

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

BANASA A.,

Claimant,

vs.

REGIONAL CENTER OF THE EAST
BAY,

Service Agency.

OAH No. 2011090811

DECISION

Administrative Law Judge David L. Benjamin, State of California, Office of Administrative Hearings, heard this matter in San Leandro, California, on December 2, 2011, and January 10 and March 5, 2012.

Mary Dugan represented Regional Center of the East Bay (RCEB), the service agency.

Claimant Banasa A. was represented by her father and stepmother.

The record was closed and the matter was submitted on March 5, 2012.

The record was reopened by the administrative law judge to receive the regional center's Notice of Proposed Action, and four addenda to claimant's Individual Program Plan, dated April 22, June 2, August 1, and December 5, 2011. These documents were submitted by the regional center on March 21, 2012, marked collectively as Exhibit 16, and admitted. The record closed again on March 21, 2012, and the matter was deemed resubmitted on that date.

ISSUES PRESENTED

Whether RCEB may eliminate personal assistance being provided to claimant in the amount of 150 hours per month and one supervisory visit per quarter, and reduce claimant's in-home respite from 60 hours per month to 90 hours per quarter.

FACTUAL FINDINGS

1. Claimant is a 30-year-old RCEB consumer who receives regional center services due to mental retardation. RCEB and claimant stipulated that “[c]laimant is a substantially disabled, profoundly mentally retarded adult with intensive support needs. She requires a person to assist her to make decisions for her, to help her reason, to help her interact with others, to help her solve problems and to help her communicate effectively. Additionally, claimant needs help maintaining safety in her environment and needs help attending to her daily living activities. Claimant requires a dedicated caregiver to provide constant supervision, 24 hours per day.” The evidence also establishes that claimant engages in self-injurious behaviors, including pica, and has a tendency to bolt.

2. Claimant lives at home with her father, who is 71 years old, and her stepmother; she has lived at home all her life.

3. Claimant's current Individual Program Plan (IPP) is dated April 9, 2010. The IPP states as one of claimant's long-term goals that claimant will live at home with her family, and describes that as “the best living arrangement for her.” The IPP calls for the regional center to provide the following services and supports to claimant:

- A behavior management day program on weekdays from 9:00 a.m. to 3:00 p.m., with the assistance of a 1:1 aide because of claimant's inappropriate behaviors.
- 60 hours per month of in-home respite.
- 150 hours per month of personal assistance at the certified nursing assistant (CNA) rate, plus one supervisory visit per quarter. Personal assistance is authorized for the hours of 6:00 a.m. to 9:00 a.m., and 3:00 p.m. to 6:00 p.m., on weekdays, before and after claimant's day program.

Under the IPP, these services and supports are to be provided through April 2013. Annual reviews of the IPP, conducted on April 22, June 2, and August 1, 2011, called for the continuation of these services and supports.

4. Claimant's personal assistance hours have been in place since 2001.

The term “personal assistance” is not defined by the Lanterman Act¹ or regional center policy. (It is mentioned in subdivision (a)(11) of section 4648 as a potential service or support, but is not defined.)

Although the term itself is not defined, the evidence establishes that the purpose of claimant’s personal assistance hours was to provide day care for claimant at a higher hourly rate. In 2001, claimant’s father and stepmother were working full-time, outside the home. They informed RCEB that because of the high level of care and supervision that claimant required, it was difficult to find and retain qualified caregivers at the day care rate being paid by the regional center. A dispute over the issue arose between claimant and RCEB. At a prehearing conference in October 2001, they reached a negotiated settlement. Pursuant to the settlement, RCEB agreed to pay a higher hourly rate – the hourly rate for a certified nursing assistant – for day care for claimant. Claimant’s caseworker described the arrangement in a June 12, 2003 purchase of service request:

[Claimant’s] family have had a difficult history in finding and retaining adequate caregivers for her. Due to this, [claimant] was approved to receive respite and daycare under home health services (CNA level) despite having no health issues. This was granted at a pre-hearing conference on 10/29/01.

Since its agreement with claimant in 2001, RCEB has been paying for claimant’s day care at the hourly rate it pays for CNA-level services. To implement the agreement, RCEB has issued purchase of service authorizations for claimant under the vendor code “personal assistance.”

5. At some time prior to May 2011, not otherwise established by the evidence, RCEB decided to revisit claimant’s need for personal assistance. According to Ronke Sodipo, RCEB’s Associate Director of Consumer Services for Alameda County, the review was prompted when RCEB learned that claimant’s father had retired and was no longer working outside the home.

6. In May 2011, RCEB Nurse Consultant Mark Berenson went to claimant’s home to perform a nursing evaluation.

In his report of the visit, dated August 4, 2011, Berenson noted that claimant is authorized to receive “167 hours of [In-Home Supportive Services] Most of these authorized hours are for protective supervision.”

With respect to claimant’s personal assistance hours, Berenson concluded that claimant

¹ Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. All statutory references are to the Welfare and Institutions Code.

does not really require personal care at the level of nursing attendant for 4-6 hours on a daily basis. And in fact, those hours have never been fully staffed. [Claimant's] primary need is for supervision, redirection, and management of her behaviors; and the transition from home to program in the morning and from program back home in the afternoon are always problematic. Her relationship with a consistent provider makes those transitions easier, but her need for hands on personal care at the nursing attendant level during those hours is minimal.

7. On June 3, 2011, RCEB refused to approve a purchase of service authorization for personal assistance, or for in-home respite at the volume specified in claimant's IPP. The decision of the director's designee states, "Nursing note does not emphasize that this is necessary service. [Sic.] There are already adequate supports as per Policy."

8. On September 13, 2011, RCEB issued a Notice of Proposed Action (NOPA) which states, in relevant part, as follows:

. . . As of November 1, 2011, the Purchase of Service for Personal Assistant through Nightingale Nursing, 150 hours a month maximum and one Supervisory visit per quarter will be cancelled.

. . . As of November 1, 2011, your respite hours will be reduced to 90 hours/quarter[.]

As reasons to terminate personal assistance, the NOPA cites section 4648, subdivision (a)(8), which states that regional center funds shall not be used to supplant the budget of another public agency, and section 4686.5, subdivision (a)(4), which prohibits a regional center from purchasing day care services to replace respite.

As its reason to reduce respite, the NOPA cites section 4686.5, which prohibits a regional center from purchasing more than 90 hours of in-home respite per quarter for a consumer, unless the consumer can establish cause for an exemption.

9. Claimant appealed from the NOPA and this hearing followed.

Personal assistance

10. As noted above in Finding 4, the purpose of claimant's personal assistance hours was to provide day care for her at a nursing-level rate. RCEB's purchase of service policy for adult day care states, in relevant part, that "day care" is "care and supervision for . . . adults with developmental disabilities who have specialized care needs and whose parent/parents/care givers [sic] are engaged in employment . . . that can only occur beyond the consumer's regular . . . day program."

11. Claimant's father is an electrical engineer. He worked outside the home until around 2001, when he retired. Since then, he has been self-employed working from an office in his home. The number of hours per day or per week that claimant's father works was not established; he testified that there is no typical day for him. Claimant's father testified that, because of claimant's need for constant supervision, he cannot work and supervise claimant at the same time. His testimony on this point is persuasive. Claimant's father also argues that without the personal assistance hours before and after claimant's day program, he would have "no opportunity to work whatsoever, even at home." This claim is not persuasive. The evidence does not establish that claimant's father is unable to work during the time claimant attends her day program, nor does the evidence establish that those hours are insufficient to meet his business needs. Claimant's father did not demonstrate, as RCEB's purchase of service policy requires him to do, that he is engaged in employment that can only occur beyond the hours of claimant's day program.

12. At the present time, claimant receives 167 hours per month of In-Home Supportive Services. Of that amount, 160 hours are for protective supervision. Claimant's father is her IHSS provider. He is free to hire someone else to provide IHSS services with the money paid by IHSS. Claimant's father states, however, that because of claimant's intensive needs, it is very difficult to find qualified workers at the IHSS hourly rate to care for claimant during the day.

In-home respite

13. Claimant's father and stepmother testified that they need more in-home respite, not less. They are having a very difficult time dealing with the intense physical and emotional demands of caring for claimant. Claimant's father and stepmother are the only family members who care for her. Claimant's biological mother is not capable of caring for claimant during claimant's waking hours, and claimant's extended family lives outside the state. Since one of them must be home to care for claimant, claimant's father and stepmother have to do things separately. They cannot do recreational activities together or shop together. They vacation separately or take claimant with them, which does not provide them with any emotional relief from caring for claimant. They have only a limited social life, they have no time to volunteer in the community, and they have limited time and energy to care for themselves or other family members. (Claimant's stepmother must travel to Oklahoma for three months every year to take care of her mother; claimant's father is the youngest of nine children, and must make health care decisions for two of his elderly siblings.) Claimant's father and stepmother state that, at a minimum, they need sufficient respite so that they can go away for one weekend per month.

14. In the words of claimant's stepmother, the elimination of personal assistance and a reduction in respite will be "the straw that breaks the camel's back." If claimant's personal assistance is eliminated and her in-home respite reduced, claimant's father and stepmother will seek an out-of-home placement for her. They do not want to break the moral commitment they have made to keep claimant in their home, but they feel they will have no

choice. They argue note that an out-of-home placement will be more costly to the regional center than the services and supports that are currently in place.

15. Sodipo, the regional center's Associate Director of Consumer Services, testified that the intensity of claimant's care and supervision needs are similar to those of other developmentally disabled adults, whose caregivers have been limited to 90 hours per quarter of in-home respite.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, the State of California accepts "a responsibility for persons with developmental disabilities and an obligation to them which it must discharge." The Act provides 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 life of the community." (§ 4501.) Regional centers are required to carry out the state's responsibility to the developmentally disabled. (§ 4501.)

2. The services and supports to be provided to a consumer are set forth in the consumer's IPP. (§ 4646.5, subd. (a)(4).) A consumer's IPP, however, must be reviewed periodically in light of the consumer's changing needs. (§ 4646.5, subd. (b).) In addition, every regional center must have in place an "internal process" to ensure that the IPP conforms to purchase of service policies, and uses generic resources where appropriate. (§ 4646.4.)

Personal assistance

3. RCEB advances two arguments for eliminating claimant's personal assistance hours: first, that the service can be provided by a generic resource, namely, claimant's IHSS hours for protective supervision; and second, that the service is in fact day care for which claimant is not eligible. Of these two issues, the nature of the service is the more fundamental. If claimant is not eligible to receive personal assistance hours, then the issue of whether those hours can be satisfied by a generic resource is moot.

4. When claimant's personal assistance hours were put in place, the purpose was to provide her with day care, but at a higher hourly rate so that she could attract more capable caregivers. (Finding 4.) Her eligibility to receive personal assistance, therefore, depends on whether she meets the necessary requirements to receive day care. She does not. Under RCEB's purchase of service policy, day care can be provided only when the caregiver is engaged in employment that can only occur beyond the hours of the consumer's day program. The evidence does not establish that claimant's father, who is also her caregiver, is engaged in employment that can only occur before and after claimant's day program.

5. In addition to asserting its own purchase of service policy, RCEB contends that it is legally prohibited from providing day care to claimant because her father does not work outside the home. To support this contention, RCEB relies on section 4686.5. That

section prohibits a regional center from purchasing more than 90 hours of in-home respite per quarter for a consumer, unless the consumer can establish grounds for an exemption. (§ 4686.5, subd. (a)(2).) It goes on to provide that

[a] regional center shall not purchase day care services to replace or supplant respite services. For purposes of this section, “day care” is defined as regularly provided care, protection and supervision of a consumer living in the home of . . . 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).) RCEB argues that, since claimant’s father is not employed outside the home, it is prohibited from purchasing day care for claimant.

Section 4686.5, subdivision (a)(4), prohibits a regional center from purchasing day care to replace respite, thereby evading the respite limitations imposed by that section. Since the evidence does not establish that claimant’s personal assistance hours were granted for the purpose of replacing respite, the definition of day care in section 4686.5 does not apply to this case.

6. Claimant argues that she needs consistent, nursing-level care to manage her behavior and to communicate effectively with her. The evidence does not support the claim that claimant requires daily nursing care. (Findings 4 & 6.) But, regardless of the level of care, the more fundamental issue is whether she is eligible for day care before and after her day program. Since the evidence does not establish that claimant’s father needs the hours before and after claimant’s day program to support his business, claimant is not eligible for day care at those times.

7. RCEB properly determined that claimant’s personal assistance hours may be eliminated.

In-home respite

8. Section 4690.2, subdivision (a), defines in-home respite as follows:

“In-home respite services” means intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client’s own home, for a regional center client who resides with a family member. These 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 to ensure the client's safety in the absence of family members.

(3) Relieve family members from the constantly demanding responsibility of caring for the client.

(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.

9. In 2009, the Legislature adopted section 4686.5, which limits the authority of a regional center to purchase in-home respite services. It states, in relevant part, that a regional center "shall not purchase . . . more than 90 hours of in-home respite services in a quarter, for a consumer." (§ 4686.5, subd. (a)(2).) A regional center may grant an exemption to this limit

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.

10. In its NOPA, the regional center asserts that claimant is subject to the 90 hour per quarter limit.² It argues that the intensity of claimant's care and supervision needs are similar to those of other RCEB consumers, whose caregivers were denied an exemption to the 90-hour-per-quarter limit.

11. The intensity of the consumer's care and supervision needs, however, is only one side of the equation. The other side is the effect of those needs on the family's ability to keep the consumer in the family home. In this case, the evidence establishes that an exemption from the respite limit is necessary to allow claimant's father and stepmother to maintain claimant in the family home. (Finding 14.)

12. Claimant has established grounds for an exemption from the respite limit. The regional center may not reduce claimant's in-home respite hours.

² At hearing, RCEB argued that claimant's respite needs can be satisfied by her IHSS protective supervision hours. While the regional center's NOPA advances this as a ground to eliminate personal assistance, the NOPA does not assert this as a ground to reduce her respite. This issue, therefore, is not considered.

ORDER

1. The appeal of claimant Banasa A. from the regional center's determination to eliminate personal assistance of 150 hours per month, and one supervisory visit per quarter, is denied.

2. The appeal of claimant Banasa A. from the regional center's determination to reduce in-home respite from 60 hours per month to 90 hours per quarter is granted.

DATED: _____

DAVID L. BENJAMIN
Administrative Law Judge
Office of Administrative Hearings