

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

In the Matter of:

CLAIMANT

v.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2019100314

DECISION

Robert Walker, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on October 29, 2019, in San Bernardino, California.

Stephanie Zermeño, Fair Hearings Representative, Inland Regional Center (IRC), represented IRC.

Claimant's mother represented claimant.

The matter was submitted for decision on October 29, 2019.

ISSUE

May IRC terminate 156 hours per month of in-home specialized day care?¹

SUMMARY

Claimant contends he is entitled to have regional center provide in-home, specialized day care after school and during school vacations.

Welfare and Institutions Code section 4685, subdivision (c)(6), provides:

When purchasing or providing a voucher for day care services for parents who are caring for children at home, the regional center may pay only the cost of the day care service that exceeds the cost of providing day care services to a child without disabilities. The regional center may pay in excess of this amount when a family can demonstrate a financial need and when doing so will enable the child to remain in the family home.

¹ As explained below, IRC is providing 156 hours per month of respite services in place of 156 hours of in-home, specialized day care. Claimant's mother does not care whether the service is called respite or in-home, specialized day care. Her concern is to have 156 hours per month of in-home care continue. In the remainder of this decision, the service IRC is providing will be referred to as *day care*.

Thus, with two exceptions, a regional center may not pay for day care. The evidence did not show that claimant comes within either exception.

Regional center may terminate 156 hours per month of day care.

Background

1. Claimant, a seven-year-old male, receives services from the regional center under a diagnoses of autism spectrum disorder. He lives in the family home with his father, mother, and younger sister. Claimant's sister attends preschool and day care. Claimant attends elementary school.

2. Claimant is nonverbal and has limited communication skills. He engages in disruptive social behaviors; he jumps up and down, cries, flaps his hands, and yells. He displays self-injurious behaviors but does not injure himself. He occasionally destroys his toys but not other property. Claimant was toilet trained, but he has regressed and currently needs help with toileting. For bowel movements, he brings a pull-up diaper to his mother to let her know he needs to put on the diaper and have a bowel movement. Claimant runs away at any opportunity; his parents have security locks on doors. Claimant has no safety awareness and requires constant supervision to prevent injury.

3. Claimant receives \$500 per month in Supplemental Security Income (SSI). His mother is the payee. Claimant has medical insurance with Inland Empire Health Plan through Medi-Cal. Claimant's health is generally stable, but he has allergies. At this time, claimant does not receive applied behavior analysis services, but he is being assessed to determine whether those services should be provided.

4. Prior to June 2019, claimant's family lived in the North Los Angeles Regional Center catchment area, and he received services through that regional center. His individual program plan (IPP) provided for 156 hours per month of in-home, specialized day care and 30 hours per month of respite. When claimant's family lived in the North Los Angeles Regional Center catchment area, he also received 200 hours per month of In-Home Supportive Services (IHSS). His mother was the service provider. She plans to apply for IHSS in San Bernardo County.

5. In June 2019, claimant's family moved to the IRC catchment area.

6. Claimant's parents are employed. His father drives approximately 40 miles to work and arrives back home in the evening at 7:00 p.m. Claimant's mother drives approximately 30 miles to work and arrives back home in the evening at 8:00 p.m.

7. Claimant's mother contends that claimant is entitled to have the regional center provide care for him when he is not in school so that his parents can work. In the 2019-2020 school year, claimant is not in school August 2019, December 2019, and April 2020. During those months, he needs care five days per week from 9:00 a.m. to 8:00 p.m. In the other months, i.e., when he is in school, he needs care after school. The special education school schedule is from 7:45 a.m. to 2:00 p.m. except on Wednesdays, when the school-day ends at 1:00 p.m.

8. IRC concluded that claimant is not entitled to the 156 hours per month of in-home, specialized day care North Los Angeles Regional Center provided. Claimant's mother disagreed. As a result of the disagreement, IRC and claimant's mother have been unable to agree to and approve a new IPP. Felicia Valencia, a program manager at IRC, sent claimant's parents a notice of proposed action (NOPA) dated August 16,

2019. Ms. Valencia wrote that IRC would continue the 30 hours per month of respite that North Los Angeles Regional Center provided. She wrote that, temporarily, IRC would provide an additional 156 hours per month of respite in place of the 156 hours of in-home, specialized day care but that, effective November 1, 2019, the 156 hours would be terminated. Ms. Valencia wrote that IRC was providing the additional 156 hours temporarily in order to provide claimant's parents with three months in which to make other day-care arrangements. Claimant's mother appealed; she filed a fair hearing request dated September 23, 2019.

9. Claimant's mother verbally advised IRC that she was amending her request from 156 after-school hours per month to 124 after-school hours.²

Regional Center's Suggestions Concerning Day Care Providers

10. By an e-mail dated August 8, 2019, Fatima Charles, claimant's former consumer services representative, provided claimant's mother with the names and phone numbers of organizations that might help arrange for after-school day care.

11. By an e-mail dated October 22, 2019, Brittany Lopez, claimant's current consumer services representative, provided claimant's mother with information

² As noted above, before claimant moved to the IRC catchment area, he received 156 hours of day care and 30 hours of respite for a total of 186 hours. In claimant's mother's fair hearing request, she asked that IRC continue to provide 186 hours. However, she later verbally amended the 156 hours based on her preparing claimant's food rather than relying on the day care provider to do that and based on claimant's father arriving back home in the evening an hour earlier than he previously did.

concerning day care centers that accept special-needs children who are not toilet trained. According to the information Ms. Lopez obtained and sent to claimant's mother, the cost would be approximately \$150 per week, i.e., approximately \$600 per month.

12. Ms. Lopez also provided contact information for the Riverside County Office of Education (RCOE), which can provide assistance in locating day care services – either center-based or home-based. Ms. Lopez advised that RCOE can help pay for after-school day care depending on a parent's financial situation. However, claimant's mother testified that she applied for RCOE financial assistance but received the following reply that was not encouraging:

You have been placed on our wait-list. There is no guarantee that services will be offered. If the state releases funding for our program, they will communicate with you.

Conflicting Evidence as to Whether a Day-Care-Center Setting Would be Inappropriate for Claimant

13. Claimant's mother testified that RCOE's after-school day care center would not be appropriate for claimant. It is in a school cafeteria. The room is too bright and too noisy. And they make no special provision for autistic children.

14. Claimant's mother testified that, because claimant is nonverbal and because he has "meltdowns," he could not tolerate a day-care-center setting.

15. Ms. Valencia holds a bachelor's degree in psychology and a master's degree in rehabilitation counselling. She has 20 years' experience working with individuals with developmental disabilities. Ms. Valencia testified that a day-care-

center setting would be preferable for claimant because it would provide opportunities for him to socialize.

Cost to Provide In-Home Day Care

Regional center submitted an authorization inquiry concerning the cost to provide 186 hours of respite for claimant each month for the months August and September 2019. The cost was \$20.60 per hour for a total of \$3,831.60 per month. The cost per hour to provide in-home, specialized day care would be approximately the same. As explained above, the 186 hours is a combination of 156 hours that IRC seeks to terminate and 30 hours that are not in dispute. Claimant's mother has amended her request concerning the 156 hours; she now requests 124 hours for after-school day care. At \$20.60 per hour, 124 hours would cost \$2,554.40.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. IRC has the burden of proof. (Evid. Code, §§ 115 & 500.) North Los Angeles Regional Center found that claimant is entitled to 156 hours per month of specialized, in-home day care, and that was set forth in claimant's IPP. IRC seeks to terminate that service.

2. The standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Overview of a Regional Center’s Obligation to Provide Services

3. The Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500, et seq.) (Lanterman Act) is an entitlement act. People who qualify under it are entitled to services and supports. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.)

4. “The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community [citations] 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 [citations].” (*Association for Retarded Citizens, supra*, 38 Cal.3d at p. 388.)

5. Persons with developmental disabilities have “a right to dignity, privacy, and humane care,” and services and supports, when possible, should be provided in natural community settings. (Welf. & Inst. Code, § 4502, subd. (b).) Persons with developmental disabilities have “a right to make choices in their own lives” concerning “where and with whom they live.” (Welf. & Inst. Code, § 4502, subd. (j).)

6. Regional centers should assist “persons with developmental disabilities and their families in securing those services and supports . . . [that] maximize opportunities and choices for living, working, learning, and recreating in the community.” (Welf. & Inst. Code, § 4640.7, subd. (a).) Regional centers should assist “individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices.” (Welf. & Inst. Code, § 4648, subd. (a)(1).)

7. In *Williams v. Macomber* (1990) 226 Cal.App.3d 225, 232-233, the court of appeal addressed the Lanterman Act and said:

In order for the state to carry out many of its responsibilities as established in this division, the Act directs the State Department of Developmental Services to contract with "appropriate private nonprofit corporations for the establishment of" a "network of regional centers." (§§ 4620, 4621.) Regional centers are authorized to "[p]urchase . . . needed services . . . which regional center determines will best" satisfy the client's needs. (§ 4648.) The Act declares: "It is the intent of the Legislature to encourage regional centers to find innovative and economical methods" of serving their clients. (§ 4651.) The Act directs that: "A regional center shall investigate every appropriate and economically feasible alternative for care of a developmentally disabled person available within the region. (§ 4652.)

[¶] . . . [¶]

[T]he Regional Center's reliance on a fixed policy is inconsistent with the Act's stated purpose of providing services "sufficiently complete to meet the needs of each person with developmental disabilities." (§ 4501.) The Act clearly contemplates that the services to be provided each client will be selected "on an individual basis." (*Association for Retarded Citizens v. Department of Developmental Services, supra*, 38 Cal.3d 384, 388.)

A primary purpose of the Act is “to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family.” (*Association for Retarded Citizens v. Department of Developmental Services, supra*, 38 Cal.3d 384, 388.) In strong terms, the Act declares: “The Legislature places a high priority on providing opportunities for children with developmental disabilities to live with their families” requiring the state to “give a very high priority to the development and expansion of programs designed to assist families in caring for their children at home.” (§ 4685, subd. (a).) In language directly applicable to the present case, section 4685, subdivision (b), states that “regional centers shall consider every possible way to assist families in maintaining their children at home, when living at home will be in the best interest of the child.” (§ 4685, subd. (b).)

The Lanterman Act “grants the developmentally disabled person the right to be provided at state expense with only such services as are consistent with its purpose.”

(*Association for Retarded Citizens v. Department of Developmental Services, supra*, 38 Cal.3d 384, 393.) As noted previously, a primary purpose of the Act is to “minimize the institutionalization of developmentally disabled persons and their dislocation from family.”

8. Welfare and Institutions Code section 4512, subdivision (b), provides examples of services and supports that should be considered.

Services and supports for persons with developmental disabilities" means 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. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. 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 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. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, physical, occupational, and speech therapy, training, education, supported and sheltered employment, mental health services, recreation, counseling of the individual with a developmental disability and of his or her family, protective and other social and sociolegal services, information and referral services, follow-along

services, adaptive equipment and supplies, advocacy assistance, including self-advocacy training, facilitation and peer advocates, assessment, assistance in locating a home, day care, behavior training and behavior modification programs, camping, community integration services, community support, daily living skills training, emergency and crisis intervention, facilitating circles of support, habilitation, homemaker services, infant stimulation programs, paid roommates, paid neighbors, respite, short-term out-of-home care, social skills training, specialized medical and dental care, supported living arrangements, technical and financial assistance, travel training, training for parents of children with developmental disabilities, training for parents with developmental disabilities, vouchers, and transportation services necessary to ensure delivery of services to persons with developmental disabilities.

Requirement that Regional Centers be Cost Conscious

9. While the Lanterman Act emphasizes services and supports to which consumers are entitled, the act also requires regional centers to be cost conscious. "It is the 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.*" (Welf. & Inst. Code, § 4646, subd. (a), italics added.)

10 Welfare and Institutions Code section 4646.4, subdivision (a), provides:

Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan . . . or of an individualized family service plan . . . 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

(2) Utilization of generic services and supports when appropriate

(3) Utilization of other services and sources of funding

(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.

11. When selecting a provider of consumer services and supports, the regional center, the consumer, or where appropriate, his or her parents, legal guardian, conservator, or authorized representative shall consider, "the cost of providing services

or supports of comparable quality by different providers, if available.” (Welf. & Inst. Code, § 4648, subd. (a)(6)(D).)

12. Welfare and Institutions Code section 4659, subdivisions (a) and (f), provide:

(a) [T]he 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.

[¶] . . . [¶]

(f) In order to best utilize generic resources, federally funded programs, and private insurance programs for individuals with developmental disabilities, the department and regional centers shall engage in the following activities:

(1) Within existing resources, the department shall provide training to regional centers, no less than once every two years, in the availability and requirements of generic, federally funded and private programs available to persons with developmental disabilities, including, but not limited to, eligibility requirements, the application process and covered services, and the appeal process.

(2) Regional centers shall disseminate information and training to all service coordinators regarding the availability and requirements of generic, federally funded, and private insurance programs on the local level.

13. The Lanterman Act requires regional centers to “recognize and build on . . . existing community resources.” (Welf. & Inst. Code, § 4685, subd. (b).)

14. In a provision concerning preventive services, the Legislature specifically mentions generic resources. Regional centers are authorized to provide preventive services to a person who is at high risk of parenting a developmentally disabled infant or to an infant who is at high risk of becoming developmentally disabled. However, a regional center may fund preventive services only when funding is unavailable from generic agencies. (Welf. & Inst. Code, § 4644, subd. (a).) The subdivision provides:

The department shall implement operating procedures to ensure that prevention activities are funded from regional center purchase of service funds only when funding for these services is unavailable from local generic agencies. In no case, shall regional center funds be used to supplant

funds budgeted by any agency which has a responsibility to provide prevention services to the general public.

15. None of these provisions concerning cost-effectiveness detracts from the fact that eligible consumers are entitled to the services and supports provided for in the Lanterman Act. These provisions concerning cost-effectiveness do teach us, however, that cost-effectiveness is an appropriate concern in choosing how services and supports will be provided. There is a tension between the requirement that services and supports be cost effective and the proposition that entitlement is determined by what is needed to implement a consumer's individual program plan.

Regional Center Seeks to Terminate Day Care Services

16. Welfare and Institutions Code section 4643.5, subdivision (c), provides, in part:

Whenever a consumer transfers from one regional center catchment area to another, the level and types of services and supports specified in the consumer's individual program plan (IPP) shall be authorized and secured, if available, pending the development of a new IPP for the consumer. If these services and supports do not exist, the regional center shall convene a meeting to develop a new IPP within 30 days. *Prior to approval of the new IPP, the regional center shall provide alternative services and supports that best meet the IPP objectives in the least restrictive setting.* (Italics added.)

17. As found above, IRC is providing claimant with 156 hours of respite care as an alternative to the 156 hours of specialized, in-home day care North Los Angeles Regional Center was providing. IRC is providing that alternative service because, since claimant moved into the IRC catchment area, no new IPP has been approved. Claimant's mother refuses to approve the IPP terms IRC proposes because she disagrees with IRC's decision to terminate claimant's day care services. Thus, the issue concerns day care services, not respite services. "[R]espite care means temporary and intermittent care provided for short periods of time." (Welf. & Inst. Code, § 4418.6.)

Claimant is Not Entitled to Day Care

18. In the NOPA, as part of the justification for terminating claimant's day care services, regional center cites Welfare and Institutions Code section 4686.5, subdivision (a)(4). That section, however, was repealed effective January 1, 2018. Nevertheless, claimant is not entitled to day care.

19. Welfare and Institutions Code section 4685, subdivision (c)(6), provides:

When purchasing or providing a voucher for day care services for parents who are caring for children at home, the regional center may pay only the cost of the day care service that exceeds the cost of providing day care services to a child without disabilities. The regional center may pay in excess of this amount when a family can demonstrate a financial need and when doing so will enable the child to remain in the family home.

20. When IRC raised Welfare and Institutions Code section 4685, subdivision (c)(6), the burden shifted to claimant to prove that the cost to provide day care for him

exceeds the cost of providing day care to a child without disabilities or that the family can demonstrate a financial need and that the regional center paying for day care will enable claimant to remain in the family home. But claimant failed to prove any of those things.

21. There was some evidence that the cost to provide day care for claimant exceeds the cost to provide day care to a child without disabilities. Claimant's mother testified that, because claimant is nonverbal and because he has "meltdowns," he could not tolerate a day-care-center setting. The 124 hours of in-home care claimant's mother now requests would cost approximately \$2,554.40 per month. The cost for day-care-center services would be approximately \$150 per week, i.e., approximately \$600 per month. Thus, if claimant had to have in-home day care, the cost to provide day care for him would far exceed the cost of providing day care services to a child without disabilities, and claimant might be entitled to have IRC pay the difference.

22. But claimant's mother's statement that claimant could not tolerate a day-care-center setting is not convincing. He tolerates school. And there is no evidence that anyone professionally qualified to make an assessment has concluded that he could not tolerate a day-care-center setting. Indeed, Ms. Valencia, who holds a bachelor's degree in psychology and a master's degree in rehabilitation counselling, testified that a day-care-center setting would be preferable for claimant because it would provide opportunities for him to socialize. Claimant failed to prove that the cost of providing day care service to him exceeds the cost of providing day care services to a child without disabilities.

Regional Center Contends There is a Second Reason Claimant is Not Entitled to Have Regional Center Provide Day Care

23. Regional center contends that claimant's parents have an obligation to cooperate with regional center to attempt to obtain IHSS for claimant in San Bernardino County. Claimant's mother plans to apply for IHSS in San Bernardo County. Regional center contends that, if claimant obtains IHSS funds, the funds will be "generic services" or "other services" within the terms of Welfare and Institutions Code section 4646.4, subdivisions (a)(2) and (a)(3). Regional center contends those funds should be used to pay for day care.

24. A parent who has a legal duty to provide care for his or her child cannot be the IHSS provider if the parent works full time. Welfare and Institutions Code section 12300, subdivision (e), provides:

Where supportive services are provided by a person having the legal duty pursuant to the Family Code to provide for the care of his or her child who is the recipient, the provider of supportive services shall receive remuneration for the services only when the provider leaves full-time employment or is prevented from obtaining full-time employment because no other suitable provider is available and where the inability of the provider to provide supportive services may result in inappropriate placement or inadequate care.

25. Claimant's mother now works full time. Regional center contends that, because claimant's mother could not be the IHSS provider, it would be appropriate to use the IHSS funds to hire a day care provider.

26. Regional center's contentions regarding IHSS funds raises issues that need not be resolved in order to dispose of this case.

ORDER

Claimant's appeal from IRC's decision to terminate 156 hours of day care services is denied.

DATE: November 12, 2019

ROBERT WALKER
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.