

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Case No. 2011110680

MARIA M.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

DECISION

The hearing in the above-captioned matter was held on December 22, 2011, at Alhambra, California, before Joseph D. Montoya, Administrative law Judge (ALJ), Office of Administrative Hearings (OAH). Eastern Los Angeles Regional Center (ELARC or Service Agency) was represented by Judy Castenada, Fair Hearing Coordinator. Claimant Maria M. (Claimant or Maria) appeared through her mother, Carolina M., who is also Claimant's conservator. Mrs. M. was assisted by Claimant's brother, Aldo M.¹ Also present was Paola Gazzaneo, who served as interpreter.

During the hearing, the Service Agency moved its exhibits 1 through 5 into evidence, and they were received. They will be designated hereafter with the prefix "SA." Claimant cited to some of her Exhibits, which were not formally moved into evidence. In order to have a complete record, some of her exhibits, designated hereafter with the prefix "CL," will be received in evidence. They include exhibits CL 3 and CL 4.

Evidence was received, argument was heard, and the case was submitted for decision on the hearing date. The Administrative Law Judge hereby renders his decision in the case.

¹ Initials are used for the family surname to protect Claimant's privacy.

ISSUE PRESENTED

Must the Service Agency provide in-home respite care (IH respite) in lieu of providing the same amount of out-of-home respite care (OOH respite), when Claimant already receives 30 hours of IH respite per month?

FACTUAL FINDINGS

1. Claimant is a 25 year-old woman who is a consumer of services provided by the Service Agency pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.² Claimant is eligible for services based on her developmental disabilities of Cerebral Palsy, Mental Retardation, and Seizure Disorder. She also suffers from Scoliosis.

2. Claimant lives with her mother in a two bedroom apartment in Los Angeles. She can not perform any self-help or independent living skills. She had difficulty consuming her food, and needs constant supervision when eating. She is non-verbal and non-ambulatory, and requires diapers. She expresses her needs through gestures and sounds, such that only her family understands her. Her family takes her into the community when it can (she uses a wheelchair), and in those settings she also requires constant supervision. (Ex. SA 4.)

3. Pursuant to the Individual Program Plan (IPP) developed between Claimant and the Service Agency in October 2010, she receives, on behalf of her mother, 30 hours per month of respite care. She was originally authorized for 24 hours of care, and it was agreed that six more hours would be added due to her mother's need to attend numerous medical appointments. In part as a result of a prior decision by the ALJ, which was issued in August 2008, ELARC was funding OOH respite, for a total of 336 hours per fiscal year, so that Claimant could have 14 days of round-the-clock OOH respite per year.³ (Ex. 4, p. 3.)

² All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

³ In the prior decision, issued in case number 2008110610, there were three issues, one of which pertained to use of respite, and more specifically, OOH respite. At that time, it was ELARC's policy to pay for 16 hours of respite for each of the 21 days of OOH respite that could be provided. Claimant's mother wanted ELARC to pay for 24 hour shifts, for each of the 21 days. The undersigned ruled that ELARC would be obligated to pay for 14 days, each of 24 hours, so long as the third shift was in the same price range as the other two. The decision did not order the provision of OOH respite in lieu of IH respite, though such was then available under ELARC policies. Because Claimant offered only two pages of the prior decision (Claimant's Exhibit 4), the undersigned has taken official notice of the entire document. (See Govt. Code, § 11515.) A complete copy will be exhibit CL 6.

4. In May 2011, the Service Agency adopted new guidelines regarding the use of OOH respite. Part III of these new guidelines provides that “In home respite in lieu of out of home respite may be used only when there is no out of home respite arrangement available.” (Ex. 3, p. 2.)

5. (A) Claimant’s mother requested that she be allowed to use a day of OOH respite in lieu of IH respite, so that she could go out of town in August 2011. That is, she did not actually want Claimant out of the home, but wanted an additional 24 hours of IH respite provided at the family home. At that time Claimant’s service coordinator advised her of the new guidelines which tended to bar the provision of OOH respite in the home. She further informed Mrs. M. that Claimant would have to have both a physical exam and have a tuberculosis (TB) test before Claimant could be placed in a facility outside of the home, that is, to utilize true OOH respite.

(B) Because Claimant did not then have a current physical and TB test, the Service Agency granted an exception, and agreed to pay for 16 hours of IH respite in lieu of OOH respite. The service coordinator advised Mrs. M. that in the future, ELARC would first have to look to place Claimant outside the home, before OOH hours could be used in the home. If an outside placement was available, then it would have to be used; if one was not available, then the OOH hours could be used for in home service.

6. Claimant’s mother requested two days of funding in October 2011, desiring to use OOH hours in the home. The request was denied. A Notice of Proposed Action (NOPA) was issued to that effect, and Claimant filed a Request for Hearing, satisfying jurisdictional requirements in this case.

7. At the hearing, Claimant’s mother testified that she does not want her daughter to stay outside of her home. Her position was very much based on a prior experience, from 2002, when her daughter was placed in a facility for a short period. When she went to retrieve Claimant, Mrs. M. perceived that Claimant had not been well cared for. She had not filed a complaint at that time, so her dissatisfaction, and a description of Claimant’s condition, was not documented.

8. Claimant’s mother pointed out that Claimant should be helped into a stander, a device that holds a disabled person upright, and that she can not move the stander to an outside facility. However, it was not established that Claimant must utilize a stander, or how often. Put another way, there is no evidence that if she stayed at an outside facility for one or two days, and did not use a stander in that period, that she would be harmed by such a practice.

9. Claimant’s brothers are in college, away from home, and not able to provide much assistance to care for Claimant. Others that might be considered part of the natural circle of support are not readily available to assist Mrs. M. Claimant’s father has long been absent from Maria’s life.

10. The parties have sought a day program for Claimant, but a placement has not been located. There is cautious optimism that the desired program would be available for actual placement in the latter part of 2012.

11. Claimant's mother has not sought an exception from the statutory rule that limits respite to 90 hours per quarter, and to 21 days of OOH respite per year, which rule is found in section 4685.5, subdivision (a)(2).

12. Claimant now has a current TB test and physical, and so could be put in a short placement for OOH purposes, if her mother was amenable to such. Mrs. M. has not toured any of the homes that the Service Agency suggested when she requested the additional OOH hours to be used in the home.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 and 6.

2. Services are to be provided to regional center clients in conformity with the Individual Program Plan (IPP), per section 4646, subdivision (d), and section 4512, subdivision (b). Consumer choice is to play a part in the construction of the IPP. Where the parties can not agree on the terms and conditions of the IPP, a Fair Hearing may, in essence, establish such terms. (See §§ 4646, subd. (g); 4710.5, subd. (a).)

3. The services to be provided to any consumer of regional center services must be individually suited to meet the unique needs of the individual consumer in question, and within the bounds of the law each consumer's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subds. (a)(1) and (a)(2).) Otherwise, no IPP would have to be undertaken; the regional centers could simply provide the same services for all consumers. The Lanterman Act assigns a priority to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).)

4. Section 4512, subdivision (b), of the Lanterman Act states in part:

‘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's family, and shall include consideration of . . . the effectiveness of each option of 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, . . . special living arrangements, physical, occupational, and speech therapy, . . . education, . . . recreation, . . . respite, . . .

5. Services provided must be cost effective (§ 4512, subd. (b), *supra*), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, *e.g.*, §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) It is clear that the regional centers' obligations to other consumers are not controlling in the individual decision-making process, but a fair reading of the law is that a regional center is not required to meet a consumer's every possible need or desire, in part because it is obligated to meet the needs of many disabled persons and their families.

6. Services are to be chosen through the IPP process. (§ 4512, subd. (b).) The regional center is also to utilize the service coordination model, in which each consumer shall have a designated service coordinator "who is responsible for providing or ensuring that needed services and supports are available to the consumer." (§ 4640.7, subd. (b).)

7. The IPP is to be prepared jointly by the planning team, and services purchased or otherwise obtained by agreement between the regional center representative and the consumer or his or her parents or guardian. (§ 4646, subd. (d).) The planning team, which is to determine the content of the IPP and the services to be purchased is made up of the disabled individual, or his or her parents, guardian or representative, one or more regional center representatives, including the designated service coordinator, and any person, including service providers, invited by the consumer. (§ 4512, subd. (j).)

8. Pursuant to section 4646, subdivision (a), the planning process is to take into account the needs and preferences of the consumer and his or her family, "where appropriate." Further, services and supports are to assist disabled consumers in achieving the greatest amount of self-sufficiency possible; the planning team is to give the highest preference to services and supports that will enable a minor child with developmental disabilities to remain with his or her family. (§ 4648, subd. (a)(1).)

9. "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 at home.
- (3) Relieve family members from the constantly demanding responsibility of caring for the clients.
- (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."

10. Out-of-home respite is defined in the pertinent regulations as "intermittent or regularly scheduled temporary care to individuals in a licensed facility and which: 1) are designed to relieve families of the constant responsibility of caring for a member of that family who is a consumer; 2) meet planned or emergency needs; 3) are used to allow parents or the individual the opportunity for vacations and other necessities or activities of family life; and 4) are provided to individuals away from their residence." (Cal. Code Regs., tit. 17, § 54342, subd. (a)(58)(E).)

11. Thus, out-of-home respite is different from in home respite in two major respects: it is provided out of the home, and it is used for planned or emergency absences from the home. The Service Agency may therefore treat its use differently from traditional in home respite.

12. Effective July 1, 2009, limits were imposed on a regional center's ability to purchase respite care for the families of consumers. Specifically, section 4686.5 was added to the Lanterman Act. It provides, essentially, that a regional center shall not purchase more than 90 hours of in-home respite in a quarter of one year. (§4686.5, subd. (a)(2).) However, a regional center may grant an exemption, and provide more of such services, where it is demonstrated either that more than 90 hours per quarter of respite care is required in order to maintain the Claimant in the family home, or where it has been established that there has been an extraordinary event that impacts the family's ability to meet the care and supervision needs of Claimant. The new statute also makes clear that in order to obtain respite care, it must be shown that the family's needs for such exceed those of a family of a child without disabilities. (*Id.*, at subd. (a)(1).)

13. Section 4646.4 was also added to the Lanterman Act as a cost-containment measure in response to the current state budget crisis. In particular, section 4646.4, subdivision (a), requires regional centers, among other cost saving measures, to conform to their purchase of service guidelines, and utilize available generic resources. However, a service policy established by a regional center to govern the provision of services may not take precedence over the established individual needs of the consumer. (*Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390-393.)

14. The Service Agency's new policy regarding the use of OOH respite hours in the home, has the salutary effect of capping IH respite at the level of 30 hours per month as

required by section 4686.5, subdivision (a)(2). A person who believes they need more IH respite must seek an exception from the new rule. Otherwise, the disabled person should use OOH respite for the proper purpose, that is, to allow the care-giving family members to respond to emergencies or to take long breaks from service, such as is provided by a vacation.

15. Based on all the foregoing, Claimant's appeal must be denied.

ORDER

Claimant's appeal is denied. The Service Agency is not required to use out of home respite hours to provide in home respite unless it can not provide an out of home placement for Claimant, at a duly licensed and vendored facility.

January 8, 2012

JOSEPH D. MONTOYA
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.