

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

In the Matter of:

**CLAIMANT,**

Claimant,

vs.

**WESTSIDE REGIONAL CENTER,**

Service Agency.

OAH No. 2010-03-0364

**DECISION**

This matter was heard by Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, on September 29, 2010, in Culver City.

Claimant, who was not present, was represented by her mother, (Claimant's Mother).

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (WRC or Service Agency).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on September 29, 2010.

**ISSUE**

May the Service Agency reduce Claimant's in-home respite hours from 26 hours per month to 14 hours per month?

**EVIDENCE RELIED UPON**

Documents: Service Agency's exhibits 1-10; Claimant's exhibits A and B.

Service Agency's Testimony: Lisa Basiri, Fair Hearing Coordinator.

Claimant's Testimony: Claimant's Mother

**FACTUAL FINDINGS**

1. Claimant is an eight-year-old female who is a consumer of WRC based on her qualifying diagnosis of autism.

2. Claimant lives at home with her mother, who is her primary caregiver and the household's sole wage-earner. Claimant attends elementary school, where she has just begun third grade. Through her school, Claimant receives the services of a one-on-one behavior intervention services aide for approximately 40 hours per week. The aide spends 30 hours per week with Claimant at school, and 10 hours per week at Claimant's home. The aide also attends to Claimant's dietary, toileting, and safety needs.

3. In accordance with Claimant's January 27, 2009, individual program plan (IPP), Claimant has been receiving 26 hours per month of in-home respite services at a rate of \$14.77 per hour. That IPP also provides that Claimant shall receive funding for 64 hours per month of specialized supervision services at a rate of \$13.22 per hour. The IPP addresses Claimant's toileting and feeding deficits as well as safety and behavioral issues, including elopement, a tendency to overstimulation, and flailing.

4. By Notice of Proposed Action dated January 19, 2010, WRC notified Claimant's mother of its proposed action to reduce in-home respite services from 26 hours per month to 14 hours per month, effective March 1, 2010. In the Notice of Proposed Action, WRC wrote that:

The [Purchase of Services] review team has reviewed and considered [Claimant's] strengths and challenges relative to those of a typically developing 7 year old [sic] and has determined that a reduction to 14 hrs/mo is appropriate. This reduction in hours conforms to WRC's Service [sic].

5. On or about February 1, 2010, Claimant's mother submitted to WRC a Fair Hearing Request on Claimant's behalf, appealing the proposed reduction in funding.

6. WRC has continued to fund 26 hours of respite services for Claimant per month, pending the decision in this matter. By letter to Claimant's mother dated September 22, 2010, WRC offered to continue funding respite services at that level for five months, to allow Claimant's mother "sufficient time to access the generic resource to help meet [Claimant's] needs." WRC suggested that because Claimant received "full-scope Medi-Cal," she might be eligible to receive In-Home Supportive Services (IHSS) through the County of Los Angeles, and offered to assist in the application process. Claimant's mother testified at hearing that she applied for IHSS in January 2010; the determination as to the amount of IHSS is currently on appeal.

7. Claimant's mother testified about Claimant's behavioral issues and other needs. Claimant elopes unless supervised, and when under stress she engages in self-injurious behavior, biting her forearms and her fingernails until they are bloody. She also has health and safety issues at school, and has toileting and feeding deficits. Claimant can feed herself, but is easily distracted and requires supervision or she will not finish a meal. She has an aversion to toileting due to a sensory aversion to the sound of rushing water, and requires prompting. She needs support with all of her personal care tasks; she has an aversion to having her hair and teeth touched. She requires prompting and assistance with

dressings. Her caregiver must tie her shoes and zip her clothes. Claimant rarely uses complete sentences and requires prompting and practice to address her receptive and expressive speech deficiencies; she receives three hours per week of speech therapy. When she experiences strong emotions, Claimant engages in flailing and jumping, which can cause her to knock into objects and create a safety issue. Most of these developmental challenges are described in Claimant's January 27, 2009, IPP. At home, during both behavior intervention and specialized supervision, Claimant receives assistance with medication, toileting, and safety. Claimant's mother remains present to ensure that Claimant is not engaging in self-injurious or elopement behavior.

8. Claimant's mother also testified about the number of hours of respite and specialized supervision provided by the Service Agency. The Service Agency began funding 26 hours of respite in 2006 or 2007, under the terms of an agreement reached with Claimant's mother during or after a fair hearing. Claimant's mother works as a freelance photographer. She has structured her work schedule to make herself available to Claimant every weekday after 2:00 p.m. Her income was approximately \$6,000 in 2008; her income did not significantly change in 2009. The state has reduced hourly wages for Claimant's special services provider, so Claimant's mother must supplement those wages. When she is financially unable to do so, the provider reduces the number of hours of specialized supervision. Thus, instead of receiving 64 hours per month for specialized supervision plus 26 hours for respite, for a total of 90 hours, Claimant is receiving a total of approximately 70 to 80 hours per month.

9. By letter dated July 23, 2010, Dr. Jeffrey S. Penso, Claimant's pediatrician, wrote that Claimant's medical status remains unchanged from last year. She has a restricted diet with multiple feedings each day, requires injections of medicine, and elopes and exhibits self-injurious behaviors such as biting her arms.

10. WRC provided no evidence of an actual assessment of Claimant's needs, other than a review of the IPP, and did not visit Claimant or observe her in the home environment in connection with the proposed reduction in respite services. The Service Agency testified that it faces challenges in making decisions regarding appropriate services and supports for Claimant. The Service Agency lacks documentation to substantiate or support the needs described by Claimant's mother in the IPP and in testimony at the hearing, and there have been difficulties in arranging meetings with Claimant's mother. The Service Agency also testified that Claimant should be able to receive IHSS, which would at least partially offset the need for respite services.

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## DISCUSSION

### *Jurisdiction and Burden of Proof*

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.)<sup>1</sup> An administrative “fair hearing” to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) Claimant’s mother requested a fair hearing to appeal the Service Agency’s proposed reduction of funding for Claimant’s in-home respite services. Jurisdiction in this case was thus established. (Factual Findings 4, 5.)

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, the Service Agency seeks to change the level of services. Therefore, the Service Agency bears the burden of proving, by a preponderance of the evidence, that its decision to reduce Claimant’s in-home respite service hours is correct. (Evid. Code, § 115.)

### *Funding for Claimant’s Respite Services*

3. The Lanterman Act acknowledges the state’s responsibility to provide services and supports for developmentally disabled individuals and their families. (§ 4501.) Regional centers, such as the Service Agency, play a critical role in the coordination and delivery of services and supports. (§ 4620 et seq.) Regional centers are responsible for developing and implementing IPPs, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (§§ 4646, 4646.5, 4647, and 4648.)

4. Section 4512, subdivision (b), of the Lanterman Act provides, in pertinent part, that respite is one of the services that may be provided to consumers and their families. “In-home respite services” are defined in the Lanterman Act as “intermittent or regularly scheduled temporary nonmedical care and supervision provided in a client’s own home, for a regional center client who resides with a family member.” (§4690.2, subd. (a).) Subdivision (a) of section 4690.2 provides that respite services are designed to “do all of the following:

- (1) Assist family members in maintaining the client at home.
- (2) Provide appropriate care and supervision in maintaining the client at home.
- (3) Relieve family members from the constantly demanding responsibility of caring for the clients.
- (4) Attend to the client’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.

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<sup>1</sup> All statutory citations are to the Welfare and Institutions Code, unless otherwise stated.

5. Effective July 1, 2009, section 4686.5 was added to the Lanterman Act, limiting a regional center's ability to purchase respite care for the families of consumers. Among other things, section 4686.5 provides that "[a] regional center may only purchase respite services when the care and supervision needs of a consumer exceed that [sic] of an individual of the same age without developmental disabilities." (§ 4686.5, subd. (a)(1).)

6. The evidence establishes that Claimant's care and supervision needs exceed those of a child of the same age without disabilities. (Factual Findings 3, 7-9.) Given the significant demands of caring for Claimant, the Service Agency has not demonstrated that a reduction of respite hours is justified.

7. The Service Agency relies in part on its Service Standards, and in particular on its Respite Guidelines, adopted in August 1999, to justify the proposed reduction in respite hours.<sup>2</sup> Those standards and guidelines have not been promulgated by the Department of Developmental Services in the form of regulations and are, therefore, of questionable effect. The guidelines, however, provide that up to 21 respite hours per month are appropriate when the child has behavioral challenges such as self-abusive behavior, and that "[a]dditional hours per month may also be provided upon documentation of need." The evidence in this matter satisfies the terms of the Service Agency's guidelines. (Factual Findings 3, 7-9.)

8. Under the Lanterman Act, regional centers may not purchase services for their clients when those services can be provided by a generic agency, an agency that has a legal responsibility to serve members of the general public and that receives public funds for providing such services. (See §§ 4648, subd. (a)(8), 4659, 4646, subd. (d), 4646.4, subd. (a), 4646.5, subd. (a)(4), and 4647, subd. (a).) IHSS may be considered a generic resource when the approved IHSS service is consistent with a specific service need identified in the client's IPP; however, respite hours purchased by regional centers should be considered as an offset only when there is a clear determination by the interdisciplinary team that the specific IHSS services are meeting "the respite need as identified in the consumer's [IPP]." (§ 4686.5, subd. (a)(5).) Here, IHSS hours for Claimant are subject to a pending appeal, so no "clear determination" could be made by WRC's interdisciplinary team that IHSS services will meet the respite needs of Claimant's mother.

9. It is not clear from the record that the respite hours are being used strictly for the purposes for which they are intended under section 4690.2, subdivision (a). At least some of the respite has been used as an extension of or concurrent with the behavioral services and other care that Claimant needs for much of the day, while Claimant's mother is present to prevent elopement. (See Factual Findings 7, 8.) Nevertheless, the Service Agency did not meet its burden of establishing grounds that would warrant the proposed reduction in hours. Moreover, under the Service Agency's 1999 Respite Guidelines, "respite may be used

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<sup>2</sup> The Service Agency also introduced excerpts from a revised version of its Service Standards, adopted in September 2010. The Service Agency testified, however, that the prior Service Standards were applied in this case.

at the same time [other] services are being provided . . . as a means to reach the desired outcomes more quickly and expediently.”

LEGAL CONCLUSION

Cause was not established to reduce Claimant’s in-home respite hours from 26 hours per month to 14 hours per month. (Factual Findings 1-10, and Discussion.)

ORDER

Claimant’s appeal is granted. Westside Regional Center shall continue funding 26 hours per month of in-home respite services for Claimant.

DATE: October \_\_\_\_, 2010

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HOWARD W. COHEN  
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.