

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

And

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2015010622

DECISION

Jennifer M. Russell, Administrative Law Judge with the Office of Administrative Hearings, heard this matter in Alhambra, California on February 23, 2015.

Judy Perez, HIPPA/Fair Hearing Coordinator, represented Eastern Los Angeles Regional Center (ELARC or service agency). Claimant's mother represented her.¹ Spanish language interpreter services were provided.

Testimonial and documentary evidence was received, the case was argued, and the matter was submitted for decision on February 23, 2015. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUE

Whether the service agency should reimburse Claimant for out-of-pocket in-home respite care services in lieu of out-of-home respite care services expenses incurred in October 2014.

¹ Claimant and Claimant's mother are not identified by their names to preserve confidentiality.

FACTUAL FINDINGS

1. Claimant is a conserved 19-year-old consumer of ELARC based on her qualifying diagnoses of autism and mild intellectual disability. She resides with her mother and her sibling.

2. Claimant's most current Individual Program Plan (IPP), dated January 27, 2014, indicates Claimant presents with Expressive Language Disorder, which is a barrier to her effective communication. She communicates her needs in three- and four-word phrases. Claimant presents with maladaptive behaviors. She is resistant to following directions and she is non-compliant. She is prone to outbursts that are accompanied with head-hitting and tantrum behaviors. She requires supervision to avoid injury and harm in unfamiliar settings and to access her community safely. Claimant requires assistance in all areas of self-help. Claimant attends a special day class in her school district where she receives speech therapy, occupational therapy and adaptive physical education. Claimant takes medication for sleeping each night. (Ex. 2.)

3. On a date not established by the evidence, Mother requested nursing respite services for Claimant. In response, the service agency initiated a nursing need analysis. A June 10, 2014 Nurse Coordinator Nursing Respite Report indicates that claimant "reportedly in good stable health currently without any major illness within the past year. She regularly sees her doctor and dentist. EEG was tested and found stable; therefore, she discontinued seeing her Neurologist." The Nursing Respite Report made the following pertinent recommendations:

1. The consumer is found to be in current stable health. She does not show any medical need for a higher acuity level of nursing respite.
2. Continue regular respite services. Hours to be determined by the unit supervisor.

(Ex. 3.)

4. ELARC funds 30 hours per month of in-home respite care services and 21 days per fiscal year (on request) of out-of-home respite care services for Claimant.

5. ELARC's Out of Home Respite Purchase of Services Policy & Procedure, effective May 2, 2011, states that "Out-of-home respite service means intermittent or regularly scheduled temporary care provided outside of the consumer's home by a vendored service provider. Providers in this category include adult day care centers, child care centers, residential facilities serving either adults or children, Intermediate Care Facilities/Developmentally Disabled-Habilitative and Intermediate Care Facilities/Developmentally Disabled-Nursing. Out-of-home respite services are intended to assist the family in securing temporary outside support in providing appropriate care and supervision of the consumer."

(Ex. 7.) The availability of an out-of-home respite care arrangement is determined after assessment of a consumer's level of care, a facility's level of services, a facility's location in relation to a consumer's residence, and vacancy at a facility. In addition, consumers and their representatives are afforded an opportunity to visit a facility to meet with administrators to discuss whether and how a consumer's specific needs are to be met. The Out of Home Respite Purchase of Service Policy & Procedure states that "[i]n-home respite in lieu of out-of-home respite may be used only when there is no out-of-home respite arrangement available." (Ex. 7.)

6. The service agency's Consumer I.D. Notes, dated September 22, 2014, indicate that Mother requested out-of-home respite care services for Claimant for the period October 13 through October 29, 2014.² (Ex. 4.) Mother anticipated traveling to Mexico for surgery and then remaining there for a period of time to recuperate.

7. The service agency considered at least five residential facilities for an out-of-home placement for Claimant. All five facilities were disqualified for varying reasons. One was unable to provide Claimant with daily transportation to and from school. A second facility was full to capacity and had no more available beds. A third facility was no longer operational. A fourth facility was licensed for consumers who are 17-years old or younger. And a fifth facility housed a population that was too old for Claimant, and which would have required Claimant to room with another individual with disruptive behaviors.

8. The service coordinator thereafter reminded Mother of the service agency's in-home respite care service in lieu of out-of-home respite care service. To facilitate the "in lieu of" placement, the service coordinator requested certain relevant information from Mother and informed Mother that the service agency would not fund for the hours when Claimant attended school or for the eight hours when Claimant slept during the night.³ The service coordinator prepared a calendar indicating that Claimant would receive the following "in lieu of" respite care services during the period an eighteen-day period commencing October 12, 2014 and ending October 29, 2014: 16 hours each day on Saturdays and Sundays; 9 hours each day on Mondays, Wednesdays, and Thursdays; and 6.5 hours each day on Tuesdays and Fridays. (Ex. 5.)

² These dates, as noted in the service agency's Consumer I.D. Notes, conflict with the dates set forth in Factual Findings 8 and 10.

³ Evidence received during the hearing ambiguously indicates that the service coordinator "informed [Mother] that [Claimant's] case was referred for nursing respite review to determine if [Claimant] needs respite support hours at night (24 hr care). Review indicated that [Claimant] is in stable health and does not show any medical need for a high acuity level of nursing respite." (Ex. 4; 10/10/2014 entry) It is unclear whether the nursing respite review reference is to Exhibit 3, set forth in Factual Finding 3, or to some other additional nursing respite review, documentation of which was not offered in evidence at the hearing.

9. Mother objected to this allocation of hours, and she requested 24 hours of “in lieu of” respite care services for each day in October 2014 that she would be away undergoing surgery and recuperating. The service agency denied Mother’s request, which denial is documented in an October 14, 2014 Notice of Proposed Action.

10. Mother travelled to Mexico for her surgery and remained there as she recuperated. During mother’s absence, a caretaker working through Cordova Agency cared for Claimant on October 13 through October 31, 2014.⁴ Cordova Agency compensated the caretaker \$1,993. Mother owes the caretaker an additional \$1,719.50.⁵ In a document dated November 25, 2014, the caretaker writes, “If [Mother] does not pay said amount within 4 months she will be taken to court, since I took care of [Claimant].” (Claimant’s Ex. 4.)

11. On December 3, 2014, the service agency re-issued its October 14, 2014 Notice of Proposed Action. Mother, acting on Claimant’s behalf, filed a Fair Hearing Request, and these proceedings ensued.

12. Mother asserts that during the night time, Claimant’s sleep is generally limited to approximately three hours. “Sometimes she sleeps well one day; then the next day not so well.” Consequently, Mother maintains that Claimant required night-time supervision, which the caretaker provided in Mother’s absence, and for which the caretaker should be compensated.

13. Claimant’s caretaker during Mother’s absence was not a relative. Claimant’s grandmother provided no assistance to the caretaker. Mother’s estranged spouse, who cared for Claimant’s sibling at his residence during Mother’s absence, provided no assistance to the caretaker.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disability Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.), which 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 of life in the community.” (Welf. & Inst. Code, § 4501.) Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Regional centers are responsible for taking into account individual consumer needs and

⁴ These dates when the caretaker provided Claimant with “in lieu of” respite care services are different from the eighteen service days commencing on October 12, 2014 and ending on October 29, 2014, which the service agency approved. (See Exhibit 5.)

⁵ Claimant’s Fair Hearing Request indicates that Claimant seeks reimbursement for \$1,643. The discrepancy between \$1,643 and \$1,719.50 was not explained at the hearing.

preferences, and for ensuring service cost effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

2. The services and supports to be funded for a consumer are determined through the individualized program planning process, which involves collaboration with the consumer and service agency representatives. Services and supports for persons with developmental disabilities are defined as “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 rehabilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives.” (Welf. & Inst. Code, § 4512, subd. (b).) Services and supports include out-of-home care, for which section 4686.5, subdivision (a)(2), authorizes up to 21 days in a fiscal year.

3. When purchasing services and supports a regional center must conform to its purchase of service guidelines. (Welf. & Inst. Code, § 4646.4, subd. (a)(1).) The Lanterman Act requires the Department of Developmental Disability (Department) to review those guidelines “to ensure compliance with statute and regulation.” (Welf. & Inst. Code, § 4434, subd. (d).) Reflecting the Department’s interpretation of statute and regulation, the purchase of service guidelines are not entitled to the deference given to a regulation; rather, the purchase of service guidelines are entitled to a degree of deference that is dependent on the circumstances in which the agency has exercised its expertise. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-15.) Most important, a regional center’s implementation of its purchase of service guidelines must account for a consumer’s individual needs when making determinations regarding the appropriateness of particular services. (See *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

4. In this case, Mother notified the service agency of her need to travel to Mexico to undergo surgery, and that she would be recuperating in Mexico for a specified period of time. Mother sought out-of-home respite care services for Claimant, but none was available for reasons beyond Mother’s control. The service agency thereafter reminded Mother of in-home respite care services in lieu of out-of-home respite care services, but sought to limit the number of hours that such service would be available to Claimant. The preponderance of the evidence establishes, however, that Claimant has a documented difficulty sleeping through the night and that even though she is prescribed sleep agents to address that difficulty, Claimant requires night-time supervision. Such night-time supervision would have been available to Claimant had she been successfully placed in a facility offering out-of-home respite care services. The fact that an out-of-home placement was not available to Claimant does not mean that her need for round-the-clock supervision during the night is lessened. The service agency’s Out of Home Respite Purchase of Service Policy & Procedure clearly states that “[i]n-home respite in lieu of out-of-home respite may be used only when there is no out-of-home respite arrangement available.” It is implicit that “in lieu of” respite care services must offer all of the same features necessary to redress Claimant’s individual needs, including hours of care, in order to serve as a viable alternative for an unavailable out-of-

home respite care placement. Accordingly, cause exists to grant Claimant's request for the service agency to refund Claimant's out-of-pocket expenses incurred in connection with the in-home respite care services in lieu of out-of-home respite care services rendered to Claimant when Mother traveled to Mexico for surgery during October 2014, as previously approved by the service agency.

ORDER

1. Claimant's appeal is granted.

2. Upon its receipt of documentation from Claimant's mother enumerating the dates and days during the period commencing October 12, 2014 and ending October 29, 2014 when Claimant received in-home respite care services in lieu of out-of-home respite care services, Eastern Los Angeles Regional Center shall reimburse the cost of providing such in-home respite care services in lieu of out-of-home respite care services for Claimant in an amount not to exceed \$1,643.

DATED: March 9, 2015

/s/
JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.