

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DAVID S.,

Claimant,

OAH No. 2012060001

vs.

REDWOOD COAST REGIONAL
CENTER,

Service Agency.

DECISION

Administrative Law Judge Jill Schlichtmann, Office of Administrative Hearings, State of California, heard this matter on July 5, 2012, in Lakeport, California.

Claimant was represented by his father, David.

Kathleen Kasmire, M.S.W., Consumer Services Manager, represented Redwood Coast Regional Center, the service agency.

ISSUE

May the Redwood Coast Regional Center discontinue funding 90 hours per month of in-home respite services that it currently provides to claimant?

FACTUAL FINDINGS

1. Claimant is a 26-year-old consumer of Redwood Coast Regional Center (RCRC) who is eligible for regional center services because he suffers from epilepsy. Claimant typically has at least three seizures per day, in his right arm, and to a lesser extent, in his right leg. Claimant's seizures are unpredictable, and can be triggered by heat,

excitement or stress. During his seizures, claimant sometimes falls and is susceptible to injury.

2. Claimant's mobility and adaptive living skills are extremely limited. Claimant weighs approximately 300 pounds and is five feet and four inches tall. He is unable to use his right hand due to the impact of the seizures. He takes medication that slows down his motor skills and increases his physical instability. Claimant requires assistance to prevent falls during a seizure, and as necessary, to lift him up from a seated position, or off of the ground. This requires around-the-clock care and supervision. Claimant needs assistance to dress, shower and toilet him.

3. Claimant suffers from chronic pain, sleep problems and anxiety. Claimant sleeps on a recliner in the living room. He typically awakens two to three times during the night to use the bathroom or to readjust himself. A caregiver stays in the living room with him throughout the night and assists him when he awakens.

4. Claimant resides with his father and his father's fiancé. The fiancé is disabled and unable to help with claimant's care. Claimant's father is also disabled which makes it extremely difficult for him to provide care and supervision to claimant. Since hernia operations in 2008 and December 2009, claimant's father has been in severe pain as a result of nerve entrapment and scar tissue that built up from the surgeries. He cannot lift heavy objects. Claimant's father was awarded disability pension benefits from the Veteran's Administration on February 7, 2012, effective August 22, 2011. Claimant's father's health has deteriorated significantly over the past 18 months.

5. Claimant's father loves his son dearly, and he has strained himself trying to keep claimant from falling. Claimant's father testified that it would be devastating physically and emotionally for him and for claimant if the respite hours were discontinued. Claimant is already depressed and has once attempted suicide. The family very much needs this assistance because claimant's father is not able to care for claimant more hours each day than he is doing currently. The testimony of claimant's father regarding the extent to which his medical condition impairs his ability to provide claimant with appropriate care and supervision was credible and candid, and was corroborated by claimant's caregiver, Tawnya Tartaro, and his fiancé.

6. RCRC provides claimant with a variety of services and supports, including 30 hours per week of personal assistance and 90 hours of in-home respite per month. On May 9, 2012, RCRC sent claimant a Notice of Proposed Action. The Notice of Proposed Action states that RCRC declined to continue funding 90 hours per month of in-home respite. In its Notice of Proposed Action, RCRC stated the reason for the reduction:

According to RCRC's "Family Respite Needs Assessment Guidelines" David and his family do not meet the requirement to qualify for Regional Center funded respite services, as set forth in California Welfare and Institutions Code section 4686.5.

David receives up to 150 hours per month¹ of Redwood Coast Regional Center funded personal assistant hours and 272 hours a month of In Home Supported Services (IHSS) funded by Lake County Department of Social Services, 60 of these hours per month are Protective Supervision. Both of these current services provide David[’s] family with respite break from David’s care.

7. Claimant timely filed a fair hearing request, and this hearing followed.

8. Claimant’s father uses the funds provided by RCRC and IHSS to hire caregivers for claimant, rather than providing those services himself. He believes that the IHSS and personal assistant hours are insufficient to assist him in the care and supervision of claimant.

9. RCRC contends that claimant’s needs must be met first with generic resources. It considers the 60 hours of protective supervision to constitute a generic resource for in-home respite services. Claimant contends that protective supervision is not a generic resource for respite. Claimant’s father provided the IHSS definition of “protective supervision” contained within a Department of Social Services provider orientation manual, which reads: “Observing the behavior of a consumer who is confused, mentally impaired or mentally ill in order to safeguard him/her against injury, hazard, or accident. It is expected that the consumer is supervised 24 hours a day, 7 days a week.”

10. RCRC Service Coordinator Drena Jensen explained the process by which RCRC reached its determination. In assessing claimant’s respite needs, RCRC uses a Family Respite Needs Assessment Guideline (Respite Guideline). The Respite Guideline assesses a consumer’s respite needs based upon factors such as the consumer’s adaptive skills, mobility, medical needs, and family situation. A point system is assigned to each factor, with increasing points based upon the needs of the consumer. According to RCRC’s Family Respite Needs Assessment Summary Sheet (Respite Summary Sheet), a score of 30 points means that a consumer may receive up to 90 hours of respite services per quarter. According to the Respite Summary Sheet, a score in excess of 30 points requires that the Expanded Planning Team meet and determine the appropriate number of respite hours per quarter, taking into account the criteria set forth in Welfare and Institutions Code section 4686.5.

11. At a hearing on October 13, 2011, Jensen acknowledged that claimant should have been assigned a score of six points instead of five points for adaptive skills because claimant “requires total care in some aspect of dressing, eating, grooming, [or] toileting.” The change increased claimant’s score to 32, thereby placing him in a category which required an Expanded Team Meeting to determine the appropriate number of respite hours to meet claimant’s needs.

¹ Claimant receives 30 hours per week of funded personal assistant hours from RCRC.

12. RCRC was ordered to re-calculate claimant's adaptive skills score on its Respite Summary Sheet, and to re-assess the extent to which claimant's father's medical condition continued to impair his ability to meet claimant's needs for care and supervision.

13. No evidence of an Expanded Team Meeting was submitted at this hearing. Instead, Jensen later met with claimant's father, and after discussing the various categories with him, she reduced claimant's assessment score 30, which does not require an Expanded Team Meeting to determine claimant's needs. Claimant's father testified at hearing that he had been under emotional stress during the meeting with Jensen due to his medical difficulties and the prospect of losing the respite hours. He believes that claimant's assessment score should have been much higher.

14. In the revised assessment, claimant was assigned five points in the adaptive skills category (instead of six points as was acknowledged during the previous hearing). There also appears to be an error in the assessment of claimant's medical needs. Claimant was assigned six points in that category. The form states that five points should be assessed if the individual has frequent illnesses or a condition requiring out of area medical appointments. It instructs that 10 points are to be assigned to individuals who require "almost constant attention to medical conditions or procedures (e.g. *seizure disorder requiring continual monitoring or immediate caregiver involvement. . .*)."

(Emphasis added.) In light of the undisputed testimony and documentary evidence that claimant suffers from at least two or three seizures daily and requires continual monitoring and immediate caregiver involvement during a seizure, 10 points, rather than six points, should have been assigned to this category.

15. These additional points increase claimant's total score to over 30 points, thereby placing him in a category which requires an Expanded Team Meeting to determine the appropriate number of respite hours to meet claimant's needs.

LEGAL CONCLUSIONS

1. The standard of proof in this case is the preponderance of the evidence because no law or statute requires otherwise. A regional center seeking to terminate ongoing funding provided to a consumer has the burden of demonstrating its decision is correct. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9 [party asserting a claim or making charges generally has the burden of proof in administrative hearings].) In this case, RCRC bears the burden of proof, because it seeks to terminate funding for respite services it currently provides. (Factual Finding 6.)

2. 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." (§ 4501.) Regional centers are required to carry out the state's

responsibility to the developmentally disabled. (§ 4501.) 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 RCRC’s proposed discontinuation of funding 90 hours per month of in-home respite services. (Factual Finding 7.)

3. In-home respite is one type of service provided to consumers. It is defined under 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. While regional centers have a duty to provide a wide array of services, they are directed by the Legislature to provide services in a cost-effective manner. (§ 4646, subd. (a).) In addition, regional centers may not fund services that are available through another public agency. This prohibition, contained in 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.” (§ 4659, subd. (a).) In addition, 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.

5. The evidence established that IHSS services provided to claimant include protective supervision, which provides claimant's father with funds to hire a third party to provide direct care and supervision for claimant. This funding serves the dual purpose of providing claimant with supervision while also allowing his father time for a break from caring for claimant. Inasmuch as the funding of protective supervision services also serves the father's need for respite, it constitutes an alternative and generic source of funding for respite. (Factual Findings 6, 8 and 9.) The question remains, however, given claimant's extraordinary needs and his father's medical condition, whether RCRC's decision to discontinue funding 90 hours per month of in-home respite services is correct.

6. The Legislature has made significant changes regarding the provision of services under the Lanterman Act through the Budget Act of 2009. With respect to the provision of respite services, Welfare and Institutions Code section 4686.5 was added to provide in relevant part:

(a) Retroactive to July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, all of the following shall apply:

(1) A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.

(2) A regional center shall not purchase more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer.

(3)(A) A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) if it is demonstrated that the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer.

Thus, Welfare and Institutions Code section 4686.5 requires RCRC to limit the purchase of respite services for claimant to 90 hours per quarter, unless the regional center determines that claimant meets the criteria for an exemption. In order for an exemption to apply, claimant must demonstrate that the intensity of his needs are such that additional respite is necessary to maintain him in the family home, or that there is an extraordinary event that impacts the family member's ability to meet his care and supervision needs.

7. The overarching goal of the Lanterman Act is to provide an array of services to support consumers and to maintain them in the family home. The goals of respite services also include assisting family members in maintaining the client in the family home, and providing appropriate care and supervision to ensure the client's safety. (Welf. & Inst. Code, § 4690.2, subd. (a).)

8. The evidence established that claimant's father requires an extraordinary amount of respite to ensure claimant's safety, and to assist him in maintaining claimant in the family home. RCRC's assessment of claimant's respite needs did not properly take these factors into account. Its assessment of claimant's needs was incorrectly calculated on the Respite Summary Sheet and no team meeting occurred, as would be required by a correct calculation. RCRC did not meet its burden of demonstrating that a discontinuation of respite services is warranted. (Factual Findings 10 through 15.)

ORDER

The appeal of David S. is granted. Redwood Coast Regional Center may not discontinue funding 90 hours per month of in-home respite services at this time.

DATED: _____

JILL SCHLICHTMANN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Judicial review of this decision may be sought in a court of competent jurisdiction within ninety (90) days.