

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

NORTH BAY REGIONAL CENTER,

Service Agency.

OAH No. 2015071356

DECISION

Administrative Law Judge Lisa Lunsford, State of California, Office of Administrative Hearings, heard this matter on September 10, 2015, in Napa, California.

Claimant was not present but was represented by her mother. Claimant's stepfather was also present for the hearing.

G. Jack Bengé, Attorney at Law, represented service agency North Bay Regional Center (NBRC).

At hearing, evidence was received and argument was heard. Mr. Bengé submitted a closing brief in lieu of closing argument. This closing brief has been marked as Exhibit I. The record closed and the matter was submitted on September 10, 2015.

ISSUE

May the Service Agency terminate or reduce funding for day care services¹ based on Claimant's receipt of protective supervision hours from In-Home Supportive Services (IHSS)?

¹ The Notice of Proposed Action states that NBRC will terminate day care services, but NBRC clarified at hearing that the proposed action is a reduction in day care hours.

FACTUAL FINDINGS

Claimant and Her Family

1. Claimant is a 26-year-old woman with diagnoses of Angelman Syndrome, intellectual disability, speech and language deficits, and a history of seizures. She is non-verbal and communicates with gestures, sounds, facial expression, and the use of multiple Picture Exchange Communication Systems. She has behaviors which include hitting, pushing, gagging for attention, biting, and dropping to the ground. Claimant is dependent for all self-care tasks and needs full assistance with bathing and brushing hair and teeth. She is not toilet trained and wears diapers or pull-ups. The pantry and refrigerator are kept locked because of her persistent focus on accessing the foods and creating messes. While she generally has a happy disposition, she easily becomes angry and frustrated. Tantrums include grabbing someone and digging her nails into them, banging on walls or windows, thrashing about in the car, and throwing herself on the floor or ground and sometimes refusing to get up. Claimant must be monitored at all times because she lacks safety awareness. Claimant lives with her mother and stepfather, who are her primary caretakers. Claimant has Medi-Cal and SSI, and her mother is her payee. In addition, she was conserved when she turned eighteen, and her mother is her conservator. Claimant is eligible for services from NBRC.

2. Claimant typically gets up by 6:00 a.m. On most weekdays, Claimant attends a day program. She has door to door transportation and gets picked up around 8:00 a.m. and dropped off at the day program around 9:00 a.m. Although she is ambulatory, she travels in a wheelchair that someone can push because of her history of refusing to get off the bus. She is in the day program from about 9:00 a.m. to 3:00 p.m. At the day program, she often has an aide next to her to prevent her from eloping. The day program addresses her difficult behaviors and also provides her with the opportunity to learn self-care tasks and participate in social and recreational activities.

3. Claimant's mother and stepfather own a business and work full-time at the office. On weekday mornings, they help Claimant from the time she awakes until 8:00 a.m. when her bus arrives. They typically leave for work right after Claimant gets on the bus. The commute to their office is about ten minutes. They return home from work around 8:00 p.m. and then attend to meals, laundry, cleaning, and bedtime. Claimant goes to bed around 10:00 or 11:00 p.m. In the middle of the night, Claimant sometimes wakes up and starts an activity, like lying on the floor to watch television. Her mother and stepfather help her get back into bed.

4. Pursuant to an Individual Program Plan (IPP) dated May 19, 2015, Claimant receives a variety of services from NBRC, including funding for the day program, transportation to and from the day program, and day care. Her day care provider picks her up at the day program at 3:00 p.m., and they usually arrive home before 4:00 p.m. The day care provider does activities with her until her mother and stepfather return home from work around 8:00 p.m. Day care helps meet several of Claimant's identified needs, including

allowing her to be cared for while her parents are working, continue to live with her family, and have the opportunity to participate in social and recreational activities she enjoys. Claimant's family does not get respite hours from NBRC, because they use the IHSS protective supervision hours as a generic resource in the place of respite.

History of Claimant's Day Care and Protective Supervision

5. Claimant requires a variable number of day care hours per month, depending on Claimant's daily schedule and her parents' work schedules. Claimant's mother sends in timesheets on a monthly basis to assist in calculating Claimant's hourly day care needs. The hours are calculated for each day and take into consideration holidays and vacations. For instance, Claimant needs about 5.5 hours of day care when she attends her day program, but needs more hours if she does not go to her day program. This year NBRC funded 120 hours in May, 110 hours in June, 142 hours in July, 120 hours in August, and 110 hours in September.

6. Claimant is comfortable with her day care provider, who has been providing her day care since April 2008. The day care provider keeps Claimant very active and does a lot of activities with Claimant in the community and at home.

7. Beginning at least as far back as October 2014, Claimant began receiving IHSS hours in the amount of 283 hours per month. These IHSS hours are variously allocated to the provision of domestic and related services (e.g. meal preparation), non-medical personal services (e.g. dressing), accompaniment (e.g. to medical appointments), and protective supervision. Claimant's mother and stepfather, as the providers, receive the IHSS funding. A Solano County Department of Social Services Notice of Action (NOA), dated June 22, 2015, indicates that as of July 1, 2015, Claimant remains eligible for a total of 283 IHSS hours per month. Of those hours, 41 hours and 41 minutes per week, or approximately 180.5 hours per month, are allocated to protective supervision.²

Claimant's IPP Addendums

8. An IPP Addendum, dated June 19, 2015, indicates that Claimant's identified needs are: to be well cared for while her parents are working or taking a break from her constant care needs; to have a day care worker that understands Claimant's needs and wants, and a person who is willing to provide close supervision; and to be cared for in an environment that she is comfortable in while her parents work. Claimant's mother requested day care services in addition to receiving IHSS protective supervision hours. Service coordinator Tanya Barreto explained to Claimant's mother NBRC's procedure regarding day

² NBRC estimated Claimant's protective supervision hours in the amount of 145 hours per month, and Claimant's parents estimated 178 hours per month. The June 22, 2015 NOA identifies 41 hours and 41 minutes per week of protective supervision, and applying the NOA's conversion formula (multiplying by 4.33 to convert weekly to monthly hours) results in a monthly total of 180.5 hours per month.

care hours when a family has protective supervision. NBRC agreed to continue funding day care for the month of July 2015 in the amount of 142 hours.

9. An IPP Addendum, dated July 10, 2015, repeats much of the same information in the June 19, 2015 Addendum. In addition, Ms. Barreto determined that Claimant has 115 hours per month of protective supervision that can be used for day care, and any hours beyond that amount could be funded by NBRC. NBRC agreed to continue funding day care for the month of August 2015 in the amount of 120 hours.

10. An IPP Addendum, dated August 6, 2015, stated essentially the same information that is in the July 10, 2015 Addendum and added that a Notice of Action was sent to the conservator and the family had requested a fair hearing. NBRC agreed to continue funding day care for the month of September 2015 in the amount of 110 hours.

NBRC's Notice of Proposed Action and Claimant's Appeal

11. In a Notice of Proposed Action dated July 14, 2015, NBRC notified Claimant that her day care services would be terminated effective August 31, 2015. The stated reason for the action was as follows:

Regional Centers are mandated to identify and pursue all possible sources of funding for consumers receiving regional center services. The parent as [sic] provided the IHSS requested documentation and IHSS Notice of action states that [Claimant] is receiving 145 hours of Protective Supervision a month. NBRC considers IHSS protective supervision an alternative resource, which can meet the need for day care when it is provided by an IHSS worker other than the parents thereby ensuring care and supervision of the recipient when parents are working. NBRC must be the payer of last resort and can not supplant a generic resource.

12. On July 29, 2015, Claimant's mother filed a fair hearing request on Claimant's behalf, appealing the termination in funding of day care hours, and this hearing ensued. Claimant contends that day care services should not be terminated because her protective supervision hours are not duplicative and are being used to fulfill a previously unmet need. NBRC contends that IHSS protective supervision is an alternative, generic resource that duplicates NBRC's day care hours and that NBRC's legal mandates to maximize alternative funding sources and demonstrate the cost-effective use of public funds require NBRC to reduce day care hours on the basis of receipt of protective supervision hours.

Claimant's Need for Day Care Hours

13. Tanya Barreto, NBRC service coordinator, testified that Claimant has been her client for about seven to eight years. After Claimant's parents informed her of Claimant's

protective supervision hours and provided the IHSS Notice of Action, she discussed Claimant's receipt of protective supervision with her supervisor and reviewed the NBRC Daycare Procedure.

14. NBRC's Daycare Procedure sets forth their policy regarding the purchase of day care services. NBRC may fund day care so that parents may work. Both parents must be employed during the hours when the client is not in school or a program. The Daycare Procedure requires NBRC to exhaust all generic supports, natural supports, client resources and alternative sources of funding, such as IHSS protective supervision, before day care is funded by NBRC. Staff are directed to reduce day care hours for each hour of generic resources received by the client. If the client has protective supervision, respite hours will be reduced before day care hours. The day care provider cannot be the parent or significant other living in the home.

15. In this case, NBRC determined that Claimant's day care would be terminated because the day care is duplicative of the protective supervision hours, and the protective supervision hours would be considered a generic resource. NBRC agreed day care would be provided through June 2015.

16. Ms. Barreto also testified as to how NBRC calculated Claimant's need for day care hours. She testified incorrectly that Claimant was receiving 145 hours per month of protective supervision. Ms. Barreto then subtracted 30 hours for respite time, which would be for supervision needed outside the time when Claimant's parents were working. This left 115 hours of protective supervision remaining which would be used for day care. She testified that if NBRC determines Claimant needs more than 115 hours per month of day care in any given month, then NBRC would pay for those additional hours. Claimant's day care applications the last few months have ranged from 110 to 142 hours per month. NBRC would subtract 115 from the total hours requested and then pay for any remaining hours. In other words, going forward, NBRC would only fund those hours in excess of 115 per month. Ms. Barreto failed to account for the numerous hours outside the parents' working day that Claimant needs supervision.

17. Pam Porter, NBRC case management supervisor, described NBRC's process for determining day care hours. Parents complete a day care application form to show the exact numbers of hours they need each month. NBRC looks at the parents' request then does a calculation to determine the exact hours. The calculation includes up to 45 hours per week of work time plus up to three hours per day of travel time to and from work. Parents indicate these amounts of time on the application.

18. Claimant's mother established that the protective supervision hours are used at times when day care is not provided. She consciously avoided having any overlap in the hours provided and does not want to "double dip." Day care hours are generally from 3:00 to 8:00 p.m. on weekdays. However, protective supervision hours are used on the weekends (13 hours per day), weekday mornings before the bus arrives (one hour per weekday), and

weekday nights after day care ends (two hours from 8:00 to 10:00 p.m.). These hours were previously not covered or compensated, so these IHSS hours satisfied an unmet need.

19. Claimant's stepfather credibly established that caring for Claimant on the weekend is her mother's responsibility. Her mother is paid through IHSS protective supervision for 13 hours per day for weekends, which he calculates at 112 hours per month. He estimates that IHSS provides 178 hours per month of protective supervision. Because 112 of those hours cover only the weekends, 66 hours of protective supervision are left "in the bank." These remaining hours are used by Claimant's mother for weekday hours (one hour in the morning and two hours at night) that are not covered by day care or any other program.

20. Based on Claimant's IPP and Claimant's mother's testimony, Claimant must be monitored at all times because she lacks safety awareness. Because her parents work, she is eligible for day care services.

21. The IHSS protective supervision hours do not duplicate the day care hours funded by NBRC. Claimant established, through testimony, tables and charts, that all of the IHSS protective supervision hours are utilized during non-day care hours. NBRC did not present any evidence to the contrary. Furthermore, the 283 monthly IHSS hours combined with NBRC's day care hours, which have recently ranged from 110-142 hours per month, provide Claimant with care and supervision from approximately 5:00 a.m. to 11:00 p.m., seven days per week. Because Claimant needs monitoring at all times, NBRC's proposed elimination of 115 day care hours per month would create a significant shortfall in Claimant's care and supervision.

22. While IHSS protective supervision hours can be used to cover an individual's day care needs, there is no evidence that they must be used for this purpose before fulfilling other needs. Claimant is utilizing her protective supervision hours in a way that meets her previously unmet need for protective supervision on the weekends and in the early mornings and nights of weekdays.

23. The day care hours funded by NBRC are being utilized appropriately and are serving their purpose of caring for Claimant while allowing her parents to engage in employment outside of the home. The day care hours are also effective in meeting several of Claimant's needs identified in the IPP and IPP Addendums, including: being well cared for while her parents are working; continuing to live with her family; being cared for in an environment that she is comfortable in; and having a day care worker that understands Claimant's needs and wants, and who is willing to provide close supervision.

24. NBRC applied its day care policy to Claimant without first attempting to consider Claimant's unique needs and preferences. NBRC should have considered Claimant's need for constant supervision and the number of hours every week during which care and supervision was not compensated. NBRC also should have considered Claimant's

family's preferences for keeping the same day care provider and using the protective supervision hours to cover other hours in the week.

25. Claimant's family is conscientiously planning and providing care and supervision to Claimant in a cost-effective manner. They have obtained services and financial assistance through multiple public programs and are utilizing Claimant's benefits in an efficient manner that avoids duplication. For instance, Claimant has SSI, Medi-Cal and IHSS protective supervision, the latter of which is the reason Claimant does not pursue respite services through NBRC. Should day care services be terminated, Claimant's family would have to consider an out of home placement for Claimant, which would be more costly.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Lanterman Act). (Welf. & Inst. Code, § 4500 et seq.)³ The Lanterman Act mandates that an "array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community." (§ 4501.)

2. Regional centers are charged with carrying out the state's responsibilities to persons with developmental disabilities and their families. (§ 4620.) Regional centers must develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP states the consumer's goals and objectives and identifies the services and supports needed by the consumer to achieve the goals and objectives. (§§ 4646, 4646.5.) The IPP and provision of services and supports must take into account the needs and preferences of the individual and the family. (§ 4646, subd. (a).) Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family. (§ 4648, subd. (a)(2).) In addition, the provision of services must be effective in meeting the IPP goals, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources. (§ 4646, subd. (a).)

3. Regional centers shall establish an internal process for purchasing services and supports to ensure, among other things, utilization of generic services and supports when appropriate. (§ 4646.4, subd. (a)(2).) In securing needed services and supports, regional center funds shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services. (§ 4648, subd. (a)(8).) Regional centers shall identify and pursue all possible sources of funding for consumers and shall not purchase any service that would

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

otherwise be available from In-Home Support Services when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage. (§ 4659, subds. (a), (c).)

4. Day care is defined as “regularly provided care, protection, and supervision of a consumer living in the home of his or her parents, for periods of less than 24 hours per day, while the parents are engaged in employment outside of the home or educational activities leading to employment, or both.” (§ 4686.5, subd. (a)(4).)

5. An administrative fair hearing to resolve conflicts between the service agency and recipients of, or applicants for, services is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal NBRC’s proposal to terminate or reduce funding for day care. Jurisdiction was therefore established. (Factual Findings 11-12.)

6. Neither the Lanterman Act nor its implementing regulations (Cal. Code Regs., tit. 17 § 50900 et seq.) assigns burden of proof. California Evidence Code section 500 states that “[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” In administrative proceedings, the party asserting the affirmative generally has the burden of proof. (See *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 5.) Because NBRC seeks to reduce the number of day care hours it is providing to Claimant, NBRC has the burden of proving that its decision is correct. The standard of proof in this case is a preponderance of the evidence. (Evid. Code, § 115.)

7. NBRC did not establish, by a preponderance of the evidence, any appropriate basis to reduce funding for Claimant’s day care. IHSS protective supervision hours can, in some instances, constitute a generic resource. However, in this case, the protective supervision hours do not represent a generic resource for day care, because they are not duplicative of the day care hours and are meeting Claimant’s other previously unmet needs. The number of hours Claimant needs for supervision is greater than the number of hours provided by both agencies combined. Any reduction to these hours would exacerbate a shortfall, so it would not be appropriate in this case for NBRC to utilize the IHSS hours in lieu of providing day care.

8. No legal authority has been presented to show that Claimant is required to use her protective supervision hours to cover her day care needs before satisfying her other needs. Claimant’s ability to use protective supervision and day care hours for the same purpose does not equate with a requirement that she do so. Claimant is thus not precluded from utilizing protective supervision and day care hours at different times for different purposes.

9. Under the Lanterman Act, section 4659, subdivision (c), NBRC is not prohibited from purchasing day care services, because Claimant has pursued IHSS coverage. In addition, there is no express provision under the Lanterman Act that precludes NBRC from funding day care based on the mere fact that a claimant also receives IHSS protective supervision.

10. NBRC failed to consider the circumstances, needs, and preferences of Claimant and her family before deciding to reduce day care services. Claimant's need for supervision easily exhausts the monthly IHSS hours, and it is her family's need and preference that the IHSS protective supervision hours help care for her during other times of the week. NBRC's policy of offsetting day care hours with protective supervision hours is an insufficient basis for doing so where that policy is applied without regard to the individual circumstances of the consumer. An individualized determination would have revealed that the protective supervision hours are not in fact meeting Claimant's day care needs.

11. NBRC's ongoing provision of day care services to Claimant reflects the cost-effective use of public resources. Claimant is combining public benefits programs in a non-duplicative way to provide for her comprehensive care and supervision. The day care services also help her stay in the family home and thereby avoid a more costly residential placement.

12. NBRC funding for day care is being utilized by Claimant for her regular care, protection and supervision while her parents are engaged in employment outside of the home. This is consistent with the Lanterman Act and effective in meeting Claimant's IPP needs to be well cared for in a comfortable environment, by a day care worker who understands her and will provide close supervision while her parents are working.

ORDER

Claimant's appeal of North Bay Regional Center's decision to terminate or reduce day care services is GRANTED.

DATED: September 23, 2015

/s/
LISA LUNSFORD
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days after receiving notice of this final decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)