

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Dawn G.,

Claimant,

vs.

Inland Regional Center,

Service Agency.

OAH No. 2009060660

DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Bernardino, California on August 3, and September 2, 2009.

Veronica Cervantes, Clients' Rights Advocate, Office of Clients' Rights Advocacy, Disability Rights California, represented Claimant Dawn G.

Catherine Bennage, Program Manager, Fair Hearings & Legal Affairs, represented Inland Regional Center, the Service Agency.

The matter was submitted on September 25, 2009.¹

ISSUE

Whether the Inland Regional Center should reinstate, and therefore fund, 10 hours of supported living services (SLS), increasing total SLS authorized and funded by the Inland Regional Center to 86 hours per month?

¹ The record remained open for receipt of written closing argument. Claimant's Closing Argument was filed on September 14, 2009 and marked Exhibit F. On September 25, 2009, the Service Agency filed its Closing Argument, marked Exhibit 21. On September 25, 2009, the record was closed, and the matter was submitted.

FACTUAL FINDINGS

1. Dawn G. (Claimant) is a 28 year-old female who lives alone in a two-bedroom apartment in Temecula, California.

2. Claimant is eligible to receive services from the Inland Regional Center (Service Agency) with a diagnosis of severe cerebral palsy. In addition, she has diagnoses of spastic quadriplegia (severe impact), Cauda Equina Syndrome with neurogenic bladder resulting in the need for a supra public catheter, major depression and vision impairment.

Claimant uses a wheelchair to move about. She has a manual and an electric wheelchair. She can sit without support, can pull to standing position to transfer but is unable to stand otherwise. She does not walk. Claimant falls and needs someone to assist her in getting up off of the floor; she has a Hoyer lift which makes it easier to do so.

Claimant can manipulate objects with both hands and all fingers. She has gross motor dexterity but not fine motor coordination.

3. Claimant requires assistance with activities of daily living. She eats with a fork, knife and spoon without spillage. She completes most of her self-care and hygiene tasks independently. With bathing, she needs assistance transferring to the bath chair and washing the bottom half of her body. Claimant dresses the top half of her body but cannot put clothes on the lower half of her body; she is unable to do fasteners or tie shoes. She is able to toilet herself but needs assistance transferring to the toilet and wiping after a bowel movement. With her supra public catheter, she has bladder leakage at night twice a week. Claimant needs assistance transferring as she was falling due to her legs weakening. She is generally aware of safety and does not usually endanger herself.

4. Claimant is prescribed the following medications for the reasons listed

<u>Medication</u>	<u>Dosage</u>	<u>Frequency</u>	<u>Prescribed for</u>
La/Oval	one tablet	1T/daily	Birth/Menses Control
Abilify	15 mg.	BID	Mood Stabilizer
Lorazepam	.5 mg.	PRN ²	Anxiety
Lexapro	20 mg.	QD	Anxiety – helps reduce Panic attacks
Depakote ER	250 mg.	BID	Bi-Polar Depression
Amoxicillin	500 mg.	4T	Dental visits
Prevacid	30 mg.	QD	Acid reflux
Flexeril	10 mg.	BID	muscle relax
Tramadol	50 mg.	PRN/QD	pain

² Claimant takes Lorazepam one to two times a week.

<u>Medication</u>	<u>Dosage</u>	<u>Frequency</u>	<u>Prescribed for</u>
Sandura xr	60 mg.	QD	bladder spasms
Hyoscyamine	.125mg.	QD	bladder spasms
Cranberry + Vit C	3000mg.	QD	supplement
Fish Oil	1000mg	QD	supplement
Multivitamin		QD	supplement

She is capable of setting up her pill box but usually her In Home Supportive Services (IHSS) or Supported Living Services (SLS) worker does so.

5. Claimant concentrates on a task at least thirty minutes.

6. Claimant has disruptive/unacceptable behaviors. She calls people excessively at all hours of the day or night if she needs or wants something or if she is having a panic attack.³ She calls and talks to people about topics inappropriate to the relationship.⁴ She seeks advice from her family; if her family members do not tell her what she wants to hear, Claimant gets depressed or has a panic attack. Over the last year, she has averaged one panic attack a week. Some months she had one to two attacks but other months she had panic attacks on a daily basis. Claimant's depression substantially affects her daily functions. When depressed, she cries and has panic attacks. She is resistive in one or more situations when she does not get her way or does not want to do what is requested. When resistive, Claimant refuses to comply. If Claimant makes up her mind about something, she will not listen or discuss the topic.⁵ She is resistive two times a week. Claimant is verbally aggressive when frustrated two to three times a month. This usually occurs when she is upset with her parents. She has emotional outbursts/frustration when hindered, obstructed or thwarted, two to three times a month. She becomes verbally abusive/verbally aggressive when frustrated or she will cry.

7. Claimant receives medical care from a variety of practitioners. She has a primary care physician, urologist, ophthalmologist, psychiatrist and therapist. She receives treatment from the therapist twice a week and from the urologist once a month to have her catheter changed.

8. By choice, Claimant does not attend a day program or paid employment. When her health allows, she hopes to participate in volunteer activities.

³ She is reported to call her mother three to four times a day and Chesca Pietila, her SLS worker, three to six times a day.

⁴ For example, she called her gym coach when she was having trouble with her catheter.

⁵ An example is she decided to move into an intermediate care facility (ICF); she would not listen to or discuss options with anyone; then, she changed her mind and decided she would not and refused to objectively evaluate the decision.

9. Consistent with State and Federal law, the California Legislature places a high priority on providing opportunities for adults with developmental disabilities, regardless of degree of disability, to live in homes they own or lease with support available as often and for as long as it is needed, when that is the preferred objective in the Individual Program Plan (IPP).⁶

Claimant's preference is to live in her own home and requires SLS in order to do so.

10. Claimant receives 193.4 hours/month of IHSS services⁷. IHSS benefits provide Claimant with personal assistance, household maintenance, laundry, meal preparation and other ancillary tasks. Claimant's IHSS worker provides her with services from 8:00 a.m. – 12:00 p.m. Monday through Saturday and 5:00 p.m. – 8:00 p.m. seven nights per week.

Claimant receives the maximum number of hours allowed by IHSS for meal preparation and close to the maximum number of IHSS hours⁸ allowed for bladder and bowel care.

11. At this time, the Service Agency funds 76 hours of SLS per month, provided by A.O.K./Ecoways, Inc. (A.O.K.) for Claimant.

A.O.K. submitted a personal success plan (PSP), dated January 18, 2009. Thereafter the Service Agency evaluated Claimant's SLS needs. In April 2009, the Service Agency issued a Notice of Action reducing SLS to 74 hours. AOK submitted a subsequent PSP, dated May 20, 2009; the Service Agency affirmed its prior decision. Following an informal meeting, the Service Agency added two SLS hours. Claimant appealed and filed a Fair Hearing Request.

The Service Agency reduced Claimant's SLS hours from 86 hours to 76 hours per month in the areas of nutrition (7 hours) and housing (3 hours). Claimant seeks reinstatement of these hours, arguing that there have been no changes in her circumstances to justify a reduction in her SLS hours.

12. Claimant requested reinstatement of seven hours to achieve her nutrition goal. She weighs 185 pounds and is 59 inches tall. She has participated in the Weight Watcher's Program (Program) for the last year and would like to continue to do so.

Debra Martinez, a Service Agency employee, is also a Program participant. She testified, among other things, about the Program, the supports, tools and resources available.

⁶ Welf. & Inst. Code §4689

⁷ The IHSS Program provides assistance to those eligible aged, blind and disabled individuals who are unable to remain safely in their homes without this assistance. IHSS is an alternative to out-of-home care.

⁸ Claimant is eligible to appeal to IHSS for 1.68 hours per month for bladder and bowel care.

On a monthly basis, under existing authorizations of IHSS and SLS, Claimant receives eight hours for grocery shopping and 21 hours for meal preparation. In order for Claimant to participate in the Program, Claimant requires additional assistance with planning nutritional meals, discussing eating habits and accomplishing goals, problem solving, reviewing recipes and attending meetings once a week, reading pamphlets and handouts and using on-line calorie tracker. Due to her disabilities, these tasks take longer for Claimant than the typically functioning individual. There is no evidence that grocery shopping or meal preparation requires additional time as a result of Claimant participates in the Program.

13. Regarding housing, Claimant explained that she requires additional hours in the area of assistance transferring from wheelchair to commode to assure that she does not fall and also requires assistance wiping after bowel movements. In addition, hours are used in this area when there are emergency situations, such as when Claimant falls or when she needs assistance with a bowel movement, and no one is available to assist her. These emergencies vary from month to month; on average, Claimant calls her SLS provider for assistance in these two areas six times per month.

According to the evidence, Claimant receives sufficient IHSS and SLS hours to provide for bladder and bowel care but requires additional assistance for emergency situations.

14. Section 4512⁹, provides, in pertinent part:

“.... (e) ‘Natural Supports’ means personal associations and relationships typically developed in the community that enhance the quality and security of life for people, including, but not limited to, family relationships, friendships reflecting the diversity of the neighborhood and the community,...

(f) ‘Circle of Support’ means a committed group of community members ... meeting regularly with an individual with developmental disabilities in order to share experiences, promote autonomy and community involvement, and assists the individual in establishing and maintaining natural supports....”

15. Claimant’s natural supports are few, if any. She has regular contact with her mother and periodic communication with her father. She has two friends. If she needs to talk, her friends are available.

There is no evidence that Claimant has natural supports or a circle of support that assist with the Program.

If Claimant needs assistance or in case of an emergency, if Claimant’s mother is available and if it is convenient for her to do so, Claimant’s mother will respond. Otherwise, response is from a paid support or Claimant calls 911.

⁹ Unless otherwise indicated, all statutory reference is to the California Welfare and Institutions Code.

16. Under existing authorizations of IHSS and SLS, on a monthly basis, Claimant has a total of eight hours for grocery shopping, 21 hours for meal preparation and 54.32 hours for bladder and bowel care. The A.O.K. PSP for Claimant includes several overlapping goals and hours. Claimant has used the maximum number of IHSS hours for meal preparation. She is eligible to apply for an additional 1.68 IHSS hours for bowel and bladder care. She has minimal, if any, natural supports and no circle of support. Accordingly, Claimant continues to have an unmet need.

On a monthly basis, Claimant requires additional assistance, to wit: four hours for nutrition and three hours for housing. Because she is eligible to apply for 1.68 IHSS hours, the Service Agency is required to fund SLS as follows: an additional four hours for nutrition and 1.32 hours (i.e., 3.0, less 1.68) for housing, a total of 81.32 SLS hours.

LEGAL CONCLUSIONS

1. Section 4659 states, in pertinent part:

“(a)... the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare the school districts, and federal supplemental security income and the state supplementary program.

(2) Public entities ... aid, insurance or medical assistance....”

2. Section 4648, subdivision (8) states,

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 for providing those services.

3. Section 4646, subdivision (b) states:

“For purposes of this section, ‘generic agency’ means any agency which has a legal responsibility to serve all members of the general public and which is receiving public funds for providing such services.”

4. On July 28, 2009, the State of California amended the Welfare and Institutions Code to include Section 4689 which, provides, in pertinent part:

“Consistent with state and federal law, the Legislature places a high priority on providing opportunities for adults with developmental disabilities, regardless of the degree of disability, to live in homes that they own or lease with support available as often and for as long as it is needed, when that is the preferred objective in the individual program plan. In order to provide opportunities for adults to live in their own home, the following procedure shall be adopted:

.... (f) The planning team, established pursuant to subdivision (j) of Section 4512, for a consumer receiving supported living services shall confirm that all appropriate and available sources of natural and generic supports have been utilized to the fullest extent possible for that consumer.” (Added by Stats.2009-2010, 4th Ex. Sess., c. 9 (A.B.9), § 13, eff. July 28, 2009.)

5. Claimant is an adult consumer of the Service Agency who made the decision, documented in her IPP, to live independently in her own home. She requires services and supports in order to do so. She receives IHSS and SLS hours on a monthly basis. There is no dispute that Claimant needs SLS to live independently. The issue is the number of hours necessary for her to do so effectively and safely. She receives 193.4 IHSS hours and 76 SLS hours.

6. *Contention of the Parties.* The Service Agency contends that Claimant receives sufficient IHSS and SLS hours to meet her daily needs; IHSS is a generic support; Claimant utilizes 180 of the 193.4 authorized hours, leaving 13.4 hours/month that are not being used; the additional services for which she requests assistance are covered through IHSS if Claimant accesses all hours granted to her through IHSS; further, Claimant’s SLS provider can modify the use of her SLS hours to meet Claimant’s needs; finally, Claimant has natural supports and a circle of support available to provide assistance.

Claimant asserts that her circumstances have not changed and therefore she continues to need 86 hours of SLS to participate in the Weight Watcher’s Program, for bladder and bowel control and emergency situations. She argues that IHSS services are not a generic support, not a duplication of services and do not supplant the budget of any such agency; she does not have natural supports or a circle of supports to provide assistance.

7. *Burden of Proof.* When a consumer seeks to establish eligibility for government benefits or services, she has the burden of proof. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits); *Greator v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 (retirement benefits).) The standard of proof in this case requires proof to a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute (including the Lanterman Act) requires otherwise.

In April 2009, the Service Agency issued a Notice of Action, proposing reduction of Claimant’s SLS hours to 74 hours. She did not appeal. A.O.K. presented a revised PSP, dated May 28, 2009, to justify reinstatement of all SLS hours. Thereafter, the Service Agency issued a Notice of Action, dated June 5, 2009 and denied Claimant’s request. Claimant appealed.

Given the foregoing, Claimant has the burden of proof.

8. Claimant asserts that IHSS is not a generic agency.¹⁰ Claimant argues that program does not serve all members of the “general public,” which has been described as “pertaining to an entire community and open to all without limitation or restriction.” (*Berkeley Center v for Independent Living*, 42 Cal.App.4th 874, 879 (1996); *Duskin v. State Board of Dry Cleaners*, 58 Cal.2d 155, 163 (1962). The IHSS program has its own unique “limitations” and “restrictions.”

In order to qualify for IHSS services, an applicant must either “receive SSI/SSP benefits; is medically needy, aged, blind or disabled; meets all SSI/SSP eligibility criteria; was once eligible for SSI/SSP benefits until engaging in substantial gainful activity....” (Manual of Policies & Procedures section 30-755.) Thus, Claimant contends that one who qualifies under the “limitations” or “restrictions” cannot be considered to meet the *Berkeley Center* definition of “general public.”

9. In the context of the Lanterman Act, Claimant’s argument that IHSS is not a generic agency is without merit. Regarding statutory construction, in *Berkeley Center*, the Court stated:

“An individual statute must be construed in the context of the comprehensive statutory scheme of which it is a part. Statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. Where uncertainty exists, appellate courts must construe provisions in a reasonable, common sense fashion taking into consideration the practical consequences that will flow from a particular interpretation. (*Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, 746 [250 Cal.Rptr. 869, 759 P.2d 504]; *San Francisco Internat. Yachting etc. Group v. City and County of San Francisco* (1992) 9 Cal.App.4th 672, 680 [12 Cal.Rptr.2d 25]; *DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18 [194 Cal.Rptr. 722].) Where possible, courts should avoid literal statutory interpretations that would lead to foreseeably absurd results in practice. (*Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1059 [1 Cal.Rptr.2d 195].)”

In the Lanterman Act, the legislature intended that the Service Agency be a payor of last resort for services and supports necessary to meet the needs of individuals with developmental disabilities. As such, before the Service Agency may fund services and supports for individuals with developmental disabilities, the Service Agency must first consider funds available from a variety of public and private entities or programs obligated to fund these services and supports. The Lanterman Act describes such entities as “generic agencies” or “generic supports”. The majority of such entities or programs impose limitations or restrictions. If Claimant’s reasoning is applied, the majority, if not all, of such entities or programs would be disregarded, an

¹⁰ “Generic agency” is defined in Section 4644, subdivision (b) (Legal Conclusions 3).

interpretation not intended by the statute.

Given the foregoing, IHSS is properly considered as a generic support.

10. Except as provided in Finding 12, insufficient evidence was offered to establish that the IHSS services constitute a duplication of services. Claimant receives the maximum number of IHSS hours allowed for meal preparation. She is eligible to receive an additional 1.68 IHSS hours for bowel and bladder care. There is no evidence that the unused 13.4 IHSS hours may be used for nutrition and/or bowel and bladder care. Claimant has minimal if any natural supports; there is no evidence that she has a circle of support. Considering Claimant's care needs in the areas of nutrition and housing, she has an unmet need.

On a monthly basis, Claimant requires additional assistance, to wit: four hours for nutrition and three hours for housing; because she is eligible to apply for 1.68 IHSS hours, the Service Agency is required to fund SLS as follows: four hours for nutrition and 1.32 hours for housing, a total of 81.32 SLS hours.

ORDER

1. The petition of Dawn G. for reinstatement of 10 hours of supported living services, increasing the total authorized supported living services funded by the Inland Regional Center to 86 hours per month is granted, as modified.

2. Inland Regional Center shall reinstate four hours of supported living services for nutrition and 1.32 hours for housing, increasing the total authorized supported living services to 81.32 hours per month.

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision.

DATED: _____

VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings