

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Case No. 2013040107

JORDAN M.-P.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL CENTER,

Service Agency.

DECISION

The hearing in the above-captioned matter was held on May 10, 2013, at Alhambra, California, before Joseph D. Montoya, Administrative law Judge (ALJ), Office of Administrative Hearings (OAH). Eastern Los Angeles Regional Center (ELARC or Service Agency) was represented by Judy Castaneda, Fair Hearing Coordinator. Claimant, Jordan M.-P. (Claimant or Jordan) appeared through his mother, E.P.¹

Evidence was received, argument was heard, and the case was submitted for decision on the hearing date. The Administrative Law Judge hereby renders his decision in the case.

ISSUE PRESENTED

Must the Service Agency provide in-home respite care (IH respite) in lieu of out-of-home respite care (OOH respite) if Claimant's mother wishes to take a short vacation?

¹ Initials are used in the place of surnames to protect Claimant's privacy.

FACTUAL FINDINGS

1. Claimant is an 11-year-old boy who is a consumer of services provided by the Service Agency pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.² Claimant is eligible for services based on his diagnosis of autism.

2. The Service Agency issued a Notice of Proposed Action (NOPA) on or about March 18, 2013, denying a request for IH respite care in lieu of OOH respite. (Ex. 1.) Thereafter, Claimant's mother filed a Fair Hearing Request (FHR), on or about March 26, 2013. (Ex. 2.) An amended NOPA was offered at the hearing. (Ex. 8.) All jurisdictional requirements have been met.

3. Claimant lives with his mother within the Service Agency's catchment area. Claimant's father is not involved in Claimant's life. Claimant has significant disabilities; he is nonverbal and he wears diapers because he lacks bowel and bladder control. He needs assistance with all self-help needs, including bathing, dressing, brushing his teeth. He mainly eats with his fingers, and while he can stab a good-sized piece of food with a fork, he cannot use a spoon. He tantrums either in the community or the home, and sometimes attempts to smear his feces. He sleeps only three to four hours per night, and has no safety awareness, while having the tendency to wander away if not closely monitored. (Ex. 5.) According to his mother's testimony, he needs constant one-to-one supervision. His school district provides him with a one-to-one aide during the school day.

4. The Service Agency provides 30 hours of IH respite care per month to Claimant. This is the maximum amount under controlling statutes, absent a finding that more such services are needed to maintain the child in the home or to cope with an extraordinary event that has impacted the family's ability to care for the child.

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

5. Since May 2011, the Service Agency guidelines regarding the use of OOH respite have provided 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." (Ex. 4, p. 2.)

6. In December 2012, Claimant's mother raised the issue of OOH respite care with Claimant's service coordinator, Jessica Parra. (Ex. 6, p. 2.) The two communicated further by e-mail in early February 2013 regarding the use of OOH respite care, as Claimant's mother wanted to take a short vacation. In an e-mail from Ms. Parra to Claimant's mother, dated February 7, 2013, the former stated that certain forms would have to be completed to obtain OOH respite care, and she further stated the Service Agency would be unable to supplement the then-pending IH respite unless the OOH respite option was first examined. (*Id.*, p. 1.) Finally, Ms. Parra reminded Claimant's mother that February 7, 2013, was her last day in the office for some time, as Ms. Parra was going on maternity leave beginning that day.

7. An impediment developed when it was discovered that Claimant did not have a TB clearance; this took time to complete. However, the temporary service coordinator, filling in for Ms. Parra was able to start the process whereby a potential out-of-home setting could be found. In that process, licensed care facilities are contacted to see if they can temporarily house a consumer of regional center services.

8. Service agency staff located potential facilities, specifically two homes that have a common management. The Service Agency staff understood that the facility, a level 4-I facility, would be able to take Claimant during the few days that his mother would be away from the family home. A level 4-I facility is deemed capable of caring for persons with significant disabilities and behavior issues; it is the highest rating given to such facilities.

9. Claimant's mother did not learn the identity of the facility until three days before she was to go on vacation. She spoke by telephone to the administrator of the two facilities, Dr. Fajardo. Claimant's mother understood from her conversation with Dr. Fajardo that he had not realized how intensive her son's needs were, and that his firm had

not contemplated the sort of one-to-one supervision that her son needed. He told Claimant's mother to call the Service Agency to get approval for such additional supervision.

10. Claimant's mother phoned the temporary service coordinator, Ms. Romero, and left her a voice mail, to the effect that the facility could not take her son without approval for more staffing. Claimant's mother spoke to him again on the day of the hearing and he confirmed that position, that he would need more staffing and would have to have the Service Agency's agreement to pay more for the staffing.

11. Ms. Romero understood from the message that Claimant's mother did not want her son in the facility. Ms. Romero recalled that Claimant's mother stated that the placement was not going to work out.

12. It appears from the available evidence that there was a breakdown in communication among the three main players, Claimant's mother, Ms. Romero, and Dr. Fajardo regarding Claimant's needs. Dr. Fajardo does not appear to have understood the intensity of Claimant's behaviors and needs. Ms. Romero may have misunderstood Claimant's mother, who, at the same time, may not have been clear in her communication that there was a staffing problem that made her uneasy.

13. Claimant's mother pointed out that if she were provided with an extra 16 hours of respite so that she could take a weekend off, such would be more cost effective than placing her son in a licensed facility, a contention that was not seriously contested by the Service Agency.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 and 2.

2. Services are to be provided to regional center clients in conformity with the Individual Program Plan (IPP), per section 4646, subdivision (d), and section 4512, subdivision (b). Consumer choice is to play a part in the construction of the IPP. Where

the parties cannot agree on the terms and conditions of the IPP, a Fair Hearing may, in essence, establish such terms. (See §§ 4646, subd. (g); 4710.5, subd. (a).)

3. The services to be provided to any consumer of regional center services must be individually suited to meet the unique needs of the individual consumer in question, and within the bounds of the law each consumer's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subds. (a)(1) and (a)(2).) Otherwise, no IPP would have to be undertaken; the regional centers could simply provide the same services for all consumers. The Lanterman Act assigns a priority to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).)

4. Section 4512, subdivision (b), of the Lanterman Act states in part:

'Services and supports for persons with developmental disabilities' means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of . . . the consumer's family, and shall include consideration of . . . the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual

program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, . . .special living arrangements, physical, occupational, and speech therapy, . . .education, . . . recreation, . . . respite, . . .

5. Services provided must be cost effective (§ 4512, subd. (b), *supra*), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, *e.g.*, §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) It is clear that the regional centers' obligations to other consumers are not controlling in the individual decision-making process, but a fair reading of the law is that a regional center is not required to meet a consumer's every possible need or desire, in part because it is obligated to meet the needs of many disabled persons and their families.

6. Services are to be chosen through the IPP process. (§ 4512, subd. (b).) The IPP is to be prepared jointly by the planning team, and services purchased or otherwise obtained by agreement between the regional center representative and the consumer or his or her parents or guardian. (§ 4646, subd. (d).) The planning team, which is to determine the content of the IPP and the services to be purchased is made up of the disabled individual, or his or her parents, guardian or representative, one or more regional center representatives, including the designated service coordinator, and any person, including service providers, invited by the consumer. (§ 4512, subd. (j).)

7. Pursuant to section 4646, subdivision (a), the planning process is to take into account the needs and preferences of the consumer and his or her family, "where appropriate." Further, services and supports are to assist disabled consumers in achieving the greatest amount of self-sufficiency possible; the planning team is to give the highest preference to services and supports that will enable a minor child with developmental disabilities to remain with his or her family. (§ 4648, subd. (a)(1).)

8. "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 at home.
- (3) Relieve family members from the constantly demanding responsibility of caring for the clients.
- (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."

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

10. Thus, out-of-home respite is different from in home respite in two major respects: it is provided out of the home, and it is used for planned or emergency absences from the home. The Service Agency may therefore treat its use differently from traditional in home respite.

11. In 2009, limits were imposed on the regional centers ability to purchase respite care for the families of consumers. Specifically, section 4686.5 was added to the Lanterman Act. It provides, essentially, that a regional center shall not purchase more than 90 hours of in-home respite in a quarter of one year. (§4686.5, subd. (a)(2).) However, a

regional center may grant an exemption, and provide more of such services, where it is demonstrated either that more than 90 hours per quarter of respite care is required in order to maintain the Claimant in the family home, or where it has been established that there has been an extraordinary event that impacts the family's ability to meet the care and supervision needs of Claimant.

12. Section 4646.4 was also added to the Lanterman Act as a cost-containment measure in response to the state budget crisis of that time. In particular, section 4646.4, subdivision (a), requires regional centers, among other cost saving measures, to conform to their purchase of service guidelines, and utilize available generic resources. However, a service policy established by a regional center to govern the provision of services may not take precedence over the established individual needs of the consumer. (*Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390-393.)

13. The Service Agency's current policy regarding the use of OOH respite hours in lieu of IH respite has the effect of capping IH respite at the level of 30 hours per month as required by section 4686.5, subdivision (a)(2). A person who believes they need more IH respite must seek an exception from the new rule. Otherwise, the disabled person should use OOH respite for the purpose relatively long breaks the constant care and supervision of a child.

14. The undersigned tends to agree with the contention made by Claimant's mother, to the effect that an occasional increase in IH respite, to cover a short vacation or trip, would likely be more cost-effective than short term placement in a facility. However, that aspect of the record has not been adequately developed, though some cost figures were brought out in the hearing. Certainly, the Lanterman Act requires any service to be cost effective. Overall, the OOH respite service policy outwardly appears in compliance with the Lanterman Act. It cannot be found, at this juncture and on this record, that it is being applied in some way that contravenes the act, and based on this record the appeal must be denied.

15. If Claimant desires extra respite care so that his mother can take some time

off then OOH respite will have to be pursued by the family and the Service Agency. In light of the communication problems that occurred in this case, Claimant's mother should alert the service coordinator of her needs as soon as known, to allow time for the search process to go forward. The Service Agency should forward a clear and detailed written description of the consumer's behaviors and needs to potential facilities, along with a note to the effect that the boy needs around the clock one-to-one supervision. That communication should take place promptly, so that all parties are on the same page regarding the child's needs. Absent such clear communication, it might not be established that an appropriate facility is available. However, if a facility is found that can meet Claimant's needs, then his mother may examine it further to assure that it is suitable.

ORDER

Claimant's appeal is denied, without prejudice to future appeals if the Service Agency is unable to provide a suitable out-of-home placement.

May 24, 2013

Joseph D. Montoya

Administrative Law Judge

Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.