

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

Claimant,

vs.

REGIONAL CENTER OF THE EAST BAY,

Service Agency.

OAH Case No. 2016100576

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DECISION

Administrative Law Judge Michael A. Scarlett, State of California, Office of Administrative Hearings, heard this matter on December 6, 2016, in San Leandro, California.

Mary Dugan, Fair Hearing Specialist, represented the Regional Center of the East Bay (RCEB or Service Agency). Mother represented claimant.<sup>1</sup>

Evidence was received and the matter was submitted for decision on December 6, 2016.

ISSUE

Should RCEB grant Mother's request to utilize claimant's older brother, who lives in the family home, as claimant's respite provider?

FACTUAL FINDINGS

1. Claimant is an eight-year-old boy who is eligible for Lanterman Developmental Disabilities Services Act (Lanterman Act) services based on a diagnosis of

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<sup>1</sup> Claimant's and mother's identities are not disclosed in order to protect Claimant's privacy.

autism. He resides with his mother and his 18-year-old brother. Claimant's father is not in his life and mother has no other relatives in the area to assist with claimant's care. Mother wants to continue receiving in-home respite care which provides her an occasional break in the care and supervision of claimant. Service Agency currently funds 90 hours per quarter of full service respite through Pacific Homecare. There is no dispute regarding Mother's need for in-home respite services or the level of respite services funded. Rather the dispute is whether Mother can use claimant's older brother as a respite provider.

2. Claimant's Individual Program Plan (IPP) dated October 2, 2014, indicated that he has tantrum behaviors, including problems with transitioning from preferred activities, and not getting his way. Mother reported that claimant frequently tantrums but the behaviors typically last only a few minutes. She noted improvement in claimant's tantrum behaviors, stating that he no longer banged his head or hit others, but he continued to scream and cry during tantrums. Claimant's safety awareness was low and he tended to wander away, but this behavior was diminishing. Regarding independent living skills, claimant needed and received help with all such skills, but he is toilet trained and can feed himself. He is fully ambulatory with no fine or gross motor deficits. On October 6, 2016, the IPP was reviewed. The Annual Review indicates that claimant continues to need assistance with independent living skills, he requires supervision at all times, he continues to exhibit behaviors such as running or wandering away, and he tantrums once per week. His tantrum behaviors include screaming, running around, and slamming doors. Claimant also continues to have problems with transitions and likes to have things his way.

3. On July 7, 2016, Mother requested RCEB to fund claimant's in-home respite utilizing claimant's older brother as the respite provider. On August 19, 2016, Service Agency issued a Notice of Proposed Action (NOPA), denying Mother's request. Service Agency denied Mother's request because it considered claimant's biological older brother a "natural support" who lived in the family home. Service Agency cited Welfare and Institution Code<sup>2</sup> sections 4512, subdivision (e), as authority to support its action.

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<sup>2</sup> All further statutory references are to the Welfare and Institutions Code.

4. On August 22, 2016, RCEB again informed Mother that it denied the request to utilize older brother as a respite provider because older brother lived in the family home and is considered a "natural support" for claimant. Service Agency agreed that the older brother "is very capable of supervising [claimant] and may be among the most qualified people to supervise him." However, it stated that the Lanterman Act prohibited regional centers from paying a family member who lives in the home to assist in claimant's care. It cited the Service Agency's Purchase of Service (POS) policy pertaining to respite which states that RCEB may purchase respite for families only when all or certain procedures are completed by the case managers. Among those procedures is "A Natural Supports and Generic Resources Evaluation" which states that: "All sources of relief through natural supports and generic resources (e.g., family, community programs, etc.) will have been fully explored by the case manager, utilized to the fullest extent, and shown to be insufficient to meet the family's need for intermittent breaks in the form of respite." The respite POS Guidelines further states that "persons residing in the family home are considered natural supports." However, the policy states that "in-home respite may also be provided through vendorization of a family member." Finally, the August 22, 2016 letter stated that "RCEB will provide you with full service respite service [sic] and the agency can try to find you a suitable respite worker that can work with [claimant] and his needs."

5. On October 6, 2016, Mother filed a FHR appealing the Service Agency's decision.

6. On October 24, 2016, Liz Vollmer, Case Management Supervisor, informed Mother that her request to utilize claimant's older brother as the in-home respite provider was denied. Service Agency again reasoned that older brother was a natural support that could not be considered a respite provider.

7. Mother tried to use respite workers from Pacific Homecare on three occasions, but the workers had no experience supervising autistic children, and Mother declined to continue to use Pacific Homecare workers. Mother has not used the 30 hours per-month of in-home respite in the IPP because of the inadequacy of the respite workers provided. She has relied on older brother for care and supervision for claimant because he understands claimant's needs and behaviors, and is excellent in caring for his younger

brother. Claimant's older brother is currently attending City College. However, but for Mother's reliance on his help with claimant, older brother would be employed in another capacity. Mother recognizes that older brother cannot be relied on to care for claimant long term because older brother needs to work while he is in school. Hence, she seeks payment for older brother as claimant's respite provider to help defray some of his lost employment opportunity as a result of providing care and supervision to claimant.

8. More importantly, however, Mother desires to use older brother to provide respite because she believes that Pacific Homecare respite workers are paid minimum wage, have not been adequately trained to and are inexperienced in dealing with children with autism. Consequently, she does not believe Pacific Homecare respite workers can provide competent and safe care and supervision for claimant. Mother states that claimant attends a non-public school because public schools are not suited to deal with claimant's maladaptive behaviors. These challenges have, and would, provide a significant challenge for inexperienced Pacific Homecare workers. Claimant has never been left alone with Pacific Homecare respite workers. Mother or older brother is always present with the respite worker to ensure proper care is provided. Service Agency does not dispute Mother's need for a respite worker that understands claimant's needs, or that older brother need to work.

9. Diane Quinday, claimant's case manager/service coordinator, described claimant as a "little on the small side," and stated that he was a very smart, bright, active child. She agreed that he had behavior issues and that claimant liked to have things his way. Quinday acknowledged that Mother needs respite services, that Pacific Homecare's workers had not performed as Mother wished, and that the respite workers had not been able to deal with claimant's behavior issues. She admitted that Pacific Homecare workers have not worked out.

10. Although Quinday initially supported Mother's request for older brother to be the respite provider, she testified that she now believes the brother is a natural support for claimant who could not be paid as a respite provider unless he lived outside of the family home. Quinday emphasized that older brother, like any other family member, needed respite from claimant's care and supervision. Consequently, she did not believe older brother should be utilized as a respite provider.

11. Kim Limato, the Case Management Supervisor, testified that Service Agency considered utilizing older brother as claimant's respite provider, but denied the request. She explained that because older brother was not quitting a job to provide care for claimant, but was attending college and unemployed, he was natural support living in the family home and could not be a respite provider. Because respite is meant to give the entire family a break from claimant's care and supervision, Limato believed older brother was not an appropriate provider. Limato will explore respite vendors other than Pacific Homecare and is confident that RCEB will be able to find an adequate respite provider that will satisfy Mother.

12. Mother is not opposed to considering other respite vendors. However, Mother is a single parent with no family support other than older brother. She attends school for her doctorate degree and she relies heavily on her older son to help with claimant's care. Mother does not seek to circumvent Service Agency's respite POS Guidelines for personal financial gain or other nefarious purposes. In fact, as stated above, Mother has forgone any entitlement to in-home respite services because of her sincere concerns about the adequacy of the service providers and claimant's safety.

## LEGAL CONCLUSIONS

1. In enacting the Lanterman Act, section 4500 et seq., the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals, and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (Welf. & Inst. Code, § 4501.) Appropriate services and supports include respite services. (Welf. & Inst. Code, § 4512, subd. (b).) Regional centers may only purchase respite services when the care and supervision needs of a consumer exceeds that of an individual of the same age without a developmental disability. (Welf. & Inst. Code, § 4685.5, subd. (a)(1).)

2. The Lanterman Act gives regional centers, such as Service Agency, a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Thus, regional centers are responsible for developing and implementing IPPs, while taking into account consumer needs and preferences, and

ensuring service cost-effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.) Regional center shall consider the consumer's choice of providers, or when appropriate, the consumer's parent's choice of providers when implementing the IPP. (Welf. & Inst. Code, § 4648, subd. (a)(6)(E).) When purchasing services and supports through the IPP process, the regional center shall ensure that generic resources and supports, when appropriate, have been utilized. (Welf. & Inst. Code, §4646.4, subd. (a)(2).) "Natural supports" means "personal associations and relationships typically developed in the community that enhance the quality and security of life for people," which includes "family relationships." (Welf. & Inst. Code, § 4512, subd. (e).)

3. In accordance with the IPP process, Service Agency and claimant's family have agreed on the need for in-home respite services. There is no dispute regarding the level of in-home respite services funded, or whether generic resources or natural supports have been fully utilized before agreeing to this service level. No evidence was presented to establish that Claimant's needs have changed or that in-home respite is no longer appropriate. To the contrary, both parties agreed that the respite services are needed.

4. This dispute involves whether claimant's older brother is prohibited from being utilized as a respite provider because he lives in the family home and is considered a natural support by RCEB. Service Agency relies on sections 4512, subdivisions (b) and (e), to deny Mother's request for older brother to provide claimant's respite services. However, none of these provisions expressly prohibit a family member from serving as an in-home respite provider. Service Agency correctly asserts that generic resources and supports must be considered when determining the level of services required. However, as stated above, the level of in-home respite is not in dispute, suggesting that generic resources and supports, including natural supports, were already considered when Service Agency and claimant's Mother agreed that 30 hours per-month of in-home respite services was appropriate. Service Agency does not assert that the level of in-home respite is impacted by older brother's presence as a "natural support" in the family home. To be sure, older brother cannot be fairly considered a "natural support" because he is not a family member 18 years old, attending community college, and but for Mother's reliance on his help to care for claimant, he could and would be gainfully employed in another capacity.

5. Service Agency's POS Guidelines also do not specifically prohibit older brother from serving as a respite provider. To the contrary, the POS Guidelines state that "in-home respite may also be provided through vendorization of a family member." The POS Guidelines merely state that all sources of relief through natural supports and generic resources must be fully explored and utilized to the fullest extent in order to determine the appropriate level of respite service funding. This has occurred in this case. Older brother's presence in the family home was considered when Service Agency set the current level of funding for claimant's in-home respite services.

6. Finally, Service Agency asserts that the in-home respite is intended to provide relief to claimant's entire family, not just Mother, and that allowing older brother to be the respite provider defeats this purpose. Older brother is not the family member responsible for the care and supervision of claimant, Mother is. In-home respite in this case is primarily intended to provide Mother relief from the care and supervision of claimant. Older brother attends community college and has been providing intermittent respite to Mother because the Pacific Homecare respite workers did not meet Mother's expectation as care providers. Service Agency does not dispute that the Pacific Homecare respite workers were inadequate. Although Service Agency insists that it can provide suitable respite workers for claimant, even if they have to find another respite vendor, adequate respite workers have not been provided. Claimant and Mother's choice of service provider must be considered when implementing the IPP. (Welf. & Inst. Code, § 4646.4, subd. (a)(2).) Here, Mother has expressed a desire to have older brother provide in-home respite to claimant because she has not been satisfied with the respite workers previously provided. Service Agency admits that older brother is very capable of supervising claimant and that he may be the most qualified person to supervise claimant, particularly in the absence of adequate respite providers. Mother has not used the in-home respite funded in claimant's IPP because of her legitimate concern regarding the adequacy of the Pacific Homecare respite workers. There is no evidence that Mother seeks to abuse or misuse the in-home respite funding by seeking to have older brother become the respite provider. Consequently, Mother's preference for older brother to be claimant's respite provider should not be rejected.

7. Older brother cannot fairly be considered a natural support and Service Agency considered all generic resources and supports in determining that claimant's current level of in-home respite funding is appropriate. As set forth in Factual Findings 1 through 12, and Legal Conclusions 1 through 6, neither the Lanterman Act nor Service Agency's respite POS Guidelines prohibits older brother from serving as the in-home respite provider. Accordingly, Mother's request to utilize older brother as claimant's in-home respite provider is granted.

## ORDER

Claimant's appeal is granted. Service Agency shall utilize claimant's older brother as the respite provider to provide in-home respite services in accordance with this Decision.

Dated: December 19, 2016

\_\_\_\_\_/s/\_\_\_\_\_  
MICHAEL A. SCARLETT  
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.