

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

MARY M.,

Claimant,

And

FRANK D. LANTERMAN REGIONAL
CENTER,

Service Agency

OAH No. 2012110894

DECISION

This matter came on regularly for hearing on February 28, April 17, May 30 and June 18, 2013, at Los Angeles, California, before David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California. Claimant Mary M. was present by her father, who is her co-conservator, and was represented by Thomas E. Beltran, Attorney at Law. (Initials and titles are used to protect confidentiality.) Frank D. Lanterman Regional Center (FDLRC or Service Agency) was represented by Marc A. Baca, Appeals and Complaint Coordinator for FDLRC.

Oral and documentary evidence was presented and the matter was submitted for decision on June 18, 2013.

ISSUE

The parties agreed to the following issue:

May the Service Agency reduce Claimant's Supported Living Services (SLS) funding from 504 to 232 hours per month, the reduction reflecting the amount of In-Home Supportive Services (IHSS) service hours available to Claimant?

EVIDENCE RELIED UPON

Documentary. Service Agency's exhibits 1 through 26 and Claimant's exhibits A through RR and TT were admitted into evidence. Claimant's Exhibit UU was the subject of official notice. As agreed at the hearing, the ALJ added as Exhibit 27: father's Request for Continuance and Waiver of Time, dated December 17, 2012, and the Continuance Order and Notice of New Hearing Date.

Testimonial. FDLRC employees Enrique Roman, Lourdes Ruiz, DaVonna Jenkins, Melinda Sullivan, and Marc Baca; FDLRC consultant Nora Asahara; Institute for Applied Behavior Analysis (IABA) employees Sara Black and Amber Kerns; and Claimant's father.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a 47-year-old conserved female who is eligible for regional center services based on her diagnoses of autism and severe mental retardation. She has also been diagnosed with various medical conditions, including celiac disease, hypoglycemia, severe myopia, allergies, esophageal reflux, and hydrops related to keratoconus (swelling related to protruding corneas). She is ambulatory, continent, and essentially non-verbal with limited expressive skills such that those persons who are familiar with her can understand some utterances and behaviors. She resides at a home shared with her developmentally disabled brother. Her father lives in a garden apartment on a neighboring property.

2. On October 29, 2012, Melinda Sullivan, the Service Agency's Associate Director of Client and Family Services, sent to father a letter advising him that SLS would

be reduced from 504 hours per month to 232 hours per month in 30 days and advising him of Claimant's rights to a fair hearing. (Ex. 1 and Ex. II.)

3. On November 7, 2012, Claimant's father submitted a Fair Hearing Request on behalf of Claimant, including an attachment. (Ex. 2 and Ex. GG.)

4. A hearing for this matter was timely set for December 27, 2012. Claimant requested a continuance of the hearing due to retaining an attorney who had a calendar conflict. The hearing was continued. As part of his request for the continuance, Claimant's father executed a written waiver of the time limit prescribed by law for the holding of the hearing and for the ALJ to issue a decision. (Ex. 27.)

CLAIMANT'S BACKGROUND INFORMATION

5. Claimant's father described the history of Claimant's diagnoses of developmental disabilities, as well as her one-year older brother's diagnoses of developmental disabilities. Early care was largely the responsibility of Claimant's mother, who passed away in 2004. Claimant's parents sought the assistance of numerous professionals and programs, and discovered that autism was not well known. The Jay Nolan organization provided primary care for Claimant for approximately 20 years when, in June 2004, the care was shifted to IABA. At that time the program was a day program, six days per week, and father tried to be home from work by 4:30 p.m. to help as the children were getting home. However, there were times when father was late or, for other reasons, the two children were not well controlled. FDLRC and father decided to try SLS, with a parent assisted coordinator, which first operated until 4:00 p.m., then expanded to 6:00 p.m., then 8:00, then 10:00. As brother's needs were greater than Claimant's, and both of their needs justified it, a 24-hour per day, seven-day per week SLS program was begun approximately three years ago.

6. The first Individual Program Plan (IPP) in evidence is an annual review dated October 5, 2007. (Ex. O.) It confirms Claimant's need for supervision in the home

and in the community for her safety. Among the services provided by IABA were 340 hours per month of AST¹, 182 hours per month of SLS, and a behavior consultant from IABA, 20 hours per month, five visits per month. Other services include speech therapy, legal services, psychiatrist visits, and 24 hours per month of respite. At that time Claimant received 287 hours per month of IHSS. Other IPP's in evidence are dated October 2, 2009 (Ex. 6), June 20, 2011 (Ex. P) and September 28, 2011 (Ex. 5 and Ex. Q). They contain much of the same narrative description of her abilities, assistance, and limitations. AST was reduced to 300 hours per month. The other change in services is that speech therapy was stopped at some point but resumed again. Speech therapy of 10 hours per month was added as of January 2012 (Ex. S) and renewed in January 2013 (Ex. R). Although these IPP's refer to SLS in the amount of 182 hours per month, the Purchase of Service Authorizations (Ex. 8) include an authorization for IABA for 504 hours per month under service code 896, which is for SLS under Regulation 54349, subdivision (d). Thus, the total of IABA service hours per month ($504 + 300 = 804$) exceeds 744, which is the number of hours in a month of 31 days. It is not completely clear from the evidence how IABA provides the services for which it is authorized; i.e., it is not clear who from IABA is doing what service (AST or SLS) and for what period of time each month to reach the total of 804 hours, plus 20 hours of behavioral consultation.

¹ It is inferred that AST refers to Adaptive Skills Trainer, because the Purchase of Service Authorizations (Ex. 8) include an authorization for service code 605 which is described as Adaptive Skills Trainer under California Code of Regulations, title 17, section 54342, subdivision (3). All further references to the California Code of Regulations are to title 17 and are designated "Regulation."

7. The services currently provided by IABA are described by many witnesses as 24-hours per day, seven-days per week. They include substantial assistance with Claimant's activities of daily living and other activities, described in more detail below.

8. IABA issues quarterly progress reports for both SLS (for example, February 20, 2013, Ex. MM and Ex. 26), and for Social and Community Integration and Participation (SCIP) (for example, March 2012, Ex. 9, and November 30, 2012, Ex. U). Among other things, the reports include references to IABA staff assisting Claimant in activities such as grooming, bathroom routine, washing, dressing, applying and removing contact lenses, and wiping after bowel movements. Staff rubs her arms and hands for sensory stimulation. In other instances the reports refer to activities in which Claimant is supported by IABA staff, without enough information to determine exactly what staff is doing. For example, staff supports Claimant in bathing, grooming, making her bed, setting the table, walking to various locations and activities, transporting her by car when necessary, accompanying her on public transportation, and using a tandem bike. IABA staff is also trained to be aware of the situations that may cause Claimant anxiety and, sometimes, agitation, and to intervene appropriately. Claimant's brother has more challenging behaviors, and when he has a behavioral outburst in her vicinity, Claimant may become agitated, unsettled and fearful, and sometimes aggressive. IABA is tracking and targeting these behaviors.

9. Changes in the law resulted in the Service Agency staff examining more closely the IHSS benefits provided to Claimant to see if the SLS program could be reduced by including IHSS as a component. These laws are discussed in more detail below. Claimant's IHSS is in the amounts of time and service categories listed in the IHSS Notice of Action dated April 20, 2011. (Ex. QQ.) The time amounts are somewhat

deceiving, as the Notice of Action also states that, under Welfare and Institutions Code² section 12301.06, these times are each reduced by 3.6 percent. Although the Notice of Action applies that reduction to the total number of hours per month (283, to reduce it to 272.9), it does not compute the reduction for each of the services listed. The Notice of Action was provided during the hearing; father had not provided it to the Service Agency prior to the hearing.

10. Claimant receives the following monthly IHSS, in the amount of hours noted (again, not yet reduced by 3.6 percent) (Ex. QQ):

Hours Description of Services

2.00 Domestic services (clean floors, wash kitchen counters, stoves, refrigerators, bathrooms; store food, supplies; take out garbage; dust, pick up; bring in fuel; change; make bed and miscellaneous)

3.50 Prepare meals

1.75 Meal cleanup

0.75 Routine laundry

0.50 Shopping for food

0.25 Other shopping errands

2.91 Non-Medical- bowel, bladder care

² All statutory references are to the Welfare and Institutions Code unless indicated.

- 4.66 Non-Medical- Feeding
- 3.50 Non-Medical- Dressing
- 2.33 Non-Medical- Menstrual care
- 1.16 Non-Medical- Ambulation
- 6.13 Non-Medical- Bathe, oral hygiene/grooming
- 2.33 Non-Medical- Rub skin, repositioning, help on/off seats, in/out of vehicle
- 3.62 Non-Medical- Care / assistance with prosthesis
- 1.30 Accompaniment to medical appointment
- 30.20 Protective supervision per week

11. IHSS is administered by the California Department of Social Services, through the counties of the state. Some of the statutes and Regulations relating to IHSS are discussed in more detail in the Legal Conclusions below. Descriptions of the activities under each of the categories of IHSS are found in the IHSS Provider Orientation Guide (Ex. 20) and portions of the Manual of Policies and Procedures, Social Service Standards, Section 30-757 (Ex. UU, pp. 10-39; Manual). According to the Manual, several of the IHSS service categories granted to Claimant include direct services by the IHSS worker to Claimant, or factor in whether Claimant can assist. More specifically, the hours granted for preparation of meals and meal clean up factor in whether Claimant can assist. (Manual, Ex. UU, pp. 16, §§ 30-757.131(b)(1) and 30-757.132(c)(1).) The following services are described as “personal care services” (Manual, Ex. UU, pp. 20, §§ 30-757.14), providing assistance to the recipient directly:

- a. Bowel and bladder care: Claimant receives 2.91 hours per month of IHSS; services are described in the Manual, Ex. UU, p. 20, § 30-757.14(a), as follows:
"includes assistance with using, emptying, and cleaning bed pans/bedside commodes, urinals, ostomy, enema and/or catheter receptacles; application of diapers; positioning for diaper changes; managing clothing; changing disposable barrier pads; putting on/taking off disposable rubber gloves; wiping and cleaning recipient; assistance with getting on/off commode or toilet; and washing/drying recipient's and provider's hands."
- b. Feeding: Claimant receives 4.66 hours per month of IHSS; services are described in the Manual, Ex. UU, p. 22, § 30-757.14(c), as follows: "includes assistance with consumption of food and assurance of adequate fluid intake consisting of feeding or related assistance to recipients who cannot feed themselves or who require other assistance with special devices in order to feed themselves or to drink adequate liquids. [¶] (1) „Feeding“ tasks include assistance with reaching for, picking up, and grasping utensils and cup; cleaning recipient's face and hands; and washing/drying hands; and washing/drying hands before and after feeding. [¶] (2) „Feeding“ tasks do not include cutting food into bite-sized pieces or pureeing food, as these tasks are assessed in „preparation of meals“ services specified at Section 30-757.131."
- c. Bathing, oral hygiene and grooming: Claimant receives 6.13 hours per month of IHSS; services are described in the Manual, Ex. UU, pp. 24-25, § 30-757.14(e) as follows:
"(1) Bathing includes cleaning the body in a tub or shower; obtaining water/supplies and putting them away; turning on/off faucets and adjusting water temperature; assistance with getting in/out of tub or shower; assistance

- with reaching all parts of the body for washing, rinsing, drying and applying lotion, powder, deodorant; and washing/drying hands.
- “(2) Oral hygiene includes applying toothpaste, brushing teeth, rinsing mouth, caring for dentures, flossing, and washing/drying hands.
- “(3) Grooming includes hair combing/brushing; hair trimming when the recipient cannot get to the barber/salon; shampooing, applying conditioner, and drying hair; shaving; fingernail/toenail care when these services are not assessed as „paramedical“ services for the recipient; and washing/drying hands.
- “(4) ‘Bathing, oral hygiene, and grooming,’ does not include getting to/from the bathroom. These tasks are assessed as mobility under ‘ambulation’ services specified at Section 30-757.14(k).”
- d. Dressing: Claimant receives 3.50 hours per month of IHSS; services are described in the Manual, Ex. UU, p. 26, § 30-757.14(f), as follows: “includes washing/drying of hands; putting on/taking off, fastening/unfastening, buttoning/unbuttoning, zipping/unzipping, and tying/untying of garments, undergarments, corsets, elastic stockings and braces; changing soiled clothing; and bringing tools to the recipient to assist with independent dressing.”
- e. Repositioning and rubbing skin: Claimant receives 2.33 hours per month of IHSS (which also includes “help on/off seats, in/out of vehicle”); services are described in the Manual, Ex. UU, pp. 27-28, § 30-757.14(g), as follows: “includes rubbing skin to promote circulation and/or prevent skin breakdown; turning in bed and other types of repositioning; and range of motion exercises which shall be limited to the following:

“(1) General supervision of exercises which have been taught to the recipient by a licensed therapist or other health care professional to restore mobility restricted because of injury, disuse or disease.

“(2) Maintenance therapy when the specialized knowledge and judgment of a qualified therapist is not required and the exercises are consistent with the patient's capacity and tolerance.

“(A) Such exercises shall include the carrying out of maintenance programs, i.e., the performance of the repetitive exercises required to maintain function, improve gait, maintain strength, or endurance; passive exercises to maintain range of motion in paralyzed extremities; and assistive walking.”

f. Transfer: It is uncertain to what extent, if any, Claimant receives this service. As noted above, Claimant's award of 2.33 hours per month of IHSS is under a category titled “Rub skin, repositioning, help on/off seats, in/out of vehicle.” In the Manual, the description of “Transfer” services appears to include some of these activities. “Transfer” services are described in the Manual, Ex. UU, pp. 28-29, § 30-757.14(h), as follows: “includes assisting from standing, sitting, or prone position to another position and/or from one piece of equipment or furniture to another. This includes transfer from a bed, chair, couch, wheelchair, walker, or other assistive device generally occurring within the same room.

“(1) ‘Transfer’ does not include:

“(A) Assistance on/off toilet. This task is assessed as part of „bowel and bladder“ care specified at Section 30-757.14(a).

“(B) Changing the recipient's position to prevent skin breakdown and to promote circulation. This task is assessed as part of „repositioning and rubbing skin“ specified at Section 30-757.14(g).”

- g. Care and assistance with prosthetic devices: Claimant receives 3.62 hours per month of IHSS; services are described in the Manual, Ex. UU, p. 29, § 30-757.14(i), as follows: "Care of and assistance with prosthetic devices and assistance with self-administration of medications, which includes assistance with taking off/putting on and maintaining and cleaning prosthetic devices, vision/hearing aids and washing/drying hands before and after performing these tasks."
- h. Menstrual care: Claimant receives 2.33 hours per month of IHSS; services are described in the Manual, Ex. UU, p. 31, § 30-757.14(j), as follows: "limited to external application of sanitary napkins and external cleaning and positioning for sanitary napkin changes, using and/or disposing of barrier pads, managing clothing, wiping and cleaning, and washing/drying hands before and after performing these tasks."
- i. Ambulation: Claimant receives 1.16 hours per month of IHSS; services are described in the Manual, Ex. UU, p. 32, § 30-757.14(k), as follows: "includes assisting the recipient with walking or moving from place to place inside the home, including to and from the bathroom; climbing or descending stairs; moving and retrieving assistive devices, such as a cane, walker, or wheelchair, etc. and washing/drying hands before and after performing these tasks.
„Ambulation“ also includes assistance to/from the front door to the car (including getting in and out of the car) for medical accompaniment and/or alternative resource travel."
- j. Protective supervision: Claimant receives 30.20 hours per week of IHSS; services are described in the Manual, Ex. UU, p. 33, § 30-757.17 as follows: "consists of observing recipient behavior and intervening as appropriate in order to safeguard the recipient against injury, hazard, or accident."

- k. Accompaniment to medical appointment: Claimant receives 1.30 hours per month of IHSS. This service was not contained in the portions of the Manual in evidence. However, by its very wording, it involves services directly assisting the recipient.

12. The IHSS Provider Orientation Guide (Ex. 20, p. 7) includes the following: "Can I spend the time authorized for specific tasks doing other IHSS tasks? No. Time may only be used specifically as identified by the county. If it takes less than the authorized time to complete a task, the remaining time cannot be spent to increase the time on other services." However, the task description for laundry services in the Manual states: "it is expected that the provider will accomplish other tasks while clothes are washing and drying." (Ex. UU, p. 19.)

13. The IHSS nominees for Claimant are two family members: father's brother-in-law Gerardo Zelada and niece Melissa Zelada. Father has assembled a staff of workers who are paid from a fund into which the IHSS money is deposited. In March 2012, father informed FDLRC that there were six workers and provided the names of five workers, in addition to the Zeladas, and listed the following functions, which he called "multi-faceted in home supports – cook, clean, shop, wash clothes, 7 days a week, provide supervision + prepare meals – bedding, 4 toilets, 4 sinks, 2 showers, 1 tub + kitchen floors, rugs, provide as nominee for supports." (Ex. 16.) Despite several requests from FDLRC for an actual schedule of when these workers are present and what tasks they perform at specific times, father has not provided such a schedule.

14. From the totality of the evidence, including father's testimony, the workers paid with IHSS funds provide very few, if any, direct contact services for Claimant. Essentially, direct contact is provided by IABA staff. The other operations necessary to run the household, such as shopping, cooking, housekeeping and cleaning are performed by the workers paid for by IHSS funds. It was not entirely clear from the

evidence, but it is more likely than not that these workers are paid for by IHSS funds for Claimant and her brother, Social Security Supplemental Security Income (SSI), and father's financial contributions. IHSS pays approximately \$9 per hour for the services awarded.

15. As noted in Factual Finding 2, Ms. Sullivan's October 29, 2012 letter addressed FDLRC's decision to reduce SLS hours from 504 to 232 per month. The reason stated is that the difference of 272 hours is to be made up by services paid from IHSS funding for 272.9 hours per month. Ms. Sullivan proposed that the reduction could take place by using the IHSS funds for overnight coverage for Claimant, when her needs were generally less demanding. Therefore, the IHSS would be used for more direct interaction with Claimant and thereby reduce the SLS services.

16. The letter was preceded by numerous meetings and written exchanges. In summary, it was father's position, and still is, that Claimant's needs are such that the types of workers paid for by the IHSS funds were not capable of providing the services that are necessary to keep Claimant safe and address her needs and the goals of IABA's overall SLS program for her.

17. For one of these meetings IABA staff prepared two documents including some of the tasks and responsibilities that they perform during the overnight shift. (Ex. RR.) On its face some of the listed tasks appear to be able to be performed by lower skilled and lower paid workers. However, the evidence established that so many of the tasks required the higher level of skill, and pay grade, of either SLS or AST workers trained by IABA that it would not be practical, or safe, to eliminate SLS or AST entirely from the overnight schedule.

18. IABA has been involved in providing services for other clients where it has trained IHSS workers, and one of the IABA staff assigned to Claimant also functions as

an IHSS worker for another client. In this manner, an IHSS worker can be aware of the particular behaviors and intervention techniques that are specific to a given client.

19. Father responded to Ms. Sullivan's October 29, 2012 letter with the Fair Hearing Request with an attached memo (Ex. 2), in which he states many examples of his concerns about replacing IABA SLS staff with IHSS workers. He also makes mention of his request for an exemption from the legal requirement to use IHSS hours to reduce SLS.

20. On the one hand, as noted in the Legal Conclusions, the applicable statute does not include any reference to any exemption or exception that would apply under the circumstances here. On the other hand, without father even having requested one, FDLRC granted an exception on behalf of Claimant's brother under similar circumstances. On October 9, 2012, Ms. Sullivan wrote to father noting that the brother receives 24/7 care as both SLS and day services, and also receives IHSS hours. FDLRC and IABA had examined the situation, and FDLRC determined that the brother "could not be supported by an IHSS worker" and that an exception was authorized by the FDLRC Executive Director "to waive the required use of IHSS hours to support [brother]." (Ex. HH.)

LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judges makes the following legal conclusions:

BURDEN AND STANDARD OF PROOF

1. This case is governed by the Lanterman Developmental Disabilities Services Act (Lanterman Act), found at section 4400 et seq. An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.)

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.) Where a service already provided by a regional center is reduced or eliminated, the burden is on the regional center to demonstrate that its decision is correct. In this instance, the Service Agency is proposing the change in services; therefore, it has the burden of proof.

JURISDICTIONAL ISSUES

3. Section 4710.5, subdivision (a), provides that an applicant for or recipient of services dissatisfied with any decision or action of a regional center may request a fair hearing within 30 days after "notification of the decision or action complained of"

4. Section 4710 delineates two types of notifications that a regional center is required to provide a consumer regarding a decision or action from which can result a request for a fair hearing pursuant to section 4710.5. Relevant here is section 4710, subdivision (a), which requires a regional center to provide a notification when it proposes to "reduce, terminate, or change services set forth in an individual program plan" or when a consumer is determined to be no longer eligible for services.

5. The Fair Hearing Request was timely and there is proper jurisdiction for this matter. (See Factual Findings 1-4.)

6. To resolve the pending Issue requires some understanding of: the IPP process; flexibility in the IPP plan; cost effectiveness in the plan; the requirement for the Service Agency to identify and use generic resources and natural supports; and the operation of SLS and IHSS.

THE IPP, FLEXIBILITY, COST EFFECTIVENESS, GENERIC RESOURCES AND NATURAL SUPPORTS

7. Under section 4620, subdivision (c), the Service Agency is responsible for providing services and supports for individuals with developmental disabilities. In doing so, the Service Agency must respect the choices made by consumers and their families under section 4502.1. Services are designed toward "alleviation of a developmental disability," and among the services and supports to be provided are supported living services, under section 4512, subdivision (b).

8. The process for identifying the need for services and for providing funding for services by regional centers is generally set forth in sections 4646 and 4648. As applied to this case, changes in services would be discussed by the IPP, including the parents and Service Agency representatives.

9. The Lanterman Act addresses the team nature of the decision-making process regarding those services that are to be supplied or funded by the Service Agency. This is accomplished by the IPP process, which is described and referred to in numerous sections of the Lanterman Act. Statutory guidance for the process of developing an IPP can be found, among other places, in sections 4512, subdivision (b), 4646, 4646.5, 4647 and 4648.

10. Flexibility and cost effectiveness of services is described in many places. One example is section 4648, subdivisions (a)(2), (a)(6)(D) and (a)(11), which state:

"In order to achieve the stated objectives of a consumer's individual program plan, the Service Agency shall conduct activities including, but not limited to, all of the following:

"(a) Securing needed services and supports.

"(2) 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.” [¶ . . .]

“(6)(D) The cost of providing services or supports of comparable quality by different providers, if available, shall be reviewed, and the least costly available provider of comparable service, including the cost of transportation, who is able to accomplish all or part of the consumer’s individual program plan, consistent with the particular needs of the consumer and family as identified in the individual program plan, shall be selected. . . .” [¶...]

(11) Among other service and support options, planning teams shall consider the use of paid roommates or neighbors, personal assistance, technical and financial assistance, and all other service and support options which would result in greater self-sufficiency for the consumer and cost-effectiveness to the state.”

11. Cost effectiveness is also addressed in sections 4512, subdivision (b), 4640.7, subdivision (b), 4648, subdivision (a)(11), 4651, subdivision (a), 4669.2, subdivision (a)(2), 4685 and 4697, subdivision (b)(2). There is also a reference to cost effectiveness in Regulation 54349, subdivision (g)(1), which provides that a regional center “shall authorize a SLS vendor to provide a service only if such service . . . is cost-effective.” “Cost-effective” is defined as “obtaining the optimum results for the expenditure.” (See Regulation 58602, subd. (f), as it refers to Regulation 58501, subdivision (6).)

12. Another manner in which the concept of cost effectiveness is addressed in the Lanterman Act is the requirement to identify and access generic agencies and resources to provide necessary services. Relating generally to the IPP process, section 4646.5, subdivision (a)(4), provides that the process shall include: “A schedule of the type

and amount of services and supports to be purchased by the Service Agency or obtained from generic agencies or other resources in order to achieve the individual program plan goals and objectives, and identification of the provider or providers of service responsible for attaining each objective, including, but not limited to, vendors, contracted providers, generic service agencies, and natural supports.”

13. Generic agencies and generic resources are defined in Regulation 54302, subdivisions (a)(31) and (32), as follows:

“(31) ‘Generic Agency’ means any agency which has a legal responsibility to serve all members of the general public and which is receiving public funds for providing such services;

“(32) ‘Generic Support(s)’ means voluntary service organizations, commercial businesses, non-profit organizations, generic agencies, and similar entities in the community whose services and products are regularly available to those members of the general public needing them.”

14. Service coordination is described in section 4647, subdivision (a), as including, among other things, “assurance that the planning team considers all appropriate options for meeting each individual program plan objective; securing, through purchasing or by obtaining from generic agencies or other resources, services and supports specified in the person’s individual program plan”

15. Regulation 54349, subdivision (g)(2), provides that a regional center shall authorize a SLS vendor to provide a service only if such service “can not feasibly be provided without cost, or at a lesser cost, through generic or natural supports available in the community.” Also concerning SLS, under section 4689, subdivision (f), the IPP planning team for a consumer receiving supported living services “shall confirm that all appropriate and available sources of natural and generic supports have been utilized to the fullest extent possible for that consumer.”

16. Effective September 1, 2008, section 4646.4, subdivision (a), requires regional centers, when purchasing services and supports, to ensure conformance with purchase of service policies and to utilize generic services and supports when appropriate.

17. Consideration of generic resources is more specifically related to SLS under section 4689. Subdivision (f) states: "The planning team, established pursuant to subdivision (j) of Section 4512, for a consumer receiving supported living services shall confirm that all appropriate and available sources of natural and generic supports have been utilized to the fullest extent possible for that consumer." Under subdivision (p)(1), the IPP team is to develop and use a questionnaire when considering and reviewing SLS to ensure, among other things, "that generic resources are utilized to the fullest extent possible" and "that the most cost-effective methods of supported living services are utilized."

18. Another aspect of service planning and cost savings expressed in the Lanterman Act is the concept that a regional center cannot supplant the budget of other agencies and entities that are required to provide services to the public. This is expressed both generally and in ways specific to the issues in this case. Generally, section 4648, subdivision (a)(8), provides: "Regional center funds shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services."

19. The Service Agency must consider Claimant's IHSS services. Under section 4689.05, subdivision (b), a regional center "shall not purchase supported living services for a consumer to supplant IHSS."

20. IHSS is also the subject of a general statutory requirement for the Service Agency to identify and utilize all possible sources of funding. Section 4659 provides, in pertinent part:

- “(a) Except as otherwise provided in subdivision (b) or (e), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:
- “(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.
- “(2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer. [¶] . . . [¶]
- “(c) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional centers shall not purchase any service that would otherwise be available from Medi-Cal, Medicare, . . . In-Home Support Services If, on July 1, 2009, a regional center is purchasing that service as part of a consumer's individual program plan (IPP), the prohibition shall take effect on October 1, 2009.”

21. As noted, several of these statutes and regulations direct that the Service Agency not “supplant the budget” of another possible source of services. According to Webster’s Seventh New Collegiate Dictionary (1969), at page 884, “supplant” is defined as “to supersede; to take the place of and serve as a substitute for . . . ,” and is synonymous with “to replace.” Use of this definition and synonym to interpret the statutory directives is supported by the unambiguous language in section 4659, subdivision (c), that a regional center “shall not purchase any service that would otherwise be available from . . . In-Home Support Services.”

22. Also to be considered in determining Claimant’s services is the part played by natural supports, which are defined in section 4512, subdivision (e), as “personal

associations and relationships typically developed in the community that enhance the quality and security of life for people, including, but not limited to, family relationships, friendships reflecting the diversity of the neighborhood and the community, associations with fellow students or employees in regular classrooms and workplaces, and associations developed through participation in clubs, organizations, and other civic activities.”

STATUTES AND REGULATIONS RELATING TO SLS

23. There are numerous statutes and Regulations regarding SLS, some of which are summarized as follows. Under section 4354, SLS “means a range of appropriate supervision, support, and training in the consumer’s place of residence, designed to maximize independence.” Further specifications are found in Regulation 58614, subdivision (a), which states that SLS consists of individually designed services which assist an individual consumer to live in his own home, “with support available as often and for as long as it is needed,” and “make fundamental life decisions, while also supporting and facilitating the consumer in dealing with the consequences of those decisions; building critical and durable relationships with other individuals; choosing where and with whom to live; and controlling the character and appearance of the environment within their home.” SLS must be “tailored to meet the consumer’s evolving needs and preferences for support so that the consumer does not have to move from the home of choice.” (*Id.*)

24. Under Regulation 58617, the list of services under SLS includes, inter alia, assistance with common daily living activities such as meal preparation, including planning, shopping, and cooking; performing routine household activities to keep a clean and safe home; locating and scheduling medical services; acquiring household furnishings; becoming aware of and effectively using the transportation, police, fire, and emergency help available in the community; managing personal financial affairs;

recruiting, screening, hiring, training, supervising, and dismissing personal attendants; dealing with governmental agencies; asserting civil and statutory rights through self-advocacy; building and maintaining interpersonal relationships, including a circle of support; participating in community life; and 24-hour emergency assistance. Further, a regional center is obligated to assess the projected annual costs of the consumer's supported living assistance, as determined through the IPP process, before SLS is provided.

25. Consumers cannot be excluded from supported living arrangements based solely on the nature and severity of their disabilities (section 4689 and Regulation 58613).

STATUTES AND REGULATIONS RELATING TO IHSS

26. The statutes defining and relating to IHSS are mostly found in sections 12300 through 12330. Section 12300, subdivisions (b) and (c), provide:

“(b) Supportive services shall include domestic services and services related to domestic services, heavy cleaning, personal care services, accompaniment by a provider when needed during necessary travel to health-related appointments or to alternative resource sites, yard hazard abatement, protective supervision, teaching and demonstration directed at reducing the need for other supportive services, and paramedical services which make it possible for the recipient to establish and maintain an independent living arrangement.

“(c) Personal care services shall mean all of the following: (1) Assistance with ambulation. (2) Bathing, oral hygiene, and grooming. (3) Dressing. (4) Care and assistance with prosthetic devices. (5) Bowel, bladder, and menstrual care. (6) Repositioning, skin care, range of motion exercises, and transfers. (7)

Feeding and assurance of adequate fluid intake. (8) Respiration. (9) Assistance with self-administration of medications.”

27. Many of the IHSS tasks which are awarded and provided to Claimant (see Factual Findings 9 and 10) are included in the SLS provided to Claimant. However, as noted above, IHSS is a generic source and the Service Agency may not duplicate services provided by IHSS.

28. Missing from the record is evidence of how much time IABA spends on SLS for Claimant that are also tasks covered by her IHSS. If Claimant’s need for services covered by IHSS exceeds the services provided by IHSS, those services can be included in SLS as well. Nevertheless, under the law, Claimant’s SLS can be reduced to the extent a service provided by IABA is also a task included in IHSS.

29. In the “normal” IPP process, the parties can exercise flexibility and practicality to accomplish the IPP goals. For example, an attempt can be made to structure the IHSS in such a way as to minimize the possible negative effects on Claimant while complying with the legal mandates to not supplant the budget of IHSS and to not purchase any service funded by IHSS. Similarly, the parties in an IPP can consider the practicality of the types of work shifts and staffing needed to coordinate care and services. For example, full shifts are generally better than part-time or oddly-scheduled shifts.

30. It is uncertain under what legal authority, if any, FDLRC granted an exception for Claimant’s brother from the requirement that it not pay for services provided by IHSS. The only exception noted in the statute does not appear to apply to brother’s circumstances. The exception is only relevant here because father requested one for Claimant. Under section 4689.05, subdivision (a), a regional center “shall not purchase supportive services, as defined in Section 12300, for a consumer who meets the criteria to receive, but declines to apply for, in-home supportive services (IHSS)

benefits, as set forth in Section 12300, except as set forth in subdivision (d).” Subdivision (d) allows a regional center executive director to “waive the requirements set forth in subdivision (a) if the executive director finds that extraordinary circumstances warrant the waiver, and that a finding is documented in an addendum to the consumer's individual program plan.” The exception, therefore, only relates to a consumer who qualifies for IHSS benefits but declines to apply for them. Claimant, and her brother, have both applied for and receive IHSS benefits. Therefore, the waiver authority under section 4689.05, subdivision (d), would not apply to Claimant.

CONCLUSION AND REVIEW OF SERVICES

31. FDLRC proposed a full reduction from Claimant’s SLS equal to all of the IHSS hours she receives. As noted above, however, there are some IHSS services that are not duplicated by IABA in the Claimant’s SLS program. The reductions required by law are in those areas wherein IABA is performing tasks also included in IHSS, in the nature of direct care that is authorized under IHSS. In Claimant’s case, the IHSS workers are not actually performing all of the IHSS tasks awarded to Claimant.

32. The following hours, all parts of the IHSS award, shall be eliminated from Claimant’s SLS program by IABA:

Hours

2.91 Non-Medical- bowel, bladder care

4.66 Non-Medical- Feeding

3.50 Non-Medical- Dressing

2.33 Non-Medical- Menstrual care

1.16 Non-Medical- Ambulation

6.13 Non-Medical- Bathe, oral hygiene/grooming

2.33 Non-Medical- Rub skin, repositioning, help on/off
seats, in/out of vehicle

3.62 Non-Medical- Care / assistance with prosthesis

1.30 Accompaniment to medical appointment

30.20 Protective supervision per week

33. To do the math properly requires factoring in the 3.6 percent reduction and that all amounts are stated as monthly, except protective supervision, which is weekly. Based on the assumption that there are 4.3 weeks in a month,³ protective supervision would amount to 129.86 hours per month. When this amount is added to all other services listed in Legal Conclusion 32, the total is 157.80 hours per month. Reduced by 3.6 percent (3.6 percent of 157.80 = 5.68), the total is 152.12 hours. This represents the total number of hours each month that IHSS has awarded to Claimant for services to be performed by IHSS workers that are, instead, performed by IABA under Claimant's SLS program. Claimant's SLS from IABA shall be reduced by 152.12 hours per month, from 504 to 351.88 hours per month.

34. The Lanterman Act anticipates that all services, and SLS in particular, need to be reviewed and monitored. Section 4646.5 provides, in part:

"(b) For all active cases, individual program plans shall be reviewed and modified by the planning team, through the process described in Section 4646, as necessary, in response to the person's achievement or changing needs, and

³ This multiplier is commonly used in cases heard by this ALJ for various regional centers over the last 16 years.

no less often than once every three years. If the consumer or, where appropriate, the consumer's parents, legal guardian, or conservator requests an individual program plan review, the individual program shall be reviewed within 30 days after the request is submitted."

The Service Agency has the right and obligation to periodically review and monitor the SLS provided (see section 4648.1) to determine whether it is effective and shall be continued.

35. The evidence established that, under difficult circumstances, father has fashioned a program to utilize Services Agency services and generic resources in a comprehensive way to provide care and needed services for his two developmentally disabled children. However, he is not using Claimant's IHSS benefits in the manner that they were intended, and the law requires the Service Agency to treat the IHSS award as if the services listed therein are being provided, as required, by IHSS workers.

36. Much of the evidence and argument at the hearing centered on whether IHSS workers can meet Claimant's needs. This is appropriate for the parties to consider and possibly adjust services in the IPP process. However, this consideration appears nowhere in the statutes relating to SLS, IHSS, cost effectiveness or, specifically, "supplanting the budget" regarding generic agencies or IHSS specifically. The most specific language to this situation is section 4659, subdivision (c), effective July 1, 2009, that "regional centers *shall not* purchase any services that would otherwise be available from . . . In-Home Support Services" (Emphasis added.) Also, section 4689.05, subdivision (b), prevents a regional center from purchasing "supported living services for a consumer to supplant IHSS." This language places no value judgment on whether SLS is better than IHSS, or that higher paid and trained SLS staff can provide more comprehensive care, or that a SLS program is better than SLS mixed with IHSS. It simply

prevents the Service Agency from purchasing SLS to do what IHSS is designed to do. The Order below carries out these statutory directives.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Claimant's appeal from the action proposed by the Service Agency is granted in part and denied in part. The Service Agency may not reduce Claimant's funding for SLS from IABA from 504 to 232 hours per month. The Service Agency may reduce Claimant's funding for SLS from IABA from 504 to 351.88 hours per month, the reduction reflecting the amount of In-Home Supportive Services (152.12 hours per month) that relate to tasks under IHSS that may not be included in Claimant's SLS.

DATED: August 9, 2013.



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.