

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

BOILAN V.,

Claimant,

v.

EASTERN LOS ANGELES REGIONAL

CENTER,

Service Agency.

OAH Nos. 2013060412

DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on August 6, 2013, in Alhambra, California.

Lee Strollo, Supervisor of the Family Services Unit, represented the Eastern Los Angeles Regional Center (ELARC or Service Agency). Claimant Boilan V. (Claimant)<sup>1</sup> was represented by her mother (Mother), who was Claimant's appointed representative in this matter.

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on August 6, 2013.

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<sup>1</sup> Claimant is identified by first name and last initial or title to protect her privacy.

## ISSUE

Must the Service Agency fund in-home respite care in lieu of out-of-home respite care from June 20, 2013 through July 2, 2013, the period in which Mother was out of the country?

## FINDINGS OF FACT

1. Claimant is 30-years-old, and is a consumer of the Service Agency. She has been diagnosed with severe mental retardation and congenital microcephaly. Claimant is non-verbal, fully dependent on others for all activities of self-help and daily living, and must be bathed, dressed, and diapered. She requires supervision at all times to prevent her from eating inedible objects and from wandering off. Claimant is eligible for services pursuant to the Lanterman Developmental Disabilities Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.<sup>2</sup>

2. The Service Agency issued a Notice of Proposed Action (NOPA) on or about May 16, 2013, denying Claimant's request for in-home respite care in lieu of out-of-home respite care. On May 20, 2013, Mother filed a Fair Hearing Request on behalf of Claimant. All jurisdictional requirements have been met.

3. Claimant lives with her Mother within the Service Agency's catchment area. The Service Agency provides 39 hours of in-home respite services per month.

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 and statutory authority also provided that the Service Agency "shall not purchase more than 21 days of out of home respite services in a fiscal year." The

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<sup>2</sup> All statutory references are to the Welfare and Institutions Code.

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 Claimant's Individual Program Plans (IPP) of March 20, 2013, which Mother signed and acknowledged.

5. In April 2013, Mother advised Claimant's service coordinator, Erika Rosas, that Mother would be leaving for vacation to Russia on June 20, 2013, and returning on July 2, 2013. Mother requested that Claimant receive in-home respite care during her absence, as Claimant had significant behavioral problems, as set forth in Claimant's March 20, 2013 IPP, such as tearing her diaper, attempting to eat and smear her feces, overfilling her mouth with food when eating, trying to touch passing vehicles, and eloping. Mother was concerned that Claimant's behaviors would worsen if required to be housed in an out-of-home facility, as she was not used to being away from home. Ms. Rosas reminded Mother of the out-of-home respite policy as set forth in Claimant's IPP, and advised Mother that Claimant had already used 17 of the 21 days of out-of-home respite for the fiscal year, and had only four days of out-of-home respite care remaining.

6. Ms. Rosas did not initially submit a referral packet to the placement coordinator to locate out-of-home respite facilities for Claimant, as Mother had expressed her belief that such facilities would do more harm than good.

7. On or about May 16, 2013, the Service Agency issued a NOPA denying her request for in-home respite care in lieu of out-of-home respite care, for the period in which Mother would be on vacation, on the grounds that Claimant was required to abide by its out-of-home respite service policy, which only allowed in-home respite in lieu of out-of-home respite care when out-of-home respite facilities were unavailable. In addition, the NOPA noted that Claimant had only four days left of out-of-home respite for the 2012-2013 fiscal year.

8. On or about June 3, 2013, Ms. Rosas submitted a referral packet to the placement coordinator to locate out-of-home respite facilities for Claimant. On June 12, 2013, eight days before Mother's scheduled trip, Ms. Rosas telephoned Mother to advise her of four available out-of-home respite facilities that were equipped to address Claimant's needs (i.e., level four facilities). Ms. Rosas also advised Mother that Claimant could only reside in an out-of-home facility for four days for the remainder of the fiscal year, specifically, from June 20, 2013 to June 23, 2013. Thereafter, Mother would have to make independent arrangements for Claimant's care at her own expense from June 24, 2013 through June 30, 2013. However, from July 1, 2013 through July 2, 2013, Claimant could return to an out-of-home respite facility. Mother explained she had already made other arrangements for Claimant to remain at home, and advised that she would not agree to place Claimant in an out-of-home respite facility.

9. At hearing, Mother explained she did not have the heart to place Claimant in an out-of-home respite facility because two or three days outside of the home were too much for Claimant to bear. In addition, she expressed concern over Claimant's emotional and behavioral well-being should she adhere to the Service Agency's proposed schedule to place Claimant in an out-of-home facility for four days, remove her from out-of-home care for seven days, and then return her to out-of-home care for two days. Moreover, Mother expressed how inequitable the Service Agency's actions were, in that after giving the Service Agency approximately two months' notice, the Service Agency provided her with only one week to explore the identified homes, which was extremely difficult given the preparation required for the trip, as well as the fact that she worked two jobs.

10. On June 13, 2013, Ms. Rosas sent Mother a letter via certified mail memorializing their telephone conversation of June 12, 2013, and set forth the available

out-of-home respite facilities the placement coordinator identified to address Claimant's needs.

11. Mother incurred approximately \$1,200 in costs to provide in-home respite care for Claimant during her vacation.

## LEGAL CONCLUSIONS

1. The Service Agency was 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.

2. 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).)

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 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.

9. "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."

10. 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).)

11. 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.



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 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.

14. Here, the Service Agency was 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, specifically from June 20, 2013 through July 2, 2013 (i.e., 13 days). As a cost savings measure, statutory authority requires regional centers to conform service purchase guidelines. (§ 4646.4, subd. (a).) In that regard, as set forth in Legal Conclusions 7 and 11, the Service Agency must adhere to these guidelines, unless it is established that the individual needs of the consumer requires more. In the instant matter, the Service Agency's purchase of service guidelines for out-of-home respite services, as set forth in Claimant's March 20, 2013 IPP, provided that Claimant would receive 21 days of out-of-home respite services per fiscal year, and that these days could be converted to in-home respite care only when no out-of-home respite arrangements were available.

The evidence established that out-of-home respite arrangements were, indeed, available, though the Service Agency's provision of only eight days' notice to Mother was less than ideal, especially given the two months' notice Mother had given the Service Agency of her intent to take a vacation. Nevertheless, eight days' notice provided Mother sufficient time visit at least one of the four out-of-home respite facilities to determine whether it was appropriate for Claimant. However, Mother made it clear to the Service Agency, as early as April, that she did not intend to place Claimant in an out-of-home respite facility, and she reiterated that position on June 12, 2013, when the Service Agency advised her of the available out-of-home facilities. As such, Mother offered no evidence establishing that any of the identified level four facilities was inappropriate or unable to address Claimant's needs.

15. Even if the Service Agency was required to convert Claimant's out-of-home respite to in-home respite, as Mother has claimed, the evidence showed that, at the time of Mother's request, Claimant had only four days of out-of-home respite care remaining for the 2012-2013 fiscal year, not 13 days as Mother required for her vacation, and she failed to establish that Claimant qualified for an exemption that would provide Claimant with additional respite days. Specifically, Mother failed to demonstrate, pursuant to Section 4686.5. subdivision (a)(3)(A), that the intensity of Claimant's care and supervision needs were such that additional respite was necessary to maintain the Claimant in the family home. While Claimant's needs were extensive, Mother offered no testimony from doctors, therapists, or other experts to establish that Claimant's individual needs could not be met without the addition of more respite time within the home or otherwise.

16. Given the above, Mother failed to establish that the Service Agency was 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, specifically from June 20, 2013 through July 2, 2013.

## ORDER

Claimant's 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.

Date: August 23, 2013

A handwritten signature in black ink, appearing to read 'Carla L. Garrett', written over a horizontal line.

CARLA L. GARRETT

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.