

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

ALTA CALIFORNIA REGIONAL CENTER,

Service Agency.

OAH No. 2016100639

DECISION

A fair hearing was held before Karen J. Brandt, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California on December 22, 2016, in Sacramento, California.

Robin Black, Legal Services Manager, represented Alta California Regional Center (ACRC).

Claimant's mother represented claimant.

Evidence was received, the record was closed, and the matter was submitted for decision on December 22, 2016.

ISSUE

Should ACRC grant claimant additional respite?

FACTUAL FINDINGS

1. Claimant was born in 1999. She is currently 17 years old. Claimant is eligible for services and supports from ACRC pursuant to the Lanterman Developmental

Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq., under the developmental disability category of autism. Claimant lives at home with her mother, who is claimant's full-time caregiver, and her brother, who is also an ACRC consumer based on a diagnosis of autism. Claimant's mother homeschools claimant and her brother.

CLAIMANT'S REQUESTS FOR ADDITIONAL RESPITE AND ACRC'S RESPONSES

2. Claimant's mother submitted a letter to ACRC dated March 11, 2016, from Catherine Jo Shao Ho, D.O., Department of Internal Medicine, Kaiser Permanente, which stated:

[Claimant's mother] is a patient of mine and currently under my care and supervision. My patient [claimant's mother] is currently in need of temporary respite and needs extra assistance with her disabled child due to current condition of tendonitis. Duration will be 2 months until May 15, 2016. If you have any further questions please contact my office at [telephone number].

3. As reflected in ACRC's Interdisciplinary Notes, at the time claimant's mother requested the additional respite pursuant to the March 11, 2016 letter, claimant was approved to receive 90 hours of respite per quarter. On March 25, 2016, Jennifer Bloom, an ACRC Client Services Manager, notified claimant's mother that claimant's respite would be increased temporarily from 90 to 120 hours per quarter for that quarter and the next in light of claimant's mother's hand condition and doctor's note.

4. Claimant's mother submitted a letter to ACRC dated May 18, 2016, from Dr. Ho, which stated:

[Claimant's mother] is a patient of mine under my care and supervision. [Claimant's mother] is placed on modified duty at work and at home from 5/16/2016-6/17/2016. This note is to support patient needing additional help with care of her children due to medical condition for which she is under treatment. If you have any questions or concerns, please contact my office at [telephone number].

5. Ms. Bloom notified claimant's mother by email dated June 15, 2016, that claimant's respite hours had been increased by another 30 hours until the end of June 2016. This brought claimant's total respite hours to 150 hours per quarter.

6. Claimant's mother submitted a letter dated June 29, 2016, to ACRC from Jeanne Taylor, D.O., Family Practice, Internal Medicine, Kaiser Permanente, which stated:

[Claimant's mother] is a patient under my care at Kaiser Permanente. Due to her wrist pain, [claimant's mother] needs three hours per day respite help per child. If you have any questions or concerns, feel free to contact me at my office at [telephone number].

7. In response to claimant's request for additional respite as set forth in the June 29, 2016 letter, ACRC issued a Notice of Proposed Action (NOPA) dated July 26, 2016. ACRC calculated that the June 29, 2016 request for additional respite constituted a request for 279 hours of respite per quarter. In the NOPA, ACRC denied claimant's request for this additional respite. As ACRC explained, effective July 1, 2009, a regional center was prohibited from purchasing more than 90 hours of in-home respite services in a quarter for a client unless the client qualified for an exemption. ACRC determined that claimant did not qualify for an exemption "because it has not been demonstrated

that the intensity of her care and supervision needs are such that additional respite is necessary to maintain her in the home.” In addition, ACRC found that there had not been “an extraordinary event which impacts [claimant’s mother’s] ability to meet [claimant’s] care and supervision needs.”

ACRC stated further that claimant’s mother was claimant’s sole In-Home Supportive Services (IHSS) chore worker. ACRC advised claimant’s mother that “[i]n order to reduce the amount of physical activity you perform in caring for [claimant], you have the option of transferring some [or] all of [claimant’s] IHSS hours to another chore worker.” ACRC stated further that claimant’s mother also had “the option to discontinue homeschooling [claimant], which would serve to further reduce your physical activity.” According to ACRC, claimant’s mother “currently [had] the ability to reduce [her] physical activity related to [claimant’s] care without the need for ACRC to fund additional in-home respite...”

ACRC also asserted that “in-home respite is designed to provide **intermittent** care and supervision in the absence of the regular caregiver. As such, it is not designed to provide **daily** care and supervision in place of a caregiver’s responsibility to provide daily care and supervision,” which was how claimant’s mother was “proposing to utilize the increased in-home respite.” In addition, ACRC stated that “in-home respite is designed to provide regular caregivers a break from the constantly demanding **responsibility** of caring for a client. In-home respite is not designed to provide clients care in order to accommodate ongoing **restrictions on a caregiver’s physical activity or range of motion.**” (Bolding in original.)

8. Claimant timely appealed from ACRC’s decision to deny additional respite.

TESTIMONY AT HEARING

9. Ms. Bloom testified that the incremental increases in claimant’s respite from the usual maximum of 90 hours per quarter, first to 120 and then to 150, were

based upon the exemption in the law that allows more respite hours if there is an “extraordinary event that impacts the family member’s ability to meet the care and supervision needs of the consumer.” (Welf. & Inst. Code, § 4686.5, subd. (a)(3)(A).) Claimant’s mother’s tendonitis was deemed to qualify as an extraordinary event that would justify the incremental increases in claimant’s respite beyond the 90-hour maximum.

10. Ms. Bloom explained, however, that in order to qualify for this exemption, the extraordinary event had to be time-limited and not indefinite. In support of her testimony, Ms. Bloom pointed to Welfare and Institutions Code section 4690.2, subdivision (a), which, in relevant part, provides, “‘In-home respite services’ means intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client’s own home, for a regional center client who resides with a family member.” Ms. Bloom also relied upon ACRC’s Service Policy Manual, which in relevant part states, “Respite services are intermittent or regularly scheduled temporary care and supervision for a regional center consumer who resides with a family member.”

11. According to Ms. Bloom, the June 29, 2016 letter did not seek respite services for claimant that were time-limited, temporary or intermittent. Consequently, Ms. Bloom found that the June 29, 2016 request for additional respite did not qualify for the extraordinary event exemption set forth in Welfare and Institutions Code section 4686.5, subdivision (a)(3)(A). She conceded, however, that she did not talk claimant’s mother to clarify whether the doctor intended that the requested respite would be for an indefinite or time-limited period.

12. Claimant’s mother testified that claimant is “severely impacted” by her autism. She has almost no language, cannot take care of herself, is impulsive, and has no safety awareness. As a result, claimant requires constant care and supervision.

13. Claimant's mother testified further that her doctor's June 29, 2016 respite request was not intended to be ongoing. Instead, it was intended to provide claimant's mother with a temporary break to allow her hand condition to heal.

14. At the hearing, claimant's mother offered Work Status Reports from Kaiser Permanente dated May 13, 2016, June 17, 2016, June 27, 2016, July 14, 2016, August 31, 2016, and November 30, 2016. These Work Status Reports addressed the "modified activity" on which claimant's mother was placed. Each of them stated:

*If modified activity is not accommodated by the employer
then this patient is considered temporarily and totally
disabled from their regular work for the designated time and
a separate off work order is not required.*

(Italics in original.)

Each of these Work Status Reports contained different information about the modified activities for claimant's mother. For example, the May 13, 2016 Work Status Report, stated that claimant's mother was "placed on modified activity at work and at home from 5/16/2016 through 6/17/2016," the same time period set forth in the June 29, 2016 letter from Dr. Taylor that was submitted to ACRC. Under the heading "Other needs and/or restrictions," the May 13, 2016 Work Status Report stated, "This note is to support patient needing additional help with care of children due to medical condition for which she is under treatment."

The June 17, 2016 Work Status Report included the following section not included in the May 13, 2016 Work Status Report:

This patient's activity is modified as follows:

- Keyboard/mouse use: Occasionally (up to 25% of shift).

- Repetitive left hand motions: Occasionally (up to 25% of shift).
- Gripping/grasping left hand: Occasionally (up to 25% of shift).
- Lift/carry/push/pull no more than 5 pounds.

(Bolding and underlining in original.)

15. Claimant's mother disputed that she was receiving the amount of IHSS hours ACRC claimed. According to claimant's mother, IHSS allowed her to receive only 180 of the total hours it had authorized for claimant. Claimant's mother also testified that IHSS hours cannot be used for respite. Claimant's mother asserted that she needed "a break" from the intensity of taking care of two teenagers with autism.

DISCUSSION

16. The burden in this matter was on claimant's mother to establish that claimant's respite hours should be increased beyond the statutory maximum of 90 hours by demonstrating qualification under one of the exemptions set forth in Welfare and Institutions Code section 4686.5, subdivision (a)(3)(A). (See Legal Conclusion 2 below.) Claimant's mother did not provide adequate evidence to meet her burden. The June 29, 2016 letter from Dr. Taylor did not contain sufficient information to demonstrate either that: (1) the intensity of claimant's care and supervision needs were such that additional respite was necessary to maintain claimant in the family home; or (2) there was an extraordinary event that impacted the ability of claimant's mother to meet the care and supervision needs of claimant. (Welf. & Inst. Code, § 4686.5, subd. (a)(3)(A).)

The evidence claimant's mother submitted at hearing also did not demonstrate that either of the two exemptions in Welfare and Institutions Code section 4686.5, subdivision (a)(3)(A), applied in this case. While the Work Status Reports from Kaiser Permanente showed that the activities of claimant's mother were restricted by her physicians due to her hand condition, they did not contain sufficient information to establish that claimant should be granted additional respite under the exemptions

applicable to this proceeding. Consequently, claimant failed to establish that her request for additional respite should be granted.

17. Claimant's mother convincingly argued that it would have been preferable if ACRC had acted collaboratively with her before issuing the NOPA to determine how much additional respite she was seeking and for how long. But ACRC's failure to engage in collaborative efforts with claimant's mother prior to issuing the NOPA does not detract from the fact that claimant failed to offer sufficient evidence to support that she qualified for an exemption for additional respite under the Lanterman Act. Her appeal must therefore be denied.¹

LEGAL CONCLUSIONS

1. In accordance with the Lanterman Act, regional centers fund services and supports for eligible consumers with developmental disabilities to enable them to "approximate the pattern of everyday living available to people without disabilities of the same age." (Welf. & Ins. Code, § 4501.)

2. Under the Lanterman Act, regional centers may fund respite for the caregivers of eligible consumers, but the amount of respite that may be funded is limited under Welfare and Institutions Code section 4686.5, which, in relevant part, provides:

¹ At the hearing, claimant's mother also asserted that she was not receiving all the respite from her respite provider that ACRC had authorized. As claimant's mother conceded, because this issue was not included in claimant's Fair Hearing Request, it was not before OAH for determination in this proceeding.

(a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, all of the following shall apply:

(1) A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.

(2) A regional center shall not purchase more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer.

(3) (A) A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) if it is demonstrated that the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer.

(B) For purposes of this section, "family member" means an individual who:

(i) Has a consumer residing with him or her.

(ii) Is responsible for the 24-hour care and supervision of the consumer.

(iii) Is not a licensed or certified residential care facility or foster family home receiving funds from any public agency or regional center for the care and supervision provided. Notwithstanding this provision, a relative who receives foster care funds shall not be precluded from receiving respite.

(4) A regional center shall not purchase day care services to replace or supplant respite services. For purposes of this section, "day care" is defined as regularly provided care, protection, and supervision of a consumer living in the home of his or her parents, for periods of less than 24 hours per day, while the parents are engaged in employment outside of the home or educational activities leading to employment, or both.

(5) A regional center shall only consider in-home supportive services a generic resource when the approved in-home supportive services meets the respite need as identified in the consumer's individual program plan (IPP) or individualized family service plan (IFSP).

3. In addition, Welfare and Institutions Code section 4690.2, in relevant part, provides:

(a) The Director of Developmental Services shall develop program standards and establish, maintain, and revise, as

necessary, an equitable process for setting rates of state payment, based upon those standards, for in-home respite services purchased by regional centers from agencies vendored to provide these services. The Director of Developmental Services may promulgate regulations establishing these standards and the process to be used for setting rates. "In-home respite services" means intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client's own home, for a regional center client who resides with a family member. These services are designed to do all of the following:

- (1) Assist family members in maintaining the client at home.
- (2) Provide appropriate care and supervision to ensure the client's safety in the absence of family members.
- (3) Relieve family members from the constantly demanding responsibility of caring for the client.
- (4) Attend to the client'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.

4. When all the evidence is considered in light of the applicable law, claimant's mother failed to establish that ACRC should be ordered to increase claimant's respite hours. Consequently, claimant's appeal must be denied.

ORDER

Claimant's appeal is DENIED.

DATED: December 29, 2016

KAREN J. BRANDT

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)