

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

In the Matter of the Fair Hearing Request of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2022020436

PROPOSED DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on August 16, 2022.

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

Valerie Vanaman, Attorney at Law, represented claimant, who was not present. Claimant's mother, who is claimant's authorized representative, was present. The names of claimant and his family members are omitted to protect their privacy.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on August 16, 2022.

ISSUE

Whether the Service Agency may, under the Lanterman Act, reduce claimant's monthly respite services from 80 to 42 hours.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1 through 12; claimant's exhibits A through E.

Witnesses: Candace Hein for Service Agency; claimant's mother for claimant.

FACTUAL FINDINGS

Parties, Jurisdiction, and Claimant's Individual Program Plan

1. Claimant, a 15-year-old conserved male, is an eligible consumer of WRC based on his diagnosis of Autism Spectrum Disorder (ASD). He lives in his family home with his parents, older sister, and younger brother. Claimant's father, an anesthesiologist, works full-time, often on long shifts that change daily. Claimant's mother, a trauma center nurse anesthetist, works full-time, often on 12-hour shifts. Claimant is home-schooled; his school district could not continue to provide services on campus due to claimant's extreme eloping behaviors.

2. Claimant's most recent triennial Individual Program Plan (IPP) dated August 30, 2019, provides that, "[d]ue to [claimant's] extreme eloping behaviors and low safety awareness, [claimant] was granted 80 hours/month of in-home respite and 105 hours/month of specialized supervision." (Ex. 6, pp. A28.) The funding was

effective from October 1, 2019, to September 30, 2020. "The need for service will be reviewed during the next Annual/IPP meeting, and will be re-authorized if determined appropriate." (Ex. 6, p. A35.) Annual IPP Progress Reports issued after meetings in August 2020 and August 2021 continued to recognize the need for 80 monthly hours of respite services.

3. After the August 25, 2021, Annual IPP Progress Report meeting, claimant's WRC service coordinator, Sanaz Nasiri, completed a family respite needs assessment for claimant's family, assigning scores for various areas of need and concluding that funding for 42 hours of respite services for claimant per month was appropriate.

4. By a Notice of Proposed Action (NOPA) and letter dated January 31, 2022, WRC informed claimant's parents that it had decided to deny their "[r]equest for WRC to continue to fund 80 hours of respite per month." (Ex. 2, p. A17.) The decision was expressly based on Ms. Nasiri's family respite needs assessment as well as on WRC's service standard on respite requiring the regional center to consider the consumer's age, needs, and level of care.

5. On February 8, 2022, claimant's mother filed a Fair Hearing Request. This hearing ensued.

Claimant's August 2019 IPP

6. Claimant's most recent triennial Individual Program Plan (IPP) dated August 30, 2019, recites that:

[Claimant] has poor safety awareness when in the community and at home. He has limited awareness of

common dangers. [Claimant] will attempt to elope from his home via windows, doors and anywhere else he can think of. He recently ran out of the house and jumped over their neighbors fence. Due to these behaviors all of the windows are sealed shut in the home, first and second floors, for [claimant]'s safety. Entrance doors into the home are locked at all times to prevent [claimant] from eloping. [Claimant] will try to elope several times daily. [Claimant] is physically very capable and the times he has been able to successfully elope, he climbed fences of his and the neighbor's yards, climbed trees and climbed onto the roof of a home that was under construction. Police have been called one at least two occasion for assistance in getting [claimant] back home. [Claimant] is very fast and seems to be looking for a chance to elope at every opportunity. [Claimant] successfully eloped from the home while receiving in-home ABA services; there were two therapists there working with [claimant] at the time. [Claimant]'s parents have contacted the police to make them aware of [claimant]'s behaviors. [Claimant] will also elope when in community settings such as at the grocery store. He will typically run away from his parents to grab the items he wants in the grocery store. At home, [claimant] climbs on all furniture, including tables and bookshelves. [Claimant] will also climb on the playground equipment in his backyard. Due to the consistent eloping behaviors (including attempts and

successes), [claimant] requires constant supervision for his own safety and the safety of those around him.

(Ex. 6, pp. A26-A27.)

7. Claimant's speech is difficult to understand for people who are not familiar with him. He has trouble initiating and maintaining a reciprocal conversation. He can follow one- or two-step directions, sometimes requiring prompts. He can remain focused on a preferred activity for 15 to 20 minutes but loses focus during non-preferred activities and requires redirection. (Ex. 6, pp. A27.)

8. Claimant attended school from pre-kindergarten to fourth grade when, due to his eloping behaviors, the school concluded it could no longer maintain claimant in a classroom setting. He was able to elope from the school premises and place himself in perilous situations. As a result, claimant is being home schooled, with instructors visiting him at his home. (Ex. 6, pp. A28-A29.)

Annual IPP Progress Reports in 2020 and 2021

9. An Annual IPP Progress Report approved on October 2, 2020, issued after a telephonic annual meeting on August 28, 2020, continued to provide that WRC would fund 80 hours per month of respite services for claimant "as an exception," effective from October 1, 2020, to September 30, 2021, and that the need for respite services at that level would be reviewed during the next annual IPP meeting "and will be re-authorized if determined appropriate." (Ex. 7, pp. A41-A42.) The report also continued to authorize funding for 105 hours per month of Specialized Supervision services, as an exception to be reevaluated annually.

10. An Annual IPP Progress Report approved on October 6, 2021, issued after a videoconference annual meeting on August 25, 2021, continued to provide that WRC would fund 80 hours per month of respite services for claimant “as an exception” effective from October 1, 2020, to October 31, 2021, and that the need for respite services at that level would be reviewed “pending receipt of documentation from family, and will be re-authorized if determined appropriate.” (Ex. 8, p. A49.) The report also continued to authorize funding for 105 hours per month of Specialized Supervision services, as an exception to be reevaluated annually.

11. Nothing in the Annual IPP Progress Reports issued since the triennial 2019 IPP reflects any change in claimant’s need for respite services funding at the level of 80 hours per month.

Additional Evidence

12. WRC has begun exploring the possibility of claimant participating in a Self-Determination Program (SDP). Claimant is not in an SDP and there is no plan in effect for claimant to transition to an SDP.

13. WRC has not convened an IPP meeting to discuss whether claimant’s needs are best met by continued funding of 80 monthly hours of respite. The Service Agency, through its questioning of claimant’s mother at hearing and in its closing argument, intimated that additional specialized supervision services hours may appropriately replace some of claimant’s respite services hours. This was never discussed at an IPP meeting.

14. Derek Ott, M.D., claimant’s psychiatrist, wrote in a letter dated October 5, 2021, that he has seen claimant continually for medication management since an initial evaluation in October 2015. Claimant presents with ASD “and associated behaviors,

including elopement and anxiety. . . . [Claimant] is continuing to receive home based academic instructions with credentialed special education teachers and all necessary therapies (ABA, speech, and OT) for safety reasons. All of his providers/teachers require that there is an adult supervising him when they come to provide services. As a result, [claimant] requires 24/7 adult supervision hours.” (Ex. E, p. Z8.)

15. Jamie Vaughn, Ph.D., BCBA-D, Clinical Manager, STAR of CA, Inc. (STAR), wrote in a letter dated September 30, 2021, that claimant receives medically-necessary Applied Behavior Analytic intervention from STAR “due to his delays and challenges associated with his Autism Spectrum Disorder.” (Ex. D, p. Z6.) Claimant’s behavioral therapy:

consists of intensive home- and community-based therapy sessions, in which communication, behavior management, play and social skills are taught. [Claimant] currently receives approximately 20 hours per week of direct intervention, 3 hours a week of supervision and 1 hour per week of parent education, and 2 hours total of ongoing reassessment and treatment plan development. [Claimant] requires adult supervision at all times, including during ABA therapy, in order to maintain his safety and wellbeing. Additionally, STAR of CA requires adult supervision during the entirety of sessions as a general policy. While ABA programming for [claimant] does target safety and adaptive skills during sessions, and while progress is being made in these areas (among others), [claimant] is not yet able to independently keep himself safe and make safe choices.

More specifically, [claimant] engages in high-risk elopement behavior that is of concern to both his parents and intervention team. He does not demonstrate safety awareness in the neighborhood or in the community with regards to street safety, presence of moving/running cars, unfriendly dogs, stranger danger, and ability to functionally communicate his needs or unsafe/dangerous situations to others so that he can be understood by others. Furthermore, [claimant] engages in ritualistic behaviors that impede his ability to attend to his environment and recognize potential danger. Again, these needs are being addressed systematically but still remain at the forefront of [claimant's] needs currently. He cannot be left unattended and requires adult supervision and support with the majority of his activities.

(Ex. D, p. Z6.)

16. Claimant's mother disputes Ms. Nasiri's scoring on the family respite needs assessment. (See Factual Finding 3.) The assessment was never discussed at an IPP meeting. Given their long and irregular work hours, claimant's parents find it difficult to ensure claimant is supported safely when they are at work. Claimant's in-home service providers, including his academic instructors and his ABA therapists, require two-to-one care, that is, someone in addition to the service provider, to ensure a guarded environment and address claimant's high perseveration behaviors that may continue for many hours and lead to elopement. Claimant has minimal verbal ability and even the best providers must always guess what is affecting him.

17. Claimant's mother testified that, without 80 monthly hours of respite, claimant's parents would not be able to provide the supervision he needs during instruction at home. Respite care is provided by Grace Orellana, recruited by claimant's parents and paid for through a respite agency. The agency could not find a highly skilled provider. Ms. Orellana has experience and exposure to behavior interventions. She has taken the initiative to work closely with claimant's ABA team of specialists. She has worked with claimant for a long period of time and saw the extreme behaviors he engaged in while going to school before home instruction was in place. Claimant's mother feels fortunate to have her provide both the respite and the specialized supervision services.

18. Claimant's mother testified that the rate of pay in WRC's purchase of services guidelines is significantly higher for respite services than for specialized supervision services, and that the agency could not recruit other specialized supervision service providers.

19. Claimant's mother has never used WRC's crisis support service, which WRC explained to her was a short-term intervention for an acute crisis, because claimant's eloping behaviors are not predictable. For instance, when claimant unexpectedly climbed on roof of a house, she did not call crisis support, she called 911.

DISCUSSION

20. Though the NOPA and the body of the NOPA letter posited that claimant was asking WRC to provide 80 monthly hours of respite, thereby placing the burden

on claimant, in fact WRC seeks to reduce claimant's respite hours from 80 to 42, and WRC has the burden in this case. (See Legal Conclusions 1 & 2.)

21. Evidence on this record supporting WRC's proposed reduction in respite hours is underwhelming, but before any consideration may be undertaken of the substantive issue of the possible merits of reducing claimant's respite hours, and perhaps substituting for those hours some specialized supervision hours, WRC must comply with the procedural requirements of the Lanterman Act. Specifically, WRC must convene another IPP meeting if it wishes to explore reducing claimant's respite hours.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.) (Further statutory references are to the Welfare and Institutions Code.) An administrative "fair hearing" to determine the respective rights and obligations of the consumer and the regional center is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal the Service Agency's decision to reduce funding for claimant's respite services. Jurisdiction in this case was thus established. (Factual Findings 1-5, 20.)

2. Because the Service Agency seeks to reduce claimant's benefits or services, it bears the burden of proving the reduction is proper under the Lanterman Act. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9; *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) The Service Agency must prove its case by a preponderance of the evidence, which requires it to present evidence that has more convincing force than that opposed to it. (Evid. Code,

§ 115; *People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

The Lanterman Act

3. The Lanterman Act acknowledges the state's responsibility to provide services and supports for developmentally disabled individuals and their families. (§ 4501.) The state agency charged with implementing the Lanterman Act, the Department of Developmental Services (DDS), is authorized to contract with regional centers to provide developmentally disabled individuals with access to the services and supports best suited to them throughout their lifetime. (§ 4520.)

4. The Legislature's intent in enacting the Lanterman Act was to ensure certain rights of persons with developmental disabilities, including "[a] right to treatment and habilitation services and supports in the least restrictive environment. Treatment and habilitation services and supports should foster the developmental potential of the person and be directed toward the achievement of the most independent, productive, and normal lives possible." (§§ 4502, subd. (a), 4640.7.)

5. Regional centers are responsible for conducting a planning process that results in an IPP. Among other things, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services based upon the client's developmental needs and the effectiveness of the services selected to assist the consumer in achieving the agreed-upon goals, address the cost-effectiveness of the services and supports, contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences. (§§ 4646, subd. (a)(1), (2), and (4), 4646.5, subd. (a), 4512, subd. (b), 4648, subd. (a)(6)(D) & (E).)

6. "Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer's goals, objectives, and services and supports that will be included in the consumer's individual program plan and purchased by the regional center or obtained from generic agencies shall be made by agreement between the regional center representative and the consumer or, when appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting." (§ 4646, subd. (d).) The regional center shall ensure that claimant's "designated representative receive[s] written notice of all meetings to develop or revise the individual program plan." (§ 4646, subd. (e).) Regional centers must comply with their IPP process "at the time of development, scheduled review, or modification of a consumer's 4646.4. individual program plan." (§ 4646.4, subd. (a).)

7. "Every regional center or state-operated facility shall, as a condition of continued receipt of state funds, have an appeals procedure for resolving conflicts between the regional center or state-operated facility and recipients of, or applicants for, service." (§ 4705.) If the recipient of services disagrees with the regional center's proposal in the IPP process to reduce services, the regional center must provide notice to the recipient of the appeal procedure. (§ 4710.)

8. The Lanterman Act requires DDS to implement a statewide self-determination program (SDP) available in every regional center "to provide participants and their families, within an individual budget, increased flexibility and choice, and greater control over decisions, resources, and needed and desired services and supports to implement their IPP." (§ 4685.8, subd. (a).) The SDP is "a voluntary delivery system . . . selected and directed by a participant through person-centered planning, in order to meet the objectives in their IPP." (§ 4685.8, subd. (c)(6).) Regional centers must ensure continuation of services and supports while the consumer

transitions to an SDP. (§ 4685.8, subd. (r)(9).) Claimant does not currently participate in an SDP. (Factual Finding 12.)

9. The goals and objectives set forth in claimant's IPP may be adjusted if the regional center's IPP team and claimant and his family determine in the course of the IPP process that an adjustment is warranted due to a change in the participant's needs or if prior needs were not addressed in the IPP. A new IPP or an IPP addendum may then be created to reflect any change. If the consumer does not agree with the proposed change to the IPP, the consumer may initiate an appeals process that may comprise one or all of the following: an informal meeting with the regional center, mediation, and a fair hearing. (See Legal Conclusions 4-7.)

Respite Services for Claimant

10. The Service Agency did not establish that it has satisfied fundamental procedural requirements of the Lanterman Act. After claimant's last IPP update, WRC decided to reduce claimant's respite hours and told claimant's parents it would implement the change absent an appeal. (Factual Findings 3 & 4.) The proper first step to implementing a change to an IPP, however, is to convene another IPP meeting. (Legal Conclusions 4-6.) WRC failed to do so. (Factual Findings 1-13.)

ORDER

Claimant's appeal from the Service Agency's decision to reduce funding for claimant's monthly respite services from 80 to 42 hours is granted. The Service Agency shall continue to fund respite services at the current level until such time as the parties may agree upon another level through the IPP process. If no agreement is reached,

any change to the IPP shall be addressed through the appeal process following that IPP process, as the Lanterman Act prescribes.

DATE:

HOWARD W. COHEN

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.