

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

Claimant,

v.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2016090279

DECISION

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on October 27, 2016, in Torrance, California.

Gigi Thompson, Rights Assurance Manager, represented the Harbor Regional Center (HRC or Service Agency). Elizabeth Stroh, Service Coordination Quality Manager, was present at hearing. Claimant's father (Father) represented Claimant. Sy Luu, Certified Interpreter, provided Vietnamese language interpreter services to Father on as needed basis. Claimant did not appear at hearing.

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on October 27, 2016.

ISSUES

Must the Service Agency increase behavioral respite hours from 30 hours per month to 480 hours per month (16 hours per day)?

FINDINGS OF FACT

1. Claimant is a 19-year-old man who lives with his parents and two younger sisters within the Service Agency's catchment area, and is a consumer of the Service Agency. Specifically, Claimant is autistic and is eligible for services pursuant to the Lanterman Developmental Disabilities Act (Lanterman Act), California Welfare and Institutions Code sections 4500, et seq.¹

2. Claimant engages in aggressive outbursts in which he damages property and engages in self-injurious behaviors. Service Agency currently provides Claimant 30 hours per month of behavioral respite services. Behavioral respite services operate like typical in-home respite services, except the workers providing the service are trained in behavioral techniques and are better equipped to work with individuals who engage in high levels of problematic behaviors.

3. Claimant additionally receives six hours per day of Applied Behavior Analysis (ABA) services through his health insurance. He also attends his neighborhood school approximately one hour per day, though entitled to six hours per day. Father explained Claimant's behaviors interfere with Claimant's ability to tolerate a full day of school. Finally, Claimant is approved to receive 267.04 hours per month of in-home supported services (IHSS), 45.02 hours designated for protective supervision, funded by the Department of Social Services. Father reported he cannot locate a provider to deliver IHSS to Claimant.

4. On August 29, 2016, Father, on Claimant's behalf, requested an increase in behavioral respite hours from 30 per month to 16 hours per day (480 hours per month), claiming Claimant had demonstrated an increase in his aggressive behaviors. Specifically, Claimant increased the frequency in which he hit his head with his fists, bit

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

his arms, and slapped his face. Father also advised the Service Agency that Claimant frequently stayed awake until 4:00 a.m., and required Claimant's mother (Mother) to hold his hand until he fell asleep.

5. On September 8, 2016, the Service Agency issued a letter denying Claimant's request for the Service Agency to fund for an increase in behavioral respite hours per month from 30 to 480. Father filed a Fair Hearing Request on Claimant's behalf.² All jurisdictional requirements have been met.

CLAIMANT'S RECENT BEHAVIORAL AND MENTAL HEALTH HISTORY

6. Father testified at hearing and explained Claimant, in addition to his autism diagnosis, had been diagnosed with intermittent explosive disorder. In early 2015, Claimant had been prescribed Risperdal to address his outbursts and tantrums, but after three months, Father requested that Claimant be taken off of the medication. Father noted Claimant demonstrated an increase in irritability and hallucinations while on the medication. In May 2015, after Claimant stopped taking Risperdal, Claimant started "acting out" in a much more aggressive way (i.e., biting, hitting his family, and trying to choke his family members) and increased the frequency in which he suffered intrusive thoughts and talked to himself. This resulted in Claimant's three-day psychiatric hospitalization in July 2015. While hospitalized, a psychiatrist diagnosed Claimant with, among other things, an Axis I disorder, namely psychosis, not otherwise specified, and intermittent explosive disorder. Additionally, the psychiatrist diagnosed Claimant with an Axis IV disorder, namely psychosocial stressors, moderate to severe.

7. Father rejected Claimant's psychosis diagnosis, and opined, after conducting independent research, that Claimant's psychotic behavior was a severe side effect of being taken off of the Risperdal. Claimant was prescribed Seroquel thereafter,

² Father serves as Claimant's conservator.

but it was not effective. Claimant was then prescribed Zyprexa, which resulted in side effects impacting his tongue and swallowing function. Claimant was weaned off of the Zyprexa from October 2015 to December 2015, which resulted in increased frequency of behavioral outbursts. However, beginning on December 28, 2015, Claimant's outbursts decreased down to a frequency of every seven to ten days, which was the same frequency in which Claimant engaged in outbursts before he started taking medication (i.e., Risperdal).

8. Claimant's intrusive thoughts continued, however. Father explained that when Claimant had intrusive thoughts, he would talk to himself, non-stop, which disrupted the household. Additionally, Claimant would not sleep during the night, and would show aggression toward Mother who required her to stay up with him and hold his hand. If Mother refused, Claimant would yell throughout the night.

SCHOOL

9. Claimant attends Cabrillo Lane Adult School (Cabrillo Lane), which is a part of the ABC Unified School District (District). Although Claimant is entitled to attend six hours of school per day, Father believes Claimant's behaviors are not conducive to Claimant attending school on a full-time basis. Specifically, Father contends that Claimant's behaviors render the environment unproductive and unsafe for Claimant, his peers, and school staff. These behaviors include yelling, scratching and biting himself, pounding on the table, running out of designated areas, stomping his feet, hitting his head, and jumping on the table. Some of Claimant's behaviors resulted in school staff utilizing a Crisis Prevention Institute (CPI) restraint hold. Consequently, Claimant's parents only require Claimant to attend Cabrillo Lane two to three times per week for approximately one hour each day.

10. On May 11, 2016, District representatives from Cabrillo Lane held Claimant's Independent Education Program (IEP) meeting with Father and Mother.

District representatives advised that Claimant's physically aggressive behaviors had been increasing, and Cabrillo Lane was not equipped to address these behaviors.

Consequently, District offered to change Claimant's school placement to a non-public school (NPS) in Irvine. A NPS is a private, nonsectarian school certified by the State of California to provide special education services to students based on their IEP, and provide an environment to help students who are struggling academically, behaviorally, and socially. The NPS would provide a six-hour school day for Claimant, as well as transportation to and from school, approximately one hour each way, for a total of eight hours dedicated to school. Father declined to tour the NPS and rejected District's placement offer.

11. At hearing, Father explained that he preferred for Claimant to remain at Cabrillo Lane because it is located just five minutes from Claimant's home. He believed that it was inappropriate for Claimant to travel an hour or more to and from the NPS, given Claimant's compromised mental health, which includes anxiety. Additionally, Father believed Claimant would continue to engage in behaviors warranting a CPI hold, which would require Father to travel an hour to the NPS to participate in all mandatory meetings stemming from the CPI, which would result in a great inconvenience to Father.

ABA SERVICES

12. Claimant's private health insurance provides him with six hours of ABA services each day. Father reported that ABA services will be terminated in December 2016 unless Claimant is found eligible to receive additional ABA services.

IHSS SERVICES

13. The Department of Social Services approved Claimant to receive 267.04 hours per month of IHSS, 45.02 hours designated for protective supervision. However, Father reported great difficulty in finding workers to provide IHSS services to Claimant,

despite Father's report that he has consulted an IHSS registry to locate workers. Father has been seeking male workers only, because he believes only men are strong enough to address Claimant's physical aggressiveness. Father opines he has been unsuccessful in locating workers because no one wants to accept a job earning only \$11 per hour, which is the amount the Department of Social Services pays. As such, Claimant has not been receiving IHSS services.

FATHER'S REQUEST / SERVICE AGENCY'S DENIAL

14. Given the short time Claimant spends at school (i.e., approximately one hour per day, two to three times per week), his inability to find male IHSS providers, Claimant's refusal to go to sleep until 4:00 a.m. and requiring Mother to stay awake with him, and in anticipation of Claimant's ABA hours being terminated in December 2016, Father has requested 16 hours per day of behavioral respite services. Father intends to use eight of those hours at night, so Mother can sleep while the behavioral respite worker attends to Claimant, and then use the remaining eight hours during the day in the event Claimant's insurance company terminates ABA services in December 2016.

15. As the payer of last resort, the Service Agency denied Father's request, asserting Claimant has failed to exhaust all generic resources. Specifically, the Service Agency contends Claimant, who will turn 20 years old in December, is entitled to attend full school days and receive school services for the next two years, pursuant to federal and state law. In this regard, Claimant should be out of the home for at least six hours per day, and if he attends the NPS that the District contends will better meet Claimant's needs, another two hours per day for transportation, for a total of eight hours. In addition to these eight hours, Claimant receives six hours per day of ABA services from another generic resource, namely his insurance company. Moreover, Claimant is entitled to receive 267.04 hours per month of IHSS, 45.02 hours designated for protective supervision, funded by the Department of Social Services. Should Claimant utilize all

hours of these generic resources, and combine them with the 30 hours per month of behavioral respite services funded by the Servicer Agency, Claimant would have well over 20 hours per day of direct support. Given these factors, Claimant is not entitled to receive an increase of behavioral respite from 30 hours per month to 480 hours per month (16 hours per day).

LEGAL CONCLUSIONS

The Service Agency is not required to increase respite hours from 30 hours per month to 480 hours per month (16 hours per day), as discussed in more detail below:

1. Services are to be provided to regional center clients in conformity with section 4646, subdivision (d), and section 4512, subdivision (b). A consumer's choice plays a part in the construction of the Individual Program Plan (IPP). Where the parties cannot agree on the terms and conditions of the IPP, a Fair Hearing may establish such terms. (See §§ 4646, subd. (g); 4710.5, subd. (a).)

2. The services to be provided to any consumer of regional center services must be individually suited to meet the unique needs of the individual consumer in question, and within the bounds of the law each consumer's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subds. (a)(1) and (a)(2).) Otherwise, no IPP would have to be undertaken; the regional centers could simply provide the same services for all consumers. The Lanterman Act assigns a priority to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).)

3. Section 4512, subdivision (b), of the Lanterman Act states in part:

"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's family, and shall include consideration of . . . the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, . . . special living arrangements, physical, occupational, and speech therapy, . . . education, . . . recreation, . . . community integration services, . . . daily living skills training, . . .

4. Services provided must be cost effective (§ 4512, subd. (b), *ante*), and the Lanterman Act requires regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, *e.g.*, §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) The regional centers' obligations to other consumers are not controlling in the individual decision-making process, but a fair reading of the law is that a regional center is not required to meet a consumer's every possible need or desire, in part because it is obligated to meet the needs of many disabled persons and their families.

5. Services are to be chosen through the IPP process. (§ 4512, subd. (b).) 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 determines the content of the IPP and the services to be purchased, is made up of the disabled individual, or his or her 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).)

6. Pursuant to section 4646, subdivision (a), the planning process is to take into account the needs and preferences of the consumer and his or her family, "where appropriate." Further, services and supports are to assist disabled consumers in achieving the greatest amount of self-sufficiency possible; the planning team is to give the highest preference to services and supports that will enable an adult person with developmental disabilities to live as independently in the community as possible. (§ 4648, subd. (a)(1).) Services and supports are subject to regular periodic review and reevaluation, particularly in response to a consumer's changing needs. (§ 4646.5, subds. (a)(7) and (b).)

7. Section 4646.4 was also added to the Lanterman Act as a cost-containment measure in response to the state budget crisis of that time. In particular, section 4646.4, subdivision (a), requires regional centers, among other cost saving measures, to conform to their purchase of service guidelines, and utilize available generic resources. However, a service policy established by a regional center to govern the provision of services may not take precedence over the established individual needs of the consumer. (*Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390-393.)

8. California Code of Regulations, title 17, section 52109, subdivision (b), provides that the regional center is the payer of last resort for a service where all other public sources for payment have been identified but decline funding.

9. Section 4686.5 provides, a more recent statute also governing respite services, contains a definition that can be applied in this case. The statute states, in pertinent part:

(a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, all of the following shall apply:

(1) A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.

(2) A regional center shall not purchase 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.

(3) (A) A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (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.

(B) For purposes of this section, "family member" means an individual who:

(i) Has a consumer residing with him or her.

(ii) Is responsible for the 24-hour care and supervision of the consumer.

(iii) Is not a licensed or certified residential care facility or foster family home receiving funds from any public agency or regional center for the care and supervision provided. Notwithstanding this provision, a relative who receives foster care funds shall not be precluded from receiving respite.

10. Here, Claimant failed to meet the burden of establishing that the Service Agency should be compelled to increase respite hours. Father contends that because Claimant attends only one hour per day of school, has yet to find a worker to deliver IHSS services, and because ABA services could be terminated in December 2016, additional behavior respite is necessary to provide the family with an opportunity to rest from Claimant's constant and aggressive behaviors. In particular, additional behavioral respite hours would give Mother an opportunity to recover after having to remain awake with Claimant at night, as Claimant does not go to sleep until 4:00 a.m. As such, Father has requested an increase from 30 hours per month to 480 hours per month (16 hours a day).

11. However, as set forth in Legal Conclusion 9, regional centers are prohibited from purchasing more than 90 hours of in-home respite services in a quarter unless a consumer meets exemption requirements. Specifically, Claimant must show that the additional respite hours are necessary to maintain him in the family home or that an extraordinary event has impacted the family member's ability to meet Claimant's the care and supervision needs. Claimant failed to proffer persuasive evidence to establish that one of the exemption criteria exists.

12. Additionally, the evidence shows Claimant has yet to fully utilize the generic resources at his disposal, which, if fully utilized, would provide the family with a break from Claimant and additional time to relax, rest, and regroup. Specifically, Claimant has yet to attend a full six-hour day at school, whether he attends Cabrillo Lane or the NPS proposed by District. Additionally, Claimant has yet to utilize IHSS service hours, as Father has not located an IHSS worker to deliver services to Claimant. As set forth in Legal Conclusions 7 and 8, regional centers are payers of last resort and are required to utilize generic resources first. Because Claimant has failed to utilize all his generic resources, the Service Agency cannot be compelled to fund for additional hours of behavioral respite. As such, and for the reasons stated above, Claimant's appeal must be denied.

ORDER

Claimant's appeal is denied.

Date: November 9, 2016

CARLA L. GARRETT

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.