

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MAKAI AND MAKAIYA A..

Claimants,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH Case Nos. 2011100960
2011100964

DECISION

Chris Ruiz, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter at the Westside Regional Center, in Culver City, California, on May 29, 2012.

Alisa T., claimants' mother (mother), was present and represented claimants Makai A. (male) and Makaiya A. (female).¹

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (WRC or the service agency.)

Oral and documentary evidence was received and argument made. The record was closed and the case was submitted for decision on May 29, 2012.

ISSUES

The parties stipulated that the following issues are to be decided by the ALJ:

1. Shall WRC be ordered to fund: (a) 180 hours of respite, per month, for female and (b) 120 hours of respite, per month, for male? This level of funding for respite is in

¹ Claimants and their family members are referred to by their initials, their family titles, and/or their gender, to protect their confidentiality.

addition to the 62 hours of specialized supervision that WRC presently funds for each claimant.

FACTUAL FINDINGS

1. Claimants are brother and sister twins and are 17 years of age. The male is a consumer of the service agency by reason of his diagnosis of autism. The female is also eligible for services, because of her diagnosis of autism, mental retardation, or both. The parties did not agree on the basis for her eligibility, but they did agree that she is eligible for services. For purposes of this decision, the specific basis, or bases, for her eligibility is not critical.

2. Claimants filed their fair hearing requests on October 14, 2011.

3. The parties previously disagreed on the level of services necessary for claimants. In December 2009, the undersigned issued a decision in OAH case numbers 2009030860 and 2009030856, which were consolidated for hearing. That decision denied claimants' request for additional respite funding, denied WRC's request to reduce funding for the quantity and hourly rate at which respite was being funded, and denied WRC's request to reduce the Individual Specialized Supervision (SS) rate. Furthermore, the decision ordered mother to request funding from In-Home Supportive Services (IHSS), a program run by the county of Los Angeles. Mother was also ordered to allow WRC personnel to observe claimants in their home environment, and other settings, as directed by WRC. The decision provides historical summary, states relevant factual findings and legal conclusions, and is hereby incorporated by reference as if fully set forth herein.

4. WRC presently funds 70 hours of respite, per month, for female. WRC also funds 62 hours, per month, of SS for female. In addition, female also receives 36 hours of funding from IHSS. In sum, female receives funding for 168 hours of funding which allows mother to pay someone to care for female. In an average 30 day month, this equates to approximately 5 and one-half hours, per day, of funding.

5. WRC presently funds 60 hours of respite, per month, for male. WRC also funds 62 hours, per month, of SS for male. In addition, male also receives 272 hours of funding from IHSS. In sum, male receives funding for 394 hours which allows mother to pay someone to care for male. In an average 30 day month, this equates to approximately 13 hours, per day, of funding.

6. SS hours are used to provide after-school care which assists mother in maintaining her employment. Mother is employed and her work hours are generally Monday to Friday, 10 a.m. to 6 p.m., and occasionally on Saturday from noon to 4 p.m. The maximum number of SS hours WRC generally funds for a consumer is 84 hours per month. At hearing, WRC indicated that claimants may be eligible for increased funding for SS, but that no additional SS funding had been requested by claimants. Claimants were unaware this

increased level of funding may be available to claimants. WRC also funds Extended School Year Services (ESY). It was not established if claimants have requested such services and/or whether WRC is funding such services.

7. The funding for both claimants' respite hours was reduced on July 15, 2011. Prior to that date, WRC proposed a reduction in funding for respite hours for both claimants. Claimants thereafter appealed that decision and filed fair hearing requests. On July 15, 2011, Administrative Law Judge Erlinda Shrenger dismissed both fair hearing requests because claimants failed to appear at the hearing on July 14, 2011, of which claimants received proper notice. The July 14, 2011 hearing date was scheduled in order for an ALJ to determine whether or not WRC's proposed reduction in respite funding should be allowed. (See OAH case numbers 2011040151 and 2011040154.) Because claimants failed to appear to contest WRC's proposal, their fair hearing requests were dismissed and the funding for respite hours was reduced to the present levels.

8. Both claimants travel to and attend school from approximately 7:15 a.m. to 3:45 p.m.

9. Mother requires assistance with claimants when they are at home. In general, one person attends to female's needs, and another attends to male's needs. The female's assistant, Lorraine, generally works from 2 p.m. to 9:30 p.m. for a total of 7 and one-half hours per day from Monday through Friday. The male's assistant, Omar, generally works approximately 8 hours per day, from 3 p.m. to 11 p.m. On weekends, both assistants work approximately 6 and one-half hours on either Saturday or Sunday.

10. In total, female has an assistant present for approximately 44 hours per week and male has an assistant present for approximately 46 hours per week. On an approximate monthly basis (four weeks) female has an assistant present for 176 hours and male for 184 hours. Female presently has a total of 168 hours of funded assistance and male has 394 hours of funded assistance.

11. WRC personnel observed female at school, home, and at WRC. WRC personnel concluded that while she has some deficits, she can express herself and does not require additional intensive supervision. On the other hand, mother describes female as having symptoms of schizophrenia and as being self-injurious. In addition to the assistance female receives from Lorraine, female is also assisted by Sheila. Sheila lives in a "rear house" behind mother's residence (residence). Sheila is at the residence from 3 p.m. until bedtime.

12. Lorraine receives payment from the respite hours, SS hours, and some of the IHSS hours which are designated for female. Mother also pays Lorraine extra money in the sum of \$50-\$150 per week. While the testimony was unclear, it appears that mother also gives Sheila some of the IHSS funding designated for female.

13. Omar is paid all the respite hours and SS hours designated for male. Male also has additional assistance which is provided by Richard, mother's nephew. Richard is "always there" according to mother and mother pays Richard approximately \$100 per week.

14. WRC contend that the recently enacted Welfare and Institutions Code section 4686.5 (new law) requires that it only fund 30 hours, per month, of respite for each claimant. While WRC's contention regarding the new law is correct, WRC previously conceded that it is likely that the male's needs would justify an exception. That is, the "new law" provides that the regional center may grant an exemption from the respite limits 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.

15. As was the case in the prior decision, it was established that the female's needs are not as intense as the male's needs. At times she can sit quietly, but at other times she displays behavior which requires continual supervision.

16. The prior hearing described the male's behavior as follows: "The male's behavior is much more intense than his sister's. He runs away and can become violent and Mother has had to call the police on multiple occasions to resolve these behaviors. The male is approximately 5' 11" tall and he weighs 150 pounds. One of his caregivers, Richard S., mother's nephew, testified at hearing. (Richard) appeared to be a strong and capable young man, but he acknowledged that the male can be difficult to contain and control, and that one person alone would have a difficult time dealing with both claimants. On the other hand, another caregiver, Shelia (G.), has worked with claimants for five years. Ms. Gibbs is also employed as a custodian, at night, at Los Angeles Community College. She sometimes takes both claimants with her to the campus and they usually sit in a room by themselves. In other words, there are times when one person may be able to safely supervise both claimants. However, Ms. Gibbs noted that the school is essentially locked up at night so that the male can safely run around on the campus and that the other campus staff also help her manage the claimants. The third caregiver, Lorraine T.-W., confirmed that she gives Richard and Ms. Gibbs assistance with claimants when they need a break."

17. When claimant failed to appear at the hearing date of July 14, 2011, their funded respite hours were reduced from 120 hours, per month, to 70 hours (female) and 60 hours (male). However, additional funding is now provided by IHSS. Female now receives 36 hours of IHSS per month and male receives 272 hours of IHSS per month. Therefore, female's respite was reduced by 60 hours, but she now receives 36 hours of IHSS, for a net loss of 24 hours. Male's respite hours were reduced by 70 hours, but he now receives 272 IHSS hours, for a net increase of 202 hours.

18. The reduction in claimants' respite hours was caused, at least in part, by claimants' failure to appear at the July 14, 2011 hearing. Thereafter, male has obtain a very substantial amount of funding from IHSS. While female's net hours have been reduced by approximately 24 hours, she did not establish "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." That is, female did not establish that the current level of respite hours being funded, in conjunction with the SS hours and the IHSS hours being funded, is insufficient and that additional respite hours are necessary. Similarly, male did not establish

that the current level of respite hours being funded, in conjunction with the SS hours and the IHSS hours being funded, is insufficient and that additional respite hours are necessary.

19. Overall, mother has four people in her home, in addition to herself, to assist in the care of claimants. Claimants have the support of family and friends: mother, Lorraine, Sheila (who essentially lives at the residence), Omar, and Richard (mother's nephew who is "always" at the residence). It was not established that this level of support is insufficient to meet either of claimants' needs. Additionally, neither claimant have apparently applied for the additional 22 hours (84 hours maximum less 62 hours presently being funded) of SS which may be available as additional assistance.

LEGAL CONCLUSIONS AND DISCUSSION

1. The Lanterman Developmental Disabilities Act (Lanterman Act) governs this case. (Welfare and Institutions Code sections 4500 et seq.)² A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant properly and timely requested a fair hearing and therefore jurisdiction for this case was established. (Factual Findings 1-2.)

2. Where a claimant seeks to establish the propriety of a service not previously agreed to by the service agency, the burden is on that appealing claimant to demonstrate the service agency's decision is incorrect. Where the service agency seeks to discontinue a service it has previously funded, the service agency has the burden to demonstrate that its decision is correct. In this case, Claimant had the burden of establishing the need for additional respite hours.

3. Section 4501 requires the state, through the regional centers, to provide an array of services and supports which is sufficiently complete to meet the needs and choices of each person with developmental disabilities. These are services and supports that will allow them, "regardless of age or degree of disability, and at each stage of life" to integrate "into the mainstream life of the community" and to "approximate the pattern of everyday living available to people without disabilities of the same age." Persons with developmental disabilities have the right to treatment and habilitation services and supports which foster the individual's developmental potential and are "directed toward the achievement of the most independent, productive and normal lives possible." The regional centers will work with consumers and their families to secure "those services and supports that maximize opportunities and choices for living, working, learning and recreating in the community." (§ 4502.)

4. Section 4646.5 defines the content of the planning process for the Individual Program Plan (IPP). It must include a statement of goals based on the consumer's needs and time limited objectives for implementing the goals. The goals and objectives should

² All further statutory references are to the Welfare and Institutions Code.

maximize opportunities for the consumer to develop relationships, be part of community life and to develop competencies to help accomplish the goals. The IPP process must also include a schedule of the type and amount of services and supports to be purchased by the regional center or obtained from generic agencies or other resources in order to achieve the IPP goals and the identification of the providers of services.

5. Section 4646 states:

- (a) It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual. . . . It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources. (Emphasis added.)
- (b) The individualized program plan is developed through a process of individualized needs determination

6. Section 4648 of the Lanterman Act describes what the regional center must do in order to achieve the stated objectives of the IPP. In securing the needed services and supports for a consumer the regional center must find services that are flexible and individually tailored to the consumer. By vendorization or contract the service agency may purchase services from any individual or agency the regional center and consumer determine will best accomplish all or any part of the IPP. Section 4648, subdivision (a)(8), prohibits the use of regional center funds “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.” These are commonly referred to as “generic resources.” However, subdivision (g) provides that, where there are identified gaps in the system of services and supports, the Department of Developmental Services may provide the services directly.

7. Services provided must be cost effective (§ 4512, subdivision (b)), and the Lanterman Act requires the regional centers to control costs so far as possible, and to otherwise conserve resources that must be shared by many consumers. (See, e.g., §§ 4640.7(b), 4651(a), 4659, and 4697.) However, section 4659 specifies that it shall not be construed to impose an additional liability on the parents of children with developmental disabilities nor to restrict eligibility for or deny services to a consumer who is unable to pay. To be sure, the obligations to other consumers are not controlling in the decision-making process, but a fair reading of the law is that a regional center is not required to meet a disabled child’s every possible need or desire, in part because it is obligated to meet the needs of many children and families.

8. Although regional centers are mandated to provide a wide range of services to facilitate implementation of the IPP, they must do so in a cost-effective manner (§ 4640.7, subdivision (b), § 4646, subdivision (a)). A regional center is not required to provide all of

the services which a client may require, but is required to “find innovative and economical methods of achieving the objectives” of the IPP (§ 4651). They are specifically directed not to fund duplicate services that are available through another publicly funded agency. This directive is often referred to as “supplanting generic resources.” Where a service is available elsewhere, the regional center is required to “. . . identify and pursue all possible sources of funding. . . .” (§ 4659, subdivision (a)). However, if a service specified in a client’s IPP is not provided by a generic agency, the regional center must fill the gap (i.e., fund the service) in order to meet the goals set forth in the IPP (section 4648, subdivision (a)(1); *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 390)). In general, a claimant must first attempt to utilize the generic resource (such as Medi-Cal, County Mental Health, private insurance) before seeking services from the Service Agency. In this case, claimants have properly complied with the undersigned’s prior order and they requested IHSS funding. As a result, claimants’ have obtained IHSS funding in the amounts of 36 hours (female) and 272 hours (male) for a total of 308 IHSS hours per month.

9. Section 4686.5 states, in pertinent part:

(a) Effective 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. (*emphasis added.*)

(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.

[¶] . . . [¶]

(c) This section shall remain in effect until implementation of the individual choice budget pursuant to Section 4648.6 and certification by the Director of the Department of Developmental Services that the individual choice budget has been implemented and will result in state budget savings sufficient to offset the costs associated with the repeal of this section. This section shall be repealed on the date of certification.

10. While the “new law” reduces the number of respite hours WRC can fund, it also provides an exception. In this case, WRC has previously determined the exemption

applied because it was already funding more than 90 hours per quarter, prior to the IHSS hours being funded.

11. Claimants did not meet their burden(s) in establishing that additional respite funding is necessary at this time. (Factual Findings 1-19.) As such, the following order is issued.

ORDER

1. Claimants' request for additional funding for respite hours for Makaii A. is denied.
2. Claimants request for additional funding for respite hours for Makaiiya A. is denied.

IT IS SO ORDERED.

DATED: July 18, 2012.

/s/

CHRIS RUIZ
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.