

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DIEGO G.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2012030283

DECISION

This matter was heard by Mark Harman, Administrative Law Judge of the Office of Administrative Hearings, State of California, on August 6, 2012, in Alhambra.

Victoria Baca, M.Ed., educational consultant, represented Claimant. Lydia G., Claimant's mother and guardian ad litem (Mother), was present at the hearing.

Jesse Valdez, Manager, represented Eastern Los Angeles Regional Center (Service Agency).

Evidence was received and argument was heard. The record was closed and the matter was submitted for decision on August 6, 2012.

ISSUE

Should the Service Agency be required to fund in-home respite services in lieu of 21 days of out-of-home respite services?

FACTUAL FINDINGS

1. Claimant is a 32-year-old male consumer of the Service Agency on the basis of severe mental retardation. He lives with his parents and brother.

2. This fair hearing apparently arose from Mother's request that the Service Agency fund additional hours of respite services. Mother specifically wants her 34-year-old daughter to be Claimant's respite provider when Mother is away from home for an extended period of time. For an unspecified number of years, the Service Agency funded in-home respite in lieu of out-of-home respite for Claimant. This allowed Mother to take a break while her daughter cared for Claimant in her daughter's home. The Service Agency does not dispute that it funded in-home respite services in lieu of out-of-home respite services for Claimant in the past. The Service Agency, however, began notifying consumers last year that it had adopted new purchase of service guidelines (POS Guidelines) regarding respite in response to changes the Legislature made to the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.)¹ in 2009.

3. The Service Agency failed to produce evidence at the hearing establishing that the parties had discussed the issue and had come to an impasse, so it is unknown what prompted the Service Agency to issue a Notice of Proposed Action (NOPA) on February 27, 2012,² which states that the Service Agency declines to fund 21 days per year of in-home respite services in lieu of out-of-home respite

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

² It also should be noted that the NOPA that was offered in evidence was written in Spanish and could not be translated by the ALJ, because the ALJ is only fluent in the English language.

services without first considering its POS Guidelines. The parties failed to convene an informal resolution meeting; however, the parties agreed upon the issue to be decided at the fair hearing and, on that basis, the hearing went forward. Mother objects to the Service Agency's application of its new respite policy in this case because she fears that group homes or similar residential facilities that are vendored by the Service Agency generally will not be able to provide safe places for her son to stay, nor will they be able to meet her son's other needs, such as providing healthy nutritious meals.

4. The POS Guidelines, which became effective on May 1, 2011, describe out-of-home and in-home respite in detail. Out-of-home respite is defined as "intermittent or regularly scheduled temporary care provided outside of the consumer's home by a vendored service provider. . . . Out-of-home respite services are intended to assist the family in securing temporary outside support in providing appropriate care and supervision of the consumer." A variety of such providers, including day care centers and several different levels of residential facilities, may provide out-of-home respite.

5. The POS Guidelines also include criteria for consideration of out-of-home respite. In summary, they provide for out-of-home respite when a consumer's need for care and supervision exceeds that of an individual of the same age who is not developmentally disabled. Such respite is available when, on an occasional basis, the consumer's needs are more than family and natural and community supports may provide. These occasions include opportunities for family members to participate in planned activities, such as vacations and hospitalizations, which preclude the involvement of the consumer. Finally, out-of-home respite is available when it is identified in the consumer's individual program plan (IPP). The POS Guidelines include a provision for exceptions in some circumstances.

6. Claimant, Mother, and Claimant's Service Agency service coordinator met and discussed Claimant's IPP goals and necessary services on February 15, 2012. According to this latest IPP document, Claimant is ambulatory and in good health. He uses short sentences to communicate his needs. He must be closely monitored at home. Claimant has some problem behaviors, including spitting habits which occur in his bedroom and restroom. Other behaviors include aggression, resistive tendencies, and tantrums. He does not like people talking about him, and will act out if he suspects anyone of doing this. His aggressive behaviors include pushing, slapping, etc. He has limited coping skills. The Service Agency has offered to fund behavior intervention services in the home, but Mother has declined.

7. Claimant performs some bathing/showering tasks but is not able to complete these independently. He is able to put on clothing but is not able to tie his shoes or close fasteners. His family provides the assistance and support he needs in most of his self help tasks. For the past 10 years, Claimant has received adaptive skills training (AST) to promote the development of Claimant's skills and to provide support in these areas. The Service Agency has been funding 24 hours per month of these services, which are provided through Francisco Banda from Future Transitions. Per the last progress report, it was determined that Claimant had learned these skills to the maximum of his ability and AST services would be gradually fading out until this service was terminated.

8. The IPP contains a desired outcome for Claimant to continue to reside in the least restrictive environment, his home. In support of this goal, the Service Agency agreed to fund 24 hours per month of parent-vendored, in-home respite, which has been provided by Claimant's brother. Claimant also receives 267.3 hours each month of State-funded in-home supportive services. The Service Agency has

agreed to continue funding Claimant's day program, which is a community integration program six hours per day, five days per week, through Mercedes Diaz Homes (MDH).³

9. Mother reported in 2009 that Claimant suffered from anemia due to poor nutrition. This continued to be a concern and, according to the February 15, 2012 IPP, Claimant had lost five pounds within the past year, a significant amount considering his height and weight. Mother maintains that she took Claimant to the emergency room recently, but she has refused to release any of his medical records to the Service Agency.

10. Mother has reported concerns regarding the MDH day program, primarily, that he is not getting good nutrition because the program is taking him to eat at places like Burger King, Wendy's and Taco Bell on a daily basis. At the hearing, Mother maintained that this practice has caused Claimant to suffer from anemia. Mother's explanation was not persuasive. Mother has never discussed this concern with MDH. At the last IPP meeting, Mother was concerned about the cost of having Diego purchase this food becoming a financial burden for the family. The IPP states Claimant is a picky eater and it is difficult for the MDH day program to provide healthy food that he is willing to eat. According to MDH, Claimant becomes resistant concerning his eating habits, and he insists upon eating "chicken sandwiches from Burger King" on a daily basis. (Exhibit 4.)

11. Claimant has other medical/behavioral problems, including pica, encopresis, enuresis, and infrequent seizures. He has been diagnosed with an adjustment disorder with mixed disturbance of emotions and conduct. Claimant has

³ Through his day program, Claimant participates in community outings and small work activities where he earns an average of \$20 per week.

other behavior problems that may have an impact on his anemia. He has a history of attempting to ingest sprays, shampoo, and toothpaste. It is reported that he has stomach ulcers from eating soap and Scope, although Claimant's caregivers have put these products under lock, and he no longer has access to them. Claimant also has a habit of hiding food, such as "bitten fruit," under his pillow in his room, which is a hygiene risk and enables him to eat inappropriate food items. (Exhibit 4.) MDH reported that Claimant had reduced his behaviors in the fourth quarter of 2011.

12. At the hearing, Mother testified that Claimant was a victim of "rape" almost two years ago while attending another program funded by the Service Agency, and that she has filed a lawsuit against the Service Agency. Although that matter was investigated by police, Mother offered no documentation, such as a police report, to corroborate her testimony. The Service Agency did not offer any specifics, either.

POS GUIDELINES EXCEPTION

13. Mother was made aware of the change in policy regarding out-of-home respite. She does not want to send her son to a residential facility because she does not trust that the Service Agency has adequately evaluated its vendored facilities. She testified: "Under no circumstances will I allow Claimant to be housed in a facility." She believes that the Service Agency's exception to the policy should apply to her.

14. The POS Guidelines contain the following limitation: "In[-]home respite in lieu of out[-]of[-]home respite may be used only when there is no out[-]of[-]home respite arrangement available." In Claimant's case, the Service Agency must determine whether a vendored residential facility is able to address his many behavioral and safety, self-help, and medical needs at the time Mother wants to take additional respite services. The Service Agency will need to submit pertinent

information about Claimant to the vendor to ensure the facility is a good fit. This must happen before the Service Agency may offer out-of-home respite services, or alternatively, in-home respite in lieu of out-of-home respite services. In addition to the unavailability of a facility able to provide care for Claimant, the Service Agency's policy requires that Mother show a specific plan making her unavailable to provide care. This could include things such as flight arrangements, or in the event of hospitalization, a physician's note indicating a need for the hospitalization. In addition, before approving in-home respite in lieu of out-of-home respite, the Service Agency requires information about who will provide the in-home respite care, and written authorization for the Service Agency to make unannounced visits to ensure the consumer's health and safety. When approving in-home in lieu of out-of-home respite, the Service Agency limits the number of in-home respite in lieu of out-of-home respite hours that may be funded, not to exceed 16 hours per day.

15. The POS Guidelines contain a sequence of events that must occur before the Service Agency will consider in-home respite in lieu of out-of-home respite. This sequence starts with a request for out-of-home respite for a specified time, a determination whether a vendored facility is able to address Claimant's needs, and whether such a facility has vacancies during the period of time requested. Arrangements may be made for the consumer and caregiver to visit the facility, and if the caregiver has concerns, for the Service Agency to try to address these concerns. Cruz Elena Garcia (Garcia), the Service Agency's placement coordinator, testified at length about the process. She reviewed Service Agency's file regarding Claimant, including his most recent psychological evaluation, the last IPP, MDH's reports, and other records. She commented that the file contained limited medical information.

16. Garcia believes that Claimant's needs are comparable to the needs of consumers who live in level-3 or low level-4 facilities. The latter offer behavioral services. Both have 24-hour staffing. Garcia is familiar with some of Mother's specific concerns, but that has not changed Garcia's opinion. Garcia believes that the Service Agency has placed individuals with more severe self-help deficits and behavioral problems than Claimant. Since Mother has not provided the Service Agency with specific dates that she wishes to have in-home in lieu of out-of-home respite, Garcia has not had an opportunity to look for an available facility, at which time Mother would be allowed to visit the facility and could determine whether it was a good match for Claimant.

LEGAL CONCLUSIONS

1. In enacting the Lanterman Act, the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals, and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (§ 4501.) Appropriate services and supports include in-home and out-of-home respite services. (§ 4512, subd. (b).)

2. The Lanterman Act gives regional centers, such as the Service Agency, a critical role in the coordination and delivery of services and supports for persons with disabilities. (§ 4620 et seq.) Thus, regional centers are responsible for developing and implementing IPP's, for taking into account a consumer's needs and preferences, and for ensuring that a service is cost-effective. (§§ 4646, 4646.5, 4647, and 4648.)

3. In July 2009, in light of California's unprecedented budget crisis, the Lanterman Act was amended to add section 4686.5, which provides, in pertinent part:

(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.

[¶] . . . [¶]

4. "In-home respite services" are defined in the Lanterman Act as "intermittent or regularly scheduled temporary nonmedical care and supervision provided in a client's own home, for a regional center client who resides with a family member." (§ 4690.2, subd. (a).) Subdivision (a) of section 4690.2 goes on to state that respite 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 in maintaining 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 family members.” The POS Guidelines are very similar to the statutory definition and objectives for in-home respite.

5. Out-of-home respite is defined in the pertinent regulations as intermittent or regularly scheduled temporary care to individuals in a licensed facility, and which:

1. Are designed to relieve families of the constant responsibility of caring for a member of that family who is a consumer;
2. Meet planned or emergency needs;
3. Are used to allow parents or the individual the opportunity for vacations and other necessities or activities of family life; and
4. Are provided to individuals away from their residence.”⁴

The POS Guidelines are very similar to the regulatory definition and objectives for out-of-home respite.

6. Section 4646.4 was also added to the Lanterman Act in 2009 as a cost-containment measure in response to the state budget crisis. It requires regional centers to ensure that a consumer's IPP adheres to federal and state law and regulation, and when purchasing supports and services “[c]onform[s] with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.” Section 4434, subdivision (d), requires the department to review any new or amended purchase of service policies prior to implementation by a regional center. These provisions allow regional centers to adopt reasonable purchase of service policies so long as they comply with the law.

7. In adopting section 4686.5 specifying a limit of 90 hour per quarter of in-home respite and 21 days per year of out-of-home respite, the Legislature clearly

⁴ (Cal. Code Regs., tit. 17, § 54342, subd. (a)(58)(E).)

expressed its intent to treat the two types of respite differently. As required by section 4646.4, subdivision (a)(1), and section 4434, the Service Agency's POS Guidelines, as approved by the department, distinguish between in-home respite and out-of-home respite, and comply with the statutory and regulatory scheme for both in-home respite and out-of-home respite.

8. In this case, the Service Agency does not dispute that Claimant's needs "exceed that of an individual of the same age without developmental disabilities." (§ 4646.5, subd. (a)(1).) Claimant's needs are substantial. He receives 24 hours per month of in-home respite, somewhat less than the maximum permitted by section 4686.5, subdivision (a)(2) and by the POS Guidelines. The Service Agency, moreover, does not dispute that Claimant may receive out-of-home respite as permitted by section 4686.5, subdivision (a)(2), and by the POS Guidelines.

9. The dispute in this case is whether the Service Agency is required to convert out-of-home respite into additional in-home respite. Neither the statute nor the implementing regulations provide for such conversion, although a statutory exemption from the limitations on the amount of both in-home and out-of-home respite is available when it is necessary to maintain a consumer in the home, or where an "extraordinary event . . . impacts the family member's ability to meet the care and supervision needs of the claimant." (§ 4646.5, subd. (a)(3)(A).) The POS Guidelines implement this exception by allowing the conversion of out-of-home respite into in-home respite when the Service Agency is unable to provide an appropriate out-of-home respite placement for the consumer. This approach is an acknowledgement that the Service Agency may not always be able to provide an appropriate out-of-home respite placement when the consumer and his family members are otherwise entitled to it. The POS Guidelines do not create a right to in-home respite in lieu of out-of-home respite. Rather, the POS Guidelines

accommodate the difficulties that may occur when trying to find an appropriate out-of-home respite placement at a time when family members request it.

10. Claimant has failed to establish, on this record, that he meets either of the statutory exceptions allowing for additional in-home or out-of-home respite services. While it is clear that Claimant's needs are significant, Claimant presented no evidence that additional respite was needed to maintain Claimant in his home. Nor is there any evidence that an extraordinary event was impacting the family's ability to care for Claimant at this time. Nor did the exception found in the POS Guidelines apply because mother declined to consider out-of-home respite.

11. While mother's request to have the Service Agency fund in-home respite in lieu of out-of-home respite is understandable, she has not established a sufficient factual basis to find that an exception allowing for such funding should be granted. Under the POS Guidelines, if Mother requests out-of-home respite, the Service Agency must consider Claimant's needs in determining the appropriateness of a facility. Nothing in the record indicates that the Service Agency will not carry out this duty. In fact, the record supports the finding that the Service Agency is well aware of Claimant's needs. His IPP's document Claimant's needs. The only hindrance to assessing Claimant's needs has been caused by Mother, who refuses to provide Claimant's pertinent medical records to the Service Agency. Nonetheless, it appears the Service Agency has a good understanding of Claimant's needs and Mother's concern for Claimant's well being.

12. Because mother has not requested out-of-home respite, the Service Agency has not begun the process of determining if an appropriate out-of-home respite placement is available. The Service Agency acknowledges that it is possible that there may not be an appropriate facility available for Claimant when Mother wants respite, and in that case, the POS Guidelines would allow for an exception.

However, it is not possible to determine the availability of an appropriate facility if Mother declines to consider any out-of-home respite placement. It is worth noting that Mother is not required to use a suggested facility if she chooses not to. But, by refusing to consider the possibility that an appropriate facility can be identified, Mother forecloses the possibility that the Service Agency will consider whether an exception exists under its POS Guidelines.

13. In light of factual finding numbers 1 through 16 and legal conclusion numbers 1 through 12, the Service Agency is not required to fund in-home respite in lieu of out-of-home respite under the facts and circumstances present in this case.

ORDER

Claimant's appeal is denied. Eastern Los Angeles Regional Center is not required to fund additional in-home respite services in lieu of out-of-home respite services.

DATED: August 23, 2012

A handwritten signature in black ink, reading "Mark Harman", with a long horizontal flourish extending to the right.

MARK HARMAN

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.