

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

A.D.,

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2013061087

DECISION

Administrative Law Judge Amy C. Yerkey, State of California, Office of Administrative Hearings, heard this matter on August 16, 2013, in Torrance, California.

Gigi Thompson represented the Harbor Regional Center (HRC or regional center or Service Agency).

Nathan D. and Kelly D. represented their daughter, A.D.¹

The matter was submitted on August 16, 2013.

ISSUE

The question in this matter is whether the Service Agency may deny Claimant's parents request to provide parent-vouchered respite services for their daughter.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-17; Claimants' exhibits A.

Testimonial: Barbara Maeser, HRC Program Manager; Jahn Rokicki, HRC Director of Children's Services; Kimberly Chvotkin, HRC Nurse Consultant; and Claimant's parents, Nathan D. and Kelly D.

¹ Initials have been used to protect the family's privacy.

FACTUAL FINDINGS

1. Claimant is a five-year-old female who qualifies for regional center services based on a diagnosis of intellectual disability unspecified, due to a chromosomal abnormality.

2. Claimant had been receiving 18 hours per month of respite services provided by a licensed vocational nurse (LVN) since 2011. Initially the respite services were provided by the agency Accessible Health Care. Claimant's parents had issues with the workers cancelling at the last minute, or failing to show up altogether, and thus they requested to use a different agency. HRC then provided respite care services through Continuity Care. In March 2013, Claimant's parents discovered that the respite worker from Continuity Care was stealing items from their home. When confronted, the worker admitted to the theft. Claimant's parents immediately discontinued respite services from Continuity Care. Claimant's parents then informed regional center about the theft problem, and requested to provide parent-vendored² respite services. By letter dated June 17, 2013, HRC denied Claimant's parents request. The stated reasons for the decision were that HRC thinks that Claimant requires respite by a medical provider, or someone with proper medical training, according to the requirements as set forth in Welfare and Institutions Code section 4686. According to HRC, there are no agencies available to provide the necessary training. In addition, HRC questioned whether Claimant was medically stable as required by section 4686. Thus, HRC determined that Claimant's parents cannot utilize the parent-voucher option.

3. Claimant's parents disagreed with HRC's decision and timely filed the instant fair hearing request.

4. Claimant's most recent Individual Family Service Plan (IFSP), dated February 12, 2013, states that HRC will provide 18 hours of "nursing respite" services per month.

5. Barbara Maeser (Maeser), HRC Program Manager for Early Childhood Services, testified at the hearing. Maeser explained that parent-vouchered respite is when the parent acts as the employer, and accepts responsibility for hiring, training, and payroll, including taxes and insurance. HRC does not currently offer parent-vouchered respite to its consumers and their families. When asked why, Maeser explained that HRC thought parent-vouchers were too burdensome, and thus HRC does not allow parent vouchers under any circumstances. Self-directed respite, which HRC does offer, allows parents to choose their respite provider, but requires that the provider be employed through an agency, so the parents are not responsible for the financial logistics associated with being an employer. Maeser also explained that respite is divided into two categories: medical or non-medical. HRC has determined that Claimant requires medical respite because Claimant obtains her nutrition

² For purposes of this Decision, the terms "parent-vendored" and "parent-vouchered" are used interchangeably and have the same meaning, which is that the parent would act as the employer for the respite worker.

through a gastrostomy tube. HRC recognized that an unlicensed respite worker may perform incidental medical services, such as those related to gastrostomy, provided that the worker has received appropriate training as set forth in Welfare and Institutions Code section 4686. HRC is not aware of any agencies that provide the required training. Thus, HRC contends that there is not an option to provide non-medical respite.

6. Jahn Rokicki (Rokicki), HRC Director of Children's Services, testified at the hearing. He reiterated that HRC does not offer parent-vouchered respite, because of the legal logistics, such as parents being responsible for taxes. HRC found that some parents who opted for the voucher-system did not comply with the requirements. HRC offers "self-directed" respite instead. He opined that even if HRC allowed parent-vouchered respite, Welfare and Institutions Code section 4686 would not apply because the law requires the respite worker to be employed by an agency. Further, HRC's position is that Claimant requires respite care from a trained worker, because of her gastrostomy tube feeding. Rokicki also mentioned issues with Claimant's heart condition and skin care. He noted that Section 4686 requires Claimant to be medically stable before the regional center could permit an unlicensed respite worker with proper training to provide her respite care. Regarding the required training, Rokicki stated that HRC is not aware of any agency within California that is certified to provide the required training, and thus HRC is not able to offer that option to Claimant's family.

7. Kimberly Chvotkin (Chvotkin), HRC Nurse Consultant, testified at the hearing. Chvotkin reviewed Claimant's medical records and agreed with the recommendation that Claimant receive respite care from a licensed vocational nurse. She opined that Claimant has an uncommon feeding schedule, requiring small amounts of nutrition over frequent periods of time, which indicates that Claimant has difficulty with larger amounts and has tolerance issues with feeding. She expressed concern that an untrained worker may not know about troubleshooting with a gastrostomy tube.

8. Claimant's father, Nathan D., testified at the hearing. At the outset, he expressed that the family's ultimate concern is the safety of their daughter. He described the difficulty that Claimant's family had with the respite workers that HRC provided, including the unreliability of the workers when they first began using Accessible Health Care, and the violation of trust they felt when they learned that the worker from Continuity Care was stealing from them. When Claimant's father initially reported the latest problems to HRC, HRC offered respite care through Accessible Health Care, the agency that had provided unreliable workers. Although HRC has eight different agencies available, it did not suggest other alternatives to Claimant's family until several months later, when they initiated the appeal process. Because of these experiences, Claimant's family wants to select Claimant's respite provider, and they know several trustworthy individuals who are willing to be trained in accordance with Welfare and Institutions Code section 4686. Claimant's father explained that Claimant is medically stable, she has no current heart or other issues, and Claimant's family is willing and able to provide medical documentation to demonstrate her stable condition. The only issues that Claimant's father noted were diapering and feeding, which involves proper care of her gastrostomy tube, and also Claimant eats some baby food by mouth. Claimant's father explained that he and his wife have learned how to properly care

for Claimant, and they are confident that the individuals they have selected can also be trained to provide safe and competent care for Claimant.

9. Claimant's father has performed extensive research to find an agency which is willing and able to meet the requirements of Welfare and Institutions Code section 4686, which sets forth the requirements for training unlicensed respite workers to perform incidental medical services. He has located United Cerebral Palsy (UCP) in San Joaquin, California, a respite agency which is currently applying for approval from the Department of Developmental Services (DDS) with regard to section 4686. UCP representatives assured Claimant's father that they would assist him or a local agency in developing the required curriculum for DDS approval, and they were willing to share the guidelines they had developed. Claimant's father found a local agency, Volunteers of America, who was willing to comply with the requirements of 4686 and the option of self-directed respite, to allow Claimant's family the option to use the respite provider of their choice. In addition, Claimant's father is willing to create his own agency. Claimant's father owns a successful air conditioning business and was not deterred by the requirements of parent-vouchered respite. The primary concern for Claimant's family is finding a respite worker whom they trust that can provide proper care for Claimant. Although Claimant's family may ultimately choose to use self-directed respite, they want the option of parent-vouchered respite.

10. Claimant's mother, Kelly D., also testified at the hearing. She further explained that when Claimant's family had previously used Accessible Health Care and had difficulty with unreliable workers, she first requested another worker from within Accessible. They informed her that no other workers were willing to work in four-hour increments, which is the amount of time desired by Claimant's family, and thus Accessible could not provide Claimant with a respite care worker. Claimant's family wound up forgoing their respite hours for a period of time as a result. Claimant's mother also explained that Claimant's medical condition is stable, and that the regional center should be aware of this not only because she has reported it, but she has also signed medical authorizations which permit HRC to access Claimant's medical records. In addition, Claimant's family is willing and able to provide documentation of her medical stability.

LEGAL CONCLUSIONS

1. Cause exists to grant Claimant's appeal and reverse HRC's decision to deny parent-vouchered respite, as set forth in Factual Findings 1 through 10, and Legal Conclusions 2 through 9.

2. The Lanterman Act, incorporated under Welfare and Institutions Code section 4500 et seq., acknowledged the state's responsibility to provide services and supports for developmentally disabled individuals. It also recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (Welf. & Inst. Code, § 4501.)

3. “The department and regional centers shall give a very high priority to the development and expansion of services and supports designed to assist families that are caring for their children at home, when that is the preferred objective in the individual program plan. This assistance may include, but is not limited to . . . respite for parents” (Welf. & Inst. Code, § 4685, subd. (c)(1).)

4. “In-home respite services” are defined as “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.” (Welf. & Inst. Code, § 4690.2, subd. (a).) The Lanterman Act authorizes family member-provided respite. (*Id.* at § 4690.5.)

5. “Notwithstanding any other provision of law or regulation to the contrary, an in-home respite worker who is not a licensed health care professional but who is trained by a licensed health care professional may perform incidental medical services for consumers of regional centers with stable conditions, after successful completion of training as provided in this section.” Incidental medical services provided by trained in-home respite workers shall be limited to the following: . . . [g]astrostomy: feeding, hydration, cleaning stoma, and adding medication per physician's or nurse practitioner's orders for the routine medication of patients with stable conditions.” (Welf. & Inst. Code, § 4686, subd. (a)(3).) Section 4686 also sets forth the requirements for training, such as employment with an agency that has developed protocols approved by the Department of Developmental Services. (*Id.*)

6. The Lanterman Act also provides that “[t]he 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, or when appropriate, the consumer’s family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in 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, . . . vouchers” (Welf. & Inst. Code, § 4512, subd. (b).)

7. “To ensure that these services and supports are provided in the most cost-effective and beneficial manner, regional centers may utilize innovative service-delivery mechanisms, including, but not limited to, vouchers” (Welf. & Inst. Code, § 4685, subd. (c)(3)(a).)

8. “Voucher” is defined as “any authorized alternative form of service delivery in which the consumer or family member is provided with a payment, coupon, chit or other form of authorization that enables the consumer or family member to choose their own provider.” (Welf. & Inst. Code, § 4512, subd. (i).)

9. Given the foregoing, Claimant’s appeal must be granted. When read together, the Lanterman Act makes clear that the Legislature has allowed for alternative forms of securing services and their payments, including parent vouchers. It would be contrary to the Legislature’s intention to simply disallow vouchers, as HRC has done, for patriarchal reasons, such as other parents had difficulty complying with the legal requirements. Here,

Claimant's father runs his own business and is capable and willing to comply with the voucher requirements. HRC has not articulated a valid reason why Claimant's family should not be permitted to use the voucher system, which is clearly permissible under the Lanterman Act. HRC's purported reason for denying parent-vouchered respite, that Claimant's family cannot meet the requirements of Section 4686, is without merit. Claimant's family may choose to hire a licensed vocational nurse with their parent-voucher. Since a licensed vocational nurse has already received the requisite training for gastrostomy care, Section 4686 would not apply. If Claimant's family chose to hire an unlicensed health care professional, then Section 4686 would apply, and Claimant's family may choose to use the self-directed option, through which their chosen worker would receive training from an accredited agency. The fact that HRC has not identified an agency to provide the training set forth in Section 4686 is not a valid reason to deny Claimant's parents from pursuing this option, especially where it is specifically provided for within the Lanterman Act. The evidence showed that at least one agency within the state is in the process of becoming accredited, and others are willing. Whether a local agency will become properly accredited to provide the training in accordance with Section 4686, or whether Claimant's father has to form his own agency, Claimant's family is entitled to all of these options under the Lanterman Act.

ORDER

Claimant A.D.'s appeal is granted. Harbor Regional Center may not deny Claimant's family from exercising the option to use a parent-voucher for respite services.

DATED: August 23, 2013


AMY YERKEY
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.