

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2013020617

CONNIE V.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on July 18, 2013, in Bishop, California. Connie V. (Claimant) was represented by her aunt and conservator, Jean C., with the assistance of paralegal, Karen Zaccheo.¹ Kern Regional Center (Service Agency or KRC) was represented by Michael Bowers, Program Manager.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on July 18, 2013.

ISSUE

Should KRC be required to pay Claimant's aunt retroactively for Claimant's care from February 11, 2012, through February 1, 2013, in the amount of \$66,000?

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

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FACTUAL FINDINGS

1. Claimant is a 45-year-old female client of the Service Agency who has been diagnosed with moderate mental retardation. She is under conservatorship and lives with her aunt and conservator, Jean C. (Service Agency Exhibit 8; Testimony of Jean C.)

2. Due to her disability, Claimant requires assistance with her personal needs, including bathing and personal hygiene. She has required and continues to require 24 hour supervision. (Service Agency Exhibit 8; Testimony of Jean C.)

3. Claimant receives up to 260 hours of In-Home Supportive Services (IHSS) through Mono County. (Exhibit 7; Testimony of Michael Bowers.)

4(a). Prior to 2011, based on "an agreement" between Jean C. and KRC, Jean C. received \$6,500 per month from KRC to provide direct services to Claimant. (Testimony of Michael Bowers.) The evidence was not clear regarding how these services were categorized. However, portions of the evidence suggested that the services were considered Family Vouchered Respite, provided in Claimant's home. (Exhibits 7 and 8.)

4(b). These hours of respite were in excess of the 90 hours per quarter set forth in Welfare and Institutions Code section 4686.5, subdivision (a)(2), effective in 2009. The evidence did not establish whether or not KRC had determined that Claimant met the exemption in subdivision (a)(3) (i.e. that "the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consume in the family home").

5. From September 2011 through February 2012, Claimant was removed from her aunt's home and placed in residential treatment for mental health issues. (Exhibit 8.)²

6. In 2011, new legislation was passed, including emergency regulations, which changed how vouchered services were provided. Vouchered services were no longer available via direct parent reimbursement. For respite services, families could choose to move their current workers to become employees for a vendored respite care agency or could chose to use a Fiscal Management Service (FMS) which would be the vendored entity that functions as the consumer's agent/co-employer in performing employment and payroll duties. Use of FMS would not preclude the use of the same care providers. (Testimony of Bowers; Exhibits 8 and 10.)

7. In February 2012, Claimant was returned to her aunt's home. According to Claimant's aunt, Claimant was traumatized by her removal from her home and it took about eight months to calm her anxieties and help her settle back in. (Testimony of Jean C.)

8. In July 2012, an Individualized Program Plan (IPP) meeting convened, and Claimant's aunt requested payment for Claimant's care 24 hours per day, seven days per

² Claimant's removal from her aunt's home created a hostile relationship between Claimant's aunt and KRC, which was evident during the fair hearing. Claimant's aunt is quite attached to Claimant and was very upset by her removal, for which she appeared to blame KRC. She believed the removal was unwarranted and harmful to Claimant. However, Claimant's removal from her home and any harm which may have occurred during her time away from home are not the subject of this fair hearing and will not be included in the discussion herein, which pertains solely to the issue of reimbursement for care after Claimant was returned to her aunt's home.

week. She was informed of the new legislation disallowing Family Vouchered Respite or direct funding to families. She was also informed of the FMS requirement and was provided with applications for submission to Full Circle FMS by her respite care providers. At the IPP, KRC also offered Behavior Respite, which

9. Claimant's aunt declined. KRC also offered a day program, eight hours per day, five days per week. KRC determined that Claimant was eligible for 20 hours per month of in-home respite. (Exhibit 8; Testimony of Bowers.) On July 31, 2012, KRC sent Claimant a Notice of Proposed Action (NOPA), stating that it "has denied funding for 24 hour/day In Home Respite hours." The stated reason for the proposed action was, "[Claimant] qualifies for up to 20 hours per month of In Home Respite per [KRC] Purchase of Service Guidelines and in accordance with state regulations and Trailer Bill Language 2009 and 2011. [Claimant] is receiving up to 260 hrs/mo of IHSS." (Exhibit 7.)

10(a). Claimant's aunt did not appeal the July 31, 2012 NOPA.

10(b). At the fair hearing, Claimant's aunt stated that she was too busy taking care of Claimant to appeal the July 31, 2012 NOPA.

11. At some point thereafter, Claimant's aunt requested retroactive payment for Claimant's care in an amount to reflect care provided 24 hours per day, seven days per week.

12. On January 24, 2013, KRC sent Claimant a NOPA, stating that it "has denied funding for retroactive pay back to February 2012 for 24 hour care for [Claimant]. This request was denied and not appealed on 7/31/12. KRC will begin providing up to 10 hrs/day of In Home Support effective 2/1/13." The stated reason for the proposed action was, "[Claimant] qualifies for up to 20 hours per month of In Home Respite per [KRC] Purchase of Service Guidelines and in accordance with state regulations and Trailer Bill Language 2009 and 2011. [Claimant] is receiving up to 260 hrs/mo of IHSS." (Exhibit 4.)

13. In January 2013, Claimant's aunt submitted a Fair Hearing Request, seeking reimbursement for her care of Claimant. (Exhibit 3.)

14. In a March 27, 2013 letter following an informal meeting, KRC maintained its denial for retroactive pay for Claimant's care. (Exhibit 2.)

15. At the fair hearing, Claimant's aunt and her paralegal argued that she should be paid retroactively for caring for Claimant and that no other agency could care for her more effectively.

16(a). At the fair hearing, KRC reiterated that Claimant's aunt did not appeal the July 2012 NOPA.

16(b). KRC argued that it cannot quantify any payment for the past services in 2011 and 2012, since Claimant has also received IHSS. Additionally, KRC noted that since February 2013, Claimant has continued to receive up to 260 hours of IHSS from the county, plus 10 hours per day of in home support funded by KRC. She has also been offered a day program (8 hours per day, 5 days per week. KRC asserted that Claimants needs are being met.

17(a). The evidence did not establish that "the intensity of the consumer's care and supervision needs [was] such that additional respite [was] necessary to maintain the consumer in the family home."

17(b). While Claimant's care needs in 2012 may have required respite hours in excess of the 20 offered by KRC, Claimant's aunt did not appeal KRC's July 2012 NOPA, and there has been insufficient evidence at this July 2013 fair hearing to establish Claimant's care needs during 2012 such that a determination can be made that Claimant's needs met the exemption and/or required 24 hour respite.

17(c). Moreover, even if the number of respite hours Claimant needed in 2012 could be assessed, the evidence did not establish the 2012 rate for respite services such that KRC would be required to reimburse Claimant's aunt the amount of \$66,000.

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LEGAL CONCLUSIONS

1. Cause exists to deny Claimant's appeal of the Service Agency's denial of retroactive payment to her aunt in the amount of \$66,000. (Factual Findings 1 through 17.)

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.) From September 2011 through February 2012, Claimant's aunt did not receive payments under her prior agreement with KRC for providing care for Claimant. In seeking reimbursement for what had been previously-funded 24-hour respite hours, Claimant bears the burden of proving by a preponderance of the evidence that the reimbursement (i.e. the funding of services) is necessary. Claimant has not met her 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, or 30 hours per month, and Claimant has not established that an exemption must have been granted in 2012.

4(b). After the break in KRC services in 2011 and placement in residential treatment for mental health issues, Claimant's needs would likely have changed. In 2012, in order to obtain funding for more than 30 respite hours per month, Claimant must have established 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." In July 2012, KRC determined that her needs were only 20 respite hours per month, and Claimant failed to appeal that determination. Although Claimant's aunt explained that she did not appeal the determination because she was too busy caring for Claimant, unfortunately, the demanding nature of her caregiving duties did not exempt her from meeting the mandated deadline for appealing a regional center determination. Additionally, as stated above, while Claimant's care needs in 2012 may have required respite hours in excess of the 20 offered by KRC, there has been insufficient evidence at this July 2013 fair hearing to establish Claimant's care needs during 2012 such that a determination can be made that Claimant's needs met the exemption and that she required 24 hour respite.

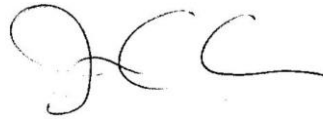
4(c). Moreover, as stated above, even if the number of required respite hours in 2012 could be determined, the evidence did not establish the 2012 rate for respite services such that KRC would be required to reimburse Claimant's aunt the amount of \$66,000.

5. Given the foregoing, the Service Agency's denial of retroactive payment to Claimant's aunt in the amount of \$66,000 was appropriate.

ORDER

Kern Regional Center's denial of retroactive payment to Claimant's aunt in the amount of \$66,000 is upheld. Claimant's appeal is denied.

DATED: August 1, 2013



JULIE CABOS-OWEN

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.