

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

NORTH BAY REGIONAL CENTER,

Service Agency.

OAH No. 2014030409

DECISION

Administrative Law Judge Regina J. Brown, State of California, Office of Administrative Hearings, heard this matter on June 4, 2014, in Santa Rosa.

Claimant was represented by his mother.

Kristin N. Casey, Attorney at Law, represented service agency North Bay Regional Center (NBRC).

The record was left open to June 12, 2014, to allow the parties to submit written closing arguments. Claimant's brief (marked for identification only as Exhibit P) and NBRC's brief (marked for identification only as Exhibit 8) were both received on June 12, 2014.

The record closed and the matter was submitted on June 12, 2014.

ISSUE

Whether regional center may consider In-Home Supportive Services for protective supervision a generic resource for respite and daycare services, and discontinue funding of respite and daycare services for Claimant.

FACTUAL FINDINGS

1. Claimant is a 13-year-old boy. He is eligible for regional center services based on a diagnosis of autism. Claimant has a history of unsafe behaviors including eloping from the home, climbing up walls and to high places, hiding out in enclosed spaces, stuffing things down toilets, having aggressive tantrums, a fascination with lighters and matches, and groping women's breasts. He acts out impulsively, and he lacks safety awareness and good judgment. For example, recently he threw a plastic toy onto the stove which caught on fire. On another occasion, his mother found him hiding in the clothes dryer. He has communication difficulties with both receptive and expressive language. He does not have typical pain sensation or the ability to communicate his pain. Claimant requires constant supervision to prevent him from hurting himself or others.

2. Pursuant to Claimant's Individual Program Plan (IPP), he receives a variety of services from NBRC including respite services. Respite is one of an array of family support services that are provided to an individual with developmental disabilities and his family and contributes to the ability of the family to continue to reside together. On September 18, 2012, NBRC completed a respite worksheet for Claimant. It was determined that Claimant was eligible for a total of up to 63 hours per quarter of respite services through September 2015.¹ It was noted in an IPP Addendum that if In-Home Supportive Services (IHSS) protective supervision was obtained, which met the need for temporary relief from the constant care of Claimant, then the respite hours would be reassessed and/or discontinued. Claimant's mother was encouraged to apply for IHSS benefits.

¹ Prior to that, according to an IPP Addendum, dated March 2, 2012, Claimant received up to 90 hours per quarter of respite services.

3. In Claimant's IPP, it was also determined that he was eligible to receive daycare services from NBRC. Claimant's father works full-time as a special education public school teacher, and his mother works part-time as an occupational therapist. The purpose of daycare is to keep Claimant safe at home and in the community when his parents are at work. His parents are responsible to pay the daycare provider the first \$5.00 of each hour for daycare services, then NBRC pays a supplement at the rate of \$3.70 per hour, and his parents are responsible for any additional amount over the supplement. Claimant's daycare services vary each month ranging from approximately 68 to 87 hours per month.

4. In 2013, the Sonoma County Social Services Department found Claimant eligible to receive IHSS. According to the IHSS Notice of Action, Claimant received IHSS funding for protective supervision in the amount of approximately 31.81 hours per week (136.8 hours per month). IHSS protective supervision is to provide supervision for one who suffers from a mental impairment to keep him or her from sustaining injury or accident. IHSS protective supervision may be provided by a third party or a parent. IHSS protective supervision can also provide a break for parents from the constant supervision of the person requiring the services. Claimant's mother became his IHSS provider. On February 6, 2014, NBRC staff became aware of Claimant's IHSS eligibility.

5. In a Notice of Proposed Action (NOPA), dated February 20, 2014, NBRC notified Claimant that his respite and daycare services would be terminated. The stated reason for the action was as follows:

[Claimant] receives 31.81 or 136.8 hours per month of IHSS Protective Supervision (direct supervision). Because Noah's parents would get a break from the constant care and supervision of [Claimant], and [Claimant] would be supervised during the time his parents are at work, if an

IHSS worker provides Protective Supervision (direct supervision) of [Claimant], NBRC has determined that Protective Supervision meets the need for both respite and daycare and is therefore a generic resource. When a generic resource meets the identified need, NBRC may not use tax payers' money to fund respite and daycare services when there is a generic resource available that can meet the same needs.

6. Claimant appealed, and this hearing followed. Claimant contends that respite and daycare services should not be terminated because his needs under protective supervision do not meet the same needs he requires for respite or daycare.

RESPITE

7. Courtney Singleton, NBRC Manager, testified at the hearing regarding NBRC policies and procedures regarding respite. The purpose of respite is to give parents a temporary break from the constant responsibility of caring for a child who receives NBRC services. NBRC's Procedure Memo 2315 sets forth NBRC's policy regarding the purchase of respite services. It requires NBRC to pursue alternative funding resources for respite and demonstrate a cost effective use of public funds. Procedure Memo 2315 also provides that individuals that are eligible for IHSS are not eligible for any NBRC services that duplicate those covered by IHSS.

8. According to Singleton, all IHSS services are not viewed as alternative funding sources for the provision of respite. Also, IHSS protective supervision allows parents to have a break from caring for their child.² Furthermore, IHSS protective

² Pursuant to Government Code section 11515, official notice has been taken of the California Department of Social Services' Manual of Policies and Procedures (CDSS

supervision and respite are equivalent because they achieve the same purpose of keeping Claimant safe and freeing the primary caregiver from that responsibility temporarily.

9. NBRC contends that Claimant's current respite worker can become an IHSS worker and provide IHSS protective supervision for Claimant, thus meeting the need for a parental break. Claimant's parents can provide the same training to an IHSS worker as provided to their respite worker. NBRC has offered to assist with additional training of an IHSS worker, if there is a behavior plan in place with an NBRC-vendored provider.

DAYCARE SERVICES

10. Singleton also testified regarding NBRC policies and procedures regarding the provision of daycare. The purpose of daycare is to supplement a portion of daycare costs for regional center clients, so that parents may work. NBRC's Procedure Memo 2301 sets forth NBRC's policy regarding the purchase of daycare services. NBRC is required to use services that meet the needs of the client and reflects the cost-effective use of public resources. Procedure Memo 2301 requires NBRC to exhaust all generic resources before services are provided by NBRC. Procedure Memo 2301 does not specifically refer to IHSS protective supervision benefits.

11. According to Singleton, all IHSS services are not viewed as alternative funding sources for the provision of daycare. The purpose of IHSS protective supervision, however, is to provide relief to parents from caring for their child.

MPP) which provides that IHSS protective supervision is for "observing recipient behavior in order to safeguard the recipient against injury, hazard or accident "when the recipient is "nonself-directing, confused, mentally impaired or mentally ill." (CDSS MPP, Div. 30, Chaps. 30-757.17 & 30-757.171.)

12. Singleton concluded that IHSS protective supervision for Claimant allows his parents to work outside the home while a third party provides direct care and supervision for Claimant. Claimant's parent can meet their need for a break from the constant care and supervision of Claimant by using a portion of the funds they receive from IHSS for protective supervision to hire someone to provide daycare for Claimant. Therefore, IHSS protective supervision and daycare are equivalent because they achieve the same purpose of keeping Claimant safe and relieving his parents from that responsibility in order to work outside of the home, and IHSS protective supervision constitutes a generic funding resource for daycare.

13. NBRC contends that Claimant's daycare worker can also become an IHSS worker to provide protective supervision which achieves the same purpose of keeping Claimant safe and supervised while parents are working outside the home. NBRC also contends that if 21 hours per month of protective supervision are used for respite, then 115.8 hours remain which can be used toward daycare. Should Claimant require additional hours more than 115.8 hours in any given month, then NBRC will provide the additional daycare hours.

CLAIMANT'S EVIDENCE

14. Claimant's mother provided testimony regarding Claimant's functioning levels and daily needs. Claimant has severe needs which require constant supervision because he will engage in harmful or destructive behaviors. His parents have considered the possibility of out-of-home placement for Claimant due to the required level of constant supervision.

15. Since July 2011, Claimant has participated in a specialized program through the Autism Treatment Center of America's Son-Rise Program. This program is based in Massachusetts and is funded by Claimant's parents, not NBRC. Claimant's parents traveled to Massachusetts to receive the specialized training. They also paid the costs to have Claimant's daycare and respite workers receive this specialized

training. A key component of the Son-Rise program is paying attention to caregivers' attitudes around Claimant's behaviors, which requires specialized training. According to Claimant's mother, an untrained IHSS worker could reinforce negative behaviors and cause Claimant's regression in the Son-Rise program. Also, according to Claimant's mother, other behavioral services provided by NBRC have not been as successful as the Son-Rise program. As part of the Son-Rise Program, Claimant has been enrolled in a homeschool education program and his mother is the primary teacher.

16. Respite provides Claimant's parents with a temporary break from the care and supervision of Claimant. Claimant's respite is provided at the home. His respite care provider also takes Claimant on outings outside of the home. When Claimant is taken outside of the home, this gives his parent's time to plan his course of treatment in the Son-Rise program and for his mother to prepare assignments for his homeschooling.

17. Claimant's mother suffers from fibromyalgia, and his father has cancer. It is important to them to have respite to have time to care for their own medical conditions. Also, respite is important for the harmony of their marriage and respite is used for them to be out of the home overnight.

18. Claimant contends that respite services is not a duplicative service for IHSS protective supervision. According to Claimant's mother, IHSS workers are not allowed to take children out of the home. IHSS workers are not allowed to work overnight shifts because they cannot be paid when a client is sleeping and they are limited to work only 12 hours per day.³ Also, IHSS workers are required to pay union dues which her current providers are unwilling to pay.

³ Singleton testified that IHSS workers can provide overnight care, but she admitted that she had no personal knowledge and she only knew this because of what other parents had told her.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Lanterman Act). (Welf. & Inst. Code, § 4500, et seq.)⁴ The Lanterman Act mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community.” (§ 4501.) Regional centers are charged with the responsibility of carrying out the state’s responsibilities to the developmentally disabled under the Lanterman Act. (§ 4620, subd. (a).) The Lanterman Act directs regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP states the consumer’s goals and objectives and delineates the services and supports needed by the consumer. (§§ 4646, 4646.5, 4648.)

2. 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.” (§ 4512, subd. (b).) While regional centers have a duty to provide a wide array of services to implement the goals and objectives of the IPP, they are directed by the Legislature to provide services in a cost-effective use of public resources. (§ 4646, subd. (a).) Accordingly, regional centers are directed to utilize generic funding resources for the provision of services and supports when appropriate. (§ 4646.4, subd. (a)(2).)

⁴ All references are to the Welfare and Institutions Code unless otherwise indicated.

3. Effective July 1, 2009, with respect to IHSS services, unless there is a law or regulation to the contrary, the Act specifically prohibits regional centers from purchasing services that are otherwise available from IHSS. (§ 4659, subd. (c).)

RESPITE

4. Respite is one type of service provided to consumers. Respite is intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client's own home for a regional center client who resides with a family member. Respite services are designed to:

- (a) Assist family members in maintaining the client at home.
- (b) Provide appropriate care and supervision to ensure the client's safety in the absence of family members.
- (c) Relieve family members from the constantly demanding responsibility of caring for the client.
- (d) 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 the family members.

(§ 4690.2, subd. (a).)

5. Pursuant to section 4686.5, subdivision (a)(5), the Act directs regional centers to consider IHSS funds as a generic resource when the approved in-home supportive services meets the respite need as identified in the consumer's IPP.

6. Overall, NBRC's policy of considering IHSS protective supervision hours as an alternative funding resource for respite is consistent with the directives of the Lanterman Act. The evidence established that IHSS protective supervision provides Claimant's family with funds to hire a third party to provide direct care and supervision for Claimant during the day. This funding serves the dual purpose of providing Claimant with supervision while also allowing the family time for a break from caring from Claimant. Inasmuch as IHSS protective supervision also serves the family's need

for respite during the day, it constitutes an alternative source of funding for respite. The fact that Claimant's mother chooses to act as his IHSS protective supervision provider instead of hiring a third party to do so does not alter this analysis.⁵ She is entitled to choose to provide protective supervision for Claimant. However, in this case, IHSS protective supervision does not meet all of Claimant's respite needs.

7. As set forth in Factual Findings 14 through 18, Claimant's parents need respite for overnight stays. IHSS protective supervision does not provide for overnight care. Therefore, IHSS protective supervision is not a generic resource for overnight respite for Claimant's parents. NBRC shall fund respite for overnight care of Claimant, when IHSS protective supervision is not available.

DAYCARE

8. Daycare is another type of service provided to consumers. Daycare is defined as "regularly provided 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." (§ 4686.5, subd. (a)(4).) Daycare is another service which must be provided to consumers and their families effectively to meet the goals stated in the IPP, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources (§ 4646, subd. (a)).

9. The evidence established that Claimant is entitled to daycare services when both of his parents are working outside of the home.

⁵ Based on the conclusion of this decision, the issue of whether Claimant's mother has a right to rely on the income as Claimant's IHSS worker need not be addressed in this decision.

10. Claimant's mother persuasively testified that Claimant's daycare providers have received specialized training in the care of Claimant. Any IHSS worker would have to receive specialized training in Son-Rise as well. NBRC can only provide for training under a NBRC-vendorized behavior plan. It is the preference of the family that Claimant's care provider be trained in the Son-Rise program.

11. The goal of protective supervision is to ensure the safety of Claimant from self-injury or harm to others. The goal of daycare is to provide supervision for Claimant while his parents are away from the home working. There is no express provision under the Lanterman Act that precludes a regional center from providing daycare services when a Claimant also receives IHSS protective supervision hours. The Lanterman Act requires a regional center to reflect the preferences of the consumer and his family while also addressing the cost effective use of public resources.

Here, the preference of the family is not to have an untrained IHSS worker provide daycare who may impact the progress Claimant has made under the specialized program. On this record, the evidence does not establish that it would be more cost effective to do otherwise, especially given that the alternative may be an out-of-home placement for Claimant. In this case, Claimant's IHSS protective supervision hours are not a duplicative or generic resource for daycare.

ORDER

1. The appeal of Claimant from the determination of North Bay Regional Center to terminate respite services is granted in part and denied in part. Claimant is entitled to respite provided for the overnight stays for his parents. North Bay Regional Center and Claimant shall convene a planning team meeting to determine the scope and hours of Claimant's needs for respite for the overnight stays of his parents. As to all other respite, the appeal of Claimant is denied.

2. The appeal of Claimant from the determination of North Bay Regional Center to terminate daycare services is granted. Claimant shall continue to receive funding for daycare services as determined by his IPP.

DATED: June 25, 2014

_____/s/_____

REGINA J. BROWN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Judicial review of this decision may be sought in a court of competent jurisdiction within ninety (90) days.