BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: AARON L., Claimant, vs. SAN GABRIEL/POMONA REGIONAL CENTER, Service Agency.	OAH NO. 2011080718

DECISION

Administrative Law Judge Michele Mann, State of California, Office of Administrative Hearings, heard this matter on September 20, 2011 in Los Angeles, California.

Aaron L. (claimant) was not present but he was represented by his authorized representatives, Oi and Jenny L.,[1] claimant's parents.

G. Daniela Martinez, Program and Fair Hearing Manager, represented San Gabriel- Pomona Regional Center (Service Agency or SG-PRC).

Oral and documentary evidence was received and the matter was argued. The record was closed and the matter was submitted on September 20, 2011.

ISSUE

May the Service Agency reduce the number of hours it funds claimant's "after school" day care services from twenty hours to ten hours per week?

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[1] Initials and family titles are used to protect the privacy of claimant and his family.

FACTUAL FINDINGS

1. Claimant is an 18-year old man, born on June 9, 1993, who is a consumer of SG-PRC based on his qualifying diagnosis of severe autism disorder and mental retardation. Claimant was diagnosed when he was approximately three and one- half years old and has extremely limited skills. He uses a Light Writer augmentative communication device to aid his speaking efforts. He is 5'10" and weighs 207 lbs. He lives at home with his mother and father and his younger sister Abigail who is eight years old.

2. At age 18, claimant struggles with basic coping skills. He is extremely aggressive, violent towards others and himself, and requires protective supervision care 24 hours per day.[2] On a near daily basis at school and day care, claimant hits, spits, traps staff members' legs so that they fall, "head butts" staff, often scratches and/or strikes out at anyone around him, and on occasion, he has picked up smaller female staff members to stop them from telling him "no." Claimant's parents handle him best and particularly during periods of transition from activity to activity, such as pick up and drop off at school or day care. Parents have had great difficulty over the years finding any respite relief other than from an occasional family member or a group of friends at church who can watch claimant while his parents attend church and for this reason they voluntarily waived Regional Center's prior funding of 16 respite hours per month on July 10, 2011.

3. Parents have filed a conservatorship action seeking appointment as conservator of claimant's person and they anticipate they will be appointed co-conservators on or before January, 2012.

4. Claimant's mother is a full-time certified public accountant with a private firm who also teaches one business class at Cal State San Bernardino. Father is a special education teacher at a local high school located within a 30 minute-drive (one way) of the family home. Claimant's sister attends extra-curricular activities which require parent involvement during weekday after school hours (for example, driving her to and from classes and rehearsals.) His parents provide a stable and caring environment for claimant although they have demanding work schedules as well as the interests of another child to manage.

5. Claimant has been receiving Service Agency funding for 20 hours of "after school" day care services per week during the regular school year since June 16, 2011 and 40 hours of day care services per week during school breaks or vacation schedule through AbilityFirst/Claremont Center. Claimant attends after school day care at AbilityFirst/Claremont Center a minimum of 15 hours per week and often as many as 20 hours per week depending on his parents' work schedules. AbilityFirst/Claremont Center is

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[2] Claimant's father testified that for the past decade he has slept in claimant's bedroom every night to ensure that claimant does not "escape" by opening windows or doors, and does not wander off and into traffic or find objects with which he could injure himself or others (for example, cutlery, staplers, etc.)

the only vendor or facility in the vicinity of claimant's home to accept him for full day school program or after school day care services given the extreme behaviors he displays on a nearly daily basis. He continues to receive funding pending his appeal. Funding for claimant's day care during school breaks or vacation is not an issue on this appeal.[3]

6. Claimant's most recent Individual Program Plan (IPP) meeting was held at claimant's home on June 16, 2011 with Louis Canales present on behalf of SG-PRC and claimant and his parents in attendance. After the IPP meeting, Mr. Canales prepared an IPP Report dated June 16, 2011 (2011 IPP) which states claimant, "continues to have and need a 1:1 aide at school to help him focus and to stay on task. He also receives speech therapy 2 times per week to help him learn to use his 'Light Writer' augmentative communication device." Mr. Canales also noted with respect to claimant's training on the Light Writer device, claimant's "[l]evel of aggression at school has improved since he started the program and is no longer physically assaulting staff as he was in the past; however his anxiety level is still evident and this has improved since the use of his new communication device . . ." (Exhibit 4.) Claimant assaulted a teacher at school on June 16, 2011, the date of the 2011 IPP, and two adults were required to wrestle the teacher from claimant's grasp.

7. The 2011 IPP also identified claimant's need to improve social skills and be able to play with peers and states claimant "[d]oes not have friends and does not initiate interactions with others. [Claimant] has been attending AbilityFirst which is an after school program and this service serves a Day Care need. [Claimant] attends 20 hours per week and this service is approved through 7/31/11." The 2011 IPP also states that claimant's "[f]amily was receiving 16 hours of respite services per month and his mother chose to terminate as service was not being used and said that he benefits more from the other services currently funded by regional. Respite terminated 7/10."

8. Claimant requires a minimum of 15 hours per week (or 60 hours per month) of afterschool day care services (from 2:30 p.m. to 5:30 p.m.), and oftentimes as many as 20 hours per week when parents have extended workday commitments like tax season scheduling and evening teaching obligations for mother or back-to-school night events for father.

9. Father testified that claimant sleeps from 9:30 p.m. to 6:00 a.m. and that claimant requires supervision during the average school week "day" from 6:00 a.m. until the school bus arrives at 8:00 a.m. to take him to school and then from 2:30 p.m. until 5:30 p.m. at which time father picks up claimant from day care. Claimant's mother testified that in a

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[3] The Notice of Proposed Action dated August 2, 2011 also proposed a reduction in service for claimant's non-school schedule or "vacation schedule" by 10 hours per week as well. However, the parties agreed prior to the hearing that that the Service Agency would withdraw this proposed reduction in funding for service as it related to claimant's school break and vacation schedule and the Service Agency would continue to fund school breaks through AbilityFirst at 40 hours per week.

typical month, while on school schedule or otherwise, claimant spends at least 240 hours of "awake" time at home where his parents and their extended family members are the sole caretakers for claimant.

10. At the June 16, 2011 IPP Meeting, claimant's parents informed the Service Agency that they had successfully renewed their application for In Home Support Benefits (IHSS benefit) on behalf of claimant with the Department of Social Services (Department) and that the Department had renewed claimant's prior award of 196 support hours per month. Claimant receives the maximum amount of benefit hours available from the Department. Per Department's policy, 160 of the 196 IHSS benefit hours per month awarded claimant are earmarked for the "protective supervision" of claimant.

11. The protective supervision component of the IHSS benefit may be applied to fund claimant's day care needs but is not allocated for a particular purpose or service. Claimant's IHSS benefit of 196 hours per month constitutes 49 hours per week of benefits which calculation also takes into account claimant's weekend/non-school week protective supervision needs.

12. The Service Agency issued a Notice of Proposed Action (NOPA) dated August 2, 2011 notifying claimant that it proposed to reduce the number of after school day care hours it funded from 20 hours to 10 hours per school week. The stated reason for the proposed reduction in funding claimant's after school day care was claimant's IHSS benefit of 196 hours per month of which 160 of those hours are designated for his "protective supervision" and may be applied to day care services. The Service Agency wrote:

> [¶] … [¶]
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> SG/PRC Purchase of Service Policy states, "After age 18, other services and benefits including Supplemental Security Income (SSI) and In-Home Support Services (IHSS) shall be considered in determining the need for the purchase of day care."
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> In addition, the Lanterman Act states, "that the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. Those sources shall include 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".
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> SG/PRC will continue to fund 10 hours per week of day care during the regular school year and will authorize 30 hours per week during the school break.
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> [¶] … [¶]

13. On August 11, 2011, claimant's mother and father filed a Fair Hearing Request on claimant's behalf, appealing the reduction in funding of after school day care hours during the school year and this hearing ensued.

14. G. Daniela Martinez is the Fair Hearing Program Manager for the Service Agency and she is familiar with claimant's case. Ms. Martinez testified that the Service Agency calculates claimant's after school day care services during the school year as 15 hours per week, that is, from 2:30 p.m. to 5:30 p.m. Ms. Martinez also testified that claimant's IHSS benefit of 196 hours per month, of which 160 hours per month (protective supervision hours) may be used for claimant's after school day care needs, readily covers and "duplicates" claimant's 15 hour-per-week or 60 hours per month of after school day care needs currently funded by the Service Agency, and thus, the Service Agency is authorized by law to reduce the number of hours it funds claimant's afterschool day care services from 20 hours per week to 10 hours per week.

15. Claimant's parents understand that they have an obligation to investigate where possible alternate generic resources of funding for claimant's day care needs in addition to those provided by the Service Agency. Claimant receives Medi-Cal benefits and parents provide private medical insurance for those needs not funded by Medi-Cal. Claimant has been receiving IHSS benefits of varying amounts from the Department since August 2007, several years before he turned 18, and was awarded the full amount of benefits the Department may award any individual (196 hours per month) in 2009.

16. The IHSS benefit of 196 hours per month plus Service Agency's current funding of 20 hours per week for day care service hours is not sufficient to cover the 24/7 protective supervision and day care needs unique to claimant in a given month.

17. In a given month, claimant is awake a least 240 hours while at home under his parents exclusive care and he attends a minimum of 9.5 hours of school activities (school and after school day care programs included) from AbilityFirst each weekday of the regular school year totaling a minimum of 47.5 hours per week (8:00 a.m. to 5:30 p.m.) or 190 hours per month. Claimant is awake, and, therefore, requires protective supervision, at least 430 hours per month. Service Agency currently pays for twenty hours per month of after school day care services for claimant during the regular school year which serves both a protective supervision and after school day care needs for claimant. Accordingly, Service Agency's proposal that all of claimant's after school day care needs during the school year (a minimum of 15 hours of after school day care services per week during the school year times 4 weeks per month), with the exception of the 10 hours per week (or 40 hours per month) which Service Agency proposes to fund, be funded by a portion of the protective supervision component of claimant's IHSS benefit exacerbates the existing shortfall of monthly unfunded protective supervision hours for claimant, and ignores claimant's unique protective supervision and day care needs.

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.)[4] An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal the Service Agency's decision to reduce funding of after school day care services during the school year. Jurisdiction in this case was thus established. (Factual Findings 12 and 13.)

2. In administrative proceedings, the party asserting the affirmative generally has the burden of proof. (See *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.) A regional center seeking to reduce the number of service hours it is providing has the burden of proving that its decision is correct. SG-PRC has proposed to reduce the number of hours it funds after school day care hours for claimant during the school year. (Factual Finding 12.) Accordingly, the burden of proof is, therefore, on SG-PRC. The standard of proof in this case is a preponderance of the evidence based on Evidence Code section 115.

3. The Lanterman Act is a comprehensive statutory scheme to provide "[a]n array of services and supports … which is sufficiently complete to meet the needs and choices of each person with developmental abilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community." (§ 4501.) The services and supports should "enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (*Id.*)

4. The services and supports to be provided to the consumer are determined in the IPP process on the basis of the needs and preferences of the consumer and a consideration of a range of service options proposed by the 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).)

5 The Lanterman Act requires "[t]hat the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. Those 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." (§ 4659, subd. (a)(1).)

6. The SG-PRC Purchase of Service Policy states: "After age 18, other services and benefits including Supplemental Security Income (SSI) and In-Home Support Services

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[4] All further statutory references are to the California Welfare and Institutions Code, unless otherwise stated.

(IHSS) shall be considered in determining the need for the purchase of day care." (Exhibit 5.)

7. Under the Lanterman Act, in determining the services and supports to be provided to the consumer by a regional center, the consumer's unique needs, as identified in the IPP process, is a relevant factor. (§ 4512, subd. (b).) Notwithstanding the Service Agency's mandate to pursue all possible sources of funding for consumer's regional center services pursuant to § 4659, subdivision (a)(1), and other equally relevant factors, the IPP process currently in place for claimant determined that he has a 24/7 protective supervision care need as well as a need for after school day care during the school year. (2011 IPP). The IPP process also indicates that claimant's violent behaviors on a nearly daily basis at school and day care and the minimum of 240 hours per month claimant is "awake" at home with his parents providing exclusive protective supervision care, are also relevant factors in determining appropriate services and supports for claimant. (§ 4512, subd. (b).)

8. The Service Agency established by a preponderance of the evidence that claimant's parents have an obligation to identify and pursue all possible alternate generic sources of funding for claimant's day care needs, in addition to the award of IHSS benefits like that awarded to claimant by the Department, including SSI benefits. (Legal Conclusions 5 and 6.) Consequently, Claimant's parents are encouraged to identify and pursue all possible alternate generic resources of funding for claimant's after school day care needs, in addition to the award of IHSS benefits or those presently funded by the Service Agency, including SSI benefits.

9. However, the Service Agency did not establish by a preponderance of the evidence any appropriate basis to reduce funding of claimant's after school day care by ten hours per week (or forty hours per month) during the school year where testimony at the hearing established that claimant's 24/7 need for "protective supervision" exceeds both the 196 hour IHSS benefit per month as well as the 80 hours (20 hours per week during the school year for afterschool day care services) presently funded by the Service Agency but claimant is awake at least 430 hours per month when he is at home, or at school and after school day care programs, and requires protective supervision 24 hours a day.

10. The Service Agency's proposed reduction in after school day care hours would exacerbate a shortfall in protective supervision hours for claimant and, at present, the 160 hours of "protective supervision" component of the IHSS benefit is not in excess of, nor does it duplicate Service Agency's funding of day care hours. The Service Agency's proposal, if approved, would also create a significant burden on his parents who testified credibly that they have been unable to duplicate both the protective supervision service and day care service/socialization services which AbilityFirst/Claremont Center uniquely provides claimant given his extremely violent behaviors on a near daily basis and the well-documented lack of other alternate protective supervision providers for claimant for these particular purposes. *Id.* (Factual Findings 2, 5, 16, and 17.)

11. Accordingly, the Service Agency did not demonstrate any appropriate basis to reduce funding at this time of claimant's after school day care services during the school year from 20 hours per week to 10 hours per week.

ORDER

Claimant's appeal is granted. SG-PRC may not reduce funding of claimant's after school day care series during the school year from twenty hours to ten hours.

DATED: _____

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MICHELE MANN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either may appeal this decision to a court of competent jurisdiction within 90 days.