

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

REGIONAL CENTER OF THE EAST BAY,

Service Agency.

OAH No. 2015110880

DECISION

Karen Reichmann, Administrative Law Judge, State of California, Office of Administrative Hearings, heard this matter on December 29, 2015, in San Leandro, California.

Claimant was represented by her mother. Claimant did not attend the hearing.

Mary Dugan, Fair Hearing Specialist, represented the Regional Center of the East Bay (RCEB), the service agency.

The record was left open for written closing arguments. Claimant's closing argument was timely submitted and marked for identification as exhibit S. RCEB's closing argument was timely submitted and marked for identification as exhibit 16.

The matter was submitted for decision on January 8, 2016.

ISSUE

May RCEB cease funding 60 hours per month of day care based on its conclusion that generic resources and natural support are available to meet claimant's needs?

FACTUAL FINDINGS

1. Claimant is a 28-year-old female who lives at home with her parents.

Claimant is blind and has mild intellectual disability and a seizure disorder. Claimant's mother works full-time outside the home and often works until late in the evening and on weekends. Claimant's father owns his own graphic design business based in the home. He periodically travels away from the home to meet with clients.

2. For many years, claimant's Individual Program Plans and Addendums have provided her with day care services funded by RCEB. Claimant is currently receiving 60 hours per month of day care, which she uses Monday through Friday afternoons, from when she returns home from an RCEB-funded day program until her parents return home from work.

3. RCEB has implemented a policy regarding day care services for clients over the age of 13. Pursuant to this policy, clients may receive day care services if: 1) they require this form of supervision; 2) day care is not available through resources found in the community, such as recreation centers, church programs, or the YMCA; and 3) the client's parents' employment can only occur during the time day care is sought. Claimants seeking day care are required to submit a day care worksheet.

On August 18, 2015, claimant's parents submitted a day care worksheet indicating that they both work seven days a week, from 7:00 or 8:00 a.m. until 7:00 to 9:00 p.m.

4. Claimant's request for day care was reviewed by RCEB's exceptions committee. The committee requested further information from claimant and her family regarding her use of County-funded In Home Support Services (IHSS). The family submitted a weekly support schedule.

According to this support schedule, claimant currently uses her IHSS on the weekends, from 3:30 p.m. through 4:00 a.m. and on weeknights, from midnight until 8 a.m. Claimant is not required to report to the County which hours are being used for protective supervision. Family members can provide IHSS, or the recipient can hire a caretaker to provide these services. Claimant's mother has been her IHSS provider.

5. Claimant receives a total of 283 hours per month (64 hours and 54 minutes

per week) of IHSS from Alameda County, which includes 38 hours and 34 minutes per week allocated specifically for protective supervision. Protective supervision is a form of IHSS which is provided only to individuals who engage in non-self-directing behavior and require supervision for their safety. The County does not dictate when IHSS hours are to be used. Josephine Jackson, a social worker supervisor explained at the hearing that it would generally not be appropriate to use protective supervision hours while the recipient is sleeping, as the purpose of protective supervision is to protect the individual from self-injurious behavior. Some other forms of IHSS can be used while the recipient is asleep, to perform tasks such as cleaning, meal preparation, and laundry.

6. During the past year, RCEB has implemented changes in how it assesses clients' eligibility for services. New forms and tools have been adopted. The decision to eliminate claimant's day care was reached after applying this new protocol, and was not based on any change in the law or in claimant's circumstances. In reviewing claimant's request for continued day care funding, RCEB identified two issues: 1) claimant's father's 2014 income of \$4,222 suggested that he might be working part-time rather than full-time, and might therefore be available to provide supervision to claimant during the hours she receives day care; and 2) claimant could potentially use IHSS to provide supervision during the hours she receives day care, instead of using these services at night when she is presumably asleep.

7. In a Notice of Proposed Action dated November 12, 2015, effective December 15, 2015, RCEB notified claimant that RCEB will not continue to fund day care services because "it has been determined that you currently have sufficient resources available to you to meet [claimant's] needs at this time. . . [Claimant] currently receives 287 hours per month of In Home Support Services (IHSS), regional center funded day program services, and natural supports from family members." Claimant requested a fair hearing.

8. It was not established which weekly IHSS hours are being used for protective supervision. It was not established how many hours claimant sleeps per night or whether she engages in behavior during the night that requires her to be constantly supervised.

Claimant has not notified RCEB that she has sleep difficulties or that she requires supervision while she sleeps. Claimant’s July 23, 2015, IPP, and August 11, 2014, Annual Review do not reflect any reported sleep difficulties.

9. In a declaration dated December 21, 2015, claimant writes that she chooses her mother to be her IHSS provider, adding “she has always been my IHSS provider for years. I do not want anybody else to be my IHSS provider.”

10. In her closing argument, claimant contends that: 1) RCEB’s change in protocol is an insufficient legal basis to cease funding a needed service; 2) claimant’s IHSS hours are insufficient to meet her need for continuous supervision and are therefore not a generic resource for afternoon day care; 3) claimant’s family members are not required by law to provide natural support in lieu of day care during the afternoons; and 4) requiring her to use IHSS in lieu of day care would violate her right to choose her own IHSS provider because her mother would not be available to provide IHSS care in the afternoon.

LEGAL CONCLUSIONS

1. Pursuant to the Lanterman Developmental Disabilities Services Act, the State of California accepts responsibility for persons with developmental disabilities. (Welf. & Inst. Code, § 4500, et seq.¹) 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 have 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 services, setting forth the services and supports needed by the consumer to meet his or her goals and objectives. (§ 4646.) The determination of

¹ All statutory references are to the Welfare and Institutions Code.

which services and supports are necessary is made after analyzing the needs and preferences of the consumer, the range of service options available, the effectiveness of each option in meeting the goals of the IPP, and the cost of each option. (§§ 4646, 4646.5 & 4648.)

2. 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 manner. (§ 4646, subd. (a).) Accordingly, regional centers may not fund duplicate services that are available through another public agency. This prohibition, often referred to as “supplanting generic resources,” is contained in section 4648, subdivision (a)(8):

Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.

Regional centers must identify and pursue all possible sources of funding when determining whether to fund a requested service. (§§ 4659, subd. (a)(1) & 4646.4.) By modifying its assessment protocol for analyzing requests for day care services, RCEB is acting in accordance with these provisions. Claimant’s assertion that this change in protocol is unlawful is without merit, given RCEB’s obligation to continually reassess claimant’s needs and the resources available to her to fulfill them.

3. Claimant’s contention that her IHSS hours are not a generic resource is unpersuasive. Alameda County provides claimant with 38 hours and 34 minutes per week of protective supervision IHSS. The county does not dictate when these hours are to be used. Claimant has elected to schedule these hours on the weekends and late at night. Claimant has the option of scheduling these hours during weekday afternoons. Therefore, claimant’s IHSS is a generic resource available to her to meet her need for supervision on weekday afternoons.

4. Claimant's contention that RCEB cannot require her family members to provide her natural support is also unpersuasive. It is not unreasonable for RCEB to expect family members living in the same household with developmentally disabled individuals to provide them some support, depending on their available time and resources.

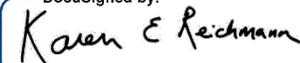
5. As the payer of last resort, RCEB has a duty to ensure that it does not fund services that are available from another public agency. Here, RCEB appropriately determined that claimant has IHSS hours available which could be scheduled in the afternoons in lieu of RCEB-funded day care. It is not unreasonable to expect claimant's parents, who live with her, to provide supervision at night, when claimant presumably is asleep and requires less active supervision. This would enable claimant to use IHSS services in the afternoons, satisfying claimant's need for care during those hours before her parents return home. The IHSS could be provided by a family member, or by an outside provider. Claimant's contention that discontinuing funding for day care violates her right to choose her preferred IHSS provider is without merit. Although claimant's mother may not be able to provide all of claimant's IHSS, this would be the result of claimant's mother's work schedule, and not the result of RCEB depriving claimant of her right to choose the IHSS provider of her choice.

Accordingly, RCEB has met its burden of establishing that it lawfully determined that generic resources exist to meet claimant's need for supervision in the afternoons after she returns home from her day program. Because claimant has generic resources available to her, in the form of IHSS, which can be used for afternoon care, RCEB correctly determined that continuing to fund day care for claimant would violate its duty to refrain from duplicating other publicly-funded resources available to her.

ORDER

The appeal of claimant from RCEB's Notice of Proposed Action dated November 12, 2015, is denied.

DATED: January 21, 2016

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KAREN REICHMANN

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.