

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2015110468

DECISION

The hearing in the above-captioned matter was held on December 10, 2015, at Pomona, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. Claimant, who was present for part of the hearing, was represented by his Mother; his Father also attended the hearing for part of the time.¹ The Service Agency, San Gabriel/Pomona Regional Center, was represented by Daniela Martinez, Fair Hearing Manager.

Evidence was received, the matter was argued, and the case was submitted for decision on the hearing date.

ISSUE PRESENTED

The issue in this case is whether the Service Agency should fund 12 hours per week of additional respite care or personal assistance, to help Claimant's Mother and

¹ Titles are used to identify Claimant and his family.

Father care for him.

FACTUAL FINDINGS

THE PARTIES AND JURISDICTION

1. Claimant is a 19-year-old man (born July 20, 1996) who is a consumer of services of the Service Agency. He receives services pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.,² based on a diagnosis of cerebral palsy and epilepsy. There is no dispute that he is generally eligible for services; instead, this case concerns what sort of services should be provided to him by the Service Agency.

2. (A) On November 3, 2015, the Service Agency issued a Notice of Proposed Action (NOPA), denying Claimant's request for an additional 12 hours per week of respite through Acceptcare. (Ex. 1.)

(B) The reasons stated for the proposed action was prolix, but boiled down to the assertion that Claimant was receiving adequate supports through generic resources and as identified in his Individual Program Plan (IPP). The NOPA stated that Claimant was receiving services from his school district, Social Security, In Home Supportive Services (IHSS), and 30 hours per month of LVN respite through the Acceptcare firm. (Ex. 1.)

3. Mother, who is Claimant's conservator, filed a Fair Hearing Request (FHR) on his behalf, dated November 6, 2015. In the FHR Claimant sought 12 hours per week of additional respite or personal care time. Claimant asserted that his mother needed the additional services to safely keep her son at home, safe from injuries and accidents.

² All further statutory citations shall be to the Welfare and Institutions Code, unless otherwise noted.

(Ex. 2.) This fair hearing ensued, and all jurisdictional requirements have been met.

CLAIMANT'S NEEDS AND LIVING ARRANGEMENTS

4. According to his August 2015 IPP, and as was confirmed by his appearance at the fair hearing, Claimant is non-ambulatory, and needs a wheelchair which he cannot move independently. He weighed 140 pounds at the time of the IPP, and was five feet, four inches tall. However, by the time of the hearing, his weight had gone up to 171 pounds. He can "combat crawl" but gets rug burns when he does. He needs assistance with all activities of daily living, including bathing, dressing, and brushing his teeth. He must wear a diaper, having no bowel or bladder control. He does not usually alert others if he must use the toilet, but can indicate with his very small vocabulary that his diaper needs changing. He must be hand fed.³ (Ex. 3, p. 2.)⁴

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5. The IPP establishes that Claimant has limited communication skills, verbalizing a words such as "mama," "change," (for his diaper) or "eat." (P. 3.) However, it is stated that he understands more, and can understand words from several languages. An assessment prepared by his school district indicates Claimant may use up to fifty words at home. (Ex. 6, p. 2.)

6. The IPP indicates that Claimant engages in a number of maladaptive behaviors, including self-injury and disruption. He will gag himself to make himself

³ A document generated by Claimant's school district states that his food must be cut into small pieces, and that he must be fed, except that he can finger feed "highly desired food items." (Ex. L.)

⁴ All further citations to the IPP are to exhibit 3.

vomit to get attention. He will bite his own hand, spit, and try to tip over his wheelchair. While he likes being out and about, he doesn't do well in large crowds or noisy environments. Documents generated by his school district show that there had been some decrease in maladaptive behaviors, but he was still spitting, gagging himself at least three times per day, and engaging in self-injury or inappropriate touching. (Ex. 7, p.4.)

7. According to Mother, Claimant sleeps in her bedroom because he doesn't sleep well, and he may have seizures. He typically sleeps about five hours per night, but will go as long as eight if he has had two or three bad nights in a row. Since Claimant has been receiving Risperdal, his sleep patterns have improved, but he has put on weight since he received the prescription. He receives a number of other medications, to respond to his convulsions, spasticity, allergies, and seizures. (Ex. 3, p. 5; Ex. B.)

8. Claimant's parents are divorced, living in separate homes. Claimant lives primarily with Mother, from when he comes home from school on Monday afternoon until Saturday afternoon, when he goes to his Father's house. He is picked up for school on Monday morning at his Father's home.

9. During the week, Claimant attends a program funded by his school district, and receives transportation to and from school from his school district. He is accompanied by a Licensed Vocational Nurse on the bus and at the school, where there are others providing support to him and several other students. His nurse also helps Mother get Claimant ready to go to school in the morning. His nurse, Ms. Estrada, testified that Claimant enjoys the school program, socializing with other persons suffering from substantial disabilities, as well as teachers and aides.

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10. Claimant's mother lives in a two-story house. It has narrow doorways, so he must get around the house in a wheelchair that is a bit too small for him. (Ex. 4, p. 1.) To get upstairs, two people must carry him a few steps to where the stairway chair lift is

located.

Claimant's mother cannot do that alone, as Claimant is taller and heavier than she is, and his legs are stiff. For one person to try to get him into the chair lift puts them in "a very unsafe and precarious position for [the caretaker] and therefor for [Claimant] as well." (*Id.*)

11. Mother and Ms. Estrada credibly testified that there are many situations where two people are needed to manage Claimant's care. This is illustrated in Factual Finding 10, regarding placing Claimant in the stairway lift. There are other situations. It takes two people to dress Claimant in the morning, two people to give him a shower, or if he is to try and toilet, two to keep him on the commode. Ms. Estrada described an incident where she and Mother were giving Claimant a shower, and he had a seizure. Mother described another incident where she left him seated for just a moment, and he fell and broke his tooth.

12. The Service Agency is under the impression that Claimant sleeps eight hours per night. (See Ex. 12.) That is not the case, as established by Mother's testimony. (See Factual Finding 7.) Her testimony is supported by a statement his nurse made while he was being evaluated by his school district in October 2015, to the effect he had been up since 2:00 a.m. on that Monday, while he was at his father's house. (Ex. 7, p. 4.) Given that misperception, the Service Agency's calculations to the effect that all hours of the week are accounted for by services being provided to Claimant (ex. 12) are inaccurate. It

is likely that he is sleeping about 150 hours per month.⁵

13. Claimant's father testified credibly that he is having trouble managing his son's care, due to Claimant's limitations, and father's bad back; the problem is becoming more acute as Claimant gets bigger.

14. It was credibly asserted that if Claimant was placed in a facility, he would need level 4 care, which would be a great expense; somewhere between \$4,000 and \$5,500 per month.

15. It is clear that Claimant's mother, who is over 40 years old, and smaller than Claimant, cannot physically manage Claimant alone, and it is doubtful that his father can either. There are times that Claimant needs two people to care for him, especially in the mornings and evenings in the home. Further, there is no nurse available when Claimant comes home from school on Mondays.

SERVICES PROVIDED TO CLAIMANT BY VARIOUS ENTITIES

16. The nurse who assists Claimant 38 hours per week is funded by Medi-Cal through the EPSDT program. The Service Agency provides 30 hours per month of LVN respite care. Claimant's local school district is providing his educational program, for approximately six hours per day. He receives 30 minutes of occupational therapy per week, and speech therapy at school. (Ex. 3, p. 8; Ex. L.) IHSS, a county program, is providing 283 hours per month of support and shift nursing. (Ex. A.) Mother is providing the IHSS care and supervision.

⁵ Mother provided authority from the United States Department of Labor, which cited section 785.22 of title 29 of the Code of Federal Regulations and case law, to the effect that interruptions of sleep constitute work hours, and that if an employee cannot get at least five hours sleep at night, the entire period is deemed working time. Hence, it appears that the parents are, at times, working at night. (Ex. K.)

17. The Service Agency calculates that the shift nursing, IHSS protective supervision, and school program covers 450 hours per month. They attribute another 182 hours per month to sleep, at the rate of eight hours per night, which is a miscalculation; the number should be 242 if Claimant actually slept eight hours per night. (Ex. 12.) However, as previously noted, Claimant does not sleep for eight hours per night, and his mother must be nearby in the event he wakes up, or has a seizure. And, the Service Agency calculations do not take into account the fact that two-to-one care is often necessary.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to Code section 4710 et seq., based on Factual Findings 1 through 5.

2. In enacting the Lanterman Act, the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals, and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (§ 4501.)

3. Services are to be provided in conformity with the IPP, per section 4646, subdivision (d). Consumer choice is to play a part in the construction of the IPP. (See §§ 4512, subd. (b); 4646, subd. (a).) Where the parties cannot agree on the terms and conditions of the IPP, a Fair Hearing decision may, in essence, establish such terms. (See § 4710.5, subd. (a).)

4. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each client's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subd. (a)(1) & (a)(2).) Otherwise, no IPP would have to be undertaken. A priority is assigned to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subd.

(a)(1), (a)(2).)

5. Section 4512, subdivision (b), of the Lanterman Act defines the services and supports that may be funded, and sets forth the process through which such are identified, namely, the IPP process, a collaborative process involving consumer and service agency representatives:

“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, or where appropriate, the consumer’s family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option

6. 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 individual consumer, or their 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. Services must be cost-effective. As stated by the Legislature, "each regional center design shall reflect the maximum cost-effectiveness possible . . ." (§ 4640.7, subd. (b).) The costs of service provided by vendors are to be compared during the planning process. (§4648, subd. (a)(6)(D).)

8. The regional centers are to seek out generic resources, and are to help bring those services into play. (§§ 44659, subd. (a); 4648, subd. (a)(8).)

9. (A) In this case the Service Agency asserts that if it provides more services, whether denominated as respite services or personal assistance, then it will be duplicating services provided by generic agencies, such as the school district or medical. In another case that might be true. Here some of the services do not go far enough, because there are situations where two people are required to assist Claimant; in those situations one is not enough. (Factual Findings 10 and 11.) If Medi-Cal was providing two nurses, or an LVN and nursing assistant, then duplication might occur if the Service Agency had to fund another person to assist.

(B) The weight of the evidence is that until Mother can get Claimant onto the school bus during weekdays, or upstairs to bed in the evenings, she is ill-equipped to assist in many basic needs. His father is having similar problems of physically managing him. Even if Mother is being paid for protective supervision, she cannot do some tasks alone.

(C) Claimant is an adult. Strictly speaking, Mother is not required to maintain him in her home, and is not required to risk injury to herself or Claimant because she

cannot move him alone. To maintain him in the home, a central tenet of the Lanterman Act, is going to require more assistance from the Service Agency.

10. Strictly speaking, what is being requested is not respite care, but personal assistance. It is needed and should be provided to Claimant, to be utilized by his parents as best meets his needs when he is at their respective homes.

ORDER

Claimant's appeal is granted. The Service Agency shall fund 12 hours per week of LVN level personal assistance to Claimant.

Dated: December 23, 2015

Joseph D. Montoya
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 NINETY (90) DAYS.