

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

In the Matter of:

CLAIMANT,

vs.

REGIONAL CENTER OF ORANGE COUNTY,

Service Agency.

OAH No. 2021010102

DECISION

Thomas Y. Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on March 17, 2021. Paula Noden, Manager of Fair Hearings, represented the Regional Center of Orange County (Service Agency). Claimant was represented by her mother. The names of claimant and her family are omitted to protect their privacy. Oral and documentary evidence was received. The record was held open until March 24, 2021 for the parties to submit further evidence. The record closed and the matter was submitted for decision on March 24, 2021.

Claimant's exhibits submitted before the day of hearing and admitted into evidence at the fair hearing were numbered 1 through 4, 5.1, 5.2, 5.3, 8.1, 8.2, 8.3, 9.1,

9.2, and the last exhibit was numbered 8. To avoid confusion and distinguish claimant's from the Service Agency's exhibits, which were also numbered, claimant's exhibits are referenced alphabetically as follows:

Exhibit A: claimant's Exhibit 1, an opening statement translated from the Spanish at the hearing by a Spanish language interpreter who assisted mother during the hearing.

Exhibit B: claimant's Exhibit 2, both (i) a February 1, 2021 Individualized Education Plan (IEP) prepared by the Greater Anaheim SELPA (Special Education Local Plan Area), and (ii) an IEP from Northeast Orange County;

Exhibit C: claimant's Exhibit 3, a January 4, 2021 Individual Program Plan (IPP);

Exhibit D: claimant's Exhibit 4, an October 5, 2020 Person Centered Plan;

Exhibit E: claimant's Exhibit 5.1, an October 9, 2020 ABA (Applied Behavior Analysis) Report prepared by Jade Behavioral Consultants, Anaheim, California;

Exhibit F: claimant's Exhibit 5.2, an October 2, 2020 Confidential Psychological Testing Report prepared by Benjamin Stepanoff, Psy.D., Advances in Mental Health and Addictions Treatment Center, Long Beach, California;

Exhibit G: claimant's Exhibit 5.3, a February 21, 2019 CalOptima: Functional Behavior Analysis (FBA)/Initial Treatment Plan prepared by Melissa Mora, MS, BCBA, Autism Spectrum Interventions, Fullerton, California;

Exhibit H: claimant's Exhibit 8.1, a February 26, 2020 note by Loren Martinez, PA, Good Samaritan Medical Clinic, Inc., Anaheim, California;

Exhibit I: claimant's Exhibit 8.2, a June 15, 2020 letter from Peter J. Chung, MD, FAAP, University of California, Irvine;

Exhibit J: claimant's Exhibit 9.1, a November 12, 2020 Agenda Planning Meeting;

Exhibit K: claimant's Exhibit 9.2, a November 30, 2020 Notice of Proposed Action (NOPA) in Spanish; and

Exhibit L: claimant's Exhibit 8, the Service Agency's I.D. (Inter Disciplinary) Notes between June 2020 and February 2021.

Following the fair hearing, claimant timely submitted color photographs which are intended to show claimant's typical behavior at home. The photographs are collectively marked and admitted into evidence as Exhibit M.

STATEMENT OF THE CASE

This matter is governed by the Lanterman Act, that is, the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code sections 4500 through 4885. Claimant seeks behavioral respite care, whereas medical records available to the Service Agency indicate that such care, without a trained medical professional present, could put claimant at risk. The parties' dispute over what type of respite care is appropriate, whether behavioral respite or respite supervised by a medical professional, arises from a general lack of cooperation between them.

ISSUES

1. Whether the Service Agency's authorization for respite should change from behavioral to LVN respite, that is, from respite provided by persons trained in behavior to respite provided by a Licensed Vocational Nurse (LVN).
2. Whether respite hours should be increased from 20 to 40 hours per month.

SUMMARY OF DECISION

Because respondent has significant medical issues, behavioral respite is not appropriate for claimant. There was no evidence to justify an increase in respite hours. Claimant's appeal is properly denied.

FINDINGS OF FACT

3. Claimant timely sought a fair hearing under the Lanterman Act following a November 19, 2020 NOPA, Exhibit 1, denying her request for behavioral respite and an increase in respite hours from 20 to 40 hours per month.

4. Claimant has Down Syndrome and is eligible for services based on a diagnosis of autism spectrum disorder (ASD). Claimant is nine years old and lives with her mother and two siblings.

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5. As set out in claimant's January 4, 2021 IPP, Exhibits 3 and C, claimant has several chronic medical conditions, including:

- i. Dysphagia, Unspecified (swallowing difficulty);
- ii. Ventricular Septal Defect (abnormal opening in the heart);
- iii. Atrial Septal Defect (a hole in the wall of the heart);
- iv. Mild Intermittent Asthma, Uncomplicated;
- v. Congenital Hypothyroidism without Goiter; and

vi. Congenital Malformation of the Lung, Unspecified. To deal with her lung disease, claimant needs oxygen at times. Mother testified that claimant's need for oxygen has decreased recently.

6. In addition to the November 19, 2020 NOPA, the Service Agency explained why it was denying the request for behavioral respite in a letter, Exhibit 2. Service Coordinator (SC) Jessica Pereira, whose hearing testimony is set out below, sent mother the letter following a November 12, 2020 Planning Team Meeting (PTM) by videoconference.

A. As SC Pereira wrote, mother provided at the PTM "additional information about [claimant's] medical needs," including that she required "daily g-tube [gastronomy tube] care and feedings, . . . receives infusions at home once a month as she is prone to infections, [and] [t]he home is also equipped with an oxygen tank to supply [claimant] with additional support as needed."

B. The Service Agency determined that, in light of the claimant's care needs, she "would need respite through a Licensed Vocational Nurse (LVN) respite

agency or Participant Directed Services.” SC Pereira was prepared to suggest various LVN respite agencies for mother to choose.

C. If on the other hand mother decided against LVN respite agencies, SC Pereira explained the other option. Mother would “select a worker who could safely support [claimant] with her g-tube care and feedings. You would also need to become vendored. The selected worker would need to be hired by an agency that can manage the employment responsibilities (a Financial Management Service - FMS).”

D. As SC Pereira noted further, the service agency had been offering the respite option since 2018, and had provided mother a vendor packet, which she had not used.

7. Claimant receives or has approval for supports of several types.

A. The January 4, 2021 IPP states that claimant receives special education supports from her school district, including speech and occupational therapy (OT).

B. In October 2018, the Service Agency approved 24 hours per month of in-home respite care with a licensed vocational nurse (LVN). At the time of the hearing, mother had 288 hours of unused respite available to her.

8. SC Pereira has a Bachelor of Arts in Psychology and has been a service coordinator at the Service Agency for approximately three years. As a service coordinator, her duties include meeting consumers’ families annually or as needed to identify the consumer’s needs and the resources, including generic resources, that best meet those needs. SC Pereira prepared the January 4, 2021 IPP in coordination with the family.

A. In hearing testimony, SC Pereira described claimant and her needs, such as her G-tube and supplemental oxygen.

B. There was in this context discussion of respite services.

i. SC Pereira explained that mother could choose an LVN respite provider from a list that the Service Agency maintains. Mother has had this option since late 2018, but has expressed reluctance to exercise it, saying that an LVN once acted inappropriately toward claimant, and claimant would not trust an LVN.

ii. Another alternative discussed was participant directed respite services. Under this alternative, mother could choose a person she trusts to provide respite who is not identified by or affiliated with the Service Agency, Under this alternative, mother would be required to submit information on a form as part of a process by which mother could become a vendor. Once the vendorization process was complete, mother would submit charges of claimant's respite provider, which the Service Agency would have to review and approve before reimbursing mother. Mother has expressed reluctance regarding this alternative too.

9. The Service Agency employs Amy Hamm, RN, as a nursing consultant,

A. Nurse Hamm earned a Bachelor of Arts in nursing from Biola University in 1996 and was certified in public health the following year. A registered nurse for 24 years, she has worked for the Service Agency for 14.

B. Among her duties is consulting with and advising SC's on cases involving consumers with significant medical issues, such as claimant. She generally reviews medical documentation, and reviewed claimant's medical history and needs in order to assess those needs for purposes of respite.

C. Nurse Hamm reviewed Exhibit 5, the August 15, 2017 check-out instructions for claimant from the Endocrinology Department of Children's Hospital Orange County (CHOC). These CHOC instructions are prefaced by lists:

i. Several diagnoses are listed, including (a) congenital hypothyroidism, (b) gastroesophageal reflux disease (GERD), and (c) developmental delay owing to Down Syndrome.

ii. Claimant's problems listed far outnumber the diagnoses, and include: (a) moderate to large size perimembranous septal defect; (b) immunodeficiency; (c) feeding problem in child over 28 days old; and many more.

iii. There is also a list of several of claimant's allergies.

The lists raise concern by their sheer number. As Nurse Hamm stated, they indicate how difficult it is safely and knowledgeably to provide respite care for claimant.

D. Nurse Hamm pointed to particular matters noted in the CHOC instructions raising especially serious concerns for claimant's home care, such as:

i. Immunodeficiency, which has led to many infections in the past, for which claimant's physicians have provided effective treatments, such as IVIG (Intravenous Immune Globulin administered through a typical IV tube).

ii. Swallowing difficulty, which presents a high risk of choking and necessitates use of a G-tube or soft pureed food.

iii. Multiple medical conditions, which requiring carefully timed administration of medication and monitoring. For instance, page 2 of the instructions specify Xopenex inhalation solution: "3mL Nebulized inhalation every 4 hours

(intervals) PRN wheezing/respiratory distress” As Nurse Hamm stated, such therapy treats both claimant’s chronic lung disease and asthma. Claimant has long suffered from these, her breathing difficulties could arise at any time, requiring quick intervention.

E. Not in the CHOC instructions but of concern as set out in the January 4, 2021 IPP is claimant’s use of an oxygen tank at times.

F. Nurse Hamm reviewed Exhibit 6, neurology outpatient notes from claimant’s February 8, 2017 visit to Anne Tournay, M.D., at CHOC. Asked why she reviewed records from 2017, not more recent records, Nurse Hamm said she reviewed what was available to the Service Agency. Though requested, mother has not provided a more recent authorization to obtain medical records. From communications with the nurse at claimant’s school, it is evident that claimant’s health and condition are essentially the same now as in 2017. The January 4, 2021 IPP reflects this as well.

G. On cross-examination, Nurse Hamm acknowledged that she has no specialized training in behavior issues and that she has not met claimant and only reviewed medical records, according to her regular practice in such cases.

10. The Service Agency has employed Crystal Sanchez for over four years, currently as an area supervisor in its office in Cypress.

A. Ms. Sanchez holds a 2011 Bachelor of Arts in Sociology from California State University, Fullerton.

B. Ms. Sanchez became familiar with claimant when, in November 2020, mother requested a change of SC and supervisor. Because of the transfer, Ms. Sanchez arranged a PTM.

C. As Ms. Sanchez stated, it is her duty to follow, and did with respect to claimant, the Service Agency's Purchase of Service Guidelines, pertinent excerpts of which are Exhibit 7. At page 16, respite care is described and criteria are listed "to ensure that the consumer and family meet the criteria for respite and the level of care required. If RCOC staff are not able to authorize the requested service given regulations, best practice or difference of opinion, then RCOC staff will discuss with the consumer and/or family any concerns or identify other options. Exceptions may be made on a case-by-case basis."

D. The respite criteria in the Guidelines, page 16, include: "2. The consumer requires care and supervision due to documented challenging behaviors; 3. The consumer requires special care and supervision due to recently documented medical problems." The Guidelines provide further, page 17: "RCOC may provide LVN/RN care for respite if the consumer has a medical condition that requires this level of intervention and there is no available generic resource, private insurance or other resources.

E. Ms. Sanchez provided mother a list, Exhibit 7, identifying 29 vendors that provide LVN respite. Mother decided against respite care from any of the vendors listed.

F. Ms. Sanchez also provided mother a Vendor Application, such as that in Exhibit 9, They discussed Participant Directed Services, the services discussed in SC Pereira's November 2020 letter, quoted in Finding of Fact 6 above. Mother rejected this alternative as well.

G. Ms. Sanchez explained further that claimant has been selected for a self-determination program. The Service Agency has not yet authorized Ms. Sanchez

to go forward with the program, but if it did, claimant would be allowed to use an agreed budget to purchase services outside the traditional system using vendors. The budget would be based on the prior 12 months of expenditures for the participant. As mother has not used an accrued 288 hours of respite, she could redirect the funding for the unused respite to her budget. The hourly rate for LVN respite under the program would be \$44.12, for behavioral respite approximately \$30.96.

11. The Service Agency has employed Christina A. Genter, a Board Certified Behavior Analyst (BCBA), for nearly 20 years.

A. A BCBA since 2003, Ms. Genter works as a Behavior Services Specialist. Her curriculum vitae is Exhibit 10.

B. Ms. Genter's duties include participating in the Service Agency's Behavioral Resources Group, performing functional behavioral assessments, and review of progress reports. Ms. Genter listens and responds to the concerns of vendors and parents and participates in PTM's.

C. Ms. Genter reviewed the October 9, 2020 report, CalOptima: Functional Behavior Assessment (FBA)/Initial Treatment Plan, Exhibit E (claimant's Exhibit 5.1) by BCBA Mey L. Lam, Jade Behavioral Consultants, Anaheim, California. She noted that on page 19 of the report BCBA Lam recommended that behavioral or ABA services be supervised. As Ms. Genter explained, entry-level caregivers may implement strategies for behavioral progress, but more skill and expertise are required to recognize when goals are properly met and the next level of progress should be pursued. Behavioral respite is such a type of care. It may be provided by entry-level staff, but effectiveness and progress depend upon skilled supervision.

D. In addition, as Ms. Genter stated, behavioral respite is inappropriate when there are significant medical issues or needs. Claimant's medications must be monitored and administered with care. Generally, behavioral respite services do not provide such care. There is also claimant's need for G-tube feedings, which may not be safely provided a person such as claimant by behavioral respite services.

E. Like Nurse Hamm, Ms. Genter acknowledged on cross-examination that she had not directly observed claimant. Rather, Ms. Genter relied upon a review of all of pertinent medical records and documentation pertaining to claimant's developmental issues.

Claimant's Evidence

12. Claimant's first witness was Evelyn Rodriguez, who has known claimant's family for several years. Ms. Rodriguez is rearing a child of her own with autism and describes herself as a supporter of that part of the Latin community who have children with special needs. She has observed claimant's dangerous behaviors, such as climbing to places where she might fall and be injured, and eloping. It is because of such behaviors that Ms. Rodriguez believes that claimant's request for behavioral respite is appropriate.

13. From her occasional observations, Ms. Rodriguez believes that claimant has little or no risk of choking. According to Ms. Rodriguez, claimant has made significant progress toward eating normally and without a G-tube, such that the Service Agency's documentation in this regard should be updated.

14. Mother hired Kenneth Scott Lancy, Jr. approximately six months ago to care for claimant part time. He has observed claimant's dangerous behaviors. For

instance, claimant has at times attempted to eat raw food, like uncooked bacon she has taken from the refrigerator at home. He has seen her put the cap from bottled water, a choking hazard, in her mouth. Elopement is a constant danger. Mr. Lancy must watch claimant constantly.

15. Mother pays Mr. Lancy cash to watch claimant. He considers his work to be for the family. No entity employs him to care for claimant. UCP-OC (United Cerebral Palsy Association of Orange County) has employed Mr. Lancy to care for other children with disabilities. Mr. Lancy is studying to be a nurse. He is not certified in ABA or any type of behavior therapy.

16. Mother's testimony was consistent with the testimony of Ms. Rodriguez, that claimant does not need a G-tube except when sleeping. Mother stated that she has tried at times since 2018 to update the Service Agency's information about claimant, but with little success. According to mother, her communications with Service Agency personnel is often ignored or discounted and she receives no response to her requests.

17. Mother stated that claimant's lung function has improved, so that she does not need supplemental oxygen as often as she did in the past. Mother believes that she will receive a medical report in the near future to show improvement in lung function. Whereas in the past claimant has needed a nebulizer twice a day, now she uses one once a day.

18. Mother acknowledged claimant's challenging behaviors, such as elopement and her attempts to eat inappropriate things.

19. Mother is happy to employ Mr. Lancy because over time he has learned how to work well with claimant and understands her psychology. Asked whether

mother would consider Participant Directed Services, as described in SC Jessica Pereira's November 12, 2020 letter (see Finding of Fact 6 above), mother said no. She would not want to be vendored in order to employ Mr. Lancy and obtain funding from the Service Agency in this way, Mother believes rather that the Service Agency should employ Mr. Lancy to care for claimant. Mother further stated she would need two hours per day of respite if the Service Agency employed Mr. Lancy.

20. Another witness called by claimant, Rosy Rincon, corroborated the testimony of others regarding claimant's challenging behaviors.

21. There was no evidence in explanation of claimant's request that respite hours be increased from 20 to 40 hours per month.

PRINCIPLES OF LAW

1. Subdivision (a) of Welfare and Institutions Code section 4646 states: the Lanterman Act respects the "needs and preferences" of the family and the developmentally disabled individual; promotes community integration; and ensures that IPP's are effective in meeting their stated goals without undue expense.

2. By statute, service agencies are mandated to cooperate with consumers and their families if appropriate in the care of the developmentally disabled. Thus subdivision (d) of Welfare and Institutions Code section 4646 states that IPP's reflect agreement: the developmentally disabled individual and the individual's family (as appropriate) agree with the service agency as it purchases services, like respite care from qualified agencies, or obtains generic resources, those available from non-exclusive sources, such as specific types of medical care from hospitals, clinics, and their medical personnel.

3. Subdivision (a) of section 54342 of California Code of Regulations, title 17, has several pertinent provisions regarding respite:

(39) In-home Respite Services Agency - Service Code 862. A regional center shall classify a vendor as an in-home respite services agency if the vendor meets the appropriate requirements in Sections 56780 through 56802 of these regulations.

(40) In-home Respite Worker - Service Code 864. A regional center shall classify a vendor as a provider of in-home respite worker services if the vendor is an individual who:

(A) Has received Cardiopulmonary Resuscitation (CPR) and First Aid training from agencies offering such training, including, but not limited to, the American Red Cross;

(B) Has the skill, training, or education necessary to perform the required services; and

(C) Provides in-home respite services

4. California Code of Regulations, title 17, section 56792, subdivision (h), provides:

The vendor shall assure that any consultants it utilizes shall comply with all California licensing, certification, registration and vendorization requirements applicable to the functions to be carried out.

5. California Code of Regulations, title 17, section 58884, subdivision (a)(1), provides: "Participant-Directed Services means those services described in California Code of Regulations, Title 17, Section 58886(a) and includes the adult consumer or family member exercising decision-making authority over specified services."

6. The process of vendoring a family member to purchase respite services from a person or entity of their own choosing is set out at length in California Code of Regulations, title 17, section 54355.

ANALYSIS

1. Mother has been reluctant to agree to the Service Agency's plan to provide respite care supervised by a medical professional, like LVN respite. Mother explained her reluctance, though in vague terms, as a consequence of a bad experience, years ago with an LVN who treated claimant badly.

2. This objection to LVN respite is not justified. It was inadequately explained. It is in any event outweighed by claimant's needs. Mother and her witnesses acknowledged that claimant has many challenging behaviors. To some extent they minimized claimant's medical needs, or characterized them as much diminished. But the needs, even if improved of late, remain, and it would be catastrophic if claimant were to suffer a medical emergency in the care of a person trained only in ABA, and not in medical care.

3. Mother maintains that claimant's records do not present an accurate account of her current condition, that the Service Agency is relying on records that are out of date by at least a year, if not years, going back to 2018, and that current records do not support the Service Agency's position. But mother has refused to provide

consents that would allow the Service Agency to consider all claimant's pertinent records. This unwillingness on mother's part is not adequately explained. Mother's claim that Service Agency personnel have ignored her communications or refused to provide answers to her queries is scarcely credible.

4. Mother's position engenders doubt in light of certain facts. For more than a year, she has had hundreds of hours of respite available to her, yet she has used none. Mother has not cooperated with the Service Agency on whether employing a caregiver like Mr. Lancy may be an appropriate solution to the respite question for claimant.

5. Mother's position is doubtful for the additional reason that she has rejected another option for respite care, Participant Directed Services. Mother is of course free to reject this option. But if it is the best option for claimant in light of mother's distrust of or reluctance to deal with any of the dozens of agencies identified by the Service Agency, outright rejection of the option is not an adequate response on mother's part. In employing Mr. Lancy, mother seems to endorse a participant directed option.

6. The evidence does not adequately explain rejection of the Service Agency's attempt to reach a cooperative, an agreed, solution, for claimant's respite care. It is agreement and cooperation that the Lanterman Act envisions. This matter shows that when agreement and cooperation break down, the Service Agency's mission to assist, and the family's desire for assistance, will be frustrated and even perhaps entirely blocked, to no one's advantage.

7. The IPP process continues to be available to the parties. More work toward cooperation, coordination, and agreement, is called for, for the good of claimant.

CONCLUSION OF LAW

1. The medical evidence available to the Service Agency establishes that LVN respite is the appropriate type of respite for claimant's safe care at home. Without additional medical evidence establishing otherwise, the Service Agency is not authorized to fund behavioral respite.

2. There was no evidence to support the request that respite hours should increase from 20 to 40 hours per month.

ORDER

Claimant's appeal is denied.

DATE: 04/09/2021

THOMAS Y. LUCERO
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.