

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

HARBOR REGIONAL CENTER.

OAH No. 2013100817

A Proceeding Under the
Lanterman Developmental Disabilities
Services Act

DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, in Torrance on January 23, 2014. Harbor Regional Center (Service Agency) was represented by Gigi Thompson, Manager of Rights Assurance. Claimant was represented by his mother.

Harbor Regional Center (Service Agency) presented Exhibits 1– 13 and 16 – 17 and the testimony of Patricia Piceno, Program Director. Claimant presented Exhibits A – F and the testimony of the mother. The Administrative Law Judge admitted the exhibits into evidence pursuant to Welfare and Institutions Code section 4712, subdivision (i).

Oral and documentary evidence having been received, the Administrative Law Judge submitted this matter for decision on January 23, 2014, and, relying on the aforementioned exhibits and testimony of witnesses, finds as follows:

ISSUE

The issue presented for decision is whether claimant should receive 10 additional hours per month of in-home respite and two hours per day of day care or after school care.

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FACTUAL FINDINGS

1. Claimant is a 19-year-old, non-conserved adult who was diagnosed with mild mental retardation (Down Syndrome). Based on his diagnosis and developmental delays and/or disabilities, claimant is eligible for and receives regional center services from the Service Agency, including 24 hours per month of in-home respite as well as support and planning services, information, and referrals to other resources as needed. Claimant receives in-home respite services from the authorized vendor Cambrian. He also receives 260.5 hours per month of In-Home Supportive Services (IHSS).

2. Claimant lives with his mother in the family home in Torrance. He communicates largely by using signs and gestures but can say one-word utterances. He often screams which may be due to his lack of verbal communication skills. Claimant tries to do many tasks himself but needs prompting and supervision to complete most of his self-help tasks. Claimant presents with challenging behaviors. When he becomes frustrated or over-stimulated, he engages in tantrum behaviors such as hitting, spitting, throwing items, and yelling. He has tantrums once or twice per day. He is also resistive and non-compliant, does not have a regular sleeping schedule, is very active, and can get out of control. Claimant has a history of eloping and his mother must be vigilant to prevent her son from leaving their house. As set forth in his most recent Individual Family Service Plan (IFSP) from April and May 2013, claimant requires close supervision on a constant basis. His behaviors are said to be attributed to a sensory integration disorder.

3. (A) Claimant's mother is his primary caregiver as well as IHSS worker. His father passed away in November 2012 and his older brother lives elsewhere and has his own family. His mother is employed as the executive officer of the Sensory Integration Education and Research Foundation (SIERF), a non-profit organization that provides treatment to children with sensory processing disorders and support and education for their parents. With offices in New Orleans and Torrance, SIERF has raised funds to provide treatment to children with special needs and to send them to summer camp. The organization has also sponsored a staff and student appreciation day at Carousel School, a non-public school, which raised funds and donations for therapy equipment.

(B) Claimant's mother works and performs her duties as the executive officer of SIERF from her office at home in Torrance. As the sole employee of SIERF in Torrance, she oversees the accounting and activities of the organization and conducts and attends fund-raising and other activities, meetings, and events. Claimant's mother often attends events and meetings in the late afternoon and evenings. In addition to her duties for SIERF, claimant's mother performs private consulting work for or with persons with special needs.

4. Based on his intellectual disability, claimant attends and/or receives special educational services and supports from his local school district. The school district determined that claimant has severe delays in cognitive functioning and delays in adaptive functioning. As set forth in his February 7, 2012 Individual Education Plan, the school district has provided claimant with specialized academic instruction at the non-public school, Carousel School in Westchester, a one-to-one aide, a behavioral support plan, occupational and speech and language therapies, and transportation to and from home, school, and after-school care.

5. Claimant attended Carousel School during the 2012-2013 school year. In addition, for the 2012-2013 school year, the Service Agency was directed to provide claimant with 50 hours per month of after school care at the Salvin Learning Center, which is affiliated with Carousel School, pursuant to a fair hearing and Decision by the Office of Administrative Hearings in Case No. 2012080055. Claimant had received Service Agency funding for after school care in the three prior school years on the basis that his mother is a single parent who works full-time from home and could not work and supervise her son due to his behavioral problems and need for constant supervision.

6. Presently, claimant is not attending Carousel School. He has a history of refusing to go to school one to two times per month. On July 13, 2013, claimant eloped from home and was detained by the police after he entered an unlocked vehicle and did not comply with instructions of the police. Thereafter, claimant refused to leave home to go to school or to preferred places. He did not attend the last two weeks of the extended school year, or summer school, and has not attended Carousel School during the current 2013-2014 school year. Claimant's mother has kept her son at home and is involved in an ongoing dispute or due process proceeding with the school district regarding the academic placement of her son at another non-public school.

7. Because claimant has not been attending school and been staying at home every school day, his mother has found it difficult to work at home and to perform her daily duties as the executive officer of SIERF. In addition, claimant has had health issues. On July 22, 2013, he was seen at a hospital for having an altered level of consciousness and referred to a clinic. On August 30, 2013, he was seen at an emergency room and prescribed medications for anxiety and behavioral problems. He had thrown objects and turned over furniture at home.

8. Based on the her son's problems described in Findings 1 – 7 above, claimant's mother made the service request that is at issue in this matter. In a decision letter dated October 4, 2013, the Service Agency denied claimant's request for an increase in in-home respite hours and child care. On October 21, 2013, claimant's mother filed a Fair Hearing Request to appeal the determination of the

Service Agency and to request additional respite hours and after school care. This matter ensued.¹

9. In this appeal, claimant's mother has requested 10 additional respite hours per week, or approximately 43 additional hours per month, so that she can work at home and her son can receive proper supervision and assistance at home. She explained that she is unable to work effectively at home while claimant stays home from school because she has to spend more time to supervise him. Furthermore, claimant's mother has requested 10 hours per week, or approximately 43 hours per month, of after school care or day care so that she can attend meetings and events required of her as the SIERF executive director. Claimant's mother did not ask for transportation services to the after-school care or day care.

10. In its October 4, 2013 decision letter, the Service Agency asked, in part, that claimant's mother provide more information about her daily and weekly work schedule so that the regional center could assess claimant's need for supervision and after school or child care hours. The Service Agency sent her a worksheet so that she could describe the hours and times that she spent in attending meetings, participating in telephone calls, corresponding or emailing, and traveling for SIERF. Claimant's mother did not complete the worksheet. Instead, she forwarded a letter from the president of SIERF and flyers on community events sponsored, in part, by SIERF. Claimant's mother testified that she cannot complete the worksheet because her work schedule is variable, cannot be described with specificity, and includes confidential or personal information from her private consulting work. In response, the Service Agency has prepared a chart (Exh. 17) showing its estimates or hypotheses how claimant's mother could provide for supervision to her son using IHSS hours, respite hours, school hours, and her own time.²

11. (A) In a Notice of Action that became effective on July 1, 2013, claimant's IHSS hours were reduced from 283 hours to 260.5 hours per month. His IHSS hours include 39.79 hours per week, or approximately 171 hours per month, for protective supervision.

¹ On September 11, 2013, claimant's mother withdrew an earlier Fair Hearing Request in which she asked for adaptive living skills training and child care for her son. Subsequently, the parties agreed that claimant should receive in-home behavioral supportive services to address and manage his behaviors. Prior to the hearing in this matter, claimant underwent a functional behavioral assessment in preparation for the provision of the behavioral supportive services.

² The Administrative Law Judge placed little evidentiary weight on Exhibit 17 inasmuch as it was an estimate by the Service Agency and was not shown to be based on actual times or information obtained from claimant's mother.

(B) At his latest IFSP meeting, the Service Agency advised claimant's mother that she should find and hire IHSS workers, in addition to herself, so that she could have the support and flexibility to care for her son's needs.

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Pursuant to the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1. Grounds exist under the Lanterman Developmental Disabilities Services Act (Lanterman Act) to grant, in part, claimant's request for more monthly hours of in-home respite but not for after-school or day care, based on Findings 1 – 11 above.

2. Under the Lanterman Act, the Legislature has decreed that persons with developmental disabilities have a right to treatment and rehabilitative services and supports in the least restrictive environment and provided in the natural community settings as well as the right to choose their own program planning and implementation. (Welf. & Inst. Code, § 4502.)³

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. (§ 4512, subd. (b).) The determination of which services or supports are necessary for each consumer must be made through the individual program planning process and may include day care, protective services, child care, community integration services, supported living arrangements, and respite, among other services. (*Ibid.*)

The Legislature has further declared regional centers are to provide or secure family supports that, in part, respect and support the decision making authority of the family, are flexible and creative in meeting the unique and individual needs of the families as they evolve over time, and build on family strengths and natural supports. (§ 4685, subd. (b).) Services by regional centers must be provided in the

³ Further statutory references are to the Welfare and Institutions Code unless indicated otherwise.

most cost-effective and beneficial manner. (§§ 4685, subd. (c)(3), and 4848, subd. (a)(11)) and must be individually tailored to the consumer (§ 4648, subd. (a)(2)).

Further, section 4648, subdivision (a)(8), provides that 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 funds to provide those services. Section 4659, subdivision (a)(1), directs regional centers to identify and pursue all possible sources of funding for consumers receiving regional center services.

Section 4646.4, subdivision (a), requires regional centers, when purchasing services and supports, to ensure conformance with purchase of service policies and to utilize generic services and supports when appropriate. Regional centers are required to take into account the consumer's need for extraordinary care, services, and supports and supervision.

3. Respite—In-home respite services are intermittent or regularly scheduled temporary non-medical care and supervision services provided for a consumer in his or her own home and who resides with a family member. (§ 4690.2, subd. (a).) Respite care is designed to assist family members in maintaining the consumer at home, provide appropriate care and supervision to ensure the consumer's safety in the absence of family members, relieve family members from the constantly demanding responsibility of caring for the consumer, and attend to the consumer'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. (§ 4690.2, subds. (a)(1) – (4).)

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. (§ 4686.5, subd. (a)(1).) A regional center shall not purchase more than 90 hours of in-home respite services in a quarter for a consumer. (§ 4686.5, subd. (a)(2).) A regional center may grant an exemption to this limit, 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. (§ 4686.5, subd. (a)(3).)

In addition, section 4686.5, subdivision (a)(5), provides that a regional center shall only consider IHSS a generic resource when the approved IHSS meets the respite need as identified in the consumer's individual program plan.

4. Discussion of Claimant's Respite Request—Claimant met his burden of proof in this administrative proceeding of showing that he should receive additional hours per month of respite services due to a change in his circumstances. (See, e.g.,

Hughes v. Board of Architectural Examiners (1998) 17 Cal.4th 763, 789, fn. 9.) Under section 4686.5, subdivision (a)(2), a consumer is generally limited to receiving 30 hours per month of in-home respite services unless he qualifies for additional respite under two exemptions. Inasmuch as there was no evidence or argument that claimant may be required to leave the family home, the issue is whether claimant qualifies for an exemption to receive more respite because there has been an extraordinary event impacting his mother's ability to meet his care and supervision needs.

Here, claimant was detained by the police in July 2013 and, thereafter, did not want to attend his non-public school and his after-school care program any longer. He had history of not wanting to go to school. His mother decided that it was in the best interests of her son to keep him at home and to seek a change of his non-public school placement through discussions with the school district. That claimant was detained and has been staying at home from school can be considered an extraordinary event that impacted his mother's ability to care and supervise him. Since claimant is not in school for the five or six hours of a normal school day and is not attending his after school program for two hours thereafter, his mother has had to shoulder more responsibility in caring for and supervising him at home. She has continued working as the executive officer of a non-profit organization but has found it difficult to work at home and supervise her son who needs constant supervision. The evidence thus demonstrated that claimant temporarily requires additional respite services so that he can receive appropriate care and supervision at home to ensure his safety and to relieve his mother from the added burden of caring for him at home.

Moreover, it was not established that claimant's IHSS can be considered a generic resource for provision of respite under section 4686.5, subdivision (a)(5). Claimant's IHSS do include hours for protective supervision, but it was not established that protective supervision hours can be used for respite or that his IHSS is supposed to meet his need for respite under his IFSP. The IFSP document indicates claimant should receive 24 hours per month of in-home respite services but it does not contain any reference that IHSS should be used for respite. As such, claimant's IHSS hours should not be considered a generic resource that can be used for purposes of assessing his need for respite services under section 4686.5, subdivision (a)(5).⁴

Based on the foregoing, claimant is entitled to receive additional in-home respite services in excess of the 30 hours per month limitation set by statute.

⁴ In Case No. 201208005, the Service Agency made a similar argument, contending that the IHSS protective supervision hours were a generic resource that should be used by claimant's mother for providing after school care for her son. However, in that case, it was determined that the Service Agency did not demonstrate that those protective supervision hours were actually available to be used for after school care.

Claimant shall continue to receive the 24 hours per month of in-home respite services as delineated in his IFSP and shall receive an additional 20 hours per of in-home respite services so that he can receive proper care and supervision at home. Unlike day care or after school, the provision of additional in-home respite services is more feasible and practicable inasmuch as claimant is already receiving in-home respite services from the provider Cambrian.

5. Day Care or After-School—Under the Harbor Regional Center Service Policy for Day or After School Care, day care or after-school care is defined as care and supervision for pre-school and school age children with specialized care needs whose parents are unavailable to provide such care and supervision because they are engaged in full-time work or vocational training. The Service Agency recognizes, in part, that some families with a developmentally disabled child are not able to meet all of their child care needs through traditional sources because some children with a developmental disability require special accommodations or other special care beyond that needed by typically developing children of similar age.

Under this policy, the Service Agency may support families of pre-school and school age children with the purchase of that portion of day care or after-school care related to a specialized need only under the following circumstances:

- a. The parent of a single parent household or both parents of a two parent household are engaged in full-time employment or vocational training and providing day and/or after-school care will enable the continuation of such employment or training; and
- b. The parent or parents are responsible for that portion of the child care costs which the parents of a typically developing child would incur; and
- c. The child has behavioral challenges, special medical needs, or other supervision needs that require specialized care which exceed that needed to care for non-disabled children of the same age; and
- d. There are no natural or generic supports available to provide the care and supervision; and
- e. Day and after-school care is not available to the family through the usual resources found in communities (such as day care centers, schools, churches, YMCA, etc.); and
- f. The cost of such extra and specialized care is reasonable and cost-effective; and
- g. Some families may be required to contribute to the additional cost of specialized child care pursuant to the Family Cost Participation Program; and

h. The day or after-school care is provided in a licensed care setting.

6. Discussion of Claimant's Request for Day Care or After-School Care—
In this matter, it was not established that claimant qualifies for the receipt of day care or after school care under the service policy of the regional center. Clearly, claimant has behavioral challenges. He tends to elope and to have tantrums. He is active and can become frustrated, resistive, and non-complaint. Claimant needs constant supervision and receives services of a one-to-one aide at school. Claimant's mother is his primary caregiver and IHSS worker and works from home as the executive officer of a non-profit organization.

However, the evidence did not clearly show that claimant's mother is engaged in full-time employment or that the provision of day care or after-school care will enable her to continue her work. Claimant's mother did not complete the worksheet to describe her work schedule or hours that could demonstrate that she is, in fact, engaged in full-time work at home. In addition, the mother chose to take her son out of school beginning in July 2013 and, while it must be difficult for her to supervise her son at home, she did not present any evidence showing that she has not been able to perform her job duties while caring for and supervising him for the past several months. She has, in fact, continued to work at home in her position for the non-profit organization while caring for her son at home.

Finally, the evidence did not demonstrate as to where claimant would receive day care or after school care and how he would be able to attend day care or after school care in the absence of transportation services that were previously provided by the school district. Under these circumstances, claimant cannot be said to qualify for day care, after school care, or child care under the service policy. His request will be denied at this time.

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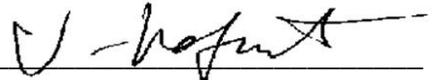
Wherefore, the Administrative Law Judge makes the following Order:

ORDER

The Fair Hearing Request and appeal of claimant for day care or after-school care is denied, based on Conclusions of Law 1 – 2 and 5 – 6 above. However, claimant's request for additional in-home respite services is granted in part, based on Conclusions of Law 1 – 4 above.

Claimant shall receive funding from the Service Agency for an additional 20 hours per month of in-home respite. As such, claimant shall receive a total of 44 hours per month of in-home respite services. The Service Agency's provision of these 20 additional hours of in-home respite shall be reviewed in one year or when claimant resolves his due process matter or complaint with the school district regarding placement and begins to attend his new school or non-public school, whichever event is earlier in time

Dated: February 4, 2014



Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision and both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.