

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Claimant,

vs.

Service Agency.

OAH No. 2014060411

DECISION

This matter was heard by Gary M. Bock, Administrative Law Judge, Office of Administrative Hearings, State of California, on July 11, 2014, in Alhambra.

Claimant was present and represented by Victoria Baca, M.Ed., Educational Consultant. Gerald A. Torres (Mr. Torres), Supervisor, represented the Service Agency. A Spanish-language interpreter assisted respondent during the hearing.

The Service Agency presented exhibits 1 through 6. Claimant presented exhibits A and B.¹ Mr. Torres testified on behalf of the Service Agency. Maria Martinez and Claimant's mother testified on behalf of Claimant.

The documentary and testimonial evidence described above was received and argument was heard. The record was closed and the matter was submitted for decision on July 11, 2014.

¹ The exhibits presented by the Service Agency and Claimant were admitted into evidence pursuant to Welfare and Institutions Code section 4712, subdivision (i). Exhibits 7 and 8 were withdrawn by the Service Agency.

ISSUE

Should the Service Agency retroactively fund 75 additional hours of in-home respite in lieu of out-of-home respite for the period of May 15, 2014, to May 24, 2014?

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FACTUAL FINDINGS

1. Claimant is a 17 year old boy. He is a consumer of the Service Agency with a qualifying diagnosis of autism.

2. Claimant resides at home with his mother and older brother in Los Angeles. Claimant has his own room. He likes his room and feels safe and comfortable there. He enjoys listening to music and watching television.

3. Claimant is ambulatory and uses a few simple words. Claimant is able to communicate and express himself through a communication device called a "Dyna Vox." Claimant uses the device sporadically, because it is large and cumbersome.

4. Claimant attends a certified nonpublic school for students with special needs. In January 2014, Claimant began attending a tenth grade classroom five days a week, from 8:30 a.m. to 2:30 p.m.

5. Claimant has difficulty sleeping through the night, whether he is at home or away.

6. (A) On January 22, 2014, the Service Agency held a conference to determine Claimant's annual Individual Program Plan (2014 IPP). Service Coordinator Albert Barajas (Mr. Barajas) and Claimant's mother were present. Claimant's mother reported that Claimant continues to display behavioral problems, is unpredictable, and sleeps very little at night. She encourages him to become more independent and has to negotiate with him to calm him down at times. She feels overwhelmed and requested

the continuation of in-home respite services that were being provided by Cordova Consulting.

(B) On January 22, 2014, Claimant's mother and the Service Agency agreed to the outcomes and plans for the services as described in the 2014 IPP. The Service Agency agreed to continue to fund 30 hours per month of in-home respite care through Cordova Consulting and 21 days per fiscal year of out-of-home respite services.

7. (A) At the time of the 2014 IPP meeting, Claimant's mother was provided with a copy of the Purchase of Service Guidelines for Out-Of Home Respite Services (POS) that were adopted by the Service Agency in 2011. According to the 2014 IPP, Claimant's mother is required to provide at least three week notice to the Service Agency to receive out-of-home respite.

(B) The POS became final on May 2, 2011, and has been approved by the Department of Developmental Services (DDS). The POS defines "[o]ut-of-home" respite service to mean "intermittent or regularly scheduled temporary care provided outside the consumer's home by a vendored service provider." The POS requires that in-home respite may be used "in lieu of" out-of-home respite only when there is no out-of-home respite arrangement available. The POS further provides that the daily amount of hours (for 21 days or less) of in-home respite in lieu of out-of-home respite will be calculated on the basis of a consumer's needs and may not exceed 16 hours per day. Hours will be calculated by taking into account the amount of time that the consumer attends school or a day program, after school care, a social or recreational program, and the hours of sleep. Claimant's mother was aware of the POS from prior appeals and meetings with the Service Agency.

8. On April 17, 2014, Claimant's mother notified the Service Agency in accordance with the 2014 IPP that she wanted 10 days of out-of-home respite for the period of May 15, 2014, to May 24, 2014 (10-day period), by leaving a phone message

for Mr. Barajas. Claimant's mother received no response and left two more messages for Mr. Barajas on April 21st and 24th. On April 29, 2014, after receiving a letter from a new service coordinator, Ms. Maria Canas (Ms. Canas), Claimant reiterated her request for 10 days of out-of-home respite, stating that she would be out of town for the 10-day period.

9. On April 30, 2014, Ms. Canas submitted Claimant's mother's request for out-of-home respite placement to the Service Agency's placement coordinator. On May 8, 2014, the placement coordinator identified two homes that were deemed available and appropriate for Claimant's needs. On May 12, 2014, Claimant, Claimant's mother, and Ms. Canas visited both homes. Claimant expressed that he did not want to be at either location and wanted to go home. Claimant's mother declined to place him in either home for out-of-home respite.

10. (A) On May 14, 2014, the Service Agency agreed to make an exception to the POS, because it was not able to find other available homes before Claimant's mother was to leave town. The Service Agency offered 130 hours of in-home respite in lieu of out-of-home respite for the 10-day period. The Service Agency's offer included 11 hours per day for those days Claimant was in school (May 15, 16, 19, 20, 21 and 22), which added up to 66 hours, and 16 hours per day for those days Claimant was not in school (May 17, 18, 23 and 24), which added up to another 64 hours, for a total of 130 hours.

(B) Claimant's mother agreed to the 130 hours of in-home respite in lieu of out-of-home respite for the 10 day period. She requested that the Service Agency issue a notice of proposed action.

(C) Claimant's mother left town and relied on a friend to provide in-home respite for Claimant during the 10-day period. The evidence did not establish how much the friend was paid or for what days and hours he provided respite services.

11. By a Notice of Proposed Action dated May 16, 2014, the Service Agency notified Claimant's mother of its decision to deny her request to fund 24 hours per day of in-home respite in lieu of out-of-home respite for the 10-day period.

12. On May 28, 2014, Claimant filed a fair hearing request to appeal the Service Agency decision. Claimant has requested that the Service Agency pay for an additional 75 hours of in-home respite services needed to cover Claimant's care above the 130 hours the Service Agency funded. At this hearing, Claimant's representative argued that the 75 additional hours were required for the evenings when Claimant had difficulty sleeping.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)² An administrative "fair hearing" to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal the Service Agency's decisions regarding his request for services (Factual Finding 12), and jurisdiction for this case was thus established.

2. Under the Lanterman Act, a regional center is required to provide services and supports for eligible consumers as determined in the process of formulating the consumer's IPP. (§ 4646, subd. (a)(1).) These services are determined on the basis of the needs and preferences of the consumer and a consideration of a range of service options proposed by the IPP team participants, the effectiveness of each option in

² All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

meeting the goals stated in the IPP, and the cost-effectiveness of each option. (§ 4512, subd. (b).)

3. When purchasing services and supports, a regional center must conform to its purchase-of-service guidelines. (§ 4646.4, subd. (a)(1).) A regional center's guidelines must be reviewed by DDS to "ensure compliance with statute and regulation." (§ 4434, subd. (d).) Such guidelines are not entitled to the deference given to a regulation but are entitled to a degree of deference dependent upon the circumstances in which the agency has exercised its expertise. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-15.) In this matter, the POS was approved by DDS and provides respite at rates equal to or greater than those allowed by statute. Effective July 1, 2009, section 4686.5 limited a regional center's ability to purchase respite services to "not ... 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." (*Id.* at subd. (a)(2).)

4. (A) The Lanterman Act does not specifically authorize retroactive funding for services to families in the fair hearing context. The statutes detailing the IPP process suggest that retroactive funding is generally not available, because the development of the IPP is supposed to be a collaborative process between the parties, and necessarily requires prior consideration and approval of any service or support to be provided to an individual client.

(B) Nevertheless, the absence of statutory authority is not necessarily dispositive of the question because general principles of equity may require retroactive funding of a service in particular cases in order to fulfill the purposes and intent of the Lanterman Act if the service has been unlawfully denied. (See *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) A regional center also may be equitably estopped from refusing to retroactively fund a service if it

has mislead a consumer to his or her detriment to reasonably believe the service would be provided. (See *In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1273; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.)

5. Here, Claimant is not entitled to receive retroactive funding for additional hours of respite for the ten day period, based upon Factual Findings 1 through 10, and Legal Conclusions 1 through 4. After Claimant's mother timely requested out-of-home respite for the 10-day period, the Service Agency found two out-of-home placements, which were deemed available and appropriate for Claimant. When these placements were declined by Claimant and his mother, the Service Agency provided Claimant's mother with in-home respite for the 10-day period in lieu of out-of home respite in accordance with the POS. (§§ 4646.4, subd. (a)(1) & 4686.5.) Claimant's mother accepted the 130 hours of in-home in lieu out-of-home respite and hired or paid a friend to provide the respite. Moreover, no evidence was presented to establish how much the friend was paid or for what days and hours he provided respite. Under these circumstances, the Service Agency is not required as a matter of equity or otherwise to fund more than the 130 hours of in-home respite that it provided to Claimant.

ORDER

The appeal of Claimant is denied. The Service Agency is not required to retroactively fund 75 additional hours of in-home respite in lieu of out-of-home respite for the period of May 15, 2014, to May 24, 2014.

DATED: July __, 2014

GARY M. BOCK

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5, subdivision (a). Both parties are bound by this decision. This decision may be appealed to a court of competent jurisdiction within 90 days of receipt of notice of this decision.