

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Claimant,

vs.

ALTA CALIFORNIA REGIONAL CENTER,

Service Agency.

OAH No. 2017110173

DECISION

This matter was heard before Administrative Law Judge (ALJ) Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Sacramento, California, on December 18, 2017.

The Service Agency, Alta California Regional Center (ACRC), was represented by Robin Black, Legal Services Manager.

Claimant was represented by her mother.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on December 18, 2017.

ISSUE

Is ACRC required to fund additional in-home respite hours for claimant?

FACTUAL FINDINGS

1. Claimant is a conserved 22-year-old young woman who resides in the family home with her mother and two younger brothers. She is eligible for ACRC services based on a diagnosis of intellectual disability. Claimant was diagnosed with Pierre Robin

syndrome and Microcephaly and is gastrostomy tube (G-tube) dependent for feedings and medication due to reported dysphagia, oral motor dysfunction and vagal nerve difficulties. She is nonverbal and communicates with gestures, and is ambulatory. Claimant receives services and supports pursuant to the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 et seq.)¹

Claimant's Individual Program Plan (IPP) provides for services and supports from ACRC, which include 60 hours per quarter of in-home respite. She also receives assistance, including protective supervision, through In Home Supportive Services (IHSS) a county program designed to help fund services provided to claimant to assist her in remaining safely in her home.

2. On September 28, 2017, ACRC issued a Notice of Proposed Action (NOPA) to claimant stating, "This is to advise you that ACRC is unable to assess the need to provide additional respite support."

The NOPA advised claimant of the following proposed action:

- (1) ACRC has authorized funding for 60 hours per quarter of in-home respite for [claimant].

Reason for this action:

You have refused to share information regarding generic resources (IHSS in this case) rendering ACRC unable to conduct a full assessment of need. Without this information, ACRC cannot make a determination of what level of support is necessary to support [your] request for additional respite

¹ Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

hours.

3. Claimant timely filed a Fair Hearing Request appealing that decision. The following was the stated reason for the Fair Hearing Request:

The Notice of Action dated September 28, 2017 is intentionally misleading. I provided all information requested by Alta including citation to the appropriate California statutes. Alta deliberately ignored the facts I submitted. Alta's actions are clearly retaliatory due to complaints that I have filed in the past.

In describing what is needed to resolve claimant's complaint, the request stated:

Alta must agree that I provided the information asked for and authorize the respite hours that were requested. I must also be reimbursed for any expenses I incur due to their harmful conduct.

4. Regional centers are governed by the provisions of the Lanterman Act. Section 4690.2, in relevant part, specifies:

(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 those 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 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 the usual daily routines which would ordinarily be performed by the family members.

5. Section 4686.5 limits the amount of respite that regional centers may provide for consumer caregivers as follows:

(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 purpose of this section, "family member" means an individual who:

(i) Has the 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 services plan (IFSP).

6. Claimant's mother testified that she is a single parent caring for children with significant needs. She has been working with ACRC to assist claimant in becoming more independent and transitioning to Supportive Living Services. She voiced frustration with the time it is taking to establish an appropriate living situation and make the transition. Claimant is residing in the family home until that time.

Claimant reached age 22 and graduated from her educational program in June 2017. She did not begin an adult day program until October 2017. Her mother testified that claimant "had nothing to do" and began to exhibit difficult behaviors including pulling her hair out, picking at her hands, and running through the home naked in front of her brothers and their friends.

7. By email dated September 8, 2017, claimant's mother informed her Service Coordinator, Jeremy Hemmer of the following:

[Claimant] has been getting worse and worse over the past few weeks. She refuses to wear clothes and I have 5

boys/men in the house right now. She's gone in the pool in her clothes, without supervision, two more times. This morning when I woke up, I found garbage all over, furniture knocked over and feces smeared on my bed. She has started going out the front door and walking down the street. I am not in any condition to keep up with her and I haven't slept properly in years. I am in crisis and my health is at risk. I never got a referral for a behaviorist. Something has to be done immediately. The last time this happened, I wound up in a psych hospital with my health and my other children in grave danger.

8. Mr. Hemmer followed up with claimant's mother suggesting setting up CBEM services and out-of-home respite. CBEM is a crisis management vendor that can assist with behaviors when a client is in crisis. Out-of-home respite would be in an Intermediate Care Facility (ICF) that is staffed with on-site nursing and individuals trained in G-tube feedings. Because claimant has a G-tube she requires specially trained staff. He also followed up with the program manager for claimant's adult day program to inquire about her start date.

Claimant's mother responded that she would like to pursue CBEM and would like more information about ICF openings; requesting at least four days to start.

9. On September 11, 2017, claimant's mother informed Mr. Hemmer that she was requesting in-home respite for 5 days for a total of 120 hours. She sought a 60 hour increase in claimant's in-home respite hours over the 60 hours previously authorized, and requested a Noticed of Proposed Action if her request was denied. She contends that an ICF or Board and Care Home is not the least restrictive environment for claimant and that claimant should be allowed to receive respite services and remain safely in her own home.

She also believes that out-of-home respite in an ICF would be traumatic for claimant.

10. Claimant's mother expressed frustration with claimant's assessed need for skilled nursing respite and a continued inability to access the service. In March 2015 ACRC provided a nurse consultant, Holly Smith, to assess claimant in her home to obtain the level of care necessary in an effort to "address the parent's concerns of needing skilled RN respite but being unable to get nurses to provide the approved hours." Ms. Smith's report noted that the family was new to the area and had not established a social support system. Claimant's mother was noted to be her conservator as well as her sole IHSS provider. Claimant received "maximum hours through IHSS, including protective supervision, and tends to get into mischief when left unattended."

Ms. Smith "acknowledged that IHSS allows non-licensed providers to do G-tube feeds (and other health care interventions) as paramedical services," but stated that "ACRC is bound by the nursing practices act, which designates G-tube feeds as nursing level of care (RN, or LVN under supervision of an RN)." She also noted, "other than the tube feedings, there weren't any significant health care needs identified."

11. Mr. Hemmer testified that when claimant's mother requested assistance he pursued CBEM and out-of-home respite options. Due to claimant using a G-tube, out-of-home respite workers required specific training. It was determined that claimant was "medically fragile" which requires at a minimum, an on site LVN with RN supervision.

Claimant's request for additional in-home respite to allow for her mother's five-day respite was an exception to standard practice of providing out-of-home respite for that period of time. Mr. Hemmer presented the request for exception to the Best Practices Committee for consideration. The committee asked him to obtain information from claimant's mother regarding IHSS hours utilized by the family. Mr. Hemmer testifies that there was no dispute that claimant's mother needs a break but that she didn't provide the requested information for ACRC to make a determination of need. Therefore, ACRC

contends that a decision was never made, nor a response provided, to claimant's request for the additional 60 hours of in-home respite.

12. Carol Wilhelm is an ACRC Client Services Manager whose responsibilities include supervising Service Coordinators, including Mr. Hemmer. Ms. Wilhelm participated in the Best Practices staffing regarding claimant's request for additional in-home respite hours and testified to the level of service required to meet claimant's respite needs.

She testified that claimant is determined to be medically fragile which usually involves using an ICF (Intermediate Care Facility) for out-of-home respite to meet the caregivers need to be away from home for five days. These facilities offer appropriately trained nursing staff. An available facility was proposed and parent declined. Consideration of a regular community care facility (CCF) option was determined by ACRC to not be appropriate due to the lack of on-site nursing support. The committee was also concerned about the continuity of care with extended in-home respite. Ms. Wilhelm explained that out-of-home respite involves a licensed facility with trained staff and assured staffing. In-home respite does not provide the same licensing oversight and there is no mandate to provide staffing.

Ms. Wilhelm testified that the committee requested additional information from claimant's parent, specifically regarding the use of available IHSS hours during the proposed respite days. She stated that the committee was not aware that claimant's mother was her sole IHSS worker. The request for additional in-home hours is an exception to standard practice that requires approval from the best practices committee. In making that determination, the committee looks at what other resources are available and being used during that time. She stated that ACRC never made a decision on parent's request for the additional in-home respite hours due to lack of information.

13. ACRC's In-Home Respite Services Procedure specifies, "non-medical care may include routine care for conditions that are not required to be performed by a

licensed medical professional.” The procedure describes two types of agency vendored respite:

Non-Medical – An agency that is vendored with ACRC to provide non-medical in-home respite care.

In-Home Respite Incidental Medical Services (IMS) – services that can be provided by an in-home respite provider who is not licensed. Services may include the following:

Colostomy and ileostomy: changing bags and cleaning stoma.

Urinary catheter: emptying and changing bags and care of catheter site.

Gastrostomy: feeding, hydration, cleaning stoma, and adding medication per physician’s or nurse practitioner’s orders for the routing medication of patients with stable conditions.

For medical agency In-Home Respite (Intermittent Licensed Nursing Care), ACRC may provide nursing respite when the client’s needs require RN, LVN or CNA level care and if the client does not qualify for Medi-Cal funded nursing support (EPSDT/NF). The Service Coordinator will staff the request for in-home medical services through a Home Health agency with the FSSC (Family Services and Supports Committee).

14. ACRC’s Procedures Manual defines Respite for the Medically Fragile (Applicable to Home Health Agency and Individual Nurse Providers) as follows:

Respite for the Medically Fragile, otherwise know as skilled nursing respite care, is intermittent or regularly scheduled

temporary medical care and supervision provided to parents or caretakers to relieve them of the stress of caring for a family member with a care need that requires the skills and expertise of medical personnel, specifically that of a registered nurse or licensed vocational nurse.

Providers of Respite for the Medically Fragile shall be fully licensed and certified by the appropriate certifying or licensing board and service provision shall adhere to the standards set forth by professional licensure requirements.

“Respite for the Medically Fragile” refers to respite care that may be provided to a client whose health conditions cannot be classified as chronic or stable; or for whom the performance of care during respite cannot be termed routine; or for whom the performance of care during respite by unlicensed persons would pose potential harm.

15. At hearing, it appeared that all requested information was available for ACRC to make a decision regarding claimant’s request for sixty additional hours of in-home respite to allow her mother a five-day break from caregiving. There was no dispute that claimant’s mother needs a break but ACRC took the position that it required additional information in order to make a determination of need.

16. As of January 1, 2018, the limits on the purchase of respite services no longer apply. Section 4868.5 limiting regional centers to purchasing no more than 90 hours per quarter of in-home respite and 21 days of out-of-home respite, absent an exemption, has been repealed.

LEGAL CONCLUSIONS

1. The Lanterman Act sets forth the regional center's responsibility for providing services to persons with development disabilities. An "array of services and supports should be established ... to meet the needs and choices of each person with developmental disabilities ... to support their integration into the mainstream life of the community ... and to prevent dislocation of persons with developmental disabilities from their home communities." (§ 4501.) The Lanterman Act requires regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP includes the consumer's goals and objectives as well as required services and supports. (§§4646.5 & 4648.)

2. Section 4646, subdivision (a), provides:

(a) 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 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.

3. Section 4646.4, subdivision (a), in pertinent part provides:

Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

- (1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.

4. Pending the outcome of this matter, the governing law set forth in section 4686.5 was repealed. In addition, there was no persuasive evidence that ACRC requires additional information that has not been provided by claimant in order to assess her respite needs. The regional center has acknowledged the need for claimant's mother to have a break from caregiving.

ORDER

Within thirty days of receipt of this Decision, ACRC shall take all necessary action to staff the best practices committee, with input from claimant's mother, to determine how to meet claimant's need for respite support in consideration of the repeal of Welfare and Institutions Code section 4648.5.

DATED: January 3, 2018

SUSAN H. HOLLINGSHEAD
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 this decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)