

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

In the Matter of:

CLAIMANT

vs.

NORTH BAY REGIONAL CENTER, Service Agency.

OAH No. 2021100597

DECISION

Administrative Law Judge Michelle Dylan, State of California, Office of Administrative Hearings, heard this matter on March 10, 2022, by videoconference and telephone.

Claimant appeared by telephone and represented herself. Jake Stebner, Attorney at Law, represented North Bay Regional Center (NBRC).

The record was held open for written closing arguments from both parties, which were submitted and marked for identification as Exhibit 12 (NBRC) and Exhibit F (claimant). The record closed and the matter was submitted on March 23, 2022.

ISSUE

Did NBRC correctly conclude that the Department of Developmental Services (DDS) did not create a temporary exception to the Lanterman Act's prohibition against the regional center funding claimant's parent to provide personal assistant services?

FACTUAL FINDINGS

Background

1. Claimant is 48 years old. She lives with her parents, brother and daughter. Claimant is eligible for regional center services based upon a diagnosis of mild intellectual disability. Claimant is very independent and manages the scheduling of her medical appointments, and her parents assist when necessary. Claimant's mother provides transportation to and from claimant's medical appointments.

2. On June 8, 2021, claimant met with NBRC during an individual program plan (IPP) meeting. Claimant explained that her parents would be providing her with care while she recovered from a surgical procedure scheduled for the following day. Claimant did not request that her parents receive compensation for caring for her during her recovery.

3. At the time of the IPP meeting, NBRC had been funding Independent Living Services (ILS) from A Bright Future since 2017. NBRC was informed by claimant's ILS provider that they were attempting to assist claimant in applying for In Home Support Services (IHSS), a county-funded generic resource.

4. Claimant was employed at A Bright Future as a receptionist, however her job ended due to the COVID-19 pandemic.

Claimant's Request for Personal Assistant Funding

5. Claimant's former service coordinator received a message from Claimant on July 12, 2021, "requesting that her mother receive payment for providing care for her while she recovered from the surgery." After consulting with her supervisor, claimant's former service coordinator informed claimant that her mother could not be compensated for caring for her during her recovery because her mother is a natural support, and that funding her to act as a personal assistant is prohibited.

6. On July 20, 2021, the Office of Client's Rights Advocacy Group (Advocacy Group) contacted claimant's former service coordinator and her supervisor and inquired as to whether claimant's mother could receive personal assistant hours for providing care for claimant. The Advocacy Group provided information to NBRC in support of their position that claimant's mother could receive personal assistant hours.

7. Claimant's former service coordinator and her supervisor met with NBRC's Director of Client Services to determine if this request could be granted. Their analysis considered the legal argument and information that the Advocacy Group provided to them, including DDS Directive No. 01-033020, (DDS Directive), DDS Frequently Asked Questions for Self-Advocates and Families About Participant-Directed Services During the COVID-19 Pandemic (DDS Memorandum), and OAH Opinion No. 2021030392 (OAH Opinion).

8. NBRC sent a letter to claimant on September 24, 2020, stating as follows:

Local Client's Rights Advocate, Yulahlia Hernandez, Esq. has been informally advocating on [Claimant's] behalf on this issue and NBRC understands her position to be as follows: under the Participant-Directed Services Waiver (PDSW), the Department of Developmental Services (DDS) recently created an exception to the general requirement that a parent, as a natural support, cannot be compensated for providing PA services; specifically, in October of 2020, DDS issued a memorandum entitled "Frequently Asked Questions for [Self-Advocates] and Families About Participant-Directed Services During the COVID-19 Pandemic" (DDS Memorandum) in which it initially addresses who, under the program, can be hired to provide Participant-Directed Services, stating that "[a] spouse and generally a parent cannot provide respite, day care, personal assistance, or independent living skills"; in a final administrative decision issued May 13, 2021 (OAH No. 2021030392), this sentence's use of the word "generally" was read to mean that "while spouses can never serve as caretakers, parents usually cannot but, under some circumstances, can," a distinction relied upon to conclude that, under the particular circumstances at issue in that case, "it is reasonable to make an exception to DDS's rule that parents are 'generally' not to be respite providers under the PDSW program"; this is consistent with the intent expressed in DDS' guidance issued on March 30, 2020 (DDS Directive 01-033020) to promote, under the PDSW program, "the greatest flexibility to support consumers and their families"; so, the DDS Memorandum is most reasonably interpreted to have also created an exception to DDS's rule that parents are "generally" not to be PA services providers under the PDSW program.

9. The letter explained that NBRC disagreed with Ms. Hernandez's legal position because while the DDS Memorandum generally allows a "qualified family member, friend, or other individual" to provide personal assistance services, it plainly states that "they cannot be provided by the consumer's parent or spouse," while no such restriction applies to respite care. Therefore, NBRC reached the conclusion that it is not lawfully authorized by any exception under the PDSW program to compensate claimant's mother for personal assistant services.

10. On September 2, 2021, claimant's former service coordinator and supervisor discussed claimant's request with her via telephone. Claimant explained that her mother had cared for her after surgery for five hours a day, seven days a week for a total of eight weeks. Her mother prepared all of her meals daily, did her laundry every three days, did her grocery shopping every two weeks, and ran errands for her every other week. Claimant's request was declined, and she was encouraged to pursue IHSS which could provide funding for such services.

11. On September 21, 2021, NBRC issued a notice of proposed action notifying claimant that it proposed to deny her request for her parent to provide personal assistant hours, because NBRC is prohibited by regulation from funding Personal Support services provided by a parent or spouse since this is considered a "natural support." The letter referenced in Factual Findings 8 and 9 accompanied the notice of proposed action.

12. On October 14, 2021, claimant submitted a fair hearing request stating: "I feel like my rights have been denied when NBRC denied reimbursement for my mother to be paid as a PA to help me recover from surgery. NBRC [needs] to provide the retroactive PA hours to my mother for when she helped me recover."

13. This proceeding followed. Based on the notice of proposed action and request for fair hearing, the issue determined is limited to whether NBRC correctly concluded that the Department of Developmental Services (DDS) did not create a temporary exception to the Lanterman Developmental Disabilities Services Act's (Welf. & Inst. Code, § 4500, et seq.)¹ (Act) prohibition against the regional center funding claimant's parent to provide personal assistant services.

Claimant's Testimony and Contentions

14. Claimant testified at hearing. Claimant reported that she was not receiving ILS services from A Bright Future at the time of her surgery due to COVID-19 restrictions. Claimant explained that she reached out to her ILS worker, but that she did not hear back from her.

15. Claimant's mother took care of all of claimant's needs during her recovery from the surgery, including preparing her meals, buying groceries and running errands. Claimant was on strong medication after her surgery and was in need of a lot of care.

16. Claimant believes that her mother is entitled to reimbursement for the hours she spent caring for claimant since "DDS said that regional centers should be flexible during the pandemic," and NBRC was not being flexible when they denied paying her mother as a personal assistant.

17. Claimant also argues that Question Four of the DDS Frequently Asked Questions (DDS Memorandum) says that "generally" a parent cannot be paid to

¹ All statutory references are to the Welfare and Institutions Code.

provide personal assistant services, which means that sometimes the Regional Center can pay parents to be personal assistance providers.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Act. The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled, and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (§§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

2. The 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 have the responsibility of carrying out the state’s responsibilities to the developmentally disabled under the Act. (§ 4620, subd. (a).) The Act directs regional centers to develop and implement an IPP for each individual who is eligible for services, setting forth the services and supports needed by the consumer to meet his or her goals and objectives. (§ 4646.) The determination of which services and supports are necessary is made after analyzing the needs and preferences of the consumer, the range of service options available, the effectiveness of each option in meeting the goals of the IPP, and the cost of each option. (§§ 4646, 4646.5 & 4648.) The IPP identifies the service providers or individuals responsible for providing the direct services and supports determined to be needed by the program

planning team to assist the individual in attaining his or her goals or objectives.
(§§ 4646.5, subd. (a)(5), 4648, subd. (a).)

3. While regional centers have a duty to provide a wide array of services to implement the goals and objectives of the IPP, they are also directed by the Legislature to provide services in a cost-effective manner. (§ 4646, subd. (a).) Regional centers are required to be “payers of last resort,” needed services are secured from natural supports and generic resources, and if no natural or generic resource is available, regional centers purchase services from regional center “vendors.” (§§ 4646.4, 4646.5, subd. (a)(5), 4648, subds. (a)(1)-(3), (8), (11), (13)(C) & (f), 4659.10 [noting it is “the intent of the Legislature that the department and the regional centers shall continue to be the payers of last resort . . . ”].)

4. The Act specifically prohibits regional centers from funding services that are available through “generic” resources and, where applicable, “natural supports.” (§§ 4648, subd. (a)(8), 4659; Cal. Code Regs., tit. 17, § 54302, subd. (a)(31)-(32), (48).) As defined in Title 17 of the California Code of Regulations, “. . . ‘Natural Supports’ means, pursuant to Welfare and Institutions Code, Section 4512(e), personal associations and relationships typically developed in the family and community that enhance or maintain the quality and security of life for people.” (Cal. Code of Regs., tit. 17, § 54302, subd. (a)(44).)

DDS DIRECTIVE AND MEMORANDUM

5. DDS issued Directive 01-033020 dated March 30, 2020, which relaxed certain restrictions on regional center funding, pursuant to the Governor’s State of Emergency Proclamation and Executive Order N-25-20, related to the COVID-19 pandemic. The Directive waives or modifies certain requirements of the Act in order for

regional centers and consumers to have the flexibility needed to receive and provide services and supports.

6. The Directive states in part: "Participant direction provides consumers the option to exercise more authority over how, and by whom, services are provided. Currently, consumers can coordinate respite, day care, transportation, nursing and day services through participant direction. With participant direction, consumers have employer authority and responsibilities including choosing, scheduling and supervising workers. The intent of this Directive is to provide consumers, regional centers and service providers the greatest flexibility to support consumers and their families."

7. To increase access and flexibility in service delivery, the Directive temporarily ordered that personal assistance, independent living skills, and supported employment be included among the services already available through participant direction.

8. An enclosure to the Directive entitled "Additional Participant-Directed Services" states that in temporarily accessing these services, the person that the consumer or family member identifies to provide the service, "[c]annot be the consumer's spouse or parent for personal assistance or independent living skills."

9. In October 2020, DDS issued the DDS Memorandum which explains that participant-directed services "lets the consumer or family choose who to hire, schedule when the person works, and supervise the work" for some types of IPP services. The services "can be used by individuals who live in their own home, their family home and some community living arrangements."

10. The Answer to Question Four of the DDS Frequently Asked Questions DDS Memorandum states that consumers "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 services.” The word “generally” in this sentence serves as the basis of the dispute in this matter.

11. Claimant relies on the OAH Decision issued May 13, 2021 (OAH No. 2021030392) interpreting “generally” in the context of respite care. However, unlike those individuals who are permitted to provide respite care, the DDS Directive specifically states that the person identified to provide the service “[c]annot be the consumer’s spouse or parent for personal assistance” The DDS Directive does not provide this limitation for respite care.

12. Furthermore, the “Description of Services That Can be Provided Through Participant-Directed Services” (Attachment 1) to the DDS Memorandum explains that the program generally allows for family members to provide respite care, unless the proposed respite worker is the family member who provides care for the consumer and needs a break from that care. However, Attachment 1 which generally allows for “a qualified family member, friend or other individual” to provide personal assistance services, specifically states that “[t]hey cannot be provided by the consumer’s parent or spouse.”

13. The DDS Directive, like the DDS Memorandum, does not say that respite care cannot be provided by a consumer’s parent or spouse. DDS did not create any temporary exception to allow for a parent to be compensated as a personal assistance provider.

14. Also applicable here is the principle that if there is a conflict between a general term and a specific term in the same statute, the specific term must control

the meaning. (*Ginsberg & Sons, Inc. v. Popkin* (1932) 285 U.S. 204, 208.) Given the clear meaning of each of the specific provisions prohibiting a regional center from paying a parent to provide personal assistance (*Walters v. Metro. Educ. Enters., Inc.* (1997) 519 U.S. 202, 207), any interpretation favoring the broader provision's use of the word "generally" should be rejected. To the extent that the specific provisions can be read to conflict with the broader statement's use of the word generally, the specific provisions must control the meaning. (*Ginsberg & Sons, Inc., supra*, 285 U.S. at p. 208.)

15. While it is undisputed that claimant's mother provided a valuable service to claimant that deserves great appreciation, NBRC is prohibited from paying claimant's parent to provide personal assistance services under the DDS Directive and DDS Memorandum.

ORDER

Claimant's appeal of the Notice of Proposed Action dated September 21, 2021, is denied.

DATE: April 5, 2022

MICHELLE DYLAN
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.