

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MICHAEL F.,

Claimant,

vs.

SOUTH CENTRAL LOS ANGELES
REGIONAL CENTER,

Service Agency.

OAH No. 2012010131

DECISION

Administrative Law Judge David B. Rosenman, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California, on February 2 and 22, 2012. Johanna Arias-Bhatia, Fair Hearing/Government Affairs Manager, represented South Central Los Angeles Regional Center (Service Agency or Regional Center). Claimant Michael F. was represented by his father, Don F. Claimant's mother, Marie F., was also present. (Initials are used to protect confidentiality.)

The matter was submitted for decision on February 22, 2012.

ISSUE PRESENTED

Claimant presently receives 24 hours per month of respite. Should the Service Agency provide 32 hours per month of respite?

FACTUAL FINDINGS

1. Claimant is a three and one-half year-old male consumer of the Service Agency who is eligible for services due to a diagnosis of autism. Claimant lives in the

family home with his mother and father and two older brothers, both of whom have been diagnosed with autism and receive services from the Regional Center.

2. Claimant had received services under the Early Start program, including respite. Early Start services end at age three. Based on his diagnosis of autism, Claimant is eligible for services under the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 et. seq., referred to as the Lanterman Act).¹ A meeting was held on October 28, 2011, to create an initial plan for those services, referred to as an Individualized Program Plan (IPP) (Exhibit 4). At that meeting, the service coordinator indicated that it was no longer possible for Claimant to receive 32 hours per month of respite. Claimant's mother requested 30 hours per month of respite, but the Service Agency agreed to fund 24 hours per month of in-home respite. Those respite services have been provided by Claimant's aunt. The Service Agency also began providing behavioral management services.

3. On November 4, 2011, the Service Agency sent a Notice of Proposed Action (Exhibit 1) indicating that the request for respite of 30 hours per month was denied. Claimant filed a timely request for fair hearing requesting 32 hours per month of respite (Exhibit 2).

4. The Service Agency has written guidelines concerning respite services, referred to as POS (Purchase of Service) Funding Standards (POS Standards) (Exhibit 10), which include a description of respite services, the procedure to obtain services and the criteria used to determine the different levels, or hours, of respite to be provided. There is a limit of 90 hours per quarter, or 30 hours per month, based upon an amendment to the Lanterman Act in 2009, with possible exceptions, discussed in more detail in the

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Legal Conclusions below. Of relevance to this matter, the POS Standards for respite list five levels of respite hours which can be funded: Level A (up to 16 hours per month), Level B (up to 24 hours per month), Level C (up to 30 hours per month), Level D (up to 40 hours per month), and Level E (over 40 hours per month). To determine the level of respite hours to be funded requires evaluation of five criteria, labeled Medical, Behavioral, Self-Care, Caregiver Condition, and Family Stress Factors, each of which is explained in more detail in the POS Standards for respite. As the consumer's behaviors or the family's situation in these five criteria become more significant or more intense, a higher level of service hours may be justified.

5. The service coordinator, Ronice Morris, brought a Respite Authorization Worksheet to the IPP meeting (Exhibit 5) which attempts to gather and summarize in a one-page grid the several pages of respite criteria explained in the POS Standards for respite. Ms. Morris conferred with Claimant's mother to gather the information necessary to complete the worksheet, and completed it after the meeting was finished. According to the worksheet and the evidence, to justify a particular level (and hours) of services, consumer's behaviors and the family situation must meet at least three of the criteria described under that level. For example, to justify up to 24 hours per month of respite (Level B), the service coordinator must find that the consumer's behaviors and the family situation satisfy three or more of the five listed criteria as described for Level B or higher. As it is difficult to adequately and completely describe the worksheet in this Decision, a copy of Exhibit 5 is attached to this Decision. (Ms. Morris explained that the worksheet is a two-sided document with the worksheet grid on side one and the back page providing space to provide added information about the five criteria: Medical, Behavioral, Self-Care, Caregiver Condition, and Family Stress Factors. Exhibit 5 is the worksheet copied in the form of a three-page document.) In some instances the POS Standards for respite provide more of a description of the five criteria than is contained

in the worksheet. In other instances, the worksheet includes descriptions or phrases that are in addition to those contained in the POS Standards for respite. Where significant, these will be noted below.

6. For the criterion labeled "Medical," Ms. Morris determined the family's needs as satisfying Level A (up to 16 hours). Claimant's parents did not submit any argument or evidence that this is incorrect.

7.A. For the criterion labeled "Behavior," Ms. Morris determined the family's needs as satisfying Level B (up to 24 hours). Claimant's parents contend that this criterion should be marked at Level C (up to 32 hours) or Level D (up to 40 hours). In the worksheet, Level B requires the consumer to demonstrate "intermittent" challenging behaviors beyond age expectation such as "aggression, self-abuse, etc." Added to Level C are that the behaviors are "ongoing," not "intermittent," and that a behavioral assessment is needed. Added to Level D are that the behaviors are "severe," "injuring self and others," and that continuous supervision is required due to "disruptive/destructive behavior (e.g., biting, smearing feces, periodic AWOL.)" The POS Standards for respite have a similar, but not exactly the same, escalation of behaviors described from Level B through Level D, with Level D referring to a consumer "exhibiting severe behavioral challenges and is injuring self and/or others, or Consumer requires continuous supervision due to disruptive and destructive behaviors." Although the formulations of the criteria are slightly different between the worksheet and the POS Standards for respite, Level D in each has the first mention of injury to self or others or biting.

7.B. Ms. Morris and her supervisor, Arlene Jackson, reviewed available assessments and reports and decided that the appropriate determination for Claimant's "Behavior" was Level B. In agreement was Bruce Williams, Ph.D., a psychologist for the Service Agency who reviews programs for consumers with challenging behaviors, is

familiar with the respite criteria, and has also reviewed available assessments and reports relating to Claimant and his family. Dr. Williams testified to the effect that it is the severity of behaviors as well as their frequency that informs the determination of the proper level of respite. He has reviewed reports of behaviors similar to Claimant's and finds those as satisfying the "Behavior" criteria for respite at Level A or Level B. For Level C or above, there must be more frequent injury and/or more severe behavior. Dr. Williams feels Level B is correct here, even with the level of behaviors described as occurring in February 2012 and depicted on a data sheet kept by Claimant's parents for use by the vendor providing behavioral management services (Exhibit R). This data includes several incidents of Claimant causing injuries by biting family member and using a pencil to stab his brother.

7.C. Claimant's mother gathered the data in Exhibit R at the request of the vendor. The month of February was the first month for which all of the data was gathered this way. Exhibit R lists at least nine different dates in February 2012 when Claimant bit family members as well as the pencil stab and numerous instances of two levels of tantrums and non-described instances of isolated aggression. She also testified to other instances of Claimant biting her and others and aggressive and disruptive behavior. On the reverse side of the respite worksheet, Ms. Morris noted that Claimant bites and scratches other people. As of the time of the IPP meeting in October 2011, Ms. Morris included the following in the IPP itself: "[Claimant] requires constant supervision during his waking hours to prevent injury or harm in all settings" (Exhibit 4, p. 2.)

7.D. The testimony from Dr. Williams established the manner in which he has interpreted the Service Agency's POS Standards for respite. Those POS Standards, and the worksheet, first mention "severe" behaviors at Level D, and this is a relative and somewhat subjective term. However, the POS Standards and the worksheet also first

mention injuring of self or others at Level D, and the worksheet first adds the example of biting at Level D. These are objective criteria which are met by Claimant. Therefore, under the criteria for "Behavior," Claimant would meet Level D, as described.

8. For the criterion labeled "Self-Care," Ms. Morris determined the family's needs as satisfying Level B (up to 24 hours). Claimant's parents contend that this criterion should be marked at Level C (up to 32 hours). The evidence established that Claimant is lacking in several particulars with respect to his ability to care for himself. In the worksheet, Level C requires the consumer to have a "physical or medical condition requiring frequent treatment." In the POS Standards for respite, Level C is met if the consumer "has chronic medical and physical needs requiring total care in at least two areas, ie. [sic], personal hygiene, eating/feeding, bathing, and dressing." (Emphasis in original.) Claimant's parents did not submit sufficient evidence to establish that the Service Agency was incorrect in determining Claimant's "Self-Care" needs at Level B.

9.A. Ms. Morris made no determination, and marked no level of respite hours, under the criterion labeled "Caregiver Condition." Ms. Morris could not explain why she made no marks for this criterion other than that she had three other criteria marked at Level B and that nothing further was needed to justify respite services at Level B. On the back of the worksheet, Ms. Morris noted that Claimant's mother was overwhelmed, in need of rest, "and appears stressed out," which would have met the Level A description of "stress related to consumer's disability." Ms. Jackson stated that "Caregiver Condition" was "captured" under the last criterion, "Family Stress," which is discussed in more detail below. By failing to include a determination in this criterion, the Service Agency failed to consider all factors required under their worksheet and POS Standards for respite.

9.B. Claimant's parents submitted evidence that satisfies either Level C or Level D for "Caregiver Condition." Claimant's father is self-employed in two businesses and

works at night on the average of four to five nights per week. Claimant's mother therefore often has no assistance during normal sleeping hours. Claimant often wakes during the night or wakes his parents by reason of his being awake or his movements and behaviors, and his mother stated she sleeps on average from four to six hours at night when she is the only one there to care for her three children, all of whom are diagnosed as autistic and are Service Agency consumers. In the POS Standards for respite, Level C under "Caregiver Condition" is met if the "Primary caregiver with no assistance experiences sleep disruption for up to two hours every night; this disruption is beyond developmental expectations for the child's age." Utilizing the POS Standards for respite, Claimant's family meets Level C. Quizzically a description very similar to this appears in the worksheet under Level D, not Level C. Utilizing the worksheet, Claimant's family meets Level D.

9.C. Ms. Morris stated that her discussion with Claimant's mother at the IPP meeting did not include much discussion of Claimant's father, his work schedule, or his treatment for stress issues (discussed in more detail below). Claimant's mother stated that she answered the questions raised by Ms. Morris and was not aware that her husband's work schedule or her own sleep disturbances were relevant. Insufficient information was gathered at the IPP meeting to properly assess the correct level for "Caretaker Condition."

9.D. Claimant's parents meet the criteria for Level C for "Caregiver Condition" in the worksheet and the POS Standards for respite.

10.A. For the criterion labeled "Family Stress," Ms. Morris determined the family's needs as satisfying Level B (up to 24 hours).

10.B. As noted above, Claimant's two older brothers are also consumers of the Service Agency. This was recognized in the discussion in the IPP of the request for respite hours (Exhibit 4, pp. 7-8). This meets the criterion under Level C of "Family

Stress," for two or more consumers in the family, both on the worksheet and in the POS Standards for respite. Further, Claimant's father has received treatment, including counseling and medication, for stress issues related to raising several children with developmental disabilities. This meets a separate criterion under Level C of "Family Stress." Ms. Morris stated that she did not ask Claimant's mother during the IPP whether either parent had received counseling for stress.

11. Claimant has presented sufficient convincing evidence that he and his family satisfy the Level C criteria for "Family Stress," the Level C or Level D criteria for "Caregiver Condition," depending on whether reference is made to the worksheet (Level D) or the POS Standards for respite (Level C), and the Level D criteria for "Behavior." Therefore, under the worksheet and the POS Standards for respite Claimant's family would be entitled to receive respite services at Level C, up to 32 hours per month. As discussed below, there is a limit of 90 hours per quarter, or 30 hours per month, based upon an amendment to the Lanterman Act in 2009, with possible exceptions. Claimant did not submit evidence that he qualifies for an exception to the limit of 30 hours per month of respite.

LEGAL CONCLUSIONS AND DISCUSSION

JURISDICTION AND BURDEN OF PROOF

1. Under the Lanterman Act, an administrative "fair hearing" is available to determine the rights and obligations of the parties. (Section 4710.5.) Claimant requested a fair hearing to appeal the Service Agency's proposed denial of funding for a greater number of hours of respite services. Jurisdiction in this case was thus established. (Factual Findings 1-3.)

2. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code,

§ 115.) A consumer seeking to obtain funding for a new service has the burden to demonstrate that the funding should be provided, because the party asserting a claim or making changes generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, Claimant bears the burden of proof regarding his request for an increase in respite services. (Factual Findings 1-4.)

RESPITE SERVICES AND HOURS

3. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act 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 life of the community.” (§ 4501.) These services and supports are provided by the state’s regional centers. (§ 4620, subd. (a).)

4 Respite is one of the specific services available to consumers listed in section 4512, subdivision (b). In section 4690.2, subdivision (a), “In-home respite services” are defined as “intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client’s own home, . . . 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.”

An almost identical definition of in-home respite services is found in California Code of Regulations, title 17, section 54302, subdivision (a)(38).

The statutory and regulatory definitions of in-home respite services clearly indicate that the primary goal of respite is to provide care to a consumer that is ordinarily provided by the consumer’s family, thereby relieving the family from that duty so that the family may absent themselves and be free to do other things.

5. In the Budget Act of 2009, the Legislature responded to the state’s difficult economic situation by making significant changes in services under the Lanterman Act. With respect to respite services, section 4686.5, subdivision (a), was added, retroactive to July 1, 2009, to provide, in relevant part:

“(2) A regional center shall not purchase . . . 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 [paragraph] (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.”

6. Section 4686.5 thus requires the Service Agency to limit the purchase of in-home respite services to 90 hours per quarter, or 30 hours per month, unless the

Service Agency determines that Claimant meets the criteria for, and grants Claimant, an exemption.

7. Under section 4434, the Department of Developmental Services (DDS) is charged with collecting and reviewing service policies from the various regional centers "to ensure compliance with statute and regulation," and DDS "shall take appropriate and necessary steps to prevent regional centers from utilizing a policy or guideline that violates any provision of [the Lanterman Act] or any regulation adopted thereunder." Under section 4646.4, subdivision (a), when developing an IPP, regional centers are to use "an internal process" to ensure that there is conformance with its purchase of service policies, as approved by DDS.

8. As set forth in Factual Findings 1 through 11, Claimant meets the requirements for respite at Level C, up to 32 hours per month. Claimant does not meet the criteria for an exemption from the respite limit. The evidence established that Claimant's care and supervision needs are significant. However, the evidence was not sufficient to establish that those needs are so intense that respite beyond 30 hours per month is necessary to keep him in the family home, and there was no evidence of any extraordinary event that impacts the ability of Claimant's parents to meet Claimant's care and supervision needs. It is clear by the language in the new statute that the exemption is designed only for the most extreme situations, where providing additional respite beyond the 90-hours per quarter limit "is necessary to maintain the consumer in the family home." Although Claimant presents many challenges, his situation does not rise to this extreme level. Based on section 4686.5, Claimant is entitled to 90 hours of respite per quarter, or 30 hours per month.

ORDER

Claimant's appeal of the Service Agency's decision to deny an increase in respite services is granted in part and denied in part. The Service Agency shall provide funding

for respite services at the level of 30 hours per month, but not more. Claimant's request for 32 hours per month of respite is denied. Respite services may be reviewed at the next IPP, unless there are changes in circumstances that require an earlier review.

DATED: March 23, 2012.

DAVID B. ROSENMAN
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.