

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018020425

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DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on March 20, 2018.

Claimant's mother represented claimant.

Stephanie Zermeño, Consumer Services Representative, Fair Hearings & Legal Affairs, represented Inland Regional Center (IRC).

The matter was submitted on March 20, 2018.

ISSUE

Is IRC required to fund 303.1 respite hours per month for claimant?

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Claimant is a 12-year-old boy who qualifies for regional center services under the Autism and Intellectual Disability categories. He attends a non-public school for children with Autism and has an Individualized Education Plan (IEP) in place.

Claimant receives 282 hours per month of In Home Supportive Services (IHSS), which includes 196 protective supervision hours. He also receives 100 hours per month of routine respite through IRC, and 35 hours per month of Applied Behavior Analysis (ABA) therapy through the family's health insurance coverage. Claimant lives at home with his older sister and brother, younger twin siblings and his parents, who are both registered nurses.

2. Claimant's mother is seeking 303.1 hours per month of respite. As stated in the summary of the parties' informal meeting on February 28, 2018, claimant's mother originally sought to increase respite from 100 hours per month to 359.35 hours per month. But, according to the Notice of Proposed Action, IRC denied claimant's request for 151.21 hours per month of respite claimant's mother requested in a December 20, 2017 email. At the hearing, claimant's mother clarified her request and stated that claimant is seeking 303.1 hours per month of respite care. IRC did not dispute that this amount of respite hours is the issue in this proceeding.

3. On January 29, 2018, claimant's mother timely appealed IRC's decision to deny claimant's request for additional respite hours.

#### CLAIMANT'S IEP

4. The following information is documented in claimant's most recent IEP dated February 1, 2018: claimant lacks safety awareness, he does not discern danger from safe situations, and he needs a lot of help in this area. His parents reported that he has climbed out windows, climbed onto the roof and eloped into the neighborhood. He is "very hyperactive" and needs "close supervision." He requires a lot of redirection; he can stay seated without eloping for about three to seven minutes. Claimant is prescribed Risperdal in the morning, Trileptal in the morning and afternoon, Ativan for aggression as needed, and Melatonin to support sleep. Claimant regularly sees a psychiatrist.

Claimant receives the following special education services at school: 1,190 minutes weekly of intensive individual services consisting of a 1:1 aide, 240 minutes monthly of behavior intervention services, 20 minutes weekly of occupational therapy, and 10 minutes weekly of language and speech with a speech language pathologist.

For the extended school year from June 2018 to August 2018, claimant is eligible to receive specialized academic instruction consisting of 360 minutes daily; and intensive individual services consisting of 360 minutes daily with an ABA trained aide.

### CLAIMANT'S MOTHER'S TESTIMONY

5. Claimant's mother testified that respite is needed because she has to remain awake at night because claimant does not sleep on a predictable schedule and will wake between 1:00 a.m. and 6:00 a.m. Because he does not appreciate danger, and due to his problems sleeping at night, he is at risk of hurting himself at night. Claimant will try to jump from the second floor of the family house and slide down the banister. Claimant's mother works two days a week at a hospital on twelve hour shifts and claimant's father works at night as a nurse at a hospital four days a week. As a result, she is sleep deprived, she and claimant's father feel worn down with flu-like symptoms, and she is close to the breaking point in her ability to adequately care for claimant. Claimant's mother also noted that she cannot give her other children any attention because she must stay up at night to ensure claimant's safety.

To illustrate the circumstances involving claimant at night, claimant's mother took photos of claimant at night on one recent occasion, which she narrated in her testimony. On this occasion, claimant woke between 1:00 a.m. and 6:00 a.m. and claimant's father brought him down to the first floor of the family house and tried to have him sit on the couch so that claimant's mother could sleep. His father placed his legs over claimant while claimant's father slept. In a short amount of time, claimant's father fell asleep and claimant left the couch and jumped on a bathroom sink and damaged it.

Claimant's mother said she needs respite care between 1:00 a.m. and 6:00 a.m. four days per week. To justify the 303.1 hours of respite, she made a calculation based not on the four days she said she needed respite but based on seven days. Her calculation is as follows: five hours a day multiplied by seven days for 35 hours a week and 35 hours per week multiplied by 4.33, average number of weeks in a month, for a total of 151.55 hours to watch claimant at night.

Claimant also asked for the same amount of hours, 151.55, so that she could spend one hour a day with each of her four children and have one hour for rest per day. The calculation is the same calculation made immediately above.

6. At the hearing, claimant, two caregivers, and claimant's siblings were present. During the hearing, claimant frequently ran around the room and one of his caregivers and his older sister monitored him closely. He was unable to remain seated for more than several minutes.

#### TESTIMONY OF FELICIA VALENCIA

7. Felicia Valencia is a Program Manager for the Riverside West Unit at IRC. She holds a Master's degree in rehabilitation counseling and has worked with persons with developmental disabilities for 20 years. She has worked as an ABA therapist.

She does not believe that respite is an appropriate service because respite is not a service to treat or alleviate a condition and is not designed to replace the role of the parent. Ms. Valencia stressed that IRC wants claimant to be included in family activities and she is concerned that respite care will mean that he is excluded from family activities. To address claimant's sleep issues, on March 12, 2018, IRC referred claimant for medication review with a pharmacist. Ms. Valencia also believed that the current amount of ABA hours does not represent the level of claimant's need. IRC would recommend that instead of more respite hours, claimant's ABA hours be increased, a treatment plan be developed, or that a different ABA vendor be utilized.

More fundamentally, Ms. Valencia disagrees that claimant is entitled to receive additional respite based on the services in place. In this regard she made the following calculations: There are 720 hours in a month; subtract 282 hours of IHSS from 720 and there are 438 hours of potential need for respite; subtract 100 of IRC-approved respite from the 438 hours and there are 338 hours. She then calculated that claimant sleeps ten hours a night four nights a week, and five hours a night three days a week, for a total of 55 hours per week, or 220 hours per month. Subtract 220 from 338 and there are 118 hours of potential need for respite. Ms. Valencia then stated that claimant is at school from 7 a.m. to 3 p.m. four days a week and from 7 a.m. to 2 p.m. on Friday for a total amount of time spent at school of 160 hours per month. Subtract 160 from 117 and there is a negative balance. Ms. Valencia noted that this does not include the amount of ABA services claimant receives.

8. Claimant's mother disagreed with Ms. Valencia's calculation of claimant's sleep schedule. She said claimant wakes up at different times and she cannot predict when he will wake and she needs to stay awake to protect him. Claimant's mother described her need to be awake at night as a safety issue similar to patients who are fall risks at a hospital. Her concern is that he will jump from the second floor or fall off the banister.

Regarding Ms. Valencia's comments about ABA therapy, claimant's mother did not disagree that ABA hours may need to be increased and she is amenable to have his ABA therapy strategies reassessed. She noted at the same time that ABA therapy does not mean that claimant's sleep problem will be resolved overnight.

#### IRC'S POLICY AND PROCEDURE REGARDING RESPITE CARE

9. IRC has established a Purchase of Service Policy for the purchase of respite care. In its POS Manual, IRC recites its policy to purchase services and supports that allow persons with disabilities to achieve the greatest degree of self-sufficiency and

personal choice consistent with the consumer's IPP. Within the context of the IPP, IRC will give the greatest preference to those services and supports that allow minors with disabilities to live with their families. IRC will authorize the purchase of services and supports consistent with standards under applicable Welfare and Institutions Code sections. Where individual circumstances exist that may require authorization to purchase services not consistent with IRC's standards, exceptions may be granted where the Interdisciplinary Team identifies and documents in the consumer's IPP that circumstances exist to warrant an exception and the Compliance Review Team will review these service purchases before services are provided.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF AND STANDARD OF PROOF

1. Each party asserting a claim or defense has the burden of proof for establishing the facts essential to that specific claim or defense. (Evid. Code, §§ 110, 500.) Claimant has the burden to show that he is entitled to the respite hours he seeks.

2. The standard by which each party must prove those matters is the "preponderance of the evidence" standard. (Evid. Code, § 115.) A preponderance of the evidence means that the evidence on one side outweighs, or is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

### THE LANTERMAN ACT

3. In enacting the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq., the Legislature declared that the State of California accepts a responsibility for persons with developmental disabilities and an obligation to them that it must discharge. The

Legislature declared that an array of services and supports should be established to meet the needs and choices of each person with developmental disabilities. (Welf. & Inst. Code, § 4501.)

4. The Lanterman Act gives regional centers a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Regional centers are responsible for developing and implementing IPPs, for taking into account consumer needs and preferences, and for ensuring cost-effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

5. Welfare and Institutions Code section 4512, subdivision (b), lists examples of the kinds of services and supports that may be funded. The determination of which services and supports are necessary for each consumer shall be made through the IPP process, a collaborative process involving consumer and service agency representatives.

#### RESPIRE SERVICES

6. Respite under the Lanterman Act is defined as a service intended “to provide intermittent or regularly scheduled temporary relief from the care of a developmentally disabled family member.” (Welf. & Inst. Code, § 4690.2, subd. (a).)

7. Respite services are to be purchased by a regional center based upon the individual needs of a given consumer and his or her family. In making its determination of the quantum of respite services for a particular family, a regional center should consider: assistance to family members in maintaining the client at home; provision for appropriate care and supervision to ensure the client’s safety in the absence of family members; relief of family members from the constantly demanding responsibilities of caring for a client; and, attendance to the client’s basic self-help needs and other activities of daily living, including interaction, socialization, and continuation of usual daily routines that would ordinarily be performed by the family member. (Welf. & Inst. Code, § 4690.2, subd. (a).)

8. Regional centers are required to provide services in a cost-effective manner (Welf. & Inst. Code, § 4646, subdivision (a).) and may purchase respite hours only when the care and supervision needs of a consumer exceed that of an individual of the same age without a developmental disability. (Welf. & Inst. Code, § 4686.5, subd. (a)(1).)

9. Effective July 1, 2009, in response to a state-wide budgetary crisis, the California Legislature adopted Welfare and Institutions Code section 4686.5, which limited respite services available to regional center consumers to 90 hours per quarter. Section 4686.5, subdivision (a)(3)(A), provides an exemption from the hourly limit under certain circumstances, including the circumstance where it is demonstrated that the intensity of the consumer's needs are such that additional respite is necessary to maintain the consumer in the family home.

**CAUSE EXISTS TO GRANT CLAIMANT'S APPEAL IN PART AND DENY CLAIMANT'S APPEAL IN PART**

10. The evidence established that claimant is entitled to receive an additional 87 hours per week of respite care per month pursuant to Welfare and Institutions Code section 4690.2, subdivision (a).

Claimant requires this increase for the following reasons: Claimant has needs in excess of an individual of the same age without a development disability and the intensity of claimant's needs are such that additional respite is necessary to maintain him in the family home. Claimant cannot appreciate danger or risks; he is hyperactive; he cannot stay seated for longer than seven minutes; he elopes without regard to his personal safety; and he sleeps irregularly at night and not on a predictable schedule. As claimant's mother credibly testified, to ensure his safety claimant must be monitored at night between 1:00 a.m. and 6:00 a.m. While claimant's father works, claimant's mother monitors claimant at night between 1:00 a.m. and 6:00 a.m. four times a week. As a



result she is exhausted and close to the breaking point and requires respite during these times.<sup>1</sup> But, her request that she needs additional respite care seven days a week was not substantiated because claimant's father is available three nights a week to monitor claimant. Similarly, claimant's mother's request that IRC fund hours so that she can spend one hour a day with her other four children and one hour a day resting was also not justified. Claimant has other supports in place, including 100 hours of routine respite and natural supports, which should allow claimant's mother to spend time with her other children.

With this noted, IRC's comment that that more respite is not a permanent solution to the challenges that claimant's condition poses is well-taken. The current amount of ABA hours claimant receives does not seem to represent the level of his need. Claimant's mother indicated that she is amenable to an increase in ABA to address strategies to help claimant remain safe and improve his sleep pattern. The parties are thus encouraged to pursue additional ABA hours as soon as possible.

## ORDER

Claimant's appeal of the regional center's decision not to increase claimant's respite services is granted in part and denied in part. IRC shall fund an additional 87 hours per month of respite services.

Dated: March 29, 2018.

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<sup>1</sup> The 87 respite hours is calculated as follows: five respite hours multiplied by four days a week multiplied by 4.33, the average number of weeks in a month.

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ABRAHAM M. LEVY

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 the State of California.**