consumer. Respite is not designed to

reduce undesirable behaviors, and is not a behavioral treatment program. Respite is not for protective supervision. Respite is not intended to take the place of natural supports.

Moreover, once the need for respite is established, an increase will not be warranted unless there is a change in health or family conditions. There is nothing in any of the documentation provided to indicate that claimant has had a significant change in her level of care over the past year to warrant additional respite. There are also generic resources available, such as requesting an increase in IHSS hours, the maximum of which is 283. Further, claimant goes back to school in August and there are after school programs available that claimant's mother is unwilling to explore. If behaviors are a concern, claimant's mother can always request additional ABA hours.

12. Claimant's mother testified at the hearing. The following is a summary of her testimony. Claimant's father is not a natural support because, although he may have visitation rights every other weekend, he does not always use his visitation. Claimant is very unpredictable and it makes it hard to take her out into the community. Although claimant's mother used to use claimant's older sister as a natural support, that is becoming more difficult because claimant's older sister has had a baby in the past seven months. Thus, claimant's sister is no longer as available to assist as she used to be. Claimant's sister is also an IHSS provider, and provides approximately 75 to 80 of the hours per month out of the 195 IHSS hours allotted to claimant.

The initial increase in respite started about a year ago because of claimant's mother's medical condition, which is how she began receiving the 48 hours per month. As different things occurred concerning her medical condition which necessitated additional hours, claimant's mother was able to obtain two temporary increases to 65 hours per month.

Claimant's mother is feeling better now, and she can do a little bit more than she could do before. However, she feels she still needs the respite to be permanent. The ABA therapy is helpful, since the ABA therapist is present from 5:30 p.m. to 7:30 p.m. five days per week. When claimant returns to school in August, she will be riding the school bus and attending class from approximately 8:00 a.m. to 2:00 p.m. daily. Claimant's mother is not opposed to after school programs, but will only consider them if they have 1:1 service and none of the programs have that.

During the night, claimant tends to wake up and does not always fall asleep right away. Claimant's mother gives claimant melatonin, but claimant does not always fall back to sleep right away. Claimant's mother sleeps with a breathing machine, which makes it difficult to care for claimant.

Claimant's mother said she is not open to seeking an alternative IHSS provider because she does not like to have other people in her home. Claimant's mother also said she does not need anyone to perform her IHSS hours because she is "capable" of taking care of claimant.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish by a preponderance of the evidence that IRC should fund the requested service. (Evid. Code, §§ 115, 500; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.)

The Lanterman Act

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) to provide 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. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

3. 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.

4. The Department of Developmental Services (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, 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 requires that the IPP and provision of services and supports be centered on the individual and take into account the needs and preferences of the individual and family. Further, the provision of services must be effective in meeting the IPP goals, reflect the preferences and choices of the consumer, *and be a cost-effective use of public resources.* [Emphasis added].

7. Welfare and Institutions Code section 4648 requires regional centers to ensure that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and to secure services and supports that meet the needs of the consumer, as determined by the IPP. This section also requires regional centers to be *fiscally responsible*. [Emphasis added].

8. In implementing IPPs, regional centers are required to first consider services and supports in natural community, home, work, and recreational settings. (Welf. & Inst. Code, § 4648, subd. (a)(2).) Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family. (*Ibid.*) A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer in order to best accomplish all or any part of the IPP. (Welf. & Inst. Code, § 4648, subd. (a)(3).)

9. The regional center is required to consider all the following when selecting a provider of consumer services and supports: a provider's ability to deliver quality services or supports to accomplish all or part of the consumer's individual program plan; provider's success in achieving the objectives set forth in the individual program plan; the existence of licensing, accreditation, or professional certification; cost of providing services or supports of comparable quality by different providers; and the consumers, or, where appropriate, the parents, legal guardian, or conservative of a consumer's choice of providers. (Welf. & Inst. Code, § 4648, subd. (a)(6).)

10. The regional center is also required 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. (Welf. & Inst. Code, § 4646.4.)

11. Welfare and Institutions Code section 4690.2, subdivision (a), defines respite services as “*intermittent* or regularly scheduled *temporary* nonmedical care” for a consumer who resides with a family member. [Emphasis added.]

12. Respite services are designed to: assist family members in maintaining a consumer in the home; provide appropriate care and supervision to ensure the consumer’s safety in the absence of family members; relieve family members from the constantly demanding responsibility of caring for the client; and tend to the consumer’s basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by the family members. (*Ibid.*)

13. Welfare and Institutions Code section 4659, subdivision (c), prohibits IRC 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.”

Evaluation

14. Claimant had the burden of proving that the temporary increase in respite hours from 48 to 65, which ends on August 31, 2019, should be made permanent. Claimant did not meet her burden.

Respite services are services that are provided to assist a family in maintaining a developmentally disabled person in the home, by *temporarily* relieving a caregiver for *short* periods of time. There has been no significant change in claimant’s level of care in the past year. Claimant’s mother’s health condition warrants attendance at certain appointments and claimant’s mother goes to the gym several days per week to assist with her health. Based on medical documentation claimant’s mother provided to IRC, it

was likely appropriate to increase the respite hours during the time claimant's mother is required to attend various medical appointments (i.e. physical therapy). However, as those are expected to end by August 31, 2019, and because claimant will be returning to school in August, claimant's mother will have at least an additional six hours per day while claimant is in school to have a break from claimant's care.

Additionally, IHSS is a generic resource and claimant's mother and sister are the providers. To obtain a break from claimant's care, claimant's mother could hire an additional IHSS worker to provide her IHSS hours. While that may not be the preferred choice, IRC is prohibited from purchasing additional services or supports when there are generic resource solutions.

Finally, as claimant is only eight years old, the parent of a non-developmentally disabled eight-year-old child would typically be expected to act as a natural support when that child is not in school. In other words, a parent would be expected to make necessary child care arrangements for the time their child was not in school in the event they needed to run errands, attend medical appointments, attend a social events, or take other breaks, without the benefit of government-funded respite. Claimant requires a higher level of care due to her developmental challenges, however, so IRC has provided for 48 hours of respite per month on a continual basis. Nothing in this record warrants increasing that amount at this time.

In consideration of all the above, and the fact that there is nothing in claimant's level of care or the family that has changed significantly, the request to make the temporary increase of 17 respite hours per month permanent must be denied.

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ORDER

Claimant's appeal from IRC's determination that an increase in respite hours from 48 hours per month to 65 hours per month was not warranted is denied. Beginning on September 1, 2019, claimant's temporary increase of 17 respite hours per month shall expire and the respite hours claimant receives shall revert to 48 hours per month.

DATE: July 26, 2019

KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.