

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2012040397

ALEJANDRA A.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on July 10, 2012, in Alhambra, California. Alejandra A. (Claimant) was represented by her mother and conservator, Margarita A., with the assistance of a Spanish interpreter.¹ Eastern Los Angeles Regional Center (Service Agency or ELARC) was represented by Veronica Valenzuela.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on July 10, 2012.

¹ Claimant's and her mother's surnames are omitted throughout this Decision to protect their privacy.

ISSUE

Should ELARC be allowed to discontinue funding 21 days of in-home respite in lieu of out-of-home respite hours?

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FACTUAL FINDINGS

1. Claimant is an adult female client of the Service Agency who has been diagnosed with mental retardation, cerebral palsy, and epilepsy. She is under conservatorship and lives with her parents and three siblings. In July 2011, she began attending a day program at Whittier Area Parents' Association for the Developmentally Handicapped (WAPADH). (Service Agency Exhibit 3.)

2. Due to her disabilities, Claimant requires total care and supervision at home. She is able to move around her home by walking and holding onto furniture or crawling from room to room. She must be supervised at all times when moving around her home. Claimant is dependent on her parents and siblings for her basic needs and requires assistance with all grooming tasks including brushing her teeth. She does not dress herself, but does cooperate while being dressed. She is not toilet trained and wears diapers daily. (Service Agency Exhibits 3 and 4.)

3. Claimant receives 273 hours of In-Home Supportive Services (IHSS). (Testimony of Margarita A.)

4. Claimant has been receiving 30 hours per month of in-home respite, funded by the Service Agency. One of Claimant's sisters, who lives in the

home, and Claimant's aunt, who lives outside the home, are her respite workers through Maxim Healthcare Services. (Service Agency Exhibit 5.)

5. The Service Agency has also funded up to 21 days per year of in-home respite in lieu of out-of-home respite for years, although the specific number of years was not established by the evidence.² (Service Agency Exhibit 5.)

6. For years, ELARC allowed parents to use in-home respite in lieu of out-of-home respite. However, following passage of Welfare and Institutions Code section 4686.5, subdivision (a) (which limited funding of in-home respite to 90 hours per quarter and funding of out-of-home respite to 21 days per year), ELARC revised its purchase of service policy on out-of-home respite. The new respite funding policy became effective May of 2011. (Service Agency Exhibit 7.)

7(a). On February 6, 2012, the Service Agency sent Claimant a Notice of Proposed Action (NOPA), stating that it "will not longer fund 21 days of in-home respite in lieu of out of home respite per fiscal year as set forth in your Individual Program Plan [(IPP)]." (Service Agency Exhibit 1.)

7(b). The stated reason for the proposed action was:

² The Service Agency pointed out that it began funding 32 hours of in-home respite per month in 2003, but that in 2009, Claimant's respite hours were reduced from 32 to 30 per month due to the newly-enacted language of Welfare and Institutions Code section 4686.5, subdivision (a). (See also Legal Conclusion 3). The Service Agency noted that Claimant's mother did not appeal the two-hour reduction. However, the evidence did not establish her reasons for accepting the reduction, which could have included the fact that she would begin or continue to receive 21 days of in-home respite in lieu of out-of-home respite.

The Legislature has enacted changes to the Lanterman Act to ensure that the regional centers and DDS comply with cost saving measures. Both the In-home respite and Out of Home respite services policies were revised to ensure compliance with these changes. . . . [Claimant] has services and supports in place to address some of her needs including natural supports in her home, day program and regular monthly respite. In addition in home respite in lieu of out of home respite may be used only when there is no out of home placement arrangement available. Your request for ELARC to fund in home respite in lieu of out of home respite was made after [ELARC] informed you of our new policy guidelines that out of home placement must be explored prior to any request [for] in home respite in lieu of out of home respite. . . . Your request for ELARC to fund in home respite in lieu of out of home respite in the future needs to provide ELARC sufficient time to assist you to explore out of home placement. (Service Agency Exhibit 1.)

7(c). The Service Agency cited Welfare and Institutions Code, section 4686.5, subdivision (a), as the legal authority for its proposed action. (Service Agency Exhibit 1.)

8. On March 16, 2012, Claimant's mother submitted a Fair Hearing Request, seeking the continued funding of all previously-funded respite hours per month. (Service Agency Exhibit 2.)

9(a). In a May 7, 2012 letter following an informal meeting, the Service Agency maintained its intent to no longer fund 21 days of in home respite in lieu of out of home respite. (Service Agency Exhibit 5.)

9(b). The May 7, 2012 letter noted that the following was discussed:

[Per Claimant's mother, Claimant] cannot stay at a residential facility due to the fact that she suffers from chronic constipation, uses adult diapers and has seizures. Per mother, [Claimant] does not like to drink liquid therefore who[m]ever is supervising [Claimant] must give her small amounts of liquids regularly. Per mother, [Claimant] is on medication for her constipation; however [Claimant's mother] expressed her concern with [Claimant] being non-verbal and being taken care of by someone who does not know her and does not know hoe to feed her. [Claimant's mother] purees [Claimant's] food and does not give her specific foods due to her constipation. Per mother, she crawls on the floor and will indicate she is hungry by following mother when mother has food in her hands. Mother stated that she knows [Claimant] very well and knows when she is hungry as well as how to calm her down when she has a seizure.

[Claimant's mother] has taken her away for 3-4 days to Ensenada, Disneyland and other places. When asked how [Claimant] did in another environment,

mother stated she was fine because she was with her family. Mother also stated that [Claimant] is accustomed to sleeping with her mother and if her mother goes away, she needs to sleep with someone. Mother stated that she will sleep with her sister or her aunt when she is away. . . .

[When Claimant's mother was asked how Claimant] is currently adjusting to her day program since she started in July 2011, [Claimant's mother] stated that she is more anxious since going to WAPADH day program and they do not allow [Claimant] to crawl on the floor. She also stated that she is unhappy with their rules of only changing [Claimant's] diaper twice per day.

[Claimant's mother was asked] if she had ever visited a residential facility and stated she has never been to a home, and is not interested in visiting one. [ELARC staff] attempted to explain to [Claimant's mother] that the residential facilities funded by ELARC are located within the community, look like typical homes, and are staffed 24 hours per day with an awake staff. However, [she] stated that she is not interested at this time. (Service Agency Exhibit 5.)

9(c). In addition to upholding the original decision to no longer fund 21 days of in home respite in lieu of out of home respite, ELARC made the following recommendations:

It is recommended that [Claimant's mother] consider utilizing her 30 hours in home respite per month, 90 hours in home respite per quarter for vacations.

It is recommended that [Claimant's mother] make contact with [Claimant's] Service Coordinator to request additional day program options if she is not happy with WAPADH.

It is recommended that [Claimant's mother] utilize natural supports, such as her daughter who lives in the home, as well as her sister for support when [Claimant's mother] goes on vacation.

(Service Agency Exhibit 5.)

10(a). At the fair hearing, in addition to citing Welfare and Institutions Code section 4686.5, subdivision (a), as the authority for its decision, the Service Agency pointed out that its purchase of service guidelines do not allow continued funding for Claimant's in-home respite in lieu of out-of-home respite.

10(b). The Service Agency's purchase of service guidelines for out-of-home respite, state that "In home respite in lieu of out of home respite may be used only when there is no out of home respite arrangement available." (Exhibit 7.)

11(a). At the fair hearing, Claimant's mother insisted that continued funding of 21 days per year of in-home respite in lieu of out-of-home respite, in addition to the 90 hours per quarter of in home respite, is necessary because she needs "extra help" and vacation time for herself. She stated that she did not want to utilize out of home respite. (Testimony of Margarita A.)

11(b). Claimant's mother noted that Claimant needs "very special attention," and that only she is able to care for Claimant "the way she needs." She noted that Claimant experiences a lot of abdominal pain and that her food must be blended. Claimant's mother massages her stomach and gives her warm juices to "settle" her stomach. She admitted that her daughter (Claimant's sister), who does not have medical training, is able to provide adequate care for Claimant. She would not admit that a licensed vocational nurse or someone with medical training would be able to care for Claimant because she did "not know if they would have all the patience required." (Testimony of Margarita A.)

11(c). Claimant's mother did "not want to leave her with anyone else" because she has "been through too much with her to place her outside the home." She noted as an example that she has been dissatisfied with Claimant's school, because the staff are unable to persuade Claimant to take her required eight glasses of water per day, and that they will not change her diaper more than three times per day. Additionally, Claimant's mother has become distrustful and uncomfortable with others caring for her daughter because in February 2012, Claimant's physician prescribed the wrong medication and Claimant had to be hospitalized and because a school bus driver once hit Claimant. (Testimony of Margarita A.)

11(d). Claimant's mother did not explain why Claimant's family members (aunt, father and siblings) could not collectively assist her to give her respite time, so that she could use her 90 days per quarter of ELARC funded respite for vacation time. (Testimony of Margarita A.)

12. Although the request to use out-of-home respite in lieu of in-home respite is, in essence, a request for an increase of in-home respite hours, the evidence did not establish that "the intensity of the consumer's care and supervision needs [is] such that additional respite is necessary to maintain the consumer in the family home," or that "there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer."

LEGAL CONCLUSIONS

1. Cause exists to deny Claimant's appeal of the Service Agency's discontinuation of funding 21 days of in-home respite in lieu of out-of-home respite. (Factual Findings 1 through 12.)

2. Where a change in services is sought, the party seeking the change has the burden of proving that a change in services is necessary. (See, Evid. Code, §§ 115 and 500.) In proposing to discontinue funding 21 days of in-home respite in lieu of out-of-home respite, ELARC bears the burden of proving by a preponderance of the evidence that the change in services is necessary. The Service Agency has met its burden of proof.

3. Welfare and Institutions Code section 4686.5 provides:

(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 hours 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) 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 provide 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 service plan (IFSP).
- (b) For consumer receiving respite services on July 1, 2009, as part of their IPP or IFSP, subdivision (a) shall apply on August 1, 2009.

4(a). Pursuant to Welfare and Institutions Code section 4686.5, Claimant's respite may not exceed 90 hours per quarter of in-home respite. Although funding of 21 days per year of out-of-home respite is allowed, section 4686.5 and the Service Agency's policies no longer allow the conversion of the 21 days of out-of-home respite to in-home respite.

4(b). Claimant is, in essence, seeking additional in-home respite hours, which may be allowed if an exemption to the statutory limitation is granted. However, Claimant's mother has not established that an exemption must be granted. The evidence did not establish that "the intensity of the consumer's care and supervision needs [is] such that additional respite is necessary to maintain the consumer in the family home," or that "there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer."

5. Given the foregoing, ELARC appropriately discontinued funding Claimant's 21 days of in-home respite in lieu of out-of-home respite. However, in light of the de facto reduction of in-home respite hours, at the next Individualized Program Plan (IPP) meeting, the Service Agency should reassess whether Claimant qualifies for an exemption from the statutory 90-hour per quarter limitation.

ORDERS

1. Eastern Los Angeles Regional Center's discontinuation of funding Claimant's 21 days of in-home respite in lieu of out-of-home respite is upheld, and Claimant's appeal is denied.

2. At Claimant's next IPP meeting, the Service Agency shall reassess whether Claimant qualifies for an exemption from the statutory 90-hour per quarter limitation.

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.

DATED: July 23, 2012

JULIE CABOS-OWEN

Administrative Law Judge

Office of Administrative Hearings