BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: JEREMY P., Claimant, vs. SAN GABRIEL POMONA REGIONAL CENTER, Service Agency.	OAH No. 2013080629

DECISION

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on September 30, 2013, in Pomona, California.

Jeremy P. (Claimant) was represented by mother, Glenda P. (mother).[1] A certified Spanish language interpreter translated the proceeding. Claimant did not attend the hearing.

Daniela Santana, Fair Hearing Manager, represented San Gabriel Pomona Regional Center (SGPRC or Service Agency).

Evidence was received and the matter was submitted for decision at the conclusion

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[1] Claimant and his mother are identified by first name and last initial to protect their privacy.

of the hearing on September 30, 2013.

ISSUE

Should Service Agency fund 30 hours per month of in-home respite?

FACTUAL FINDINGS

JURISDICTIONAL FACTS

1. Claimant is a four-year-old boy who lives with his mother, father and his older brother. He also has an older sister who does not live in the family home. Claimant is eligible for Lanterman Developmental Disabilities Services Act services (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.) on the basis of an intellectual disability.[2]

2. By letter dated July 26, 2013, the Service Agency gave Claimant notice of its proposed action (NPA) denying Claimant's request for 16 hours per month of respite. [3] Service Agency's NPA stated:

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[2] All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

[3] According to the Service Agency's NPA, Claimant originally requested 16 hours per month of respite. Claimant's Fair Hearing Request asks for an unspecified increase in the number of respite hours funded by Service Agency. During the hearing, Claimant requested 30 hours per month of respite. Service Agency did not object to Claimant request for 30 hours. Thus, this Decision will address Claimant's request for 30 hours per month of in-home respite.

[Claimant] is a 3 year old boy with a diagnosis of Intellectual Disability, unspecified. You have requested respite hours based on his deficits with his behaviors and self-care needs. Respite care may be purchased if the child has significant self-care needs beyond those normally associated with his or her age or if the child with a developmental disability exhibits behavioral challenges which require specialized care. [Claimant's] deficits with self-care needs in the areas of feeding, toileting, dressing, bathing and communication are associated with those of an individual with the same chronological age who does not have a developmental disability. [Claimant's] behaviors displayed by daily outbursts such as yelling, crying[,] scratching, biting, kicking, pulling hair and his lack of safety awareness substantiate for behavior challenges requiring specialized care.

[Claimant's] needs are currently being addressed through his Individualized Educational Program (IEP) and Individual Program Plan (IPP). [Service Agency] has authorized the purchase of a Behavioral Intervention Assessment through the California Pediatric services to address [Claimant's] behavioral needs.

[¶ . . . ¶]

The [Service Agency's] Board Approved Purchase of Service Policy requires that we take into account in determining the need for respite, the family's responsibility for providing

> similar services to a child without disabilities and other services and/or activities that are provided to the client that would provide the family with relief for continued care of your child. Respite is not intended to provide for all supervised care needs of the family, it is supplemental to the family's responsibility for care.

3. Service Agency determined that Claimant is eligible to continue receiving 12 hours per month of respite services in order to meet his needs. In support of its decision, Service Agency cited section 4686.5 which provides in pertinent part: "A regional center may only purchase respite services when the care and supervision of a consumer exceeds that of an individual of the same age without developmental disabilities."

BACKGROUND

4. Claimant has been diagnosed with Coffin Siris Syndrome. He has asthma and uses abuterol through a nebulizer as needed. His most recent asthma attack was on August 25, 2013. Mother gives Claimant Prednisone for five days following an asthma attack. Claimant has used oxygen in the past, but Claimant is not using oxygen at this time. Claimant was hospitalized for pneumonia while traveling out of the county in the summer of 2013. Claimant is allergic to wheat as well as dogs and cats. Mother reported that Claimant was recently diagnosed with "water on the cerebellum." Mother describes Claimant as medically fragile and prone to respiratory infections, which is likely related to his Coffin Siris Syndrome. She takes Claimant to the emergency room quite often. She also reports Claimant misses one to two days of school each week because he is ill.

5. Claimant has a history of using leg braces to assist in ambulation. According to mother, Claimant no longer uses braces. He can walk and run without assistance and

will run away if not watched.

6. Claimant needs assistance with all self-care needs. He is not fully toilet trained and continues to wear diapers at all times. He salivates excessively and this puts him at risk of choking.

7. Claimant has a limited vocabulary. He uses single words to communicate his needs and can be difficult to understand. He cries when he is unable to communicate his needs.

8. Claimant has significant maladaptive behaviors. He tantrums and engages in aggressive behaviors more than one time per day. He is easily frustrated and becomes angry frequently. He yells and cries until he turns purple and appears to stop breathing. He bites, kicks, scratches, and pulls hair when he does not get what he wants. His behavior makes it difficult to take Claimant to public places. In the grocery story, Claimant will kick and pull things off the shelf if he does not get what he wants. It is difficult to take him to a restaurant because he tantrums and wanders off if not continually supervised. Claimant also wanders from home if not supervised. The family has put safety locks on all the doors so Claimant cannot leave the house.

9. Claimant has problems with sleeping. He wakes up around one or two in the morning. He kicks his brother's bedroom door to try to wake him up. Mother returns Claimant to his room, but he has problems returning to sleep and will often stay up all night. Mother testified she is not able to return to sleep after Claimant wakes up because he requires constant supervision. Mother testified that she informed the service coordinator about this, but it is not contained in the either the July 16, 2012 (July 2012 IPP) or August 29, 2013 (August 2013 IPP) IPPs.

10. Claimant enjoys interacting with other children and adults, but gets bored easily and can get into disputes with other children. His mother describes some problems in his interaction with his older brother. According to mother, the boys argue. Until

recently, mother tended to be more supportive of Claimant in these disputes. Mother testified that she attended a behavior modification class this year and learned that she must hold Claimant accountable for his misbehavior. Since she began implementing that strategy, the boys have less conflict and the older child is less resentful of Claimant.

11. Claimant's July 2012 IPP and August 2013 IPP indicate that Claimant resides with his parents and brother. Other members of the household are identified as Claimant's grandmother, an aunt and cousins. According to mother this information is incorrect. Grandmother lives with mother's sister. Grandmother is elderly and does not drive. Mother must pick her up when grandmother comes to the home to help with Claimant's care. According to mother, Claimant's aunt and cousins briefly lived in the family home several years ago but currently reside out of state.

12. Claimant does not receive Social Security Disability Income (SSDI) or In-Home Support Services (IHSS) funding. The IPPs do not indicate whether Claimant has applied for or been denied SSDI or IHSS. Mother testified that she had to repeatedly call her service coordinator to obtain information and get assistance with services.

CLAIMANT'S JULY 2012 AND AUGUST 2013 IPP DESIRED OUTCOMES

13. Claimant's July 2012 and August 2013 IPPs include six Desired Outcomes as follows: 1. Maintain good health; 2. Increased vocabulary; 3. Decreased tantrums which consist of crying, yelling, scratching and biting; 4. Be fully toilet trained; 5. Provide parents with a break from the care that Claimant requires; and 6. Re-evaluate Claimant's eligibility for Lanterman Act services.

14. With respect to Desired Outcome 3, reducing tantrums, the July 2012 IPP and the August 2013 IPP state that the service coordinator will obtain a signed behavior intervention agreement and would "explore appropriate funding and program resources. If no generic resource is available and if SGPRC funds are requested, funding for behavioral assessment or interventions will be according to SGPRC Board approved funding

guidelines." Claimant's August 2013 IPP adds the following provision:"SGPRC will fund for a behavior intervention evaluation effective 7/23/13 through California Pediatric and Family Services."

Claimant's August 2013 IPP addresses Claimant's progress in meeting his July 2012 Desired Outcomes. With respect to Desired Outcome 3, the IPP indicates that Claimant has made "NO PROGRESS." Claimant continues to get frustrated, display daily temper tantrums and behavioral outbursts, including aggressive behavior. It states that parents have installed safety locks to prevent Claimant from wandering. It further reports that Claimant has no sense of danger, lacks safety awareness skills and requires parent supervision at all times to ensure his safety. The IPP also notes that parent had completed a behavior workshop held at Service Agency and that the evaluation for behavior intervention services was being completed. The IPP does not address why a behavior intervention evaluation was not authorized until July 23, 2013. Mother testified that she was waiting for the service coordinator to arrange the evaluation.

15. With respect to Desired Outcome 5 on Claimant's July 2012 and August 2013 IPPs, regarding providing parents' with relief from the care of Claimant, parents are directed to arrange respite services with a respite agency, provide the respite provider with information relating to Claimant's medical and social needs, and the service coordinator will "explore appropriate funding and program resources. If no generic resource is available and if SGPRC funds are requested, funding for respite will be according to SGPRC Board approved funding policy."

Claimant's August 2013 IPP addresses Claimant's progress in meeting his July 2012 Desired Outcomes 5. The IPP indicated that Claimant has made "NO PROGRESS." "Claimant continues to require assistance from parents to complete all of his self-help skills . . . [he] also has a history of behavioral tantrums, aggressive outbursts and lack of safety awareness. Parent is currently receiving respite services due to [Claimant's] deficits in the self-help area and due to his behavioral outbursts."

CLAIMANT'S SCHOOL PROGRAM

16. Claimant's May 2012 initial IEP states that during the assessment, Claimant "was active and busy with all the toys in the assessment room. He requires physical prompts to remain seated and engage in test items. [Claimant] would tantrum and hit mom when she attempted to redirect him to the assessment table." Claimant attends a preschool program from 7:45 a.m. to 11:15 a.m., where he receives pre-academic skills services, behavioral services, speech and language services, and occupational and physical therapy services. Service Agency did not have a copy of Claimant's 2013 IEP at the time of the hearing.

SERVICE AGENCY DECISION

17. Daniela Santana (Santana), SGPRC Fair Hearing Manager, testified at the hearing that the Service Agency follows the Board's Purchase of Service Policy when determining the amount of respite that will be provided to a Claimant. Santana also explained that to make the decision more uniform, service coordinators complete a Family Respite Needs Assessment Summary Sheet (Summary Sheet). The Summary Sheet follows the Family Respite Needs Assessment Guidelines (Guidelines) and includes 7 areas of need: 1. Medical; 2. Mobility; 3. Adaptive skills; 4. Behavioral skills; 5. Family situation; 6. Age of individual; and 7. Day program/school attendance. Each area is rated according to the Guidelines.

18. In May 2013, Claimant received a Summary Sheet rating of 6 points, indicating that he was entitled to up to 12 hours of respite per month. In July 2013, Claimant received a Summary Sheet rating of 7 points, also indicating that he requires 12 hours of respite per month.

19. Santana testified that there are factors not included in the Guidelines that

may affect the decision to award additional hours. This could include consideration of a consumer's sleep patterns, and unexpected emergencies. Santana noted the Claimant's IPPs do not include information about Claimant's sleep problems. According to Santana, Service Agency considers the time Claimant spends in school as a form of respite for the parents. Service Agency also considers behavioral interventions services as a means to relieve the demands of caring for a disabled child.

SERVICE AGENCY'S PURCHASE OF SERVICE POLICY

20. Service Agency has adopted a Purchase of Service Policy. The Policy addresses the provision of respite care.

> Respite care services are designed to provide family members with temporary relief from the continual care of a person with a developmental disability. The Regional Center may only purchase respite services when the care and supervision of the person exceed that of an individual of the same age without developmental disabilities.
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> The number of respite hours will vary depending upon the needs of the individual and the family. Typically, a family's need for respite can be satisfied with 16 hours of in-home respite service per month or less. . . .

RESPITE

21. One of the services under the Lanterman Act that is available to consumers is respite. However, a regional center's authority to purchase respite in not unlimited. Section 4686.5, subdivision (a)(1) provides: "A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the

same age without developmental disabilities.” Section 4686.5, subdivision (a)(2), limits the authority of a regional center to purchases respite to not “more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer.” Section 4686.5, subdivision (a)(3)(A) provides: “A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) if it is demonstrated that the intensity of the consumer’s care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member’s ability to meet the care and supervision needs of the consumer.” A family member is one who has a consumer residing with her, is responsible for 24- hour care and supervision of the consumer, and is not an unrelated licensed residential care facility or foster family service. (§ 4686.5, subd. (a)(3)(B).)

22. “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 goes on to state that respite services are designed to “do all of the following: (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.”

PARENT’S CONTENTIONS

23. Mother is the primary caregiver for Claimant. She believes Claimant will benefit if she receives additional respite from caring for him because she will be less stressed. She testified that she did not need assistance when her daughter and mother lived with her because they helped with Claimant’s care. But neither lives with her now and

as noted above, grandmother lives with another daughter, does not drive and is elderly. Daughter does not live in the family home, works and attends school and is unable to provide care for Claimant.

24. Mother is very concerned that she is placing her older son at risk because she is unable to give him attention. The family does not engage in family activities because of Claimant's behavior. According to mother she requested behavior intervention services more than a year ago, but the assessment was not conducted until August 2013 and the report has not yet been received.

25. Mother repeatedly expressed her need for help. Because Claimant gets sick easily, mother is hesitant to have him around other people. He has allergies to dog and cats. As a result of Claimant's needs, Mother has lost friends and is isolated.

LEGAL CONCLUSIONS

JURISDICTION AND BURDEN OF PROOF

1. The Lanterman Act governs this case. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a fair hearing to appeal the Service Agency's decision to deny more than 12 hours of respite per month. Jurisdiction in this case was thus established. (Factual Findings 1 through 3.)

2. The standard of proof in this case is a preponderance of the evidence, because no applicable law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Because Claimant is requesting additional services he bears the burden of proof. In seeking government benefits, the burden of proof is on the person asking for the benefits. (See, Lindsay v. San Diego Retirement Bd .(1964) 231 Cal.App.2d 156, 161 (disability benefits).)

APPLICABLE LAW

3. The Lanterman Act sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. As the California Supreme Court explained in Association for Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 388, the purpose of the Lanterman Act is twofold: "to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community" and "to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community." Under the Lanterman Act, regional centers are "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." (Id. at p. 389, quoting from § 4620.)

4. To comply with the Lanterman Act, a regional center must provide services and supports that "enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (§ 4501.)

5. Regional centers provide "specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives." (§ 4512, subd. (b).)

6. The determination of which services and supports the regional center shall provide is 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 individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option." (§ 4512, subd. (b).) As the California Supreme Court recognized in *Association for Retarded Citizens, supra,* 38 Cal.3d at p. 390, while a regional center has "no discretion at all in determining whether to implement" an individual program plan, it has "'wide discretion in determining how to implement" an individual program plan.

7. As set forth in section 4646, subdivision (a): "It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources."

8. Section 4646, provides (d): "Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer's goals and objectives, and services and supports that will be included in the consumer's individual program plan and purchased by the regional center or obtained by generic agencies shall be made by agreement between the regional center representative and the consumer or, where appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting."

9. However, section 4646.4, subdivision (a), provides: "Effective September 1, 2008, regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections

4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following: (1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434. (2) Utilization of generic services and supports when appropriate. (3) Utilization of other services and sources of funding as contained in Section 4659. 8. (4) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting. In this determination, regional centers shall take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care."

10. In addition, a regional center is responsible for using its resources efficiently. Section 4648, subdivision (a)(2), provides that: "In implementing individual program plans, regional centers, through the planning team, shall first consider services and supports in natural community, home, work, and recreational settings. Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family."

DISCUSSION

11. As set forth at Factual Findings 4 through 25 and Legal Conclusions 3 through 10, the IPP is central to the identification of Claimant and family's needs and preferences. Information contained in the IPP forms the basis for making decisions about services and supports to help Claimant achieve his goals and objectives. In this case, Service Agency did not assess Claimant for behavioral services as identified in Claimant's July 2012 IPP until August 2013. The August 2013 IPP does not explain why such assessment did not occur sooner. Because Service Agency did not timely assess Claimant

for behavioral services, such services have not yet been implemented. As noted in Claimant's August 2013 IPP, Claimant has made no progress in improving his behaviors. Without an assessment and services to assist parents to manage Claimant's behaviors, his behaviors are a significant stressor for the family and in particular for mother, his caregiver.

12. Moreover, Claimant's July 2012 and August 2013 IPPs did not contain important and accurate information about Claimant's functioning, programming and family situation. It did not include the fact that Claimant is attending school only three to four days a week due to illness resulting in a greater burden on mother as caregiver. Similarly the IPP did not include information about Claimant's sleep disturbance, which places a significant burden on mother, who stays awake with Claimant during the night.

13. Claimant's August 2013 IPP stated that he wears braces when in fact he is able to walk and run without assistance. As a result, he requires greater supervision because he will run away when not supervised. Similarly, Claimant's IPP identifies that he uses oxygen, when he does not. On the other hand, the IPPs do not address Claimant's frequent illnesses and medical appointments. In addition, Claimant's IPP incorrectly identified grandmother and an aunt as residing in the home. Neither resides with the family and grandmother is dependent on mother to travel to the family home to assist with Claimant's care, thus reducing the available support from family members.

14. Moreover, Mother testified that she was waiting for Service Agency to provide her with information about SSDI and IHSS. The IPP provides that the service coordinator will explore generic resources to fund respite services. SSI and IHSS funds are generic resources which must be considered by Service Agency when determining what services and supports Claimant needs. If such funds are available under either of these programs, those funds may provide a source of funds for additional respite. The IPPs do not address whether service coordinator took any steps to assist the family to obtain generic resources to fund respite.

14. In light of the Factual Findings 4 through 25 and Legal Conclusions 3 through 14, Claimant is entitled to 30 hours of respite per month. This should provide ample time for Service Agency to implement behavioral intervention services in accordance with Claimant's IPP, as well as sufficient time to determine whether Claimant is eligible for generic resources such as SSDI, or IHSS, or other funds that may assist with respite. It also allows time for the Service Agency to obtain Claimant's current IEP to determine how much time Claimant is attending school.

ORDER

Claimant's appeal is granted. Service Agency is ordered to fund 30 hours of in – home respite per month.

Dated: October 14, 2013

Deborah M. Gmeiner

DEBORAH M. GMEINER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

UNDER THE LANTERMAN DEVELOPMENTAL DISABILITIES SERVICES ACT, THIS IS A 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.