

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018040656

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on June 26, 2018.

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

Araceli Diaz, Disability Advocate, represented claimant, who was not present. Claimant's mother was present at the hearing and participated with the assistance of Dolores Lemus, an uncertified Spanish interpreter, by agreement of the parties.

The record was closed and the matter submitted on June 26, 2018.

ISSUE

Should IRC increase the respite hours claimant receives from 30 hours per month to 120 hours per month?

## FACTUAL FINDINGS

### CLAIMANT'S BACKGROUND

1. Claimant is a 12-year-old boy who qualifies for regional center services based on a diagnosis of autism. He resides at home with his mother and older brother. Claimant's older brother is also a regional center consumer. Claimant requires supervision on a 24-hour basis. There was no testimony concerning claimant's father's role in claimant's life, if claimant's father provides financial assistance to claimant, and if not, whether claimant's mother has pursued the lack of financial assistance from claimant's father – a natural support – through proper authorities. According to claimant's April 2018 Individualized Program Plan (IPP), claimant "no longer sees his father."

Claimant currently receives 30 hours of respite services. Claimant's April 2018 IPP documented that he receives 38 hours per month of protective supervision through In-Home-Supportive Services (IHSS), and claimant's mother is his IHSS provider. Claimant's mother contended at hearing that claimant receives 230 hours of IHSS, although that is not reflected anywhere in IRC's documents. Claimant has a 1:1 aide at school. Claimant's medical insurance funds applied behavioral analysis therapy. Claimant also attends speech and occupational therapy twice per week.

Claimant (and claimant's brother) attend school every day of the week. Transportation is provided. Claimant is generally in school from 8:00 a.m. to 2:00 p.m., although his mother claimed he is sometimes late because he does not want to get on the bus.

According to claimant's consumer services coordinator, Robert Gomez, claimant has some challenging behaviors, as reported by claimant's mother, such as: being resistive, pacing, hand-flapping, rocking his body, hyperactivity, aggressive behavior , pulling hair, biting, spitting, self-injurious, scratches and bangs his head on the table),

throwing things, and wandering off. However, Mr. Gomez visited claimant's school in September 2017 and did not observe any of the above-referenced behaviors. Rather, claimant was well-behaved and responding to directions. Claimant's health is currently stable and no emergency issues have arisen to show a change in claimant's circumstances to warrant additional respite hours.

In early 2018, claimant's mother contacted IRC. Mr. Gomez explained that claimant's mother was aware that the limit on respite hours was lifted in 2018, and demanded an increase to 120 hours. After checking with his supervisor, IRC agreed to give claimant an additional 10 hours of respite, or 40 hours per month. Claimant's mother became angry and refused the additional hours. She demanded a notice of proposed action so she could seek the 120 hours. Mr. Gomez stated that the case simply did not warrant an increase in respite. He said IRC took into consideration the time claimant is in school, the time he attends therapies, the IHSS hours received, and parental support. He said that there simply are not enough hours in the day to warrant 120 hours of respite, and noted that respite is intended only to provide a temporary and intermittent break from care.

Program Manager Felicia Valencia also testified. She was in complete agreement with Mr. Gomez.

#### NOTICE OF PROPOSED ACTION AND FAIR HEARING REQUEST

2. On March 22, 2018, IRC served claimant with a notice of proposed action (NOPA) denying claimant's request for an increase in respite services. IRC noted that it had offered claimant an additional 10 hours per month of respite but claimant's mother refused the offer. Therefore, it was denying the request for an increase in respite.

3. On April 4, 2018, claimant's representative filed a fair hearing request on claimant's behalf, objecting to the denial of an increase in respite hours. It read:

My case worker failed to provide my son respite hours to help relief [sic] me from intensity in the amount of care [claimant] requires. [Claimant] is a very restless-active child, someone must keep their eyes on him 24-hours a day to maintain his safety while living in his home. I would need my son . . . to get 120 hours a month to help maintain his supervised care he requires and giving me the time I need to take care of my own personal needs.

#### PURPOSE OF RESPITE AND IHSS

4. According to the Department of Developmental Services' website, which both supports and supplement Mr. Gomez's testimony, in-home respite services are meant to: assist family members to enable a person with developmental disabilities to stay at home; provide protective supervision if a family member is temporarily absent; relieve family members from having to provide continuous care; and attending to basic self-help needs and other activities that would ordinarily be performed by the family member. Respite services can be obtained through a vendor, but can also be purchased out-of-pocket by the consumer or consumer's family on a private pay basis.

5. According to the Department of Social Services' October 16, 2009, IHSS Orientation Provider Handout, the purpose of IHSS is to provide, among other things, protective supervision for someone who is disabled. IHSS also provides routine services such as: bowel and bladder care, domestic housework, dressing, feeding, heavy cleaning, meal cleanup, shopping and errands, limited medical services, preparation of meals, and tending generally to hygiene needs. The IHSS program in the area where claimant lives is administered by the County of Riverside IHSS Public Authority, which maintains a list of registered IHSS providers. It is not required that the IHSS provider be a family member. A person may qualify for up to a maximum of 283 hours per month of IHSS.

## CLAIMANT'S MOTHER'S TESTIMONY

6. Claimant's mother testified that she is "constantly" providing care for her two children. She said she requested additional respite because she does not get any rest. Claimant gets up very early, is very active, and is never calm. Even at night claimant may wake up, so she has to be awake. Sometimes when claimant wakes up at night, claimant wakes up his special-needs brother who then also requires supervision. At that point, she needs to watch both children.

Claimant's mother admitted that she was upset when IRC offered to give claimant an additional 10 hours of respite because she feels it requires a lot of work to take care of claimant. She said that during school vacation and holidays she has to watch him the whole time. She wants to have a normal life and a job and have a vacation like a "normal" person. The respite hours would help because she could get more rest and be a better mother to her children. Claimant's mother said she provides the IHSS and does her "job." She claims she cannot get a job outside of the home because of the flexibility she needs to tend to her children.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish by a preponderance of the evidence that IRC should fund the requested service. (Evid. Code, §§ 115, 500; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.)

### THE LANTERMAN ACT

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) to

provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

3. Welfare and Institutions Code section 4512, subdivision (b) defines "services and supports" as:

[S]pecialized 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 or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the

goals stated in the individual program plan, and the cost-effectiveness of each option . . . Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.

4. The Department of Developmental Services (DDS) is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.) In order to comply with its statutory mandate, DDS contracts with private non-profit community agencies, known as "regional centers," to provide the developmentally disabled with "access to the services and supports best suited to them throughout their lifetime." (Welf. & Inst. Code, § 4620.)

5. A regional center's responsibilities to its consumers are set forth in Welfare and Institutions Code sections 4640-4659.

6. Welfare and Institutions Code section 4646 requires that the IPP and provision of services and supports be centered on the individual and take into account the needs and preferences of the individual and family. Further, the provision of services must be effective in meeting the IPP goals, reflect the preferences and choices of the consumer, and be a cost-effective use of public resources.

7. Welfare and Institutions Code section 4648 requires regional centers to ensure that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and to secure services and supports that meet the needs of the consumer, as determined by the IPP. This section also requires regional centers to be fiscally responsible.

8. In implementing IPPs, regional centers are required to first consider services and supports in natural community, home, work, and recreational settings.

(Welf. & Inst. Code, § 4648, subd. (a)(2).) Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family. (*Ibid.*) A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer in order to best accomplish all or any part of the IPP. (Welf. & Inst. Code, § 4648, subd. (a)(3).)

9. The regional center is required to consider all the following when selecting a provider of consumer services and supports: a provider's ability to deliver quality services or supports to accomplish all or part of the consumer's individual program plan; provider's success in achieving the objectives set forth in the individual program plan; the existence of licensing, accreditation, or professional certification; cost of providing services or supports of comparable quality by different providers; and the consumers, or, where appropriate, the parents, legal guardian, or conservative of a consumer's choice of providers. (Welf. & Inst. Code, § 4648, subd. (a)(6).)

10. The regional center is also required to consider generic resources and the family's responsibility for providing services and supports when considering the purchase of regional center supports and services for its consumers. (Welf. & Inst. Code, § 4646.4.)

11. Welfare and Institutions Code section 4659, subdivision (c), prohibits IRC from purchasing services available from generic resources, including IHSS, "when a consumer or family meets the criteria of this coverage but chooses not to pursue this coverage. As the family is eligible for IHSS, but has not chosen to pursue it, IRC cannot fund the requested services.

## EVALUATION

12. Claimant had the burden of demonstrating the need for the requested service or support, in this case, an increase in respite hours from 30 per month to 120 per month. Claimant did not meet that burden.



The Lanterman Act is clear that generic resources must be exhausted before IRC may purchase additional services for a claimant. In this case, claimant's mother is claimant's IHSS provider. Claimant also is not receiving the maximum number of IHSS hours. It is unclear whether he receives 38 hours per month or 230 hours per month, but regardless, claimant's IHSS hours are not at the maximum of 283 hours per month. IHSS will provide protective supervision for its clients. Consequently, the generic resource of IHSS has not been exhausted.

Further, even assuming the IHSS hours were increased to 283 hours per month, claimant's mother could hire an outside person from the registry to provide those hours. That would free her from providing care during those hours. While claimant's mother may financially benefit from utilizing the IHSS hours on her own, IHSS is not intended to be an income-generating mechanism to supersede earning income outside of the home. IHSS is merely intended to provide care to a disabled individual. If claimant's mother needs a break from providing that care, hiring an outside provider would solve that problem.

Finally, even if the generic resources were exhausted, this record does not support an increase in claimant's respite hours. Claimant's health and condition is stable, and he has been receiving 30 hours with no issues. It was only when the law changed in January 2018 that claimant's mother requested additional hours – and a change in the law alone is insufficient to warrant an increase. Claimant – as well as claimant's brother – are in school most of the day (from 8:00 a.m. to 2:00 p.m.) Claimant's mother therefore has six hours of a daily break without the children during that time, which is typically how parents with non-developmentally disabled school-aged children manage their time (i.e. rest, run errands, etc.) Claimant attends speech and occupational therapy twice per week for several hours; claimant attends ABA therapy every week; and claimant receives, according to his mother, 230 hours per month of IHSS. Between the IHSS hours

available (should another person provide the service) and the hours both children are in school, that is approximately 16 hours per day claimant's mother can free herself from having to provide care.

Additionally, claimant receives 30 hours of respite – bringing that daily total (assuming she used 1 hour per day every day), to 17 hours per day she can free herself from having to provide care. That leaves only six hours per day that claimant would have to be supervised by his mother – and as a parent, a certain amount of natural support is expected under the Lanterman Act. On this set of facts, it would simply not be fiscally responsible to fund 120 hours of respite. 30 hours per month appears quite sufficient, under the circumstances.

Claimant's mother's difficult situation is understandable. As a single mother of two developmentally disabled children, she is to be commended for providing her children the care that they receive. Nonetheless, IRC is prohibited by law from purchasing services when generic resources have not been fully utilized, or when a preponderance of the evidence does not support the request for an increase in respite hours. To that end, the Lanterman Act requires denial of claimant's appeal.

## ORDER

Claimant's appeal from Inland Regional Center's determination that it will not fund an increase in respite hours from 30 hours per month to 120 hours per month is denied.

DATED: July 5, 2018

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KIMBERLY J. BELVEDERE

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 ninety days.**