

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

In the Matter of:

CLAIMANT,

v.

SOUTH CENTRAL LOS ANGELES REGIONAL CENTER

OAH No. 2021030392

DECISION

Administrative Law Judge Deena R. Ghaly, Office of Administrative Hearings (OAH), State of California, heard this matter on May 14, 2021, by videoconference.

Claimant's mother (Mother) appeared by telephone and represented Claimant, who was not present.¹ Court-certified Spanish interpreter Alex Zajdmant appeared by video conference and provided translation assistance to Mother.

Aaron Abramowitz, Attorney, represented the South Central Los Angeles Regional Center (SCLARC).

¹ Titles are used to protect the family's privacy.

Testimony and documentary evidence was received. The record closed and the matter was submitted for decision on May 14, 2021.

ISSUE

Is Claimant's father (Father) eligible to serve as Claimant's paid respite services provider (respite provider) under the Participant-Directed Services Waiver (PDSW) program?

EVIDENCE RELIED UPON

Documents: Service Agency's Exhibits 1, 2, 4, and 9; Claimant's Exhibits C-G; I, J, and M-S.

Testimony: Herlinda Rodriguez, Program Manager, Mother, and Father.

SUMMARY

Claimant suffers from intellectual disability, cerebral palsy, and epilepsy. He requires 24-hour full care. Due to Covid 19 restrictions and Claimant's increased health concerns, Claimant did not receive or participate in day programs, significantly increasing his need for in-home care and respite services for Mother who is his primary caretaker. The parties agree that Claimant's family is eligible for the Department of Disability Services (DDS)-created emergency program, PDSW, which allows family or friends to provide respite services. They also initially agreed that Father could serve as the PDSW respite services provider. However, SCLARC later determined that further DDS instruction precluded parents from serving as respite

providers in the PDSW program. Mother and Father disagreed and requested a hearing.

A reasonable reading of the DDS's explanation of the PDSW and a preponderance of the evidence established that parents may sometimes be appointed as respite providers and, in Claimant's case, that would be appropriate.

FACTUAL FINDINGS

Background

1. Claimant is 31 years old and a SCLARC consumer based on his diagnoses of severe intellectual disability, cerebral palsy, and epilepsy. He also suffers from mild respiratory disorder. Due to his condition, Claimant requires 24-hour full care.

2. SCLARC currently funds up to 30 hours per month of respite services provided by a licensed vocational nurse (LVN), two hours per month of registered nurse supervision, and a day program along with supplemental transportation services for Claimant. Because of the current COVID-19 pandemic, Claimant has not been able to attend the day program.

3. Except for the LVN-provided respite hours, Mother is Claimant's caretaker.

PDSW Program

4. In October 2020, SCLARC offered Claimant's family the opportunity to participate in the PDSW program, which temporarily allows for regional center-funded

respite by a family member or friend. Claimant's family accepted the offer and requested SCLARC approval to have Father be Claimant's designated provider.

5. PDSW-approved caretakers are required to meet several requirements, including completing CPR certification. In December 2020, Mother informed SCLARC that Father's CPR certification was delayed. Meanwhile, the DDS, the state agency which oversees regional centers, issued additional directives regarding the PDSW, including that some immediate family cannot be the designated care provider. SCLARC notified Claimant's family of DDS's position and recommended that the family find an alternate friend or family member.

6. On March 11, 2021, Mother and Father met with SCLARC personnel to discuss the issue. The next day, Shantel Garcia, who identified herself as SCLARC's executive director's designee, signed a letter summarizing the meeting. The March 12, 2021 letter provides in relevant part as follows:

During the meeting I explained the rationale behind how we fund COVID 19 respite/Personal assistance hours per SCLARC protocol. I also explained that while we were allowing parents to serve as a respite worker through parent directed services (PDS) as allowed by DDS, there was an October 2020 disclosure from the [DDS] that stated that generally parents cannot be the respite provider.

(Exh. M.)

7. The word "generally" in Ms. Garcia's letter is the genesis of the dispute between Mother and Father and SCLARC. Mother and Father understand from the letter that the rule against having parents be the respite providers under the PDSW

program can have exceptions. Further, they believe that the particular challenges involved in caring for Claimant justify such an exception. SCLARC has taken the position that, pursuant to DDS, parents can never be PDSW respite providers.

Ongoing Circumstances

8. As of the hearing day, Claimant's family had not been able to find a substitute caretaker for Claimant. Moreover, the nursing agency which provides the LVN respite care has not been able to find coverage for all the hours SCLARC has approved.

9. Mother serves as Claimant's caretaker under the Department of Social Services' in-home supportive services program (IHSS). She receives the maximum hours of compensated service, 283 hours per month, available to her.

10. Mother has been under increasing pressure from the effort involved in caring for Claimant as his health has deteriorated. Because of Claimant's deteriorating health, both Mother and Father are concerned about having additional people in the household, even if a suitable candidate could be identified. In a letter dated March 2, 2021, one of Claimant's doctors, neurologist Theodore Prentice Jr., agreed that Claimant is especially vulnerable should he contract COVID-19. Dr. Prentice also agrees Father should be one of his caretakers. (Exh. N.)

LEGAL CONCLUSIONS

The Lanterman Act

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.)² governs this case. The Lanterman Act establishes that the state is responsible for providing services and supports for developmentally disabled individuals and their families. (§ 4501.)

2. DSS is authorized to execute the laws regarding caring for developmentally disabled individuals, including the Lanterman Act. (§ 4416.) DSS contracts with service agencies such as SCLARC which are in turn, "charged with providing developmentally disabled persons with 'access to the facilities and services best suited to them throughout their lifetime' and with determining "the manner in which those services are to be rendered." (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389, quoting from § 4620.)

3. Services and supports may include respite services. (§ 4512, subd. (b).) "In-home respite services" are defined in the Lanterman Act 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).) Subdivision (a) of section 4690.2 provides that respite services are provided to do the following:

² Further statutory cites are to the Welfare and Institutions Code unless otherwise designated.

- (1) Assist family members in maintaining the client at home.
- (2) Provide appropriate care and supervision in maintaining 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.

Emergency Provisions During the Pandemic

EXECUTIVE ORDER N-25-20

4. On March 4, 2020, Governor Gavin Newsom declared a State of Emergency in California as a result of the threat of the COVID-19 pandemic. On March 12, 2020, in Executive Order N-25-20, Governor Newsom identified the needs of individuals with developmental disabilities as paramount:

Whereas, many individuals who have developmental disabilities and receive services through regional centers funded by [DDS] also have chronic medical conditions that make them more susceptible to serious symptoms of COVID-19, and it is critical that they continue to receive their services while also protecting their own health and the general public;

[¶] . . . [¶]

IT IS HEREBY ORDERED THAT:

1. All residents are to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19.

[¶] . . . [¶]

10. To ensure that individuals with developmental disabilities continue to receive the services and support mandated by their individual program plans threatened by disruptions caused by COVID-19, the Director of [DDS] may issue directives waiving any provision or requirement of the [Lanterman Act] . . . and the accompanying regulations of Title 17, Division 2 of the California Code of Regulations

DEPARTMENT OF DEVELOPMENTAL DISABILITIES DIRECTIVES AND PROGRAMS

5. Based on the Governor’s expressed acknowledgement for flexibility in providing necessary services to regional center consumers during the pandemic, the DDS Director issued directives and developed new programs pursuant to Executive Order N-25-20, including the PDSW program.

6. In October 2020, the Department issued a memorandum entitled “Frequently Asked Questions for Self-Advocated and Families About Participant-Directed Services During the COVID-19 Pandemic” (DDS Memorandum). Relevant portions of the DDS Memorandum follow:

1. What are Participant-Directed Services?

Participant-directed services gives consumers more control over how and by whom some Individual Program Plan (IPP) services are provided. Participant-directed services lets the consumer or family choose who to hire, schedule when the person works, and supervise the work. They can be used by individuals who live in their own home, their family home and some community living arrangements.

2. How Can Participant-Directed Services Help Me?

Sometimes consumers or families have a hard time finding providers during the hours they need services. For some consumers and families, it may be hard to find providers who speak their preferred language. During COVID-19, a consumer or family may want services from a familiar person as a safety measure.

3. Which IPP Services Can Be Participant-Directed?

Before the COVID-19 pandemic, California allowed consumers to use a participant-directed model for respite, day care, non-medical transportation, nursing and day services. These participant-directed services will continue after the pandemic ends.

Because of COVID-19, DDS expanded the list of participant-directed services to also include personal assistance,

independent living skills, and supported employment services. The temporary addition of these three services may help consumers or families get the services they need during COVID-19.

4. Who Can I Hire to Provide Participant-Directed Services?

You, and the Financial Management Services (FMS) agency you select to help you hire and pay staff, must verify that the person has the skills to perform the work. You can ask your regional center for information about how to do this.

The person must be 18 years old or older.

The individual must be eligible to work.

You may hire a family member, friend or another qualified person to provide participant-directed services. **A spouse and generally a parent cannot provide respite, day care, personal assistance, or independent living skills.**

[¶] . . . [¶]

(Exh. 9, pp. 130-131 [Underscored text in original; bold text added; footnote omitted.]

Analysis

7. Nothing presented in the record by either party explains or elaborates upon what, if anything, would allow an exception to the “general” prohibition against allowing parents to be the designated service providers under the PDSW. Although the

DDS Memorandum is neither a regulation or statute, the principles of statutory interpretation are instructive in assessing the significance of its wording:

Courts do not presume that the legislature performs idle acts, nor do they construe statutory provisions so as to render them superfluous. Whenever reasonably possible, courts avoid reading statutes in a way that renders meaningless language the Legislature has chosen to enact.

Statutory interpretations that render words surplusage are to be avoided as are interpretations that would render related provisions nugatory or ineffective, particularly when that interpretation would frustrate the underlying legislative purpose. The courts should give meaning to every word of a statute if possible.

However, the rule against statutory interpretations that make some parts of a statute surplusage is only a guide and will not be applied if it would defeat legislative intent or produce an absurd result. While a statute should be interpreted so as to eliminate language being rendered surplusage, there is no rule of construction requiring courts to assume that the legislature has used the most economical means of expression in drafting a statute.

(Cal. Jur. Statutes § 92, May 2021 [Footnotes omitted].)

8. Here, the DDS Memorandum excludes “spouses” from serving as PDSW caretakers without qualifying that term while qualifying its exclusion of parents with

the word "generally." A reasonable reading of the DDS Memorandum is that, while spouses can never serve as caretakers, parents usually cannot but, under some circumstances, can. In other words, the prohibition against parents serving as caretakers is not absolute.

9. Applying the principles of statutory interpretations, concluding that Father cannot act as the PDSW respite provider, as has SCLARC, requires "rendering superfluous" the wording of the DDS Memorandum. Under the principles of statutory interpretation, the only valid reason to do that is if to do otherwise would defeat DDS's intent or produce an absurd result. On the other hand, acknowledging that the DDS Memorandum draws a distinction between spouses and parents, unqualifiedly prohibiting spouses from serving as respite workers, while "generally" –i.e., in most but not all instances-- prohibiting parents, as Claimant's family urges, would preserve the meaning and effect of each word in the DDS Memorandum.

10. Acknowledging the distinction between how spouses and parents are treated under the DDS Memorandum does not defeat DDS's intent in creating the PDSW program nor does it result in "absurd" results. It is not clear why spouses are unqualifiedly excluded from serving as the PDSW respite providers; however, that is not the issue here. The issue is whether, under at least some circumstances, it would be appropriate to have a parent serve as a PDSW respite provider.

11. Here, Claimant is in need of full care and is in failing health, he is exceptionally vulnerable to COVID-19, a condition which could be exacerbated by bringing additional people into the household, Mother is exhausted, and, although there is increasing hope that the pandemic will soon be over, emergency protocols continue at least in part, so he has not resumed attending the day program and is not anticipated to return in the immediate future. Until the controversy regarding DDS's

rules for the program, Father was considered by all parties to be an appropriate choice to be the designated respite provider. Under these circumstances, it is reasonable to make an exception to DDS's rule that parents are "generally" not to be respite providers under the PDSW program.

ORDER

Claimant's appeal is granted. SCLARC is ordered to enroll Claimant and his family in the Participant-Directed Services Waiver Program and designate Claimant's father as the respite provider.

DATE:

DEENA R. GHALY

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.