

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH No. 2014020638

DECISION

Glynda B. Gomez, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on March 24, 2014, in Bakersfield, California. Kristine Khuu, Program Manager, represented the Service Agency, Kern Regional Center (Service Agency or KRC). Cherylle Mallinson, Director of Community Services was also present. Claimant was represented by his mother (Mother). The record was left open until April 1, 2014, for Claimant's submission of a document concerning the acceptable uses of adoption assistance funds and any response by KRC. Claimant's document was marked and admitted as exhibit 1. KRC's response was marked and admitted as exhibit I.

ISSUE

Whether KRC must retroactively fund 57 additional hours of respite services for Claimant's care while his parents were on vacation in Florida.

FACTUAL FINDINGS

1. Claimant is a 9-year and 11- month old boy. He lives in Bakersfield, California with his mother, father, and 5 adopted siblings who range in age from 10 to 17. Claimant is also adopted. His family receives \$3,000 per month in adoption assistance funds from Kern County to provide for his needs. All of Claimant's siblings have special needs and disabilities, and one of his siblings is also a KRC consumer. Claimant is a regional center client based upon his diagnoses of mild mental retardation (intellectual disability), epilepsy and cerebral palsy.

2. Claimant requires constant supervision and assistance based upon the manifestations of his disabilities. Claimant has limited and unintelligible speech and requires assistance with daily living skills such as toileting and eating. Claimant has tantrums and aggressive behavior. Claimant has no sense of danger and is curious about strangers. If not supervised, he will elope, run into the street, or walk away. Claimant has seizures on a daily basis and takes several medications. Claimant also has feeding issues and is at risk for choking. Claimant is incontinent and soils his under garments and bedding regularly at night.

3. Claimant attends a special day class within his local school district.

4. Claimant's most recent Individual Program Plan (IPP) meeting with KRC was developed on May 23, 2013. According to the IPP, KRC provides case management services, socialization training and respite services to Claimant. Claimant receives 90 hours per quarter of respite services which is the maximum level of respite services that KRC provides without approval of an exception.

5. On June 6, 2013, Service Coordinator Madeline K. Dierck completed a four page assessment of Claimant's respite needs. KRC determines respite needs based upon assessment score ranges and consideration of extraordinary factors. The assessment rates a consumer in the areas of age, adaptive skills, safety

awareness, and mobility, attendance at a day program or after school program, medical needs, behavioral needs and family situation. Although Claimant's numerical score of 19.5 alone would usually have resulted in his being assessed as needing no more than 20 hours per month of respite, KRC considered other factors including the health conditions of his parents, family situation and the presence of a sibling who is also a KRC consumer. After review of the assessment, the interdisciplinary team determined that Claimant needed 90 hours per quarter of in-home respite services.

6. Mother does not work outside the home. She is the primary caregiver for six adopted children including Claimant. Claimant's siblings have a range of disabilities and special needs including Attention Deficit Hyperactivity Disorder (ADHD), Bipolar Disorder, Intellectual Disability (previously Mental Retardation), Asthma, and Acid Reflux. The children include boys and girls and range in age from 10 to 17 years old. Mother has cancer and underwent surgery and chemotherapy in October of 2013.

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7. Claimant's father works full-time in his business from 7:00 a.m. to 7:00 p.m. each day. By the nature of his business, Claimant's father sometimes has unpredictable breaks in the day. According to the KRC assessment, Claimant's father also suffers from Bipolar Disorder, but no information was provided at hearing about the severity of his condition.

8. In January of 2014, Mother was exhausted from her illness and the demands of caring for all of the children, including Claimant and felt that her marriage was suffering. Mother reached a near-breaking point in January of 2014

and needed to get away. Mother made arrangements for Claimant to be cared for in the home of a relative who is very familiar with Claimant and his specific medical needs and made other arrangements for the other five children before leaving California and going on a weeklong trip to Florida with Claimant's father, from January 31, 2014, to February 7, 2014. Mother testified that she needed a break from Claimant's needs and the needs of his siblings and without the break; it was likely that she would not have been able to continue caring for the Claimant and his siblings. Although she received constant telephone calls regarding Claimant and his siblings while she was away, she believes that she had sufficient time to rest, regroup, and reconnect with her husband to continue her care of Claimant and his siblings.

9. Mother thought she had requested additional respite hours from KRC before leaving for Florida. However, there was no evidence of such a request and Mother acknowledged that her request on February 10, 2014, three days after her return from Florida, for 97 additional respite hours may have been the first request. Claimant had recently changed Service Coordinators. The new Service Coordinator documented Mother's request in KRC's computerized Interdisciplinary Notes System as made on February 10, 2014. Claimant's respite hours are generally used when Mother is attending to the needs of the other children (i.e. doctor appointments, school function, etc.).

10. After review of the request, Mother and KRC determined that Claimant had 40 unused respite hours for the quarter which could be applied to the 97 hours requested. The parties agreed that Claimant had exceeded his 90 hour per quarter allotment by 57 hours and that Claimant's request should be reduced to 57 hours.

11. Ultimately, KRC denied Claimant's request for retroactive funding of

57 hours of respite care based upon its purchase of service (POS) guidelines because (1) generic resources in the form of friends, relatives, and the \$3000 per month in adoption assistance funds that Mother receives for Claimant's care are available to meet his additional respite needs; (2) the hours requested exceeded the maximum 90 hours per quarter permitted and the circumstances did not warrant an exception because there was not an "extraordinary event that impacts the family's ability to meet the care and supervision needs of the consumer," and (3) the request was made after the fact without any emergency or medical necessity.

12. Mother submitted an excerpt from a document entitled "County Letter 08-17" presumably issued by Kern County, which she asserted supported the position that she is prohibited from using any of the \$3,000 per month in adoption assistance she receives for Claimant from Kern County to pay for his care while she was away on her trip to Florida. The portion of the letter that Claimant asserts supports the position reads as follows:

AFDC-FC paid by counties to foster care providers under W&IC Section 11464, is for the care and supervision needs of the child as defined in W&IC section 11460(b). AAP benefits are paid to prospective adoptive or adoptive families for the purpose of enabling them to meet the needs of the child (W&IC Section 16115.5) According to SB 84, AFDC-FC and AAP benefits are not to be considered in the family's gross income for purposes of the Family Cost Participation Program for regional center services. Regional centers are financially responsible for separately purchasing or securing the services that are

contained in a dual agency child's IFSP or IPP, pursuant to W&IC section 4684, without regard to receipt of these benefits.

13. Welfare and Institutions Code section 11460, subdivision (b) provides that "care and support" includes "food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, reasonable travel to the child's home from visitation, and reasonable transportation to remain in school."

14. The excerpted portion of "County Letter 08-17" does not bar Claimant's parents from using adoption assistance funds to pay the portion of the cost of providing care to Claimant that exceeds his 90 hour per quarter respite allowance.

15. Mother also testified that the adoption assistance funds for the applicable time period were spent providing a nice, comfortable home for Claimant, transportation, food, and clothing, as well as a number of luxury and comfort items for Claimant.

16. Mother was not interested in having Claimant placed in a facility for out of home respite.

LEGAL CONCLUSIONS

1. Service Agency contends that in accordance with the recent changes to the Lanterman Act which provide that it may not provide more than 90 hours of respite per quarter to consumers. Service Agency further contends that Claimant does not qualify for an exception to the 90 hours per quarter because generic resources are available, there was no immediate need, and the request was made after the fact. Claimant contends that the intensity of his needs, his parents' health conditions, the needs of his siblings and the exhaustion of Mother jeopardize his

parents' ability to safely care for him and warrant an exemption. For the reasons set forth below, Claimant's appeal is denied.

2. The burden of proof is on the Claimant as the party seeking to terminate the service or change the status quo. The burden of proof in this matter is a preponderance of the evidence. (See Evid. Code, §§ 115 and 500.)

3. The Lanterman Act sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. As the California Supreme Court explained in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, the purpose of the Lanterman Act 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." Under the Lanterman Act, regional centers are "charged with providing developmentally disabled persons with 'access to the facilities and services best suited to them throughout their lifetime'" and with determining "the manner in which those services are to be rendered." (*Id.* at p. 389, quoting from Welf. & Inst. Code, § 4620.)

4. To comply with the Lanterman Act, a regional center must provide services and supports that "enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (Welf. & Inst. Code, § 4501.) The types of services and supports that a regional center must provide are "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 habilitation or rehabilitation of an individual with a developmental disability, or

toward the achievement and maintenance of independent, productive, normal lives... Services and supports listed in the individual program plan may include, but are not limited to, respite, " (Welf. & Inst. Code, § 4512, subd. (b).)

5. As set forth in Welfare and Institutions Code section 4646, subdivision (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 the 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.

6. Welfare and Institutions Code section 4646.4, subdivision (a), provides, in relevant part:

Effective September 1, 2008, 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:

[¶] . . . [¶]

(2) Utilization of generic services and supports when appropriate.

[¶] . . . [¶]

(4) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting. In this determination, regional centers shall take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care.

7. In addition, a regional center is responsible for using its resources efficiently. Welfare and Institutions Code section 4648, subdivision (a)(2), provides that:

In implementing individual program plans, regional centers, through the planning team, shall first consider services and supports in natural community, home, work, and recreational settings. Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family.

8. Welfare and Institutions Code section 4686.5, subdivision (a) provides that:

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.

9. Welfare and Institutions Code section 4686.5, subdivision (a)(3)(A), provides that an exemption may be granted from the limitation on respite services 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

DATED: April 15, 2014

GLYNDA B. GOMEZ
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.