

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

and

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2016100854

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DECISION

Jennifer M. Russell, Administrative Law Judge with the Office of Administrative Hearings, heard this matter in Torrance, California on December 8, 2016.

Gigi Thompson, Manager Rights Assurance, and Latrina Fanin, Manager Rights and Quality Assurance, represented Harbor Regional Center (HRC or service agency). Claimant's father represented Claimant.<sup>1</sup> Claimant was not present at the hearing.

Testimonial and documentary evidence was received, the case was argued, and the matter was submitted for decision on December 8, 2016. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUES

1. Whether the service agency should fund periodic, short-term out-of-home respite care services for Claimant.

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<sup>1</sup> Claimant and his father are not identified by name to preserve confidentiality.

2. Whether Claimant's father may directly negotiate with service agency vendors to customized out-of-home respite care services for Claimant.

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## FACTUAL FINDINGS

1. Claimant is a 17-year-old consumer of HRC based on his qualifying diagnoses of Intellectual Disability and Autism Spectrum Disorder. Claimant requires assistance with his daily living needs, including toileting, grooming, and eating. Claimant presents with non-compliant behaviors and elopement. Claimant does not present with aggressive or assaultive behaviors. Claimant's speech is unintelligible; he uses an iPad for communication.

2. For the past two years, Claimant's sleep patterns have been erratic, as more fully described by Father in the following unedited April 18, 2016 email to the service agency:

[Claimant] usually woke up around 6:00AM and goes to bed at 9:00PM. Sometime it takes an hour or two before he truly fall asleep. He is on gluten-free casein-free diet. He doesn't have aggressive behavior; but, he needs to have full time attention (minute to minute). He will create a msss if the attention is missing. He will move around all-day long and needs assistance on self-help items. The most difficulty is at night time. He wakes up more than 10 times a night. This routine is going on every night for last two years. We have brought him to see doctors and no solution yet.

(Exh. A.)

3. When Claimant is awake at night, Claimant's parents must also remain awake to supervise Claimant to ensure his safety and wellbeing in their home. Consequently, Claimant's erratic sleeping patterns have caused his parents to suffer sleep deprivation, which in turn has negatively impacted their quality of life. In particular, sleeplessness has affected Father's ability to discharge his duties and responsibilities as an engineer. Father has requested support in the form of periodic, temporary out-of-home respite care services to address Claimant's erratic sleeping patterns.

4. The service agency does not dispute Claimant's need for out-of-home respite care services. Claimant's most recent Individual Family Service Plan (IFSP), dated September 28, 2016, obligates the service agency to conduct a search for an appropriate out-of-home respite care service placement and provider for Claimant, and the service agency has commenced such a search. During the course of its search, the service agency has reached out to Alliance, a foster family agency that certifies foster family homes. At times, a foster family home may have a temporary opening occasioned by a resident's departure or death. Until another foster placement occurs, the foster family home may be available to provide temporary out-of-home respite care service. Alliance identified a foster family home located in Hawthorne, California as a possible temporary out-of-home respite care placement for Claimant. The foster mother was initially amenable to accepting Claimant, but she ultimately declined the placement because she subsequently assumed the additional responsibility of caring for an ill member of her extended family. The service agency identified another foster family home located in Belflower, California, but that caretaker also declined to accept Claimant. The caretaker had health issues, including a broken arm, and she was already caring for two consumers who were experiencing difficulty sleeping during the night.

5. Independent of the service agency's search, Father contacted Hai Nguyen, an HRC vendor providing out-of-home placements for un-emancipated consumers. After conducting an inspection of Hai's home, Father favored a placement for Claimant there because Father believes that Hai runs a good operation and that Hai is knowledgeable about how to work with Claimant. There were, however, no openings at Hai's home, and, in any event, Hai's home was available only for permanent out-of-home placements and not for recurring, temporary out-of-home respite care placements.

6. By letter dated October 18, 2016, the service agency informed Claimant's parents that its search for a suitable out-of-home respite care provider for Claimant was on-going. The service agency proposed temporary alternatives to alleviate immediately Claimant's parents' sleep deprivation. Those alternatives included advocacy on behalf of Claimant to obtain an increase in Claimant's in-home supportive services (IHSS) hours from 200 hours per month to 283 hours per month in order to retain an IHSS worker to supervise Claimant during the night or permitting an HRC-funded personal care assistant from Cambrian Home Care to provide Claimant with overnight sleep support. (See Exh. 3.) Father rejected these alternatives because both he and his spouse are apprehensive about having a third person in their home at night while they are asleep or when he is away on business-related travel and because their home does not have an extra bedroom to accommodate such staffing. They were also concerned about maintaining privacy while a "stranger" was present in their home.

7. On behalf of Claimant, on October 23, 2016, father filed a Fair Hearing Request asserting the following reasons for a hearing:

1. Not able to receive short-term out-of-respite service for 6 months after submitted request.
2. Do not receive reasonable/actionable plan from HRC to resolve this issue.

3. Not be able to have direct discussion with service providers and create service plan due to HRC internal guideline & practice.

(Exh. 2.)

8. The service agency maintained at the administrative hearing that the Harbor Regional Center Service Policy Respite Care (Respite Care Policy), which the Department of Developmental Services approved in July 2012, articulates the parameters within which its purchase of out-of-home respite care services for Claimant must occur. The Respite Care Policy provides the following:

"Respite" is defined as intermittent relief or rest from the additional demands that may be placed on a family caring for a son or daughter with a disability. "Intermittent relief" means that the break from caregiving is intended to be periodic, as opposed to continuous, and that is time limited.

[¶ . . . ¶]

The Harbor Regional Center may purchase respite care for families only under the following circumstances:

1. the person with a developmental disability has behavior challenges or special medical needs or supervision needs that exceed those of people of the same age without developmental disabilities; and
2. there are few or no natural or generic supports available to provide necessary supervision during times when family members are away; or

3. the family is experiencing a short-term crisis or emergency situation.

In the above circumstances, the purchase of respite care may be authorized only in accordance with the following:

1. respite is provided in the family home for a maximum of 30 hours per month or 90 hours per 3 month period; or

2. respite is provided in a licensed residential setting for not more than 21 days per year.

An exemption to the limits set forth in paragraphs 1 and 2 immediately above may be granted by the Executive Director if it is demonstrated that the intensity of the person's care and supervision needs are such that additional respite is necessary to maintain the person with a developmental disability 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 person.

(Exh. 6.)

9. The service agency explained its search within and without the HRC catchment area for a licensed residential setting within which Claimant can receive temporary out-of-home respite care services. During its search, the service agency told potential vendors that Claimant desired out-of-home respite care placement one weekend each month and that Claimant had a preference for the same vendor for each

monthly placement. The service agency explained that it had no authority to compel a vendor to accept a particular individual for placement or to dictate the circumstances under which a vendor will make a placement available to consumers.

10. At the administrative hearing, the service agency further explained the history underlying the development of the four-bed model used in licensed residences offering out-of-home placement services. Although the four-bed model is not mandated by governing regulations, the four-bed model takes into consideration, among other things, an adolescent's need for privacy, staffing ratios, staff's ability to care for individuals requiring supervision or medical attention, and behavior management concerns. The service agency cannot insist that a vendor hold a bed open because neither the governing statute nor regulations authorize the payment of a "bed hold." As a business matter, when a bed at a licensed residential facility becomes available, vendors prefer a permanent placement.

11. The service agency additionally explained that consumers cannot individually negotiate an out-of-home respite placement arrangement directly with a service agency-vendored respite provider. Among other concerns, such direct consumer to vendor contact poses a threat to the privacy of vendored respite providers who by definition provide the out-of-home respite care services in their private homes. The service agency employs the skilled expertise of its professional staff to conduct a search for an appropriate, vetted provider before introducing that provider as a viable option to a consumer.

12. At the administrative hearing, Father expanded on his position that he should be allowed to engage in direct negotiations with the service agency's vendors to secure a tailored out-of-home respite care service for Claimant. Father questioned the rationale behind the four-bed model and queried about expanding the capacity of residences available for out-of-home placements to a six-bed model. Father inquired

about future efforts to address a growing population of individuals with disabilities and a need to develop additional venues for out-of-home placements. As the Administrative Law Judge noted at the hearing, these are important policy matters best left to the Legislature for determination. These policy matters are not germane to the immediate resolution of this matter.

## LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.), which mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream of life in the community.” (Welf. & Inst. Code, § 4501.) Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Regional centers are responsible for taking into account individual consumer needs and preferences, and for ensuring service cost effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

2. The services and supports to be funded for a consumer are determined through the individualized program planning process, which involves collaboration between the consumer and service agency representatives. Services and supports for persons with developmental disabilities are defined as “specialized 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 rehabilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives.” (Welf. & Inst. Code, § 4512, subd. (b).) Services and supports include out-of-home care, for which section 4686.5, subdivision (a)(2), authorizes up to 21 days in a fiscal year.



3. When purchasing services and supports a regional center must conform to its purchase of service guidelines. (Welf. & Inst. Code, § 4646.4, subd. (a)(1).) The Lanterman Act requires the Department of Developmental Services (Department) to review the guidelines "to ensure compliance with statute and regulation." (Welf. & Inst. Code, § 4434, subd. (d).) Reflecting the Department's interpretation of statute and regulation, the purchase of service guidelines are not entitled to the deference given to a regulation; rather, the purchase of service guidelines are entitled to a degree of deference that is dependent on the circumstances in which the agency has exercised its expertise. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-15.) Most important, a regional center's implementation of its purchase of service guidelines must account for a consumer's individual needs and preferences when making determinations regarding the appropriateness and the cost-effectiveness of particular services. (See *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

4. Claimant's need for out-of-home respite care service is not disputed. The evidence offered at the administrative hearing in this matter establishes the service agency's ongoing good faith efforts to procure out-of-home respite care services for Claimant. As set forth in Factual Findings 4 and 5, circumstances beyond both the service agency and Claimant's control have precluded a successful out-of-home respite care service placement at this time. In the interim, the service agency has offered alternatives to alleviate Claimant's parents' sleeplessness caused by Claimant's disruptive erratic sleep patterns. However, for several reasons those alternatives were unacceptable to Claimant's parents. (Factual Finding 6.) Under these circumstances, it is not unreasonable for Claimant to wait until the service agency's search produces an out-of-home respite care placement that is suitable to meet his individual needs.

5. Until the service agency completes or abandons its good faith efforts, Claimant's request for a fair hearing at this time is not ripe. Under the Lanterman Act, "a decision [by the service agency] without the mutual consent of the service recipient or authorized representative to reduce, terminate, or change services set forth in an individual program plan" triggers the right to a fair hearing. (Welf. & Inst. Code, § 4710, subd. (a)(1).) The service agency has not yet taken or proposed concrete action against Claimant's right to out-of-home respite care services. None of the evidence presented at the administrative hearing suggests an inevitable impending adversity against Claimant's entitlement to out-of-home respite care services.

6. By reason of Factual Findings 1 through 12 and Legal Conclusions 1 through 5, Claimant's fair hearing request is dismissed without prejudice.<sup>2</sup>

## ORDER

Claimant's October 23, 2016 Fair Hearing Request is dismissed without prejudice.

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<sup>2</sup> In the event that the service agency makes a concrete decision without the mutual consent of Claimant or Claimant's representatives to reduce, terminate or change Claimant's entitlement to out-of-home respite care services, Claimant or Claimant's representatives may invoke the fair hearing procedures set forth in the Lanterman Act. (See Welf. & Inst. Code, § 4710 et seq.)

DATED: December 14, 2016

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JENNIFER M. RUSSELL  
Administrative Law Judge  
Office of Administrative Hearings

## NOTICE

This is a final administrative decision. This decision binds both parties. Either party may appeal this decision to a court of competent jurisdiction within 90 days.