

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

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER, Service Agency.

OAH No. 2021100895

DECISION

Ji-Lan Zang, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference and telephone on January 3, 2021.

Candance J. Hein, Fair Hearing Specialist, represented Westside Regional Center (Service Agency or WRC).

Claimant's mother (Mother) represented claimant as his Authorized Representative. Claimant and his family members are identified by titles to protect their privacy.

Testimony and documentary evidence was received. The record remained open until January 10, 2022, for claimant to submit the following documents: (1) a five-page statement from Mother (marked as Exhibit A); (2) claimant's daily schedule (marked as

Exhibit B); (3) a letter from claimant's brother's dentist (marked as Exhibit C); (4) the 2021 Individual Program Plan (IPP) Progress Report (marked as Exhibit D); and (5) select statutory references to the Welfare and Institution Code (marked as Exhibit E). WRC stipulated to the admission of Exhibits A through E without any objections; however, it was granted leave until January 17, 2022, to provide responsive comments or arguments, if any, to these exhibits. Claimant timely filed his exhibits, and WRC timely provided a response, which was marked for identification as Exhibit 15. On January 20, 2022, claimant filed a reply to WRC's response, which was marked for identification as Exhibit F. However, claimant's reply was not considered, as the record was not held open for the submission of additional argument from claimant.

The record closed and the matter was submitted for decision on January 17, 2021.

ISSUES

1. Should Service Agency be required to restore 25 hours per month of Covid respite (in-home respite hours authorized by Service Agency to support claimant with distance learning while his school was closed due to the Covid-19 pandemic), after claimant's school has reopened?

2. Should Service Agency be required to fund for claimant an additional 61.5 hours per month of specialized supervision or regular respite, consisting of 58.5 hours while claimant is engaged in online applied behavioral analysis (ABA), occupational therapy (OT), and speech therapy (ST), and three hours for Mother to attend medical appointments?

EVIDENCE RELIED ON

Documentary: Service Agency's exhibits 1-15; claimant's exhibits A-E.

Testimonial: Candance J. Hein, WRC Fair Hearing Specialist, and Mother.

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a seven-year-old male client of WRC. He qualifies for regional center services under a diagnosis of Autism Spectrum Disorder.

2. On October 14, 2021, Service Agency sent claimant a Notice of Proposed Action (NOPA) letter denying his request for 61.5 hours of additional regular respite while claimant is engaged in online, afterschool therapy sessions and for Mother to attend medical appointments. (Ex. 2, p. 3.) The NOPA explained that under Welfare and Institutions Code (all further references are to the Welfare and Institutions Code, unless otherwise designated) section 4646.4, supervision during those therapy sessions is "the family's responsibility for providing similar services and supports for a minor child without disabilities." (*Id.* at p. 4.)

3. On November 17, 2021, Mother filed a request for a fair hearing on claimant's behalf, appealing the denial. She wrote in her fair hearing request, "I disagree with the decision to deny my son additional respite and specialized supervision. I also disagree with the decision to reduce my son's respite by 25 hours per month. The RC [regional center] did not provide a notice of proposed action for

the 25-hour reduction. I'm requesting aid paid pending for 25 hours of respite. . . .” (Ex. 2, p. 3.) This hearing ensued.

Claimant's Background

4. Claimant lives at his home with his parents, his brother, and maternal grandmother. Claimant's brother is not a regional center consumer. Claimant's father works outside the home, but Mother is not working. She stays at home to take care of claimant and his brother.

5. Claimant's most recent individual program plan progress report (IPP Progress Report), dated April 12, 2021, contains Service Agency's and claimant's family's agreements, sets forth specific objectives and goals, and contains the services and supports to achieve them. (Ex. D.) It also describes claimant's needs and behaviors. According to the IPP Progress Report, claimant requires assistance with all self-care tasks. He tries to dress himself and can put on his shirt, but Mother helps him put on his pants. Claimant is resistant to having his teeth brushed. He is still working on potty training, and he wears diapers at night. Claimant can drink from a straw or an open cup, but he sometimes drops the cup. He can feed himself finger foods, but he often asks Mother to feed him. In terms of language skills, claimant is able to use three to four letter words, but he often uses the incorrect tense or pronoun. Claimant also exhibits behavioral issues, and he has almost daily emotional outbursts of screaming. Claimant is in first grade at his elementary school, where he attends a special day class with a one-on-one aide. From his school, claimant also receives speech therapy and social skills training.

6. Claimant is currently attending school in person from 8:15 a.m. to 2:30 p.m. from Monday through Friday. He also receives two hours of ABA, one hour of OT,

and one hour of ST every week. These services are provided online due to the Covid-19 pandemic. Claimant also receives 247 hours of in-home supportive services (IHSS). (IHSS is in-home assistance provided by the county to eligible disabled individuals as an alternative to out-of-home care.) Service Agency currently funds 35 hours of regular respite for claimant.

Restoration of 25 Hours of Covid Respite

7. Pursuant to a decision dated July 6, 2020, in OAH case number 2020050194 (OAH Decision), claimant was granted 25 additional hours of Covid respite “during the duration of school closures due to the COVID-19 emergency.” (Ex. 14, p. 67.) Because claimant’s school reopened in August 2021 and claimant has been attending school in person since that time, Service Agency terminated the 25 hours of Covid respite without issuing a NOPA.

8. At the hearing, Mother did not dispute that claimant is currently attending school in person. Mother stated she understood WRC’s decision to terminate the 25 hours of Covid respite due to the resumption of in-person classes at school. She withdrew her request for aid paid pending and the restoration of the 25 hours of Covid respite.

Regular Respite/Specialized Supervision While Claimant Attends Online Therapies

9. Claimant requests regular respite and/or specialized supervision for Mother while he attends online therapies consisting of two hours of ABA therapy, two hours of OT, and one hour of ST every week. On a monthly basis, claimant is requesting 58.5 hours of respite for Mother while he is engaged in these online therapies.

10. In an undated letter submitted by Mother, she wrote about claimant's behavioral and adaptive living skills challenges. Specifically, Mother wrote that claimant is unable to complete many self-care tasks independently, including bathing, brushing teeth, dressing, preparing simple snacks, and getting to bed. Mother notes that "[claimant] receives ABA therapy for 2-3 hours every day after school, Monday through Friday, OT 1 hour on Monday, speech 1 hour on Friday. During this time, I [Mother] must be present and participate." (Ex. A, p.2)

Regular Respite/Specialized Supervision for Sibling's Dentist Appointment and Mother's Medical Appointments

11. Claimant requests an additional three hours of respite and/or specialized supervision per month for Mother to attend to medical appointments for his brother and for herself. In support of this request, Mother submitted a letter dated May 13, 2021, showing that claimant's brother requires dental appointments every four to six weeks beginning on May 20, 2021, for approximately 24 to 36 months. (Ex. C.) In addition, Mother submitted two letters from her doctors. The first letter, from Cyril Anaydke, M.D., dated September 22, 2021, stated that Mother had a procedure and will be attending a follow up appointment. (Ex. 4.) The second letter, from Yulionas Gayauskas, MD., dated December 7, 2021, stated that "[Mother] has back pain, which limits her to care for her children." (Ex. 4.)

12. In a letter dated October 14, 2021, Rachel Credo, claimant's service coordinator wrote to Mother, "You expressed that you need additional supports due to your current medical condition, for which we requested a doctor's note to justify your request. The doctor's note you provided did not indicate information regarding physical limitations which would affect your ability to supervise [claimant's] afterschool therapy sessions." (Ex. 2, p. 5.) At the hearing, Service Agency confirmed that it had

reviewed Drs. Anaydke and Gayauskas' letters, but it denied additional regular respite for Mother because the physicians' letters did not place limitations on Mother's ability to supervise claimant.

13. At the hearing, Mother testified that she suffers from back pain and a colon condition. However, she was uncertain if she requires surgery for these conditions. Mother averred that she had follow-up appointments with her doctors in the afternoon of the day of the hearing, after which she expected to learn more about the status of her medical conditions.

WRC Service Standards for Specialized Supervision

14. WRC's Service Standards for Specialized Supervision was admitted into evidence as Exhibit 10. Specialized supervision is a type of day care service with one-on-one supervision for school-aged children with specialized needs. WRC's Service Standards for Specialized reads, in relevant part, "Day care services are provided to school-aged children with a developmental disability while family caregivers are at work or attending a vocational/educational program leading to future work and have no other means to care and supervision." (Ex. 10, p. 25.)

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WRC Service Standards for Respite

15. WRC's Service Standards for Respite was admitted into evidence as Exhibit 9. It reads, in relevant part:

Each family that can benefit from respite services has different needs. The Family Respite Needs Assessment Guideline and Summary (incorporated by reference) will be used to establish the number of hours per month of in-home respite that can be funded by the Regional Center. The Family Respite Needs Assessment Guideline considers such factors as: age, adaptive skills, mobility, communication, school or day program attendance, medical needs, behavioral needs, family situation, and availability of "generic resources." The Assessment Guideline is filled out with input from the consumer, family, or guardian and yields an estimate of the amount of hours needed.

(Ex. 9, p. 21.)

16. The Family Respite Needs Assessment Guideline referred to in the Service Standards for Respite, however, was not submitted into evidence. There was also no evidence presented that Service Agency performed a respite needs assessment in accordance with the Family Respite Needs Assessment Guideline after receipt of claimant's request for additional respite.

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Service Agency's Contentions

17. WRC contends that the 58.5 hours of respite requested for Mother while claimant is engaged in online therapies is parental responsibility because the parents of a child who does not have a developmental disability are also expected to be present for any telehealth therapies. According to WRC, arranging supervision for a seven-year-old when a parent must take a sibling to a dentist appointment is also parental responsibility that is expected of all families. WRC further contends that Service Agency's current provision of 35 hours of respite and claimant's receipt of 247 hours of IHSS is sufficient to meet Mother's needs for her own medical appointments.

Mother's Contentions

18. Mother contends that she needs the additional respite hours to assist her with supervision of claimant while he is engaged in online therapy, while she attends medical appointments for her personal health, and while she takes claimant's brother to his dentist appointments. She disagrees with WRC's contention that IHSS should be considered when assessing respite needs.

LEGAL CONCLUSIONS

Standard and Burden of Proof

1. Where a change in services is sought, the party seeking the change has the burden of proving that the change in services is necessary by a preponderance of the evidence. (See Evid. Code, §§ 115 & 500.) Preponderance of the evidence means evidence that has more convincing force than that opposed to it. (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324.)

2. In this case, claimant requests Service Agency funding for additional respite hours beyond the 35 hours per month of respite Service Agency currently funds. Therefore, claimant has the burden of proving by a preponderance of the evidence that he is entitled to the requested services and funding.

Statutory Framework

3. The Lanterman Developmental Disabilities Services Act (Lanterman Act) (§ 4500 et seq.) sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. Under the Lanterman Act, a regional center is required to secure the services and supports that meet the needs of the consumer, as determined in the consumer's IPP. (§ 4646, subd. (a)(1).) The determination of which services and supports are necessary for each consumer shall be made through the IPP process. (§ 4512, subd. (b).) 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 IPP participants, the effectiveness of each option in meeting the goals stated in the IPP, and the cost-effectiveness of each option. (§ 4512, subd. (b).)

4. When purchasing services and supports for a consumer, a regional center shall ensure, among other things, "[c]onformance with the regional center's purchase of service policies, as approved by the [Department of Developmental Services] pursuant to subdivision (d) of Section 4434," and "[u]tilization of generic services and supports when appropriate." (§ 4646.4, subd. (a)(1) & (2).)

5. 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. Such sources of funding include governmental entities or programs required to provide or pay for the cost of providing services, including Medi-Cal. (§ 4659, subd. (a)(1).)

6. Regional centers are also required, when purchasing services and supports, to consider "the family's responsibility for providing similar services and supports for a minor child without disabilities. . . ." (§ 4646.1, subd. (a)(4).)

7. Respite is a service that may be included in a consumer's IPP. (§ 4512, subd. (b).) In-home respite services are "intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client's own home, for a regional center client who resides with a family member." (§ 4690.2, subd. (a).) Respite services are designed to assist family members in maintaining the client at home, provide appropriate care and supervision to ensure the client's safety in the absence of family members, relieve family members from the constantly demanding responsibility of caring for the client, and attend to the client's basic self-help needs and other activities of daily living which would ordinarily be performed by the family members. (§ 4690.2, subd. (a); Cal. Code Regs., tit. 17, § 54302, subd. (a)(38).)

The 25 Hours of Covid Respite

8. Service Agency authorized the Covid respite hours pursuant to the OAH Decision to support claimant while he attended school through distance learning. For the current school year, claimant has returned to attending school in person. As a result, he no longer has a need for Covid respite hours to support him with distance learning. Additionally, the 25 hours of Covid respite terminated by operation of the order in the OAH Decision, once in-person schooling resumed. Therefore, Service

Agency properly terminated the 25 hours of Covid respite without the issuance of a NOPA and properly denied the continuation of this service.

Specialized Supervision In Lieu of Respite

9. In his request for additional regular respite, claimant also requested specialized supervision as an alternative. Specialized supervision is a type of day care service with one-on-one supervision for school-aged children with specialized needs. According to WRC's Service Standards for Specialized Supervision, day care is only provided to families in which both parents work or attend a vocational/educational program. Because Mother is not working and stays at home as a caregiver, funding specialized supervision or day care is not appropriate.

The 58.5 Hours of Respite While Claimant Engages in Online Therapy

10. Service Agency properly denied claimant's request for 58.5 hours of respite for his Mother while he is engaged in online therapy. Service Agency persuasively argued that a parent is typically expected to be present for these types of therapies for a child without a developmental disability. In particular, ABA therapy involves training the parents to implement tactics to reinforce positive behaviors, and parents are expected to participate in these therapy sessions. Mother, in her undated letter, also confirmed that she is expected to be present and participate in claimant's online therapy sessions. Therefore, respite, which is intended to be a resting period to relieve family members from the demands of caring for a child with development disability, cannot be appropriately used during the time that claimant is engaged in online therapy. Mother's participation in claimant's online therapy is not only a typical parental responsibility within the meaning of section 4646.1, subdivision (a)(4), it is necessary for his treatment and habilitation.

The Three Hours of Respite for Medical Appointments

11. Similarly, claimant's request for respite for Mother to take his brother to his dentist appointment is also a task that a parent of a child without developmental disability is expected to perform. All parents are expected to adjust their schedules to meet the responsibilities of parenting multiple children, such as arranging childcare for one child while taking another child for a dentist appointment.

12. However, Mother presented testimony and submitted letters demonstrating that she currently has medical conditions which may require additional respite. Specifically, Mother testified that she has issues with her colon and her back which may necessitate surgery. Her physician, Dr. Gayauskas, confirmed in a letter dated December 7, 2021, that Mother's back problems limit her ability to care for her children. WRC's Service Standards for Respite require the Service Agency to use the Family Respite Needs Assessment Guideline to establish the number of hours of respite, taking into consideration factors including medical needs and family situation. However, no evidence was presented that such an assessment had been performed to determine whether Mother's medical conditions warrant more respite hours. Mother also stated at the hearing that she will be able to obtain more information from her physicians regarding her need for surgery during follow-up appointments on the day of the hearing. Consequently, Mother shall be ordered to cooperate with Service Agency in providing additional medical information to support her request for regular respite, and Service Agency shall be ordered to conduct a respite needs assessment based on that information in accordance with the Family Respite Needs Assessment Guideline.

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ORDER

1. Claimant's request for restoration of 25 hours of Covid respite is denied.
2. Claimant's request for 58.5 hours of regular respite for his mother while he engages in online therapy is denied.
3. Claimant's request for additional hours of regular respite for Mother to take his brother to his dentist appointment is denied.
4. Mother shall cooperate with WRC in providing her medical information regarding her colon and back conditions, and Service Agency shall conduct a respite needs assessment based on this information in accordance with its Family Respite Needs Assessment Guideline.

DATE:

JI-LAN ZANG

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.