

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2017051358

OAH No. 2017071043

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard these consolidated matters on November 16, 2017, in Culver City, California.

Lisa M. Basiri, Fair Hearing Specialist, represented Westside Regional Center (WRC or Service Agency). Claimant's parents represented claimant, who was not present.<sup>1</sup>

An order dated August 16, 2017, consolidated these two cases for hearing. At the hearing, the parties stipulated that the cases be consolidated for all purposes; therefore, a single decision will issue addressing the matters raised in each of the consolidated cases.

Oral and documentary evidence was received. The record was held open to allow claimant to submit additional evidence by December 8, 2017, and to allow the Service Agency to respond by December 15, 2017. Claimant timely submitted additional

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<sup>1</sup> Family and party titles are used to protect the privacy of claimant and his family.

documents, which were collectively marked for identification as exhibit J. The Service Agency timely submitted a response, which was marked for identification as exhibit 19. Exhibits J and 19 were admitted in evidence. Claimant filed a response to the Service Agency's response; it was not timely; nevertheless, it was marked as Exhibit K and admitted.

The record was closed and the matter was submitted for decision on December 15, 2017.

## ISSUES

1. Whether the Service Agency must fund an increase in claimant's respite hours, from 21 hours per month to 70 hours per month, retroactively and in the future.
2. Whether the Service Agency must fund 20 hours per week of specialized supervision day care for claimant, retroactively and in the future.
3. Whether the Service Agency must fund 200 hours of extended school year (ESY) specialized supervision day care services for claimant, retroactively and in the future.

## EVIDENCE RELIED UPON

*Documents.* Service Agency's exhibits 1-19; claimant's exhibits A-K.

*Testimony.* Julian Hernandez; claimant's mother.

## FACTUAL FINDINGS

### PARTIES AND JURISDICTION

1. Claimant is a seven-year-old boy who is a WRC consumer based on qualifying diagnoses of autism spectrum disorder and mild intellectual disability. Claimant has a diagnosis of Spastic Diplegic Cerebral Palsy (he wears small leg braces

that do not interfere with his mobility) and a history of seizures (he had one seizure in 2015).<sup>2</sup> In addition, claimant has chronic lung disease and chronic constipation.

2. Claimant lives at home with his mother, his twin sister, and his cousin. His sister is a WRC consumer. His father is separated from his mother and no longer lives in the home.

3. Claimant's school district provides claimant with behavioral supports, language and speech therapy, occupational therapy, a one-on-one health aide, adaptive physical education, and health-related services. Claimant attends a full school day of approximately seven hours.

4. In early 2017, claimant's parents requested an increase in respite hours, from 21 to 70 per month, and requested that the vendor rate change from the sibling rate to an individual rate.

5. By a letter and Notice of Proposed Action (NOPA), dated April 6, 2017, the Service Agency notified claimant's parents of its decision to deny the request for increased respite hours and to grant the change in rate. Candice La Mere, then claimant's service coordinator at WRC, wrote, with respect to denying the increase in hours:

The request for the increase in respite service hours was to assist your family with providing supervision for your child, so that the child has the appropriate amount of supervision. You have stated that due to the client's individual needs, each child requires their own caregiver and it was too

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<sup>2</sup> The parties did not clarify why these conditions did not also establish eligibility for regional center services under the Lanterman Developmental Disabilities Act (Lanterman Act).

difficult for one person to watch both clients[] together. In addition, you stated that you usually take them separately to each session. You also stated that the rationale for an increase in respite support was: "The children and their individualized needs are your full-time job, you are a citizen advocating for the community, and you serve on the Westside Regional Center Board."

The basis of this decision was that the Purchase of Services Committee determined that based upon your description, a review of the client's records, and the results of the completed Family Respite Needs Assessment Guideline, [claimant] qualifies for 21 hours a month of Regional Center funded respite services.

(Ex. 2.) The Service Agency cited Welfare and Institutions Code section 4686.5, subdivision (a)(2), which limits in-home respite services to 90 hours per quarter.<sup>3</sup>

6. On May 18, 2017, claimant's parents filed a fair hearing request (FHR) to appeal the Service Agency's decision to deny their request to increase respite hours.

7. On July 6, 2017, WRC reviewed another request from claimant's parents, that WRC fund 20 hours per week of "day care" services during the school year and 200 hours for when school is not in session, i.e., ESY services.

8. By a letter and Notice of Proposed Action (NOPA), dated July 12, 2017, the Service Agency notified claimant's parents of its decision to grant their request to fund

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<sup>3</sup> This section has been repealed effective January 1, 2018. All further statutory references are to the Welfare and Institutions Code, except where otherwise stated.

specialized supervision day care services during the school year, as an exception, but to deny the request for 20 hours per week, agreeing to fund 27 hours per month instead.<sup>4</sup> The Service Agency also notified claimant's parents of its denial of their request for ESY services funding. Jesús Franco, then claimant's service coordinator, wrote that the family must use generic resources when appropriate, citing section 4646.4. Franco wrote that WRC service standards state that day care services are provided "while family caregivers are at work or attending a vocational/educational program leading to future work, and have no other means to provide care and supervision." (Ex. 10.) He continued that WRC "may pay only the cost of care that exceeds the cost of normally providing day/after-school care to a child without disabilities of the same age." (*Ibid.*)

9. On July 11, 2017, claimant's parents filed an FHR to appeal the Service Agency's decision to deny their request for 20 hours per week of specialized supervision services and ESY specialized supervision services.

#### CLAIMANT'S IPP

10. An IPP meeting was held on March 28, 2017. Julian Hernandez, a program manager at WRC, attended, as did claimant's former service coordinator, Candice La Mere. Claimant's mother, claimant, and claimant's sister were present. While the meeting proceeded, Hernandez played with the children, engaged them in conversation, found claimant to be pleasant, funny, and cooperative, and observed no inappropriate behavior or aggression. It was the only time Hernandez and La Mere met claimant. Claimant's current service coordinator, Jesús Franco, has never met claimant.

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<sup>4</sup> Claimant's mother requested a personal assistant for claimant, rather than specialized supervision. The Service Agency provided specialized supervision because regional centers offer personal assistant services only to adults, not to school-aged children, for whom regional centers may offer day care services.

11. Claimant's most recent IPP, dated March 28, 2017, states that claimant needs assistance with most of his daily living skills, such as dressing, eating, and on occasion toileting. He requires monitoring and assistance to ensure he takes his medications. He requires constant supervision in all settings due to deficits in safety awareness. He has limited communication skills, may wander off if unsupervised, has mild behavioral issues, and has occasional tantrums but is responsive to adult redirection. He is cared for by both parents and is close to his grandparents and aunt. He receives In-Home Support Services (IHSS) and California Children's Services supports and therapies and is eligible for Medi-Cal. Claimant's mother has not yet signed the IPP. She asked the Service Agency to revise it to correct what she considers some outdated information, and the revision process has not concluded. Relevant information in the prior IPP, dated February 29, 2016, is similar to that in the 2017 IPP.

#### RESPIRE SERVICES

12. The Service Agency uses its Family Respite Needs Assessment Guideline to determine whether to provide respite services to each of its consumers and the number of hours to provide. The Guideline takes into account age, adaptive skills (e.g., eating, grooming, dressing), mobility, communication skills, day programs, medical needs, behavioral needs, family situation (e.g., whether a sibling is also a consumer), and generic resources (e.g., IHSS), assigning a score based on the consumer's needs in each area. The Guideline notes that respite is not "daycare," but is designed to provide appropriate care and supervision to protect the consumer's safety in the absence of a family member, and to "relieve family members from the constantly demanding responsibility of providing care." (Exs. 3 & 10.)

13. WRC applied the Guideline at the time of claimant's most recent IPP meeting. Claimant received a score of 18. A score in the range of 15 through 19 warrants 21 hours per month of respite services. Claimant receives 21 hours per month.

Claimant's respite hours have not been limited by the statutory quarterly 90-hour cap. (See § 4686.5, subd. (a)(2).)

14. The Guideline provides that, for all respite requests, WRC must consider other "natural supports available to provide for the temporary care of the individual," such as grandparents, the consumer's school, IHSS hours, and other generic resources. (Ex. 3.)

15. WRC's Service Standard regarding respite provides that WRC may grant an exemption from respite limits,

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. [WRC] does not purchase day care services to replace or supplant respite services. "Day care" is defined as regularly provided care, protection, and supervision of a consumer living in the home of his or her parents, for periods of less than 24 hours per day, while the parents are engaged in employment outside of the home or educational activities leading to employment, or both.

(Ex. 8.)

16. Claimant's mother testified she requires additional respite hours because she is responsible for three children, two of whom are consumers of regional center services, and is dealing with the death of a child. Both claimant and claimant's sister are regional center consumers (they were two of three triplet siblings; their sister died in

2014). Claimant's mother recently became the legal guardian of her six-year-old niece when her brother died. She is separated but not divorced from her husband, who has regular contact with the children. Her oldest daughter is at college and visits on weekends. She has two elderly parents, who require care. She uses two respite providers, her husband, Miguel Lopez, and a woman who works on Fridays and weekends.

17. Claimant's mother uses some of the respite hours to serve as a WRC board member and attend meetings approximately once every month or two.

18. Claimant receives 283 hours of IHSS. Claimant has frequent appointments with many health care providers; it takes two hours to drive him to his primary care physician. IHSS covers only some of the time required to take claimant to his frequent doctor appointments. An IHSS provider, Sonya Torres, provides 100 IHSS hours monthly; Torres assists with housekeeping and meal preparation, and does not generally provide direct care to claimant.

19. Rather than hire additional service workers, claimant's mother herself provides the other 183 IHSS hours every month. She testified she has had difficulty finding someone to care for her children at the IHSS rate of \$11.18 per hour.

#### SPECIALIZED SUPERVISION SERVICES

20. Claimant's mother requested that WRC fund a personal assistant for claimant. When WRC offered specialized supervision day care services instead, she initially declined the offer. Because claimant has self-care needs, frequent medical appointments, numerous medications, breathing treatments, OT and PT, among other needs, claimant's mother believes specialized supervision is inadequate but a personal assistant would be useful. For example, a personal assistant could remain with claimant at a doctor visit while claimant's mother goes home to care for the other children.

21. Hernandez testified that personal assistant services are specifically targeted to adults; children may receive instead specialized supervision day care

services, when such care is appropriate under WRC's day care services standard or policy. Under that standard, as Franco informed claimant's parents in his NOPA letter in July 2017, day care services are only available where family caregivers work full-time or attend a vocational or education program leading to future work and have no other means to provide care and supervision. Regional centers may pay only the cost of care that exceeds the cost of providing day care or after-school care to a child of the same age without disabilities. WRC offered claimant 27 monthly hours of day care services as an exception, "due to the famil[y]'s highly stressful and crisis situation." (Ex. 4, p. 6.) Claimant has been using the specialized supervision day care services, though the March 2017 IPP notes that claimant's mother asked to terminate the services. (*Ibid.*)

22. WRC explored with claimant's mother whether she was working full-time and could therefore satisfy one of the requirements for receiving day care services for claimant. Because she hopes to start a non-profit business, working from home to assist bereaved families, and is only in the initial stages of forming that business, claimant's mother provided only vague information to WRC about her work status. At hearing, she testified she works from home part-time, not full-time. She submitted documents again acknowledging that she does not work full-time and that she has not formalized her business. She has filed a fictitious business name statement for "A Moment of Loss" and "Vicky & Friends." (Ex. J.) She has explored having a website created. She has assisted families by finding affordable funeral services and arranging for transportation of decedents to their countries of origin. On forms she has completed in connection with that assistance, she has generally identified herself as a "friend." (Ex. J.) The evidence regarding her business endeavors does not establish the required condition for day care services, namely that claimant qualifies for funding for after school supervision due to the unavailability of family caregivers who "are at work or attending a

vocational/educational program leading to future work, and have no other means to provide care and supervision.” (Ex. 11.)

23. Claimant receives 283 hours per month of IHSS. WRC does not offset those hours against claimant’s respite hours; IHSS hours are, however, available support for claimant. WRC provides 21 hours per month of in-home respite and 27 hours per month of specialized supervision. Together with the IHSS hours, claimant receives 331 hours per month of paid support. Claimant is in school approximately seven hours per day, or 154 hours per month. School and other supports account for a total of 485 hours per month. If one adds eight hours of sleep per night, or 240 hours of sleep per month, that accounts, when combined with the 485 hours of funded and generic services, for 725 hours, or all the hours in a 30-day month.

24. In view of the fact that claimant receives services and supports during virtually every waking hour, and that WRC has funded specialized supervision as an exception because claimant does not satisfy the ordinary requirements for those services, claimant has not established a need for additional specialized supervision hours. Family circumstances do not warrant an exception under the Lanterman Act or WRC policies.

#### ESY SPECIALIZED SUPERVISION SERVICES

25. According to WRC’s Day Care Services standard, ESY refers to specialized supervision day care services provided when school is not in session, for “persons attending school whose parents are unavailable to provide supervision because of their employment during customary school hours.” (Ex. 11.) Hernandez testified that, at the time of claimant’s parents’ July 2017 request for ESY, WRC had already granted an exception to its service standard for specialized supervision day care services, funding 27 hours at the single rate. The service standards for day care provide that parents accept normal parental responsibilities, and that funding may be provided if the parents or

primary caregivers are not available to supervise the consumer during what would be the child's school hours due to their employment or school or training attendance. WRC denied ESY funding because claimant's mother did not provide documentation to show that both she and her husband are employed during what would normally be claimant's school hours. Her husband, though he does not live in the family home, has regular contact with the children, is one of claimant's respite providers, and "is equally responsible for them and he is also considered a generic resource." (Ex. D, p. 9.) Contrary to claimant's assertion, in denying ESY WRC did not assume claimant's grandparents were available as caregivers; they are elderly and incapable of providing care for claimant. (*Ibid.*)

26. Claimant's mother works primarily as a stay-at-home parent. The evidence did not establish that she must devote all the hours claimant would normally be in school to the development of her business.

## LEGAL CONCLUSIONS

### APPLICABLE LAW AND ANALYSIS

1. The Lanterman Act governs this case. (§ 4500 et seq.) An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) Claimant's mother requested a fair hearing to appeal the Service Agency's denial of her request to increase claimant's respite hours from 12 hours per month to 30 hours per month. (Factual Findings 4, 5.)

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, claimant seeks to change the level of services. Therefore, claimant bears the burden of proving, by a preponderance of the evidence, that he is entitled to an increase in respite service hours. (Evid. Code, § 115.)

3. The Lanterman Act acknowledges the state's responsibility to provide services and supports for developmentally disabled individuals and their families. (§ 4501.) Regional centers, such as the Service Agency, play a critical role in the coordination and delivery of services and supports. (§ 4620 et seq.) Regional centers are responsible for developing and implementing IPPs, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (§§ 4646, 4646.5, 4647, and 4648.)

4. Respite is one of the services that regional centers may provide to consumers and their families. (§ 4512, subd. (b).) The Lanterman Act defines "in-home respite services" as "intermittent or regularly scheduled temporary nonmedical care and supervision provided in a client's own home, for a regional center client who resides with a family member." (§4690.2, subd. (a).) Respite services are designed to:

- (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 family members.

(4690.2, subd. (a).)

5. Section 4686.5 provides that "[a] regional center may only purchase respite services when the care and supervision needs of a consumer exceed that [*sic*] of an individual of the same age without developmental disabilities." (§ 4686.5, subd. (a)(1).)

6. Under the Lanterman Act, regional centers may not purchase services for their clients when those services can be provided by a generic agency, an agency that

has a legal responsibility to serve members of the general public and that receives public funds for providing such services. (See §§ 4648, subd. (a)(8), 4659, 4646, subd. (d), 4646.4, subd. (a), 4646.5, subd. (a)(4), and 4647, subd. (a).) IHSS may be considered a generic resource when the approved IHSS service is consistent with a specific service need identified in the client's IPP; however, respite hours purchased by regional centers should be considered as an offset only when there is a clear determination by the interdisciplinary team that the specific IHSS services are meeting "the respite need as identified in the consumer's [IPP]." (§ 4686.5, subd. (a)(5).) Here, the Service Agency agrees that IHSS hours do not replace and should not be used to offset respite hours. The evidence does not show that the Service Agency based its determination not to increase respite hours on the availability of IHSS. (Factual Finding 23.)

7. When purchasing services and supports, a regional center must conform to its purchase-of-service guidelines. (4646.4, subd. (a)(1).) Those guidelines are to have been reviewed by the Department "to ensure compliance with statute and regulation." (§ 4434, subd. (d).) Reflecting the Department's interpretation of statute and regulation, the guidelines are not entitled to the deference given to a regulation but are rather entitled to a degree of deference dependent upon the circumstances in which the agency has exercised its expertise. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-15.) The Service Agency in this case relied on its service standards regarding respite and day care services to justify (a) its denial of additional respite hours, while granting an increase in the rate paid for respite, (b) its granting of claimant's request for day care services while denying more than 27 hours of those services per month, and (c) its denial of ESY day care services.

8. Claimant has not demonstrated that an exception to the requirements for respite hours is warranted. The hours were determined by application of WRC's respite guideline, using factors relevant to the Lanterman Act's criteria for respite services. The

guideline provides that the Service Agency “may only purchase respite services when the care and supervision needs of the person exceed that [*sic*] of an individual of the same age without developmental disabilities.” (Ex. 5). This language mirrors almost exactly the language of section 4686.5, subdivision (a)(1). The guideline also incorporates factors relevant to Lanterman Act provisions governing the funding of respite services. For example, transporting children to school and to medical appointments are typical parental responsibilities and do not justify additional respite hours.

9. Applying its day care and ESY standards, the Service Agency concluded that claimant’s care and supervision needs exceed those of a child of the same age without disabilities only to the extent that 27 hours per month of day care services are warranted, given the family’s recent difficult circumstances. WRC denied ESY because claimant’s mother is available to provide care and supervision for claimant during school hours when school is not in session. Claimant’s mother did not provide evidence sufficient to demonstrate that claimant is entitled to more monthly day care hours, or to ESY hours, to meet claimant’s needs.

10. In addition, claimant’s mother has chosen not to maximize the use of generic resources available to her and appropriate for claimant’s needs. She apportions to herself 183 monthly hours of IHSS, provided through Los Angeles County, rather than using those hours to hire a service provider. She offered insufficient evidence of unsuccessful attempts to hire a service provider. The service provider she has retained for the remaining 100 IHSS monthly hours provides primarily housekeeping and meal preparation services, not direct care to claimant. WRC funds 27 hours of specialized services for claimant and his sibling, under an exception, but it is unclear exactly how claimant’s mother uses those hours. The children are in school approximately 154 hours per month. Thus, for 485 hours per month, or almost 15.5 hours per day, claimant

receives some form of paid service. Only eight hours remain each day with no funded service; presumably, claimant sleeps most or all of those eight hours. The Service Agency has provided the supports that claimant needs and has ensured that other, generic supports are being utilized. The record does not warrant a higher level of care for, e.g., claimant's medical conditions. Nor has the documentation regarding claimant's mother's self-employment efforts justified additional services for claimant.

#### DETERMINATION

11. Claimant did not establish that WRC must fund an increase in his respite hours, from 21 hours per month to 70 hours per month, retroactively and in the future. (Factual Findings 1-19, and Discussion.)

12. Claimant did not establish that WRC must fund 20 hours per week of specialized supervision day care, retroactively and in the future. (Factual Findings 1-11 and 20-24, and Discussion.)

13. Claimant did not establish that WRC must fund 200 hours of extended school year specialized supervision day care services, retroactively and in the future. (Factual Findings 1-11, 25, and 26, and Discussion.)

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#### ORDER

Claimant's appeal is denied.

DATE:

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HOWARD W. COHEN

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.