

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

In the Matter of:

CLAIMANT

v.

REGIONAL CENTER OF THE EAST BAY, Service Agency.

OAH No. 2021090927

DECISION

Administrative Law Judge Regina Brown, State of California, Office of Administrative Hearings, heard this matter remotely on November 29, 2021.

Claimant was represented by his conservator. Claimant was not present at the hearing.

Mary Dugan, Fair Hearing Representative, represented Regional Center of the East Bay (RCEB), the service agency.

The matter was submitted for decision on November 29, 2021.

ISSUE

Did RCEB err in its decision to deny funding 109.55 monthly hours of supported living services (SLS) to Claimant for services that typically would be funded by In-Home Supportive Services (IHSS)?

FACTUAL FINDINGS

1. Claimant is a 38-year-old adult male consumer of RCEB services. Claimant has resided alone in his own home in San Lorenzo since his mother passed away in December 2017. Claimant requires around-the-clock care seven days a week. Claimant's conservator was appointed by the superior court in June 2018.

2. In December 2019, RCEB updated Claimant's Individual Program Plan (IPP). According to the IPP, Claimant will continue to live at his home,¹ attend a community-based day program, and receive transportation services. On December 3, 2020, RCEB conducted an annual review of the IPP and did not change these objectives. Terri Henderson is Claimant's RCEB case manager.

¹ The IPP incorrectly indicated that Claimant lives with his step-father in Alameda. According to the Claimant's fair hearing brief, the conservator was married to Claimant's mother from 2001 to 2011.

3. According to RCEB, it is believed that Claimant has a trust fund that pays for some of his care.² The existence of or amount contained within a trust fund with Claimant named as a beneficiary was not established at hearing. The parties agreed that Claimant is not eligible for Medi-Cal or IHSS.

4. In July 2021, Claimant's conservator requested to allow Claimant to participate in the Self-Determination Program (SDP), pursuant to Welfare and Institutions Code section 4685.8. A proposed SDP budget was developed based on RCEB's expenditures used to purchase services in the IPP from September 2020 to August 2021. The proposed budget included the community-based day program, transportation services, and SLS.³

5. SLS is a program implemented by RCEB vendors to provide clients with daily support. SLS may include, for example, assistance with activities of daily living, meals, grocery shopping, medication and money management, accessing appropriate activities, and building relationships. SLS can be provided up to 24 hours per day, depending on the client's needs and other supports. A vendor was selected to

² According to the Claimant's fair hearing brief, Claimant does not and has never had a trust fund. However, the brief referred to Claimant having a bank account. For the purposes of this decision, trust fund will continue to be used throughout in reference to Claimant's financial resources.

³ The evidence did not establish whether Claimant's SDP budget has been finalized or services have been initiated. It appears that the parties are waiting for resolution of this matter.

complete an assessment to determine the amount of monthly SLS hours Claimant would need.

6. In a letter to the conservator, dated September 23, 2021, RCEB confirmed Claimant's eligibility for SLS and continued funding of a community-based day program and transportation services. RCEB denied funding any SLS hours that would normally be funded by IHSS because Claimant would qualify for IHSS hours if it were "not for his personal financial resources." RCEB agreed to proceed with the funding of SLS hours after the vendor's assessment, with the estimated IHSS hours subtracted, citing Welfare and Institutions Code section 4659, subdivision (a). This section provides, in relevant part, that:

Except as otherwise provided in subdivision (b) or (e), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.

(2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer.

7. On September 23, 2021, RCEB issued a Notice of Proposed Action (NOPA) denying the funding of SLS hours that typically would be funded by IHSS. The reason for the action was that: "Regional Center is obligated to consider client's resources. Consumer receiving supported living services shall confirm that all appropriate and available sources of natural and generic supports have been utilized to the fullest extent possible for that consumer." RCEB cited Welfare and Institutions Code section 4659, subdivision (a), and RCEB SLS Policy No. 3421 as its authority for taking the action. On September 28, 2021, Claimant timely submitted a Fair Hearing Request. This hearing followed.

8. At hearing RCEB contended that the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.) requires RCEB to pursue all sources of funding including Claimant's own funds. RCEB also contended that Claimant's funds are not in a "special needs trust"; if so, those funds could not be considered available resources by RCEB.⁴ RCEB concluded that because Claimant would be denied IHSS because he is not eligible for Medi-Cal, he has personal funds available in his trust fund. After consulting with the California Department of Developmental Services, RCEB was directed to deny funding 109.55 hours of SLS services to Claimant that would typically have been provided by IHSS. RCEB acknowledges that 109.55 hours of SLS was an arbitrary amount. However, RCEB contended that this is a conservative estimate of what Claimant would have been awarded in IHSS hours, if eligible, and that Claimant should pay from his trust fund for these SLS hours.

⁴ The evidence did not establish why Claimant does not have a special needs trust.

RCEB Purchase of Service Policy No. 3421

9. RCEB Purchase of Service Policy No. 3421, Date Revised: 10/2010, Supported Living Service provides as follows:

SERVICE DEFINITION

Supported living services are those services and supports that support consumers' efforts to make fundamental life decisions, while also supporting and facilitating consumers in dealing with the consequences of those decisions, building critical and durable relationships with other individuals, living in their own homes, participating in community activities, and realizing their individualized potential to live lives that are integrated, productive and normal. Consumers receive services from a provider they choose. Consumers receiving SLS shall have the right to make decisions that shape the nature and quality of their lives in accordance with their preferences, and consistent with the goals stated in their Individual Program Plan (IPP). "The cost of providing services or supports of comparable quality by different providers, if available, shall be reviewed and the least costly available provider of comparable service, including the cost of transportation, who is able to accomplish all or part of the consumer's individual program plan, consistent with the particular needs of the consumer and family as identified in the individual program plan, shall be selected. In determining the least costly provider, the

availability of federal financial participation shall be considered. The consumer shall not be required to use the least costly provider if it will result in the consumer moving from an existing provider of services or supports to more restrictive or less integrated services or supports." Welf. & Inst. Code section 4648, subd. (a)(6)(D))

... ¶

BOARD POLICY

... ¶

All Generic supports and services will be used first and to the fullest extent possible before RCEB purchase of service. If eligible, In-Home Supportive Services shall be used as part of the support plan and RCEB "shall not purchase supportive living services for a consumer to supplant IHSS". Welf. & Inst. Code section 4689.05, subd.(b). RCEB will not purchase supportive living services "for a consumer who meets the criteria to receive, but declines to apply for, in-home supportive services (IHSS) benefits." Welf. & Inst. Code section 4689.05, subd.(a). The RCEB "executive director may waive the requirements set forth in subdivision (a) if the executive director finds extraordinary circumstances warrant the waiver, and that a finding is documented in an addendum to the consumer's individual program plan." Welf. & Inst. Code section 4689, subd.(d).

Between the date that a consumer applies for IHSS and the date that a consumer's application for IHSS is approved RCEB "shall not purchase supportive services for the consumer at a rate that exceeds the IHSS hourly rate, which includes the IHSS provider hourly wage, the provider's hourly payroll taxes, and the hourly administrative costs, for the county in which the consumer resides." Welf. & Inst. Code section 4689.05, subd. (c).

The Board of Directors strongly encourages the development of a circle of support and the use of natural supports in the community for all consumers receiving supported living services.

RCEB will not pay for any costs incurred by a consumer receiving SLS in securing, occupying or maintaining a home except when the Executive Director of RCEB approves using the criteria outlined in regulation.

Before SLS is provided to a consumer, the projected annual cost of the consumer's SLS shall be determined through the IPP process. RCEB staff will help review the budgets of each consumer to help determine the cost of the services.

[Bold in original.]

10. RCEB Case Manager Margaret Casebeer testified at hearing. According to Casebeer, RCEB expects eligible individuals to apply for IHSS through Medi-Cal. Casebeer agreed that Claimant is ineligible for Medi-Cal and IHSS because he has

available resources from a trust fund. She distinguished Claimant's trust fund, which RCEB considers as an available resource, from a special needs trust fund which RCEB cannot use as an available resource for services. However, there was no evidence regarding the amount of available funds in Claimant's trust fund that would be considered as an available resource.

11. According to Casebeer, the maximum number of hours that an eligible consumer can receive for IHSS is approximately 283 hours per month. Because Claimant is ineligible for Medi-Cal, there was no exact calculation available from IHSS of the number of hours that would have been authorized by IHSS. To calculate the estimated number of IHSS hours Claimant likely would have received, Casebeer sought advice from her former supervisor who she stated used to work for Medi-Cal/IHSS. The evidence did not establish when or for how long this former supervisor worked for Medi-Cal/IHSS.

12. Based on an assessment of Claimant's needs, Casebeer calculated the estimated IHSS hours based on 24 hours of care as follows: 489.29 SLS hours plus 129.9 day program hours plus 109.55 IHSS hours to equal approximately 728 hours. The calculation of 109.55 covers IHSS categories for meal preparation at 6 hours, cleaning at 30.31 hours, shopping at 15.155 hours, errands at 15.155 hours, laundry at 4.33 hours and personal care at 38.6 hours. Casebeer used a RCEB template to arrive at 728 hours which does not match the approximate number of 744 hours in any given month. Nevertheless, Casebeer confirmed that RCEB would ensure coverage for 24 hours of care on a monthly basis.

Claimant's Additional Evidence

13. Claimant's conservator testified at hearing. From 2000 to 2011, he lived with Claimant and Claimant's mother in Alameda. He does not live with and has never lived with Claimant in San Lorenzo.

14. The conservator provided an accounting of monthly costs expended for Claimant's care which are over and above RCEB's services provided under the IPP. Claimant pays over \$17,000 in costs for his care every month which, according to the conservator, is substantially more than RCEB's proposed SDP monthly budget of \$12,000. He contends that even if Claimant were eligible for IHSS, Claimant's actual monthly costs of care would still not be met.

Ultimate Factual Findings

15. The RCEB SLS policy states that, "if eligible" for IHSS, then IHSS will be used and RCEB will not purchase SLS for a consumer to supplant IHSS. The evidence established that Claimant is not eligible for IHSS. This is not a situation where Claimant declined to apply for Medi-Cal/IHSS, which under the policy would have required RCEB to deny SLS services outright. The policy does not expressly prohibit payment of SLS when a consumer is not eligible for IHSS.

16. The RCEB SLS policy provides that all generic supports and services will be used first and to the fullest extent possible before any RCEB purchase of service. The policy also encourages the use of natural supports in the community for all consumers receiving SLS. Services and supports that are available to the public through publicly funded agencies are called "generic" services. "Natural" supports are the types of help a consumer gets at no cost from family, friends, neighbors, and

others in his or her community. SLS can help a consumer develop, strengthen, or expand their natural supports.

Again, the evidence established that Claimant was not eligible for the generic service of IHSS. Also, the evidence did not establish that Claimant had free natural supports from family, friends, or others in his community. RCEB erroneously concluded in the IPP that Claimant's conservator resides in the same house as Claimant, and would have been considered as a natural support.

Although RCEB did not specifically contend that Claimant's trust fund (or bank account) is a private entity, the NOPA referred to Welfare and Institutions Code section 4659. Under this provision, a regional center must identify and pursue all possible sources of funding for consumers receiving regional center services, including private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer. Here, there was no evidence to establish that Claimant's trust fund (or bank account) is considered a private entity subject to section 4659.

17. Overall, RCEB contends that it must pursue all sources of funding including Claimant's personal funds available in his trust fund. According to RCEB, Claimant does not have a "special needs trust" which precludes RCEB from pursuing his funds. RCEB contends that the California Department of Developmental Services directed the regional center to deny funding 109.55 hours of SLS services to Claimant that would typically have been provided by IHSS.

These contentions are not persuasive. The evidence did not establish that Claimant has sufficient resources in his trust fund (or bank account) to cover 109.55 SLS hours per month. RCEB did not request that Claimant provide information about

his “personal financial resources” to specifically identify an amount in Claimant’s trust fund (or bank account) that could be used as a potentially available resource. If RCEB had requested such information, and Claimant had refused to provide that financial information, RCEB might be entitled to deny the SLS hours. However, RCEB arrived at an arbitrary amount of SLS hours in lieu of IHSS hours, and expects Claimant to fund that amount without ascertaining that Claimant has the available resources. Until RCEB provides a quantitative and qualitative rationale to determine that Claimant’s trust fund (or bank account) is a potentially available resource, RCEB is prohibited from refusing to fund Claimant’s SLS hours on the premise that it is in lieu of IHSS hours that he does not qualify for.

LEGAL CONCLUSIONS

1. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, RCEB bears the burden of proving, by a preponderance of the evidence, that it is entitled to reduce the level of funding for SLS services for Claimant. (Evid. Code, § 115.)

2. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. The Lanterman Act mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community.” (§ 4501.) Regional centers are charged with the responsibility of carrying out the state’s responsibilities to the developmentally disabled under the Lanterman Act. (§ 4620, subd. (a).) The Lanterman Act directs regional centers to develop and implement an IPP that states the

consumer's goals and objectives and delineates the services and supports needed by the consumer. (§§ 4646, 4646.5, 4648.)

3. An individual's IPP states the consumer's goals and objectives and delineates the services and supports needed by the consumer. (§§ 4646, 4646.5, 4648.) In implementing an IPP, the regional center must first consider services and supports in the individual's natural community, home, work, and recreational settings. (§ 4648, subd. (a)(2).) While regional centers have a duty to provide a wide array of services to implement the goals and objectives of the IPP, they are directed by the Legislature to provide services that reflect the cost-effective use of public resources, including the use of natural supports. (§§ 4512, subd. (e), 4646, subd. (a).)

4. Regional center funds "shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." (§ 4648, subd. (a)(8).) Pursuant to section 4659, regional centers are required to identify and pursue all possible sources of funding for consumers receiving regional center services. (*Id.*, subd. (a).) Such sources of funding include governmental entities or programs required to provide or pay for the cost of providing services, including Medi-Cal, and private entities. (§ 4659, subds. (a)(1) & (2).) Section 4659, subdivision (e), provides that this section shall not deny services to any individual who qualifies for regional center services but is unable to pay.

5. The California Supreme Court has held that the Lanterman Act is an entitlement act. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) Regional centers must therefore provide services to eligible consumers regardless of their financial status. (*Clemente v. Amundson* (1998) 60 Cal.App.4th 1094, 1103.) But the obligations of the state and the regional centers

under the Act are not open-ended and without restriction. The most basic restriction is that developmentally disabled persons are entitled to receive at state expense "only such services as are consistent with [the Act's] purpose." (*Association for Retarded Citizens Services, supra*, at p. 393.) Other restrictions on the scope of entitlements are those specifically imposed by statute. (*Clemente v. Amundson, supra*, at pp. 1103-1106 [the court rejected the regional center's argument that the directive to seek "alternative sources of payment for services" provided a basis for a copayment requirement for respite services].)

6. In this case, there is no express statutory authority that permits RCEB to consider Claimant's trust fund (or bank account) as an available resource that must be tapped into before the service agency will provide him the services and supports he has requested. Therefore, RCEB may not require Claimant to pay for an arbitrary (but arguably conservative) amount of hypothetical IHSS hours from his trust fund (or bank account). Although not specifically argued, RCEB did not establish that Claimant's trust fund (or bank account) constitutes a generic resource or private entity under section 4659, or that Claimant has any available natural support under section 4512.

7. As indicated above, the Lanterman Act is an entitlement act in which services are provided. The Lanterman Act requirement that service agencies provide services and supports in an economical and cost-effective manner does not detract from the fact that eligible consumers are entitled to the services and supports provided for in the Lanterman Act without regard to their income or personal wealth. The entitlement provisions must be read in conjunction with the cost-effectiveness requirement. It does not mean, however, that the service agency should seek to limit its own costs by requiring consumers to fund services and supports out of their own resources without establishing whether (and how much) the consumer can contribute

towards funding his services and supports. In this case, RCEB's determination of arbitrary and speculative IHSS hours that it believes Claimant would be entitled to in order to justify denial of SLS hours and require Claimant to pay does not appear to comply with the cost-effectiveness requirement.

8. RCEB did not meet its burden to establish that it may deny funding 109.55 hours of monthly SLS hours to Claimant for services that typically would be funded by IHSS.

ORDER

Claimant's appeal from RCEB's Notice of Proposed Action, dated September 23, 2021, is granted.

DATE:

REGINA BROWN

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.