

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

NORTH BAY REGIONAL CENTER,

Service Agency.

OAH No. 2017030815

DECISION

Administrative Law Judge Juliet E. Cox, State of California, Office of Administrative Hearings, heard this matter on June 23, 2017, in Napa, California.

G. Jack Bengé, Attorney, represented service agency North Bay Regional Center (NBRC).

Maria del Pilar Gonzales Morales, Attorney, represented claimant.

The record was held open to permit the parties to file written closing arguments. Claimant timely provided a closing statement, which was marked for identification as Exhibit 20 and considered. Claimant's closing statement attached additional evidence, which was not considered because it was untimely. NBRC timely provided a closing statement, which was marked for identification as Exhibit 21 and considered.

The matter was submitted on July 10, 2017.

ISSUES

1. Did NBRC provide a timely Notice of Proposed Action with respect to its decision to deny addition of respite services to claimant's Individual Program Plan (IPP)?

2. Did NBRC err when it denied claimant's request to add 90 hours per quarter of respite services to her IPP?

FACTUAL FINDINGS

1. Claimant is nine years old. She is eligible for services under the Lanterman Developmental Disabilities Services Act (the Lanterman Act, Welf. & Inst. Code, § 4500 et seq.), and receives those services from NBRC.

2. Claimant requires much more intensive care and supervision than do most children her age. Although claimant is similar in size and mobility to many nine-year-old children, she requires one-on-one assistance with most activities of daily living, including eating, dressing, and toileting. Claimant is self-directed and impulsive but has no safety awareness and very limited communication skills. She sleeps poorly, sometimes waking several times each night and requiring her parents' attention.

3. Claimant lives with her parents and her younger sibling. Claimant's sibling does not receive Lanterman Act services.

4. Claimant's father works full-time outside the family home.

5. Before claimant's birth, claimant's mother also worked full-time outside the home. She had intended to return to her career after claimant's birth, but delayed her return for several years because of claimant's disabilities.

6. The evidence did not establish exactly when claimant's mother returned to work, but did establish that claimant's family paid caregivers to supervise claimant during some non-school daytime hours between approximately August 2011 and August 2013. During this period, although claimant's mother intended to work full-time, she had to leave work frequently to attend to emergencies involving claimant.

7. A caregiver who worked for claimant's family between August and December 2011 described claimant's care as "different than any other childcare position I have ever had." Although this caregiver felt affection for claimant, she left the position

in part because “it was ultimately too much to handle.” Another caregiver who worked for claimant’s family in 2013, and who has babysat claimant occasionally since then, noted that claimant “requires your full undivided attention,” both to keep claimant safe and to avoid distressing her.

8. Claimant’s mother again left the full-time workforce in September 2013 and began serving as claimant’s main caregiver. In January 2014, claimant became eligible for In-Home Supportive Services (IHSS), administered for claimant by Solano County. Solano County approved claimant’s mother as claimant’s IHSS provider, in part because claimant’s parents were unable to find regular, suitable caregivers other than claimant’s mother.

9. Before claimant began receiving IHSS services, her parents received respite services through NBRC. In February 2014, with claimant’s mother’s consent, NBRC amended claimant’s IPP to call for claimant to obtain comparable services through IHSS. At that time, claimant’s mother believed that she would be able to hire suitable substitutes for herself through IHSS, and in this manner receive relief from the demands of claimant’s care.

10. Because claimant has grown in size and strength, and because she has learned new skills (such as how to unlock doors) without learning the judgment to use those skills safely, claimant has become more difficult to supervise since February 2014.

11. A competent adult must supervise claimant at all times (168 hours per week). Claimant currently receives approximately 33 service hours per week through IHSS for assistance with various activities of daily living, and approximately 32 IHSS service hours per week for protective supervision. During the school year, claimant attends school for approximately 36 hours per week. Claimant’s parents provide the remaining 67 or more hours of supervision claimant needs every week.

12. Although claimant's IHSS hours are about evenly divided between "personal services" and "protective supervision," caregivers must intersperse these activities throughout claimant's day. For example, claimant receives IHSS support for assistance with "bowel, bladder care," which occurs sporadically throughout the day and night. Likewise, claimant receives IHSS support for "feeding"; because of her disabilities, she must eat four meals per day and each meal takes between 30 and 60 minutes.

13. Claimant's parents have been unable to hire suitable substitutes for claimant's mother through the Solano County IHSS program.

14. While claimant is awake and at home, her parents rarely can devote any attention to themselves, to claimant's sibling, or to household chores. Because claimant reacts poorly to noise and to crowds, she limits her family's ability to socialize together in public with other adults and families. To go out together without their children, claimant's parents cannot hire an ordinary babysitter. Even while claimant should be asleep, claimant's parents must monitor her in case she awakens, so that she does not escape the house, harm herself, or damage things.

15. In late November 2016, NBRC service coordinator Latrice Simmons met with claimant and her mother to review claimant's IPP. Claimant's mother asked Simmons to ask NBRC to restore 90 hours per quarter (about seven hours per week) of respite services to claimant's IPP. Simmons took this request to her supervisors, who directed Simmons to inform claimant's mother that NBRC would not add these services to the IPP. The evidence did not establish when Simmons's supervisors made this decision, or what information they reviewed in making it.

16. Simmons prepared an addendum to the IPP dated January 20, 2017, stating that NBRC expected claimant's parents to obtain respite by finding someone to substitute from time to time for claimant's mother as claimant's IHSS protective supervision caregiver. Simmons also prepared a formal Notice of Proposed Action on

that same date, stating "North Bay Regional Center is unable to fund respite services requested as family has access to a generic resource." For reasons that the evidence did not explain, however, NBRC did not mail these documents to claimant until February 21, 2017. Claimant filed a timely request for a hearing after receiving the Notice of Proposed Action.

17. NBRC has a written policy to guide its decisions regarding respite services. This policy acknowledges that these services' overall purpose is "to provide parent/guardian relief from the constant care and supervision of their child which exceeds what would be typical for a person of the same chronological age." The policy calls for NBRC and the child's parents to explore all "generic" sources of respite support before turning to NBRC to fund respite service. It also states that for children who receive IHSS protective supervision services and whose parent(s) provide that protective supervision, "the parent is not receiving a break from the child's care and therefore does not have access to a generic resource that can meet the same need as respite."

18. Claimant may not use IHSS service hours to pay for someone to accompany her outside her home for social or recreational activities.

19. With seven hours' respite per week, claimant's mother and father could run household errands much more efficiently. They also could take claimant's sibling to activities where they could pay one-on-one attention to him, or could have a respite worker take claimant places while claimant's sibling stays with his parents. Finally, claimant's mother and father could use respite services to reinforce their relationship with one another and to strengthen their ability to tend jointly to both of their children's needs. Given the intensity of claimant's needs, the evidence established that claimant's request for 90 hours per quarter of parental respite services is reasonable and not excessive.

20. Claimant presented no evidence showing that her family had incurred expenses for respite care between November 2016 and the date of the hearing.

LEGAL CONCLUSIONS

1. The Lanterman Act requires claimant's IPP to reflect consideration of the needs of claimant's entire family unit, and to support claimant's parents' decision to care for claimant at home. (Welf. & Inst. Code, § 4685.)

2. Parent respite is a service available under the Lanterman Act. (Welf. & Inst. Code, § 4685 subd. (c)(1).) One of its chief purposes is to "[r]elieve family members from the constantly demanding responsibility of caring for the client." (*Id.*, § 4690.2, subd. (a)(3).)

3. NBRC must provide all services in a cost-effective manner, and must identify and pursue all possible funding sources for services meeting claimant's needs. (Welf. & Inst. Code, §§ 4646, subd. (a), 4659, subd. (a)(1).)

4. When NBRC considered and acted on claimant's request for 90 hours per quarter of parent respite, the Lanterman Act permitted NBRC to provide this service only "when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities." (Former Welf. & Inst. Code, § 4686.5,¹ subd. (a)(1).) The matters stated in Findings 2, 7, and 10 through 12 establish that claimant meets this criterion. The Lanterman Act also permitted NBRC to treat IHSS as a resource that could meet claimant's respite needs, but only if evidence specific to claimant's circumstances showed that IHSS actually met those needs. (*Id.*, subd. (a)(5).)

¹ The Legislature repealed this code section effective June 27, 2017. (Stats. 2017, ch. 18, § 20.)

Here, the matters stated in Findings 7 through 9, 12 through 14, 18, and 19 show that the IHSS services available to claimant do not meet her family's need for respite services.

5. The policy described in Finding 17 conforms generally to the statutes governing NBRC's provision of respite services. The matters stated in Findings 2 and 7 through 19 show, however, that NBRC has failed to respect its own policy statement in making its decision regarding respite services for claimant's parents. Claimant is eligible for respite services through NBRC.

6. The matters stated in Findings 13, 15, 18, and 19 show that 90 hours per quarter of respite services will meet claimant's family's needs at this time.

7. The Lanterman Act requires NBRC to provide written notice within five days after making a decision "to deny the initiation of a service or support requested for inclusion in the individual program plan." (Welf. & Inst. Code, § 4710, subd. (b).) As stated in Findings 15 and 16, NBRC waited at least 30 days after deciding to deny claimant's mother's request to restore respite services to claimant's IPP before sending written notice of that decision to claimant. NBRC did not provide timely notice of its decision in this matter.

8. Under appropriate circumstances, a hearing officer may order NBRC to reimburse a claimant for Lanterman Act services that the claimant procured independently despite NBRC's erroneous denial or delay of those services. In this matter, however, by reason of Finding 20, claimant has not established entitlement to any such reimbursement.

ORDER

Claimant's appeal is granted. For the current fiscal quarter and continuing until further revision of claimant's IPP, claimant's IPP services shall include 90 hours per quarter of respite care.

DATED: July 13, 2017

_____/s/_____

JULIET E. COX

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This decision is the final administrative decision in this matter. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.