

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2012050405

JARRED P.,

Claimant,

vs.

NORTH BAY REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard before Dianna L. Albin, Administrative Law Judge, State of California, Office of Administrative Hearings. The hearing was conducted in Vacaville, California, on June 19 and 20, 2012.

John P., claimant's father, represented claimant Jarred P.

Kristin Casey represented North Bay Regional Center, the service agency.

The record was held open for the parties to submit written arguments. Claimant's closing brief was marked for identification as Exhibit L. NBRC's closing brief marked for identification as Exhibit 18. The record was closed and the matter was submitted for decision on July 6, 2012. On July 16, 2012, the record was re-opened in order to obtain the missing pages from claimant's Exhibit F1. The entire document was received and marked as Exhibit F1A for identification and admitted in evidence. The record was closed and the matter submitted on July 18, 2012.

ISSUE

Has North Bay Regional Center erred in determining to terminate the respite services it has been providing to claimant because claimant is receiving protective supervision through In-Home Supportive Services?

FACTUAL FINDINGS

1. Claimant is a 29-year-old consumer of North Bay Regional Center (NCRB) who lives at home with his mother and father. He has been diagnosed with severe mental retardation, and pervasive developmental delay. Although he exhibits several tendencies indicative of autistic behavior, he has never been officially diagnosed with autism. Claimant is eligible for regional center services based on his diagnosis of severe mental retardation.

2. Claimant is nonverbal. He is ambulatory, in good health, and is a large strong young man (five feet-nine-inches tall and approximately 165 pounds). Claimant needs help to complete his activities of daily living including bathing, dressing, toileting, tying his shoes, and performing basic chores such as the upkeep of the family home. Claimant displays significant behavioral acts of aggression, property destruction and emotional outbursts that have resulted in physical harm to both his parents and his workers. For these reasons claimant cannot be left alone, and requires 24-hour supervision for his health and safety. Claimant is extremely sensitive to any change in his routine or the people he interacts with. Change causes claimant to behave in an unpredictable and severely aggressive manner.

3. Claimant currently attends PACE Parkway in Vacaville, Monday through Friday, from 9:00 a.m. to 3:00 p.m. Claimant's PACE Parkway program has been specifically designed for claimant due to his aggressive outburst behavior and property destruction. As part of his 30 hour-per-week program at PACE parkway, claimant receives six hours of community integration support, as well as, seven hours of two staff (2:1 supplemental staffing) support. The 2:1 supplemental staffing is implemented when claimant is being transported to and from the PACE program and when claimant is on community outings. The additional support provided during these times is to ensure his safety and the safety of other PACE consumers and staff.

Claimant's Behavioral History

4. In August 2008, claimant was removed from the PACE Solano Nut Tree program due to his maladaptive behaviors. During this time, claimant displayed an increased frequency and severity of physical outbursts, aggressive behavior and property destruction. His behaviors injured PACE Solano Nut Tree staff being injured, escalated staff fears and anxiety and posed a danger to fragile consumers. PACE Solano Nut Tree's program was unable to handle claimant's explosive outburst behaviors without additional assistance. Consequently, claimant was removed from the PACE Program. Claimant's father provided sole supervision for claimant during the day from September 2008 through November 2008.

5. In December 2008 claimant was designated as a “Crisis Case Referral,” and NBRC funded a program through the Institute of Applied Behavioral Analysis (IABA) to assist PACE in the development of supports to reduce claimant’s behavioral outbursts and aggression while increasing his coping skills with environmental changes.

6. A Comprehensive Functional Assessment Report and Recommended Support Plan was prepared by Kevin Loeb, M.S., Senior Behavior Analyst at IABA. Loeb’s report involved assessing claimant during the period of December 4, 2008 through January 15, 2009. Loeb notes in his report, that while at home, claimant required both of his parents to supervise him because of his unpredictable aggressive outbursts. Complainant’s parents have developed a team response when claimant is at home in order to keep claimant safe. After both parents try to determine the source of complainant’s irritation or frustration, one parent attempts to solve the problem while the other attempts to redirect or distract claimant. Claimant’s aggressive behaviors are random and unpredictable. However, there are consistent triggers, such as, claimant having to wait for something he wants or changes to his routine. Once the behavior escalates to physical aggression or property destruction, both parents are required to restrain him in order to protect claimant from hurting himself or destroying property.

Loeb states in his report that “routine” and “consistency” in complainant’s day program and while at home are critical in order to identify and manage claimant’s aggressive outbursts and to maintain the safety of claimant and those around him. Loeb recommended an intensive behavioral training program for PACE staff working with claimant and claimant’s parents.

7. A February 19, 2009 report by Daniel Silva, NBRC’s client program coordinator, filed in support of claimant’s limited conservatorship hearing, states in relevant part:

II. PROPOSED CONSERVATEE’S DEGREE OF DISABILITY

. . . [Claimant] also lacks safety awareness. He must be supervised when in public as he cannot read street signs or distinguish traffic lights of when to cross or not to cross the street. He is also prone to bolting (i.e. running away from situations when scared or anxious) and when in this state is not aware of dangerous situations that could be harmful to himself or others.

[Claimant] is non-verbal and can only utter small phrases; therefore, it is difficult for other people besides his family to know or understand when he is expressing emotions of joy or anger as well as discomfort. . . .

[¶]

. . . When [claimant] becomes scared or anxious, it is members of his family who can understand and appropriately calm him down . . .

Claimant's Individual Program Plan

8. Claimant's March 29, 2011 Individual Program Plan (IPP) notes that while "PACE and IABA have worked intensely with claimant for the past two years to ensure he can attend PACE for a full program day, remain safe and participate in the educational and social activities he enjoys, he continues to display verbal abusiveness (i.e. screaming and yelling), property destruction, biting (his own clothing, property and others) and self injurious behavior. Re-directing claimant's aggression can require at least four staff members using IABA non-restrictive techniques and Pro-Act training; the successful implementation of these techniques, as well as, the current medications regimen have decreased the episodic severity and occurrences of these outbursts."

At the time the March 2011 IPP was completed, claimant received In Home Support Services (IHSS), which included 45.03 weekly hours of protective services. As part of the March 2011 IPP, NBRC funded 84 hours of agency respite per quarter after "NBRC determined claimant met the standard for an exception to TBL section 4646.4, due to the intensity of [claimant's] care and supervision needs, to provide [claimant's] parents relief from his constant care and supervision."

Residential/Respite objective

9. Respite was identified as a service for the long-term objective of family support in claimant's March 2011 IPP and the April 20, 2012 Addendum.

As noted in claimant's March 2011 IPP:

[Claimant's] behaviors can change inexplicably from a calm state to aggressive, self injurious or disruptive. When this behavior occurs and redirection is unsuccessful, diversionary tactics must be implemented and in some cases physical restraint must be utilized to prevent injury to him or others. He also becomes agitated when he is unable to convey his needs to others, his routine is changed, or he is removed from in (sic) an environment where he feels secure.

On multiple occasions [claimant] has acted out aggressively toward his parents. According to [claimant's parents] this is most often due [to] environmental changes, having to wait for a preferred item or activity or being asked to perform an unpreferred request. His maladaptive behaviors include property damage, banging his hand or arm, banging his head with his hand, shredding his clothing, and screaming when he is frustrated. Additionally, he will show aggressive behaviors toward others such as hitting, pushing, grabbing, spitting, kicking and biting.

In 2012, claimant continues to display the same behaviors described in the 2011 IPP.

10. NBRC utilizes a Respite Worksheet to determine the amount of respite to be provided to a family. In May 2011, claimant's Service Coordinator Daniel Silva completed the worksheet with claimant's father participating by telephone. The form instructs that IHSS protective supervision hours are to be considered a generic resource. Based on the worksheet formula, the amount of authorized in-home respite was up to 84 hours per quarter. Silva noted on the worksheet that claimant was receiving 45.03 hours per week of IHSS protective supervision, but he did not deduct the IHSS hours as a generic resource which would reduce the respite amount. Thus, claimant received 84 hours per quarter of respite.

June 2011 IPP Addendum

11. On June 11, 2011 an IPP addendum was issued stating that NBRC considers the 45.03 weekly hours of protective services claimant receives from IHSS to be a generic resource that NBRC can no longer fund. "NBRC granted a one-time exception for respite funding a year ago. NBRC will fund one more year of up to 84 hours per quarter (as determined by the respite worksheet) of agency respite from Bay Respite care, because NBRC failed to fully explain its policy and the statutory considerations in the IPP."

2012 IPP Addendums

12. A March 1, 2012 Addendum to the IPP indicates that claimant still displays unexpected outbursts of aggressive behavior. Claimant has been placed in a modified classroom at PACE designed to protect him and staff from any injury that may occur during aggressive outbursts. Claimant has his own room that has been outfitted with plexi-glass windows, the furniture is "bolted down" and the computer is encased in plexi-glass to preventing destruction.

Despite a reduction in claimant's aggressive behavior over the past reporting periods, between September 2011 and March 2012, he displayed 20 incidents of physical aggression, 15 episodes of self injurious behavior in the form of self hitting and biting, 11 incidents of tearing his shirt and 54 incidents of property destruction.

13. A NBRC Respite Worksheet was completed on April 20, 2012. Based on the information provided, the amount of respite authorized increased from 84 hours of respite per quarter to “up to 90 hours per quarter.”

14. On April 30, 2012, an IPP addendum was issued which proposed to terminate all in-home respite services based on claimant’s receipt of IHSS protective supervision of 45.03 hours per week. The addendum reflects that claimant’s family did not agree with this decision. NBRC issued a notice of proposed action dated April 30, 2012, terminating respite effective May 31, 2012. Claimant timely filed a fair hearing request. Claimant has continued to receive respite pending this decision.

NBRC Purchase of Service Policies

15. Purchase Memo 2301 of the North Bay Regional Center Procedures Manual governs general requests for purchases of service. It provides, among other things, that NBRC will not expend funds for services available through other public resources, citing Welfare and Institutions Code section 4659.

16. Purchase Memo 2315 governs the purchase of respite service for adult children living in the home. It provides, among other things, that individuals who are eligible for IHSS services are not eligible for any NBRC services that duplicate services covered by IHSS.

17. Joanne Giardello, NBRC Case Management Supervisor was present and testified at hearing. Claimant qualifies for up to 90 hours of respite, based on NCRB’s Respite Worksheet factors, only if generic resources are not available. Giardello testified that NBRC considers IHSS Protective Supervision to be a generic resource for in-home respite. Consequently, it is NBRC’s position that since claimant receives 45.03 weekly hours of protective supervision. Therefore, NBRC will not continue to fund up to 90 hours of respite for claimant.

Stipulations

18. The parties stipulate that protective services meet claimant’s need and that claimant has extreme needs.

NBRC

19. Michi Gates, Ph.D., is the Associate Director of Client Services of NBRC. She testified that NBRC considers IHSS Protective Supervision to be a generic resource for in-home respite.

20. Dr. Gates explained NBRC’s position in this case. NBRC had failed to follow its own guidelines in the March 2011 IPP. Notwithstanding this error, the decision was made to continue funding respite in 2011 and 2012 because the IPP had listed respite as a long-

term goal. In Dr. Gates view it was not fair to the family to discontinue respite under these circumstances. NBRC intended to fund respite for only one additional year, which it did.

21. Dr. Gates recognizes claimant's severe needs and that transitions result in aggravating claimant's stress levels and increasing his aggressive behavior. NBRC is willing to provide claimant with a long transition period in order to minimize respondent's stress and to train an IHSS worker in IABA techniques.

IHSS services

22. Claimant's parents provide claimant's IHSS protective services. Claimant's mother is employed as a para-professional in special education at a local high school. Claimant's mother works full time at school during the school week. Claimant's father is a retired police officer who currently works for the Special Olympics. Claimant's father is able to work at home during the week.

23. Claimant's typical day begins a 7:00 a.m. and ends at 10:00 p.m. However, claimant has aggressive outbursts requiring his parents' attention in the middle of the night. Claimant's parents remain "on call" during the day while claimant is at the PACE day program in the event claimant displays aggressive behavior and is required to leave the PACE facility. As claimant gets older and bigger, it is increasingly difficult for claimant's parents to respond to his aggressive behavior. Claimant's aggressive outbursts more often than not require a two person response to redirect claimant and prevent him from hurting others or himself.

24. Claimant's physical aggression and unpredictability has taken an emotional toll on his mother over the years, resulting in her receiving medical care and treatment for anxiety. On occasion, in order to rest, claimant's mother will go to a hotel to sleep while claimant's father stays with claimant.

25. Claimant's father has an injury to his spine that causes pain and limits his ability to restrain claimant during claimant's violent outbursts.

26. A June 12, 2012 letter from Carmen Curry, Social Worker in the IHSS program at Solano County Health and Social Services Department, states that claimant has been receiving IHSS services since 2008. There is no requirement that IHSS care providers receive training in either paramedical or behavioral challenges or education that supports claimant's needs. Curry's letter also notes that "IHSS care providers are not required or trained to deal with clients that need a higher level of care, therefore it would create a safety issue for the client and provider to insert a general care provider into the home that would receive hours allotted by the IHSS program in order for the claimant's parents to receive a respite period."

Team Jarred

27. Elaine Go, PACE Site Support Lead, and member of “Team Jarred” was present and testified at hearing. “Team Jarred” refers to the individuals at PACE who have been trained in IABA techniques and received specific training to work with claimant. “Team Jarred” consists of three-to-six PACE staff members, depending on claimant’s degree of agitation. Changes in claimant’s routine result in claimant’s severe agitation and aggressive behavior. Go has personally observed claimant’s aggressive behaviors. During the five years she has worked at PACE, no other consumer has received IABA assistance.

28. Andria Lopez Gomez was present and testified at hearing. Gomez is a former employee of PACE and was part of “Team Jarred.” Gomez has been trained in IABA techniques and received specific training in order to work with claimant. Gomez currently provides respite care for claimant and last worked with him in June 2012. Gomez describes working with claimant as rewarding, but physically, mentally and emotionally draining. Protective supervision of claimant requires hyper vigilance in order to anticipate triggers that may result in an aggressive outburst by claimant. Gomez’s extensive training in how to handle claimant’s behaviors and her ability to interact with claimant in a consistent manner that has enabled Gomez to successfully provide respite to claimant.

Other Evidence Regarding Claimant’s Behavior Analysis

29. David Mauger is a behavior consultant who provides services to PACE. Mauger was present and testified at hearing. Mauger works with PACE by performing oversight of claimant’s comprehensive IABA plan. Claimant has one of the most intense behavioral challenges in the entire PACE organization. Mauger ranks claimant’s behavioral challenges as number one or number two on the list of intense behavioral challenges Mauger has experienced throughout his career. Mauger noted that while claimant’s behavioral data indicates the frequency of his aggressive behaviors has decreased, the intensity and the severity of these outbursts has increased.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. The Lanterman Act mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community.” (Wel. & Inst. Code § 4501.) Regional centers are charged with the responsibility of carrying out the state’s responsibilities to the developmentally disabled under the Lanterman Act. (Wel. & Inst. Code § 4620, subd. (a).) The Lanterman Act directs regional centers to develop and implement an IPP for each individual who is eligible for

regional center services. (Wel. & Inst. Code § 4646.) The IPP states the consumer’s goals and objectives and delineates the services and supports needed by the consumer. (Wel. & Inst. Code §§ 4646, 4646.5, & 4648.)

2. While regional centers have a duty to provide a wide array of services to implement the goals and objectives of the IPP, they are directed by the Legislature to provide services in a cost-effective manner. (Wel. & Inst. Code § 4646, subd. (a).) In addition, regional centers may not fund services that are available through another public agency. This prohibition, contained in Welfare and Institutions Code section 4648, subdivision (a)(8), provides:

Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.

Toward this end, regional centers must “identify and pursue all possible sources of funding for consumers receiving regional center services.” (Wel. & Inst. Code § 4659, subd. (a).) In addition, Welfare and Institutions Code section 4646.4 requires regional centers when purchasing services and supports to ensure, among other things, 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. Respite is one type of service provided to consumers. Respite is defined in Welfare and Institutions Code section 4690.2, subdivision (a), as follows:

“In-home respite services” means intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client’s own home, for a regional center client who resides with a family member. These 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 to ensure 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 the family members.

4. The evidence establishes that in this case, IHSS provides claimant with 45.03 hours per week of protective supervision. There is no dispute that claimant has extreme needs and that claimant has intense behavioral challenges. The evidence established that claimant requires two providers trained in IABA techniques to provide claimant's IHSS protective services at home, and that three-to-six PACE staff members, specifically assigned to claimant, be available during his day program in order to provide claimant with protective services at PACE.

IHSS care providers are not required or trained to deal with clients that need a higher level of care; therefore, it would create a safety issue for claimant and his provider to insert a general care provider into the home in order for claimant's parents to receive a respite period. Moreover, NBRC's offer to fund IABA training for an IHSS care provider in order for claimant's parents to have a break from caring for claimant, underscores the fact that the IHSS protective supervision services are not an alternative generic service for respite.

This analysis is consistent with the limitations of section 4686.5, subdivision (5), which provides:

A regional center shall only consider in-home supportive services a generic resource when the approved amount of in-home supportive services meets the respite need as identified in the consumer's [IPP]

Based upon the facts presented, the IHSS protective supervision hours claimant currently receives do not provide him with the same services as respite. Claimant's protective services require both parents active participation to keep claimant from hurting himself and others. The evidence established that claimant's parents can not use the IHSS money to pay a third party to provide claimant with protective services due to his unique situation. The evidence also established that claimant's current respite provides appropriate care and supervision to ensure his safety in the absence of his family members. Claimant's IPP identifies claimant's respite need as requiring a break from his constant care and supervision. Claimant's IHSS protective supervision services therefore do not meet the consumer's respite need.

ORDER

The appeal of claimant Jarred P. from the determination of North Bay Regional Center to discontinue funding for respite services, is granted. North Bay Regional Center shall continue to fund up to 90 hours per quarter of respite for claimant.

DATED: _____

DIANNA L. ALBINI
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.