

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

**In the Matter of:**

**CLAIMANT**

**v.**

**INLAND REGIONAL CENTER**

**Service Agency**

**OAH No. 2019050517**

**DECISION**

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on June 26, 2019, in San Bernardino, California.

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

Claimant's mother appeared on behalf of claimant, who was not present.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on June 25, 2019.

## **ISSUE**

Is claimant entitled to an increase in respite in any amount from the current 187 hours per month that claimant currently receives?

## **FACTUAL FINDINGS**

### **Background**

1. Claimant is a 14-year-old boy who qualifies for regional center services based on a diagnosis of Autism Spectrum Disorder (autism) and mild intellectual disability.

2. Claimant lives at home with his four siblings, maternal grandmother, and both parents, who are registered nurses. Claimant receives 281 hours of In-Home Supportive-Services (IHSS), of which 197 hours is protective supervision. Claimant's mother is the IHSS provider. Claimant receives 40 hours per month of in-home applied behavioral analysis therapy (ABA therapy), and has a 1:1 aide at school. Claimant receives curb to curb transportation to and from school. Finally, claimant receives 187 hours of preferred provider respite, as a result of an earlier state level hearing.<sup>1</sup>

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<sup>1</sup> In December 2017, claimant's mother requested an increase in respite hours from 100 to 151.21. IRC denied the request and the matter proceeded to a state level hearing. At hearing, claimant's mother requested a total of 303.1 hours per month of respite. OAH rendered a decision (OAH Number 2018020425) denying that request,

3. On April 16, 2019, IRC served claimant's mother with a Notice of Proposed Action, denying claimant's request for an increase in respite in any amount from the currently provided 187 hours per month claimant currently receives. The Notice stated:

After reviewing the combination of support services currently in place from Medi-Cal, In-Home Supportive Services (IHSS), the regional center, the school district, and generic services that are available, it has been determined that 187 hours per month of respite is adequate in providing you with a periodic break from tending to claimant's care. Additionally, there have been no significant changes in claimant's level of care reported to IRC to warrant an increase in respite hours.

[¶] . . . [¶]

Respite is intended to be temporary and intermittent care provided to the consumer for short periods of time. When considering respite, IRC must also take into account a parent(s) responsibility for similar service needs for a minor child without disabilities and the natural supports in place. . . .

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but ordering an increase in respite in the amount of 87 hours, bringing the total amount of respite claimant receives to 187 hours per month.

4. On May 6, 2019, claimant's mother filed a fair hearing request contesting IRC's decision not to increase the hours of respite claimant receives. The fair hearing request did not specify the amount of respite being requested. In claimant's mother's exhibits, it specified she was requesting 337.4 hours of respite. In claimant's mother's testimony, she requested 568 hours of respite. In a prior hearing, which claimant's mother did not appeal, she had requested - and been denied - a total of 303.1 hours of respite. In her written exhibits, claimant's mother requested 712.285 hours of respite.

Given the constant morphing of the number of hours of respite being requested, this decision considered whether *any* increase is appropriate under applicable law in excess of the 187 hours per month claimant already receives.

### **Evidence Presented at Hearing**

5. Claimant's February 1, 2019, Individual Program Plan (IPP) generally described claimant as follows: claimant is a happy and affectionate boy who is perceptive and quick. He enjoys going for walks and is constantly moving. Claimant likes music and loves to eat. Claimant will repeat words and has become more verbal. The amount of times claimant has become agitated has decreased in the past year. Claimant can eat with utensils but likes to eat with his hands. Claimant can toilet on his own but needs help with wiping and wears a diaper during travel. Claimant does have some self-injurious behavior such as biting himself or biting others. Claimant attends school Monday through Thursday from approximately 8:00 a.m. to 3:15 p.m., and until 1:00 p.m. on Fridays. Most important, although claimant does experience disruptive behaviors and wakes up 2 to 3 times per night (as per the IPP), claimant's mother reported that claimant's behaviors have not changed in the past year. Claimant's mother corroborated claimant's schedule in her testimony, but indicated that claimant

only wakes up at night 2 to 3 times per week, rather than 2 to 3 times per night as reflected in the IPP.

6. Claimant's April 23, 2018, Individualized Education Program (IEP) plan was provided, and shows claimant continues to have "many academic strengths." Claimant met or partially met all stated goals.

7. A report dated November 15, 2018, from claimant's ABA provider, was admitted into evidence. A similar report from claimant's ABA provider, dated May 15, 2019, was admitted into evidence. In reviewing both reports, there is no significant changes noted in claimant's behavior, level of care, or needs. In fact, the 2019 ABA report explained that claimant was "more successful" in working with his therapist. Claimant "mastered" 4 out of 10 of his set goals, and is "making progress" in his remaining goals.

8. David Camarena is claimant's consumer services representative and testified at the hearing. The following is a summary of his testimony. Mr. Camarena participated in claimant's 2019 IPP meeting. According to claimant's parents, there has been no change in claimant's condition in the past year. Claimant can be aggressive when agitated, but claimant takes medication for that agitation as well as for sleep. Recently, Mr. Camarena completed a visit to claimant's school. Mr. Camarena spoke with the school's behavioral interventionist, who indicated that claimant did not have any aggression at school. To the contrary, claimant would sit, do his work, and respond to prompting and redirection, if needed. Further, claimant does not exhibit extreme behaviors and the overall trend in claimant's academic work and work with his behavioral therapist in connection with ABA therapy shows the overall trend is that claimant is mastering some goals and making improvements in all other goals not yet

met. Finally, claimant's mother is claimant's IHSS provider, and she has the option of hiring an IHSS worker to perform those hours so she could get the break she seeks.

9. Felicia Valencia is a Program Manager at IRC. Ms. Valencia testified at the hearing. The following is a summary of her testimony. Respite care means temporary and intermittent care for short period of time in order to give someone a break from having to care for a consumer. Respite is not designed to reduce undesirable behaviors, and is not a behavioral treatment program. Respite is not for protective supervision. Respite is not intended to take the place of natural supports. Claimant is making good progress with his behaviors, and there is nothing in either his IPP or ABA reports from 2018 and 2019 to indicate claimant has had a significant change in his level of care over the past year to warrant additional respite.

When taking into account requests for paid services, IRC looks at the overall picture, including the amount of services claimant currently receives. In claimant's case, there are a myriad of paid services in the home. Similarly, when looking at the hours, claimant's request must be denied. Assuming there are 30 days in a month multiplied by 24 hours in a day, claimant has approximately 720 hours of supports in place per month (respite, IHSS, ABA, curb to curb transportation, etc.) That leaves very few hours each day for which claimant's parents are completely responsible to provide care to claimant. Further, Ms. Valencia noted that claimant's IEP showed claimant typically regresses in his behavior after time off school where he has only been spending time at home. The 2019 ABA report also indicated claimant's parents are not using the tools taught by ABA (visual schedules and prompting). This is important because if they use those tools, it will reduce problematic behaviors claimant may have.

Finally, there are natural supports in the home such as siblings and extended family, along with claimant's parents. Respite is not intended to provide around the

clock care; claimant's parents seem to be confused about the purpose of respite. Based on a review of claimant's case, Ms. Valencia did not see any basis to increase the respite hours claimant currently receives.

10. Claimant's mother testified at the hearing. The following is a summary of her testimony. Claimant's mother verified the hours claimant attends school, as noted in the IPP. Claimant's mother testified that claimant wakes up, on average, 2 to 3 nights per week, and stays up the entire night once awake. Claimant's mother said she really does not want to request more respite but feels claimant's safety is in jeopardy. She did not appeal the previous OAH decision regarding the requested increase in respite because she was scared. It was not until she found claimant standing outside on a ledge of the second story of the house that she decided she needed to pursue additional respite hours. Claimant's mother said she was not watching claimant at that moment because she was supervising her daughter who has an eating disorder and who is suicidal. Claimant's mother said the family is already paying a private caregiver to help them with their family because her husband works full-time and she works full-time.

Claimant's mother provided exhibits showing the various activities she and her family have on a weekly basis, which show their family life is, indeed, very busy. Some of the "weekly respite needs" she identified were 4 hours for "cooking dinner"; 2 hours for kitchen clean up; 2 hours to attend baseball practice for another child; 6 hours to attend Tae Kwan Do lessons for another child; 3 hours to attend swimming lessons for other children; 3 hours to attend baseball and soccer games for another child; and 18 hours to tend to another child who has an eating disorder. Claimant's mother later wrote that she has "too many parental responsibilities" and needs someone to watch claimant from 10:00 p.m. to 6:00 a.m. every day to keep claimant safe. She then

estimated that she needs a total of 712.285 hours per month of respite calculated as follows: 8 hours per day to watch claimant all night; 4.5 hours per day for meal preparation and to do her food shopping; 1.5 hours per day to spend with a child other than claimant; 1.5 hours per day to spend with her husband; 1.5 hours per day to do other errands and tend to her other children's needs; 4 hours per day for a child other than claimant; and 2.5 hours per day for a child other than claimant.

Claimant's mother also argued, in writing, that a regional center cannot use policies to decide "the actual amount of services you get" as well as "there is no maximum level of service." She also argued, in writing, that the law says "you should get the respite you need" and the "IHSS hours [for which] you are eligible." Claimant's mother's exhibits with respect to IHSS were hard to follow, and were not entirely clear. She wrote:

I use almost all IHSS to pay for someone to keep claimant safe when I need to pick up or drive my kids to school, or other activities. . . . If I use almost all the IHSS I can not afford to support my kids basic needs, and educational needs. My pay is \$55.00 per hour. With IHSS only \$11.50 per hour. When I pay a caregiver to keep claimant safe I pay \$11.50 per hour + mileage.

Claimant's mother then wrote how difficult it is maintaining claimant in the home, but that she deeply desires to keep her family together.

11. Claimant's father testified at the hearing. The following is a summary of his testimony. He asserted that the law "requires" a regional center to provide for the individual needs of the family, and claimant needs around the clock supervision. He

and his wife already pay extra for additional caregivers on top of what is already provided by respite. They have challenges in their family, and out of home placement may be needed for claimant. The best way to maintain claimant in the home is simply to have someone in the house watching him all the time.

## **LEGAL CONCLUSIONS**

### **Burden and Standard 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.* [emphasis added].

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.* [emphasis added].

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 4690.2, subdivision (a), defines respite services as "*intermittent* or regularly scheduled *temporary* nonmedical care" for a consumer who resides with a family member. [Emphasis added.]

12. Respite services are designed to: assist family members in maintaining a consumer in the home; provide appropriate care and supervision to ensure the consumer's safety in the absence of family members; relieve family members from the constantly demanding responsibility of caring for the client; and tend to the consumer'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 the family members. (*Ibid.*)

13. 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.”

## **Evaluation**

14. Claimant had the burden of proving that an increase in respite hours from the current 187 hours per month to any amount is warranted. Claimant did not meet his burden.

Respite services are services that are provided to assist a family in maintaining a developmentally disabled person in the home, by *temporarily* relieving a caregiver for *short* periods of time. Respite hours are not an unlimited bank of hours to dedicate to a consumer so that the consumer’s family can have around the clock care provided. Such a service would be a completely different service, that would need to be justified under its own criteria. Put another way, under the Lanterman Act, respite is not intended to be provided on a continuous long-term basis so that the caregivers can tend to other activities such as raising other children, maintaining full-time jobs, or attending events outside the home on a regular basis.

There has been no significant change in claimant’s level of care in the past year. Claimant currently receives 187 hours of respite per month; 281 hours of IHSS; 40 hours per month of ABA; and spends approximately 132 hours in school per month (at 33 hours per week), not including curb to-curb transportation. All of those provided services and supports total 640 hours per month. Assuming there are 720 hours in a month (30 days per month multiplied by 24 hours per day), that leaves only 80 hours per month, or 2.6 hours per day for which claimant receives no paid services or supports. Moreover, IHSS is a generic resource and claimant’s mother is the provider. To obtain a break from claimant’s care, claimant’s mother could hire an IHSS worker to

provide the 281 hours per month, which would give her an additional 9 hours per day to use as she sees fit.

While certainly claimant's parents have their hands full with five children, a family that does not have a developmentally disabled child would have similar struggles maintaining schedules and tending to the needs of five children. Such families would have no respite, and instead would have to use the time the children are in school to take a break, or hire outside caregivers for assistance if needed. Thankfully, claimant's parents do not have to do that because they have 640 hours per month in services and supports to maintain claimant in the home, and are responsible to provide natural support to claimant only 2.6 hours per day. It is not unreasonable for claimant's parents to provide 2.6 hours per day of care as natural supports, and to order additional respite hours would not be a cost-effective use of public resources or fiscally responsible.

Claimant's parents argued that IHSS and ABA hours should not be included in any calculations when deciding whether respite is appropriate because the services are all separate. However, that is not how the Lanterman Act works and their assertion represents a fundamental misunderstanding of the law. In deciding whether additional hours for temporary or intermittent breaks from claimant's care are needed, all services and supports, including natural supports, must be considered. Further, although the Lanterman Act also requires consideration of the individual family needs in deciding whether to fund a requested service or support, the individual family needs provision does not mean ignoring the rest of the Lanterman Act. In other words, while the family may feel they need additional respite hours, where the services and supports already in place, *including* generic resources, and the record as a whole do not support that request, the request must be denied. In consideration of all the

above, and the fact that there is nothing in claimant's level of care that has changed significantly to warrant additional respite hours, the request for additional respite must be denied.

## **ORDER**

Claimant's appeal from Inland Regional Center's determination that an increase in monthly respite hours – in any amount - is denied.

DATE: July 10, 2019

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 90 days.**