

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

EASTERN LOS ANGELES
REGIONAL CENTER,

Service Agency.

OAH No. 2015060175

DECISION

Administrative Law Judge David B. Rosenman, Office of Administrative Hearings, State of California, heard this matter in Alhambra, California, on July 14, 2015. Margarita Duran, Supervisor, represented Eastern Los Angeles Regional Center (Service Agency). Claimant was represented by his mother. (Names are not used to protect confidentiality.)

The matter was submitted for decision on July 14, 2015.

ISSUE PRESENTED

Should the Service Agency should reimburse claimant's mother for respite hours provided on May 23, 2015?

FACTUAL FINDINGS

1. Claimant is a ten year-old male consumer of the Service Agency who is eligible for services due to diagnoses of autism and seizure disorder. Claimant lives in the family home with his mother and an older brother, who also attends college in San

Francisco. According to Claimant's mother, there are few if any family members or friends who are able to assist in caring for Claimant.

2. A meeting was held on February 20, 2015, to create the current plan for services, referred to as an Individualized Program Plan (IPP) (exhibit 1). Numerous services are covered. As relevant here, the Service Agency agreed to fund 30 hours per month of in-home respite, and up to 21 days of in-home respite in lieu of out of home respite (in lieu respite). Also relevant is the notation that claimant receives 188 hours per month of IHSS (In-Home Supportive Services), which is a county program providing funding for services to assist claimant and his mother. In several months, claimant's mother used all of the allotted in-home respite hours, and in other months all of the available hours were not used.

3. Claimant's mother requested respite hours in a letter dated April 28, 2015 (exhibits 3 and C-5). More specifically, claimant's mother wanted to join a group going to a casino in Nevada on May 23, 2015. The bus would leave at 6 a.m. and return at 10:30 p.m. No one under age 21 could go with the group. Claimant's mother requested 19 hours of respite coverage for the period 5 a.m. to 12 a.m. At the hearing, she explained that her regular in-home respite hours were already scheduled, and she wanted to use in lieu respite to provide care for claimant.

4. On May 14, 2015, the Service Agency sent a Notice of Proposed Action (NOPA; exhibit 1) indicating that the request was denied. Claimant filed a timely request for fair hearing (exhibit 2).

5. The NOPA cited several reasons for denial, including: parent could use regular in-home respite hours; IHSS hours could be used; and the request was not considered as an out-of-home respite request as there was no need for an over-night service. Service Coordinator Nancy Godoy explained at the hearing that this last reason related to the Service Agency's policy that addressed a trip that would require 24 hours

or more.

6. The Service Agency has written guidelines concerning respite services, referred to as Purchase of Service Guideline for Out-of-Home Respite Services (Guideline; exhibits 2 and C-4). Of relevance to this matter, the Guideline states that "Out-of-home respite services are intended to assist the family in securing temporary outside support in providing appropriate care and supervision of the consumer." The Guideline includes certain criteria and limits. The criteria are:

- (a) "Occasional family and/or consumer needs are more than the support of friends, natural and community supports can provide. Additionally, out of home respite may be used as a support should family members have planned activities which preclude the participation of the consumer such as vacations, hospitalizations and family emergencies."
- (b) "Out-of-home respite is requested by the family, consumer and/or authorized representative, under the above criteria, and identified as a preferred objective in the IPP."
- (c) "When the care and supervision needs of the consumer exceed that of an individual of the same age without developmental disabilities WIC [Welfare and Institutions Code section] 4686.5(a)(1)."

7. The Guideline states that there is a maximum of 21 days of out of home respite services in a fiscal year; that in lieu respite can be used when there is no out of home respite arrangement available; and that proof of vacation plans and other documents must be submitted. "The daily amount of hours . . . will be calculated on individual need, not exceeding 16 hours per day. Hours are calculated by taking into account the amount of time that the consumer attends school/day program during the day, after school care, social/recreational program, hours of sleep, etc. Respite hours cannot be provided during these times. . . . [¶] Generic services and natural supports

(extended family, friends, etc.) must be explored and secured prior to [Service Agency's] purchase of out-of-home respite services." Generic services include IHSS and a "parent's responsibility to provide care to a minor under 13 years of age." (Exhibits 2 and C-4.)

8. The only exception in the Guideline relates to an exception from the limit of 21 days, not the 16 hour limit, and requires an intensity of consumer's need such that more days are needed, or an extraordinary event that impacts the family member's ability to care for the consumer.

9. When the request was denied, claimant's mother arranged for a friend to care for claimant. The friend provided 20 hours of care, from 5 a.m. to 2 a.m., and received \$200 from claimant's mother. (Exhibit C-6.)

10. Margarita Duran, a supervisor at the Service Agency, was not the supervisor of claimant's service coordinator when the respite request was made or denied. After she was assigned to represent the Service Agency at the fair hearing, she offered to reimburse claimant's mother for the equivalent of 16 hours of in lieu respite. Ms. Duran believed that this amount was authorized under the Guideline at the time she made the offer, and at the time of the hearing.

11. Claimant's mother refused the offer. She believes there are exceptions to the 16 hour limit. Further, she believes that IHSS hours are for other services for claimant, but not respite, which is for claimant's mother to get relief from caring for claimant.

12. Claimant has presented sufficient convincing evidence to support reimbursement from the Service Agency for the equivalent of 16 hours of in lieu respite. No greater amount was justified, as there are no exceptions in the Guideline to provide a greater amount. Further, claimant's mother did not establish that the need for claimant's care beyond 16 hours was anything other than the normal responsibility of a parent to provide care for any child ten years of age when a parent takes a trip and is

not available to provide care. The trip took place on a Saturday. There were no extraordinary circumstances justifying more hours of service.

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LEGAL CONCLUSIONS AND DISCUSSION

JURISDICTION AND BURDEN OF PROOF

1. This case is governed by the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 et. seq., referred to as the Lanterman Act Lanterman Act).¹ Under the Lanterman Act, an administrative “fair hearing” is available to determine the rights and obligations of the parties. (Section 4710.5.) Claimant requested a fair hearing to appeal the Service Agency’s proposed denial of funding for hours of respite services. Jurisdiction in this case was thus established. (Factual Findings 1-4.)

2. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) It is difficult to say who bears the burden of proof in this matter. It might be the Service Agency, as in lieu respite is included in the IPP yet the Service Agency initially denied the request. However, after the denial, the Service Agency now contends that it is limited to funding 16 hours only, and claimant’s mother contends that there should be an exception, which would be her burden to establish. Under these circumstances, claimant’s mother bears the burden of proof regarding her request for respite services

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

for May 23, 2015, beyond the 16 hours that the Service Agency has agreed to fund.
(Factual Findings 1-4.)

RESPITE SERVICES AND HOURS

3. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. 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." (Section 4501.) These services and supports are provided by the state's regional centers. (Section 4620, subd. (a).)

4. Respite is one of the specific services available to consumers listed in section 4512, subdivision (b). In section 4690.2, subdivision (a), "In-home respite services" are defined as "intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client's own home, . . . designed to do all of the following:

"(1) Assist family members in maintaining the client at home.

"(2) Provide appropriate care and supervision to ensure the client's safety in the absence of family members.

"(3) Relieve family members from the constantly demanding responsibility of caring for the client.

"(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 the family members."

An almost identical definition of in-home respite services is found in California Code of Regulations, title 17, section 54302, subdivision (a)(38).

The statutory and regulatory definitions of in-home respite services clearly indicate that the primary goal of respite is to provide care to a consumer that is

ordinarily provided by the consumer's family, thereby relieving the family from that duty so that the family may absent themselves and be free to do other things.

5. In the Budget Act of 2009, the Legislature responded to the state's difficult economic situation by making significant changes in services under the Lanterman Act. With respect to respite services, section 4686.5, subdivision (a), was added, retroactive to July 1, 2009, to provide, in relevant part:

"(2) A regional center shall not purchase . . . 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 [paragraph] (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."

6. Section 4686.5 thus requires the Service Agency to limit the purchase of in-home respite services to 90 hours per quarter, or 30 hours per month, unless the Service Agency determines that claimant meets the criteria for, and grants claimant, an exemption.

7. There is no indication in the Guideline that a trip must last 24 hours for out of home respite to be provided. This basis for denial is not supported by the evidence. Whether or not claimant's mother could use IHSS hours or regular hours is superseded by the Service Agency's subsequent position that out of home respite could be provided, but limited to 16 hours as set forth in the Guideline. The focus now becomes whether the facts and law support the request of claimant's mother for more than 16 hours of respite.

8. Claimant's mother did not provide sufficient evidence that she was entitled

to additional hours. The exemption defined in the statute relates to regular respite, not in lieu respite. The exemption defined in the Guideline relates to the 21 day limit for out of home respite, not the 16 hour limit per day. Claimant's mother did not prove any exceptional circumstances that would justify an exception to the 16 hour limit. Claimant's mother wanted to take a short trip on a Saturday. The IPP identified in lieu respite as an available service. After denying the request for in lieu respite, and after claimant's mother made other care arrangements, the Service Agency took the position that claimant's mother was entitled to be reimbursed for the equivalent of 16 hours of in lieu respite. This is a reasonable interpretation of the Guideline and will become the order.

ORDER

Claimant's appeal of the Service Agency's decision to deny respite services for May 23, 2015, is granted in part and denied in part. The Service Agency shall reimburse claimant's mother for the equivalent of 16 hours of in-home in lieu of out of home respite. Claimant's request for additional reimbursement is denied.

Dated: July 15, 2015

DAVID B. ROSENMAN
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.