

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

In the Matter of the Fair Hearing Request of:

STEVE M.

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER

Service Agency.

OAH No. 2011110927

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on December 27, 2011, in Alhambra. The record was closed and the matter was submitted for decision at the conclusion of the hearing.

Claimant, who was not present, was represented by his mother.¹

Felipe Hernandez, Chief of Consumer Services, represented the Eastern Los Angeles Regional Center (ELARC or Service Agency).

ISSUES

1. Was Claimant's mother entitled to use in home respite in lieu of out-of-home respite for the specific dates of November 11 and 12, 2011?
2. May Claimant's mother continue to use in home respite in lieu of out-of-home respite on an ongoing basis as she has in the past?

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a 31-year-old male who is a consumer of ELARC based on his qualifying diagnoses of seizure disorder and mild mental retardation.

¹ Initials and family titles are used to protect the privacy of Claimant and his family.

2. For reasons explained in more detail below, the Service Agency has authorized Claimant's mother to use in home respite in lieu of out-of-home respite (OHR) on occasions when she needed an extended stay away from the family home. The Service Agency allowed the in home respite to be funded as parent coordinated personal assistant (PCPA) services, in which Claimant's younger brother was usually the compensated in home respite provider.

3. On a date not established, Claimant's mother requested to use in home respite in lieu of OHR for an extended absence from the home planned for November 11 and 12, 2011. At that time, Claimant's Service Coordinator advised Claimant's mother that, due to a recent change in its internal purchase of service policy concerning OHR, such funding would only be provided if no out of home placement was available. Each time Claimant's mother wanted to use in home respite in lieu of OHR in the future, she would be required to give advance notice to the Service Agency and explore the availability of OHR facilities. Claimant's mother requested that she be allowed to continue using in home respite in lieu of OHR as she had in the past, including as a PCPA service.

4. By a Notice of Proposed Action (NOPA) dated October 27, 2011, the Service Agency notified Claimant's mother that her request for in home respite in lieu of OHR for the two dates in question was denied, and that the Service Agency proposed to only provide such funding in the future if an out-of-home arrangement was not available.

5. Claimant's mother, who is his conservator and thus an authorized representative, submitted a Fair Hearing Request to the Service Agency on or about November 9, 2011, which appealed the denial of her service request and the proposed change in the way she would be allowed to use in home respite in lieu of OHR.

6. On December 13, 2011, the parties participated in an Informal Conference to discuss the issues presented in this case. No resolutions were reached.

Background Information

7. Claimant lives at home with his mother. Claimant's younger brother recently moved out of the family home after he married.

8. Claimant's seizure disorder is serious. He has several seizures every day. He is currently on a complicated regimen of over 30 different medications for his seizures and related medical issues. For that reason, he must be supervised around the clock, even when he goes to the bathroom, for fear that he will have a seizure.

9. Claimant formerly attended a day program, but stopped sometime in 2010 after an injury at the day program that led to life-threatening medical complications. Claimant's mother does not believe her son is ready to resume attending a day program at this time.

10. Claimant receives \$830 per month in Supplemental Security Income (SSI) from the federal government. His family has also been awarded 283 hours per month of In Home Supportive Services (IHSS) funded by Los Angeles County, which recently was reduced to 272.9 hours per month due to budget cut-backs. Of that amount, 128.12 hours per month are for protective supervision. Claimant's mother is the compensated provider of the IHSS hours. Claimant receives day care funding for at least six hours per day, five days per week. This is used when Claimant's mother is out of the house working or looking for work. The Service Agency has authorized extended day care for when more than six hours is needed on a particular day. Claimant's younger brother is the paid provider of that service.

Respite Needs of Claimant's Mother

11. As reflected in Claimant's current Individual Program Plan (IPP), the Service Agency has agreed to provide funding for Claimant's mother to use 40 hours per month of in home respite and up to 21 days per fiscal year of OHR. Due to his medical needs, Claimant qualifies for LVN respite. However, because that service was difficult to secure in the past, the Service Agency agreed to fund PCPA in lieu of LVN respite. For the same reason, the Service Agency also agreed to allow Claimant's mother to utilize in home respite, through PCPA, in lieu of OHR. Claimant's mother is the PCPA vendor and she typically uses her younger adult son to provide the care, although a niece has more recently become available to assist. Neither of them are LVNs nor have any similar training.

12. Claimant's mother uses OHR for trips with her sister or friends when she must stay away from home overnight. Sometimes these are weekend trips on the spur of the moment; sometimes these are weeklong vacations to her sister's timeshare that are planned two to three weeks in advance. In the past, Claimant's mother was only able to use three or four days of OHR per year because of the difficulty in locating an acceptable facility. Since the Service Agency has agreed to the in home respite in lieu of OHR, provided by Claimant's brother, Claimant's mother has used 17 to 18 days per fiscal year of OHR.

13. On May 2, 2011, the Service Agency amended its existing purchase of service policy (POS) regarding OHR, which was subsequently approved by the Department of Developmental Services (DDS), as follows:

A. In home respite in lieu of OHR "may be used only when there is no out of home respite arrangement available."

B. In addition, families are required to submit to their service coordinator prior to implementation of in home respite in lieu of OHR the following information: 1) proof of vacation plans, medical emergency, etc.; 2) information on the respite caretaker if different from the provider on the vendor application; 3) written authorization for the Service Agency to make unannounced visits to the home to ensure the consumer's health and safety; and 4) the daily amount of hours approved will not exceed 16 hours, and will take into account time that the consumer spends in school or day care program, asleep, etc.

C. Generic services (such as IHSS, private insurance, etc.) and natural supports (extended family, friends, etc.) must be explored and secured prior to approval.

14. Claimant's mother specifically requested in home respite in lieu of OHR for the dates of November 11 and 12, 2011. She made that request no later than October 25, 2011, the earliest date referenced in the Service Agency's NOPA. On November 9, 2011, just days before her planned absence, Claimant's Service Coordinator e-mailed Claimant's mother information for two facilities the Service Agency believed could meet Claimant's needs, Neargrove Home (Neargrove) and Special Adult Care Home (SACH). The Service Agency failed to offer evidence explaining why the referrals were made so close to the planned absence of Claimant's mother.

15. Claimant's mother visited Neargrove on November 25, 2011. She later sent a letter to the administrator who gave her a tour indicating that the facility was not acceptable because it did not have LVN services. Claimant's mother was under the erroneous impression that a facility had to have an LVN in order to give the prescriptive medications that her son required. Claimant's mother also testified that she did not like Neargrove because none of the residents spoke and because the facility served sandwiches almost every day. These reasons were not persuasive, given a proposed stay of short duration, and the fact that Claimant's mother did not mention them in her letter to Neargrove.

16. Claimant's mother testified that SACH refused to see her and/or provide services to her son. However, the letter Claimant's mother sent to the administrator with whom she spoke on the telephone simply indicated that the administrator had not been previously contacted by Service Agency staff, and that SACH only had access to an LVN for one hour per day, which Claimant's mother deemed unacceptable. The letter did not necessarily indicate that SACH refused to provide OHR services to Claimant. Claimant's mother's testimony on this point was not persuasive.

17. It was not established by a preponderance of the evidence that both of the two facilities recommended by the Service Agency were unavailable to meet Claimant's needs. Claimant's mother labored under the erroneous impression that an OHR facility had to be staffed by an LVN to administer prescribed medications. Her erroneous impression colored her view of whether the two recommended facilities were available. Claimant's mother's reason for finding Neargrove unacceptable was not persuasive. It was not established that SACH refused to provide service to Claimant or was unable to do so. However, neither was it established that one or both of the facilities was available to meet Claimant's needs. The Service Agency presented no evidence on this point, other than the e-mail referral of the facilities by Claimant's Service Coordinator. That evidence was amply refuted by the evidence submitted by Claimant's mother and described above.

18. Claimant's mother took her extended stay away from home on November 11 and 12, 2011. She used some of her 40 hours per month of in home respite to compensate the person who cared for her son in her absence. She requests reimbursement of that time in the form of 22 additional hours of in home respite in a subsequent month.

19. By a letter dated November 30, 2011, the Service Agency advised Claimant's mother that her request to use in home respite in lieu of OHR for the dates of November 11 and 12, 2011, had been approved. After taking into account reductions due to Claimant's IHSS hours as required by the POS regarding OHR, the Service Agency authorized 22 hours of OHR for November 2011. Although the letter erroneously stated that these hours would be added to her amount of in home respite for September 2011, it is clear from the letter that the intent was to increase the in home respite hours for December 2011 from 40 to 62 hours to account for the 22 hours of OHR authorized for November 2011.

20. Claimant's mother testified that she should not be required to conform to the amended POS regarding OHR because of the Service Agency's documented failure to find a suitable facility in the past. Based on her rejection of the two facilities recently recommended by the Service Agency, Claimant's mother doubts the Service Agency will be able to find a suitable facility that can meet Claimant's OHR needs. She views her compliance with the amended POS as "a waste of her time."

21. Claimant's mother testified that she has few members of her extended family available to help. Those who have helped in the past now refuse because Claimant is older, bigger, and they are afraid of accepting responsibility if they cannot properly respond to his seizures. As for her younger son and niece who currently provide Claimant's day care and respite care, Claimant's mother testified that they should be compensated for their services, and that in light of the amount of time they spend helping Claimant, they are already donating their services in some respects. Therefore, Claimant's mother does not view Claimant's younger brother or his cousin as natural supports that should provide the service without compensation. Claimant's mother also testified that she is unable to find anyone else who can provide the respite service at her vendored rate of \$11.49.

DISCUSSION

Jurisdiction and Burden of Proof

The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)² An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Claimant timely requested a hearing to appeal the Service Agency's denial of his mother's request for OHR respite on two particular days and its proposal to change the way in which she obtains OHR respite funding. Jurisdiction in this case was thus established on those two issues. (Factual Findings 1-6.)

The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

² All further statutory references are to the Welfare and Institutions Code.

A regional center seeking to terminate or reduce ongoing funding provided to a consumer has the burden to demonstrate its decision is correct, because the party asserting a claim or making changes generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, the Service Agency bears the burden of proof because it is attempting to change the way it has delivered and funded respite services in the past. (Factual Findings 1-6.)

Funding for Respite

Respite under the Lanterman Act is defined as a service intended “to provide intermittent or regularly scheduled temporary relief from the care of a developmentally disabled family member.” (§ 4690.2, subd. (a).)

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).)

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.

In response to the current state budget crisis, the Legislature enacted section 4686.5, subdivision (a)(2), which provides that a regional center shall not purchase more than 21 days of out-of-home respite service in a fiscal year nor more than 90 hours of in-home respite services in a quarter. 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 generally 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.)

The recent amendments to the Lanterman Act demonstrate the Legislature’s intent for regional centers to carefully scrutinize respite service requests and impose certain limits to funding. In this case, the Service Agency has amended its POS regarding OHR in ways intended to contain costs, by relying on generic sources and a consumer’s natural supports, by trying to manage costs by exploring available out of home placements where possible.

In this case, no cause was established to exempt Claimant's mother from conforming to the POS regarding OHR at this time. While the Service Agency has had problems in the past finding a suitable OHR placement for Claimant, it is now forced to comply with its new POS. It was simply not established, one way or the other, whether the two facilities recommended by the Service Agency would have met Claimant's needs. Even if they had not, one failed attempt is not enough to warrant exempting Claimant's mother from the POS to which other families must comply. It may be that in the future Claimant's mother can prove that a number of facilities recommended by the Service Agency truly cannot meet Claimant's needs.

To an extent, Claimant's mother's recent use of OHR has morphed into a parallel form of in home respite, meaning she is actually receiving more than 40 hours per month of traditional in home respite. Since OHR is intended for more planned out or emergency situations, requiring her to submit her plans for OHR use in the future and to give the Service Agency an opportunity to find a suitable OHR placement is a fair way of complying with the recent amendments to the Lanterman Act. Moreover, the fact that Claimant's younger brother and his cousin have spent substantial time caring for him in his mother's absence, and have been compensated for those efforts, means that there are natural supports available to fill the breach for some of his OHR needs. This is not to say that they shall be used for all of Claimant's OHR needs. But their availability does provide more support for the family complying with the amended POS regarding OHR. None of this appears to be in conflict with Claimant's mother's need for respite.

With regard to the specific request of OHR for November of 2011, although the Service Agency initially denied the request, it soon thereafter approved 22 hours of OHR to be applied to Claimant's in home respite hours for December, or presumably thereafter if those hours were not used in December. Claimant's mother did not voice an objection to that resolution during the hearing, so it is deemed to be a satisfactory way of resolving her appeal in that regard. Although the Service Agency has already agreed to credit Claimant with an additional 22 hours of in home respite, the below order shall memorialize that agreement.

LEGAL CONCLUSIONS

1. Cause was established pursuant to sections 4690.2, 4686.5, and 4646.4, as well as California Code of Regulations, title 17, section 54342, subdivision (a)(58)(E), to deny Claimant's request to be exempted from conforming to the Service Agency's policy regarding out-of-home respite at the this time. (Factual Findings 1-21 and Discussion.)
2. Pursuant to agreement by the Service Agency, cause was established to increase Claimant's in home respite hours for December of 2011 from 40 to 62 hours. (Factual Findings 1-21 and Discussion.)

ORDER

Claimant's appeal is denied, in part, and granted, in part, as follows. Claimant's in home respite hours for December 2011 shall be increased from 40 to 62 hours. Those additional hours are transferable and may be used by Claimant and his family in any succeeding month through June of 2012. Claimant's mother is not exempted, at this time, from complying with the Service Agency's purchase of service policy regarding out-of-home respite.

DATE: January 3, 2012

ERIC SAWYER
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.