

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DAVID H.,
JENNIFER H., AND
KEVIN H,

Claimants,

v.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH Nos. 2013040763
2013040767
2012040769

DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on May 30, 2013, in Alhambra, California.

Belinda Salinas-Pulido, Supervisor, represented the Eastern Los Angeles Regional Center (ELARC or Service Agency). Claimants David H., Jennifer H, and Kevin H. (Claimants)¹ were represented by their father (Father). Claimants' mother (Mother) was present and assisted by a certified Vietnamese language interpreter.

Pursuant to a stipulation between the parties, OAH Case Numbers 2013040763, 2013040767, and 2013040769 were consolidated for hearing purposes only. Oral and

¹ Claimants are identified by first name and last initial or title to protect their privacy.

documentary evidence was received, the record was closed, and the matter was submitted for decision on May 13, 2013.

ISSUE

Must the Service Agency fund in-home respite care in lieu of out-of-home respite care from March 1, 2013 through March 23, 2013, the period in which Mother was out of the country?

FINDINGS OF FACT

1. Claimants are siblings and consumers of the Service Agency. Specifically, David H. and Jennifer H. are nine-year-old twins, and Kevin H. is six-years-old and has a twin sister. David H. has Attention Deficit Hyperactivity Disorder Combined Type and Pervasive Development Disorder Not Otherwise Specified. Jennifer H. and Kevin H. have varying degrees of autism spectrum disorders. Claimants are eligible for services pursuant to the Lanterman Developmental Disabilities Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.²

2. The Service Agency issued a Notice of Proposed Action (NOPA) on or about April 4, 2013, denying Claimants' request for in-home respite care in lieu of out-of-home respite care. On April 12, 2013, Father filed a Fair Hearing Request on behalf of each claimant. All jurisdictional requirements have been met.

3. Claimants live with Mother and Father within the Service Agency's catchment area. The Service Agency provides 30 hours of in-home respite services per month to each 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.

4. Since May 2011, the Service Agency guidelines regarding the use of out-of-home respite care have provided that “[i]n home respite in lieu of out of home respite may be used only when there is no out of home respite arrangement available.” The guidelines also provided that the Service Agency “shall not purchase more than 21 days of out of home respite services in a fiscal year.” The purpose of these guidelines was to control costs and to conserve resources shared by the Service Agency’s consumers. These guidelines were set forth in David H.’s and Jennifer H.’s Individual Program Plans (IPP) of September 24, 2012, and in Kevin H.’s IPP of December 14, 2012, all of which Father signed and acknowledged.

5. on March 19, 2012, Mother’s sister died in Vietnam as a result of illness. Mother became depressed, which manifested in incessant crying, profound sadness, and hair loss. On or about February 2, 2013, Mother’s family in Vietnam began planning a memorial service to mark the one year anniversary of her sister’s death. Because of Mother’s prolonged sadness, Father felt that Mother would feel better if she could attend the memorial service. Consequently, Mother left for Vietnam on Friday, March 1, 2013, to attend the memorial service scheduled for March 16, 2013.

6. On Monday, March 4, 2013, Father contacted the Service Agency to request additional respite hours for the month of March 2013, due to Mother’s departure. Specifically, Father spoke collectively with Diane Sepulveda, who was the service coordinator assigned to Claimants’ cases, and Elizabeth Ornelas, who was Ms. Sepulveda’s supervisor, and advised them that Mother had to go out of the country unexpectedly, and now he desired in-home respite services in lieu of out-of-home respite care. Ms. Sepulveda and Ms. Ornelas advised Father that the Service Agency no longer provided in-home respite services in lieu of out-of-home respite services as it had in the past, due to the change in policy in May 2011, unless no out-of-home respite facilities were available. However, Ms. Sepulveda and Ms. Ornelas, who presumed Mother’s departure was due to an emergency, told Father that they would begin a search for out-of-home respite

locations for Claimants. Ms. Sepulveda and Ms. Ornelas also advised Father he could utilize the 30 hours of monthly in-home respite services while they located facilities, which Father declined. Ms. Sepulveda notified Father that, if the Claimants had not had physical examinations and Tuberculosis (TB) tests performed within the last 12 months, he would need to obtain them for each claimant, or Claimants would not be permitted to stay in an out-of-home respite facility. Father advised he would obtain the exams and TB tests for Claimants.

7. Father was too busy to obtain exams and TB tests right away, but when he did, he contacted Ms. Sepulveda on or about Friday, March 8, 2013, and advised he was too busy to physically deliver the test results and exam reports to the Service Agency. This prompted Ms. Sepulveda to come to Father's home on or about Monday, March 10, 2013, and retrieve the results and reports. On March 12, 2013, Ms. Sepulveda returned to Father's home and gave him a list comprised of three out-of-home facilities she identified for Claimants, including a facility that could accommodate all three children.

8. Although Ms. Ornelas testified to the contrary, Father, according to his testimony, contacted these facilities beginning on or about Thursday, March 14, 2013. Father's testimony, in this regard, is given more weight, as the Service Agency proffered no witnesses or documents from the facilities evidencing that Father failed to contact them, and the demeanor and manner of Father while testifying on this topic suggested he was truthful. Father waited several days for a return call from one facility, as well as the receipt of written information he requested from another facility. Father made no follow-up telephone calls to the facilities, or attempted any visits. On or about March 19 or 20, 2013, Father left a voicemail message for Ms. Sepulveda advising he had not heard back from the facilities.

9. On or about March 21, 2013, Father and Ms. Sepulveda spoke by telephone, and Ms. Sepulveda inquired whether Father had visited any of the facilities. Father responded in the negative, advised her of his attempts to contact them, and requested Ms.

Sepulveda to visit the facilities with him to ensure they were satisfactory. Ms. Sepulveda advised that her busy caseload did not permit her go with him to visit the facilities, and that he would have to visit the facilities on his own as other parents were required to do. Later that day, Ms. Sepulveda advised Father that, given the passage of time and the limitations on existing availability, Claimants would no longer be able to attend the same facility, but rather would have to be separated. Father objected to having one or more of his children in separate facilities, and insisted that Claimants attend the same facility. Ms. Sepulveda told Father to submit, in writing, any specific requests he had concerning out-of-home respite care.

10. Two days later, on March 23, 2013, Mother returned from Vietnam as planned.

11. On April 4, 2013, Father faxed a letter to the Service Agency seeking reimbursement for money he paid to a care provider for respite hours performed in his home during his wife's absence, due to her taking a "vacation" from March 1, 2013 to March 23, 2013.

12. On April 4, 2013, the Service Agency denied Father's request, as there was no emergency situation as it initially thought, but rather Father made the request because Mother took a vacation. The Service Agency generally required 30 days notice from parents for requests for out-of-home respite care when parents wished to take time for vacation.

LEGAL CONCLUSIONS

1. Services are to be provided to regional center clients in conformity with 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).)

2. 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).)

3. 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, . . .

4. 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.

5. 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).)

6. 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).)

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

(a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, all of the following shall apply:

- (1) A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.
- (2) A regional center shall not purchase more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer.
- (3)(A) A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) if it is demonstrated that the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer.

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: (1) it is provided out of the home, and (2) 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. 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.)

12. The Service Agency’s current policy regarding the use of out-of-home respite hours in lieu of in-home respite has the effect of capping in-home 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 in-home respite must seek an exemption from the new rule. Otherwise, the disabled person should use out-of-home respite for the purpose of relieving caregivers of lengthy periods of constant care and supervision of that individual.

13. Here, the dispute is whether the Service Agency must fund in-home respite care in lieu of out-of-home respite care during the period in which Mother was out of the

country, specifically from March 1, 2013 through March 23, 2013. As set forth above, controlling statutes provide that regional centers may not purchase more than 90 hours per quarter of in-home respite services (i.e., 30 hours per month) for a client, unless that client qualifies for an exemption, such as an extraordinary event that impacts the family's ability to meet the care and supervision needs of the consumer. (§4686.5, subd. (a)(3)(A).) Father failed to establish that Claimants, who were each receiving the maximum amount of in-home respite services allowable by statute, qualified for such an exemption. While he argued, in essence, that Mother's departure was due to an emergency situation that impacted that the family's ability to meet the care and supervision needs of the Claimants, the evidence showed otherwise. Specifically, the facts established that Mother's departure was not due to emergency reasons, as Father had initially represented to the Service Agency, but rather Mother left the country for non-emergent purposes; namely to attend a memorial service for her sister. The evidence showed that Mother's family had been planning the event since February 2, 2013, approximately one month prior to Mother's departure. In fact, Father, himself, referenced Mother's period in Vietnam as a "vacation" in his April 4, 2013 letter to the Service Agency, in which he requested reimbursement for his payment of in-home respite care services during Mother's absence.

14. While Father alternatively argued, citing his testimony, as well as Mother's, that she suffered sadness and depression as a result of her sister's death in March 2012, which impacted the family's ability to meet the care and supervision needs of the Claimants, and thus, necessitated Mother's trip to Vietnam, Father failed to provide sufficient proof to support this position. Specifically, Father presented no testimonial or documentary evidence from any doctor, counselor, or any other mental health professional suggesting Mother's last minute trip was necessary as a form of therapy or treatment. Given these and the above factors, Father failed to establish that Claimants qualified for an exemption from the limitations on in-home respite hours.

15. As for out-of-home respite care, statutory authority provides consumers 21 days per fiscal year of out-of-home respite care, pursuant to section 4686.5, subdivision (a)(3)(A). However, Service Agency guidelines provide that, if an appropriate out-of-home respite care facility is unavailable, then out-of-home respite care can be converted to in-home respite care. In the case of Claimants, Father failed to establish that appropriate out-of-home respite care was unavailable. The evidence showed that Father had very limited contact with the facilities Ms. Sepulveda identified for Claimants. Specifically, Father called two of the three facilities only once, made no follow-up calls, and made no effort to visit any of the facilities. He offered absolutely no evidence establishing that any of the identified facilities was inappropriate, and only asserted a complaint concerning the placement of Claimants in separate facilities. However, neither the Lanterman Act nor the Service Agency's guidelines require that siblings attend the same out-of-home respite facility, and Father presented no other authority establishing that Service Agencies are required, when determining appropriateness and availability of an out-of-home facility, to keep siblings together. Given the above, the Service Agency is not required to fund in-home respite care in lieu of out-of-home respite care during the period in which Mother was out of the country, March 1, 2013 through March 23, 2013.

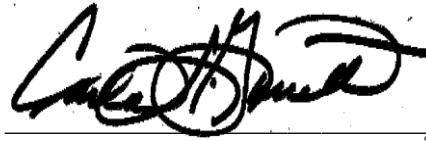
ORDER

Claimants' appeal is denied. The Service Agency may deny Claimants' request for funding of in-home respite care in lieu of out-of-home respite care.

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.

Date: June 12, 2013

A handwritten signature in black ink, appearing to read 'Carla L. Garrett', is positioned above a horizontal line.

CARLA L. GARRETT

Administrative Law Judge

Office of Administrative Hearings