BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: JOCELYNE O. Claimant, vs. EASTERN LOS ANGELES REGIONAL CENTER, Service Agency.	OAH No. 2011110685

DECISION

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on January 9, 2012, in Alhambra, California.

Jocelyn O. (Claimant) was represented by Jackie Chiang Dai, Esq., Client Rights Advocate, and Lucy Garcia and Maria Santoyo-Borjas, Assistant Client Rights Advocates, Disability Rights California. Claimant's mother, Rocia and father, Valente, were also present assisted by the Spanish language interpreter, Bernadette Buckley. Claimant was present throughout the hearing. .[1]

Judy Casteneda, Fair Hearing Coordinator, represented Eastern Los Angeles Regional Center (ELARC, Regional Center or Service Agency).

Oral and documentary evidence was received. The matter was submitted for decision at the conclusion of the hearing.

[1] Claimant and her mother and father are identified by first name and last initial to protect their privacy.

ISSUE

Should Eastern Los Angeles Regional Center be permitted to reduce Claimant's in-home respite from 35 hours per month to 16 hours per month?

FACTUAL FINDINGS

Background

1. Claimant is a 16 year-old girl who lives with her mother, father and 18 year old sister, Lissette. Claimant's mother is a homemaker and her father is a bus driver. Claimant qualifies for regional center services on the basis of autism and severe mental retardation. She is also diagnosed with Intermittent Explosive Disorder. Claimant is in generally good overall health. Claimant is enrolled in a severely handicapped class through the Whittier Unified School District (District).

2. Claimant's most recent Individual Program Planning meeting (IPP) was held on October 17, 2011. At that time, Lupe Reyes (Reyes), the service coordinator assigned to Claimant's case informed mother that ELARC was recommending Claimant receive 16 hours of respite services per month, a reduction from the 35 hours she had been receiving since approximately June 2011. Parent's disagreed with the recommendation. On October 19, 2011 ELARC issued a Notice of Proposed Action (NPA) notifying Claimant of its intent to reduce her respite to 16 hours per month. Service Agency based its decision on Welfare and Institutions Code sections 4686.5 and 4646. [2] On November 2, 2011 Claimant, through her mother, filed a timely fair hearing request. This hearing ensued.

3. On December 6, 2010, an IPP was held. ELARC agreed to provide 30 hours of respite per month. Respite was provided by Claimant's sister Lissette. She was also receiving 30 hours personal assistance through People's Care. People's Care provides community integration activities with Claimant so as to reduce her maladaptive behaviors and to develop safety and socialization skills. The family was receiving 249 hours per month of In-home Support Services (IHSS) to assist with her self-care need. Mother was Claimant's IHSS provider. The IPP included a recommendation that ELARC fund a "DIR" assessment. [3] The DIR assessment appears to have been included to address Claimant's maladaptive behaviors and to improve her communication skills.

4. On January 27, 2011, Claimant was admitted to College Hospital, located in Cerritos, California, due to psychiatric and behavioral concerns. On January 31, 2011, ELARC commenced funding the College Hospital placement. The January 31, 2011 Psychiatric and Mental Status Examination report, prepared by Craig Wronski, M.D., stated that Claimant was placed in the developmentally disabled/mentally ill unit as a result of her

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[2] All further citations are to the Welfare and Institutions Code, unless indicated.

[3] DIR refers to a "Developmental, Individual difference, Relationship" based model for the delivery of services to individuals with autism. DIR is also known as Floortime.

developmental disability as well as her psychotic symptoms. Dr. Wronski reported that Claimant, while taking her prescribed psychotropic medications, had recently engaged in self-harmful behavior as well as assaultive behaviors towards others. Several incidents of agitation, and assaultive and self injurious behavior were documented in her October 2010 Behavior Support Plan prepared by the District. College Hospital staff documented Claimant's maladaptive behaviors and what progress was being made in reducing their frequency. As of late May 2011, Claimant continued to exhibit maladaptive behaviors with both hospital staff and peers. During the course of her hospital stay, Claimant was administered over 30 different psychotropic medications in an effort to find a medication regime that would reduce her maladaptive behaviors. Discharge was planned for late June 2011.

5. Parents were very concerned about the care Claimant was receiving at College Hospital and arranged for her discharge to home on June 3, 2011. After her discharge from College Hospital, Claimant's People's Care services were reduced from 30 hours to 25 hours per month and her respite hours were increased from 30 to 35 hours per month. Mother thought this was a compromise reached so that she could have more in-home respite services.

2011 IPP and Claimant's Present Needs and Service Levels

6. On October 17, 2011, Claimant's annual IPP was held at Claimant's home. Mother and Claimant's service coordinator, Lupe Reyes (Reyes), attended the IPP. The IPP documents Claimant's many self-care needs and maladaptive behaviors. The IPP notes that Claimant's behaviors improved for about five weeks after her hospitalization, and then regressed. At the time of her 2011 IPP, Claimant was still aggressive despite receiving her medication as prescribed. The 2011 IPP recommends continued funding for 25 hours of People's Care personal assistance services.

7. According to the 2011 IPP, Claimant was receiving 240.2 hours IHSS per month to assist her with her daily living skills. Mother testified the IHSS hours were for protective care. No evidence was presented showing how much mother receives per hour to perform this service. Claimant also receives Supplemental Security Income (SSI) in an amount that varies depending on her father's earnings. Claimant is a Medicaid Waiver[4] recipient. According to the IPP, Mother declined DIR services, although mother testified she was willing to use such services and believed she had been placed on a waiting list by the service coordinator. DIR services are intended to reduce Claimant's maladaptive behaviors so that she can remain in the family home and improve the quality of her life. In the past, Claimant had received behavior modification services. Mother discontinued the behavior modification services because Claimant was very resistant to such intervention.

8. After reviewing Claimant's needs and ELARC's 2011 Purchase of Service Guidelines for In-home Respite (Guidelines), Reyes recommended Claimant's in-home respite hours be reduced to 16 hours per month. According to the Service Agency

[4] An eligible regional center consumer who is a minor on a Medicaid Waiver may receive Medi-Cal without a share of costs.

representative, the Guidelines were approved by both the ELARC Board of Directors and the California Department of Developmental Services. The Guidelines provide guidance for considering in-home respite services when a consumer's needs are beyond the support of family, friends and other natural and community supports. In addition, the Guidelines cite various services that may be considered as providing respite for family members, including an extended school year, community integration programs, camp, independent living skills programs and any other form of services which relieves the parent of direct care responsibilities. A service coordinator is required to explore alternative forms of respite. According to the Guidelines, a service coordinator may authorize up to 16 hours per month of respite without providing additional justification for the recommendation. Services in excess of 16 hours must be evaluated according to the Reference Guide for Respite Levels of Services (Reference Guide) contained in the Guidelines. The Reference Guide lists seven levels of respite service, A through G, and requires the service coordinator to evaluate the consumer needs in five areas: Medical, Behavioral, Self-Care, Care Giver Condition, and Family Stress Factors. Relying on the Guidelines and Reference Guide, Reyes rated Claimant as requiring a high degree of Level C services. Level C provides for 12 hours per month of respite if one or more of the following circumstances pertinent to Claimant's needs are present:

> C.2 BEHAVIORAL: Consumer is demonstrating ongoing challenging or atypical behavior(s) beyond age expectations (e.g., aggression, self abuse, disruptive/ destructive behavior, extreme irritability, atypical behaviors related to psychiatric diagnosis.).
>
> C.3 SELF-CARE: Consumer has chronic medical and physical needs requiring <u>total</u> care (e.g. personal hygiene, eating/feeding, bathing and dressing.)

9. Level D care provides for up to 18 hours of in-home respite per month. Level D services involve "severe behavioral concerns" with the consumer injuring self/or others and the need for continuous supervision due to disruptive and destructive behaviors. Level E care provides for 24 hours of in-home respite per month. Level E does not specify Behavioral factors that would qualify a consumer for 24 hour per month of in-home respite. Level F care provides for 30 hours per month of in- home respite and is available either where the consumer has chronic or acute medical condition requiring around the clock care for a life-threatening condition, or chronic intense behavior which require 24-hour supervision. Level G provides for more than 30 hours per month in exceptional circumstances and requires that an "Action Plan" be done on a quarterly or semi-annual basis.

10. Claimant clearly requires a high level of supervision and services on a daily basis and her parents are struggling to provide those services to her. Parents are tired and stressed because of the care Claimant needs. The situation became so severe that in January 2011 Claimant was hospitalized in a psychiatric facility due to increased aggression and self-injury. That hospitalization lasted for about four months.

11a. Mother described Claimant's typical week during the school year. Because Claimant is non-verbal, she points and gestures for what she wants. Mother describes Claimant as having a high pain threshold. Claimant is not aware of danger, so mother is constantly following and monitoring her. Claimant will leave the house and go into the street if not monitored. Mother provides most of Claimant's daily care. Father works 10-hour days four days per week in a stressful job. He is hesitant to provide the personal care, such as bathing, toileting and dressing that Claimant requires, although he does assist mother in managing Claimant's maladaptive behaviors. On school days, Claimant is awakened at about 6:00 a.m. Her mother provides full assistance with morning personal care. Claimant wears pull ups because of toileting accidents. Claimant requires full assistance with her menstrual periods. Because Claimant has difficulty feeding herself, and easily becomes angry and frustrated, mother feeds Claimant breakfast and gives her morning medications. The school bus picks Claimant up at about 7:00 a.m. Claimant becomes agitated and angry if the bus is delayed. If Claimant is having problems at school, mother is called pick her up at school and to bring her home.

11b. Claimant returns home from school around 3:30 p.m. Upon her return home, mother changes her clothes, assists her with toileting, and general grooming. She provides Claimant with a snack. Claimant is very particular about the food she eats. Claimant can become angry when feeding, throwing herself to the floor screaming, hitting and kicking mother for up to 25 minutes. When Claimant engages in such behavior, Mother holds Claimant so that she cannot injure mother or herself. After her afternoon snack, mother encourages Claimant to engage in independent activity like listening to the radio. If mother does not respond to Claimant's demand for attention, Claimant will hit her head and start to cry. After dinner, Claimant is readied for bed by her mother. She can be resistive to efforts to bathe her. Bedtime is approximately 9:00 p.m., but sometimes it takes Claimant several hours to fall asleep. Claimant sometimes wakes mother up during the night. It can take up to an hour before Claimant returns to bed. Sometimes father is able to redirect Claimant back to bed more quickly than mother.

11c. On Saturday, Claimant leaves the house at 8:00 a.m. to participate in People's Care. She returns home around 2:00 p.m. and her parents care for her until she goes to bed. Her Saturday is otherwise very similar to school days. Sunday's are spent with family providing for her care.

11d. Given the foregoing daily routine during days when school is in session, on a weekly basis Claimant spends 42.5 hours per week in school. She spends 6 hours per week in People's Care. These are considered alternate forms of respite under the Guidelines. Claimant also receives 55.5[5] hours per week of IHSS services from her mother. It is not clear from the evidence whether these services constitute a generic service which may be treated as an alternative form of respite.

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[5] Hours are rounded to the nearest tenth of an hour. For purposes of calculation, 4.33 weeks constitute a month.

12. The evidence demonstrates that the service coordinator underestimated the level of service Claimant requires and thus the amount of respite that is needed by the family. Rating Claimant as having "ongoing challenging or atypical behaviors beyond age appropriate expectations (e.g. aggression, self-abuse, disruptive/destructive behavior, extreme irritability, atypical behavior related to a psychiatric disorder. . .)," as described in the Reference Guide, Level C, underestimates the level of maladaptive behavior in which Claimant engages. In addition to her maladaptive behavior, Claimant also exhibits "chronic. . . physical needs requiring total care . . ." as described in Level C. Meeting one or more criteria at Level C would ordinarily entitle a family to 12 hours of respite per month, but as authorized by the guidelines, service coordinator recommended 16 hours per month or about 3.7 hours per week. Given the evidence adduced at trial, Claimant ranks between a Level D and Level F. Level E is allocated 24 hours per month of respite. Although there are no specified behavioral criteria in the Reference Guide for Level E, because the evidence demonstrates that Claimant's behaviors are more severe than Level C and less severe than Level F, it is reasonable to assign this respite level to her. The evidence does not support the parents' assertion that Claimant requires 35 hours per month of respite.

LEGAL CONCLUSIONS

1. The Lanterman Act (Welf. & Inst. Code, § 4500 et seq.) governs the provision of services to Claimant. In accordance with the Lanterman Act, a regional center is required to secure services and supports that meet the individual needs and preferences of consumers (§§ 4501 and 4646, subd. (a)); support their integration into the mainstream life of the community (§§ 4501 and 4646, subd. (a)); "foster the developmental potential of the person" (§ 4502, subd. (a)); and "maximize opportunities and choices for living, working, learning and recreating in the community." (§ 4640.7, subd. (a).)

2. The consumer's needs are determined through the IPP process. "The individual program plan is developed through a process of individualized needs determination. The individual with developmental disabilities and, where appropriate, his or her parents, legal guardian or conservator, or authorized representative, shall have the opportunity to actively participate in the development of the plan." (§ 4646, subd. (b).)

3. The standard of proof in this matter is a preponderance of the evidence. Regional Center bears the burden of proof to the extent that it seeks to reduce the level of respite services Claimant has been receiving. Claimant bears the burden of showing that an exception exists pursuant to section 4686.5, subd. (a)(5), which limits the number of in-home respite hours a consumer may receive absent one of the statutory exceptions.

3. In July 2009, in light of California's unprecedented budget crisis, the Lanterman Act was amended to add section 4686.5. Section 4686.5 provides, 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.
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> (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.
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> (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.
>
> [¶] … [¶]
>
> (5) A regional center shall only consider in-home supportive services a generic resource when the approved in-home supportive services meets the respite need as identified in the consumer's individual program plan (IPP) or individualized family service plan (IFSP).

4. Claimant contends that Service Agency has underestimated the level of care Claimant requires and thus, the level of respite services parents need to maintain her in the home. Claimant also contends that 42 U.S.C. section 1396n, subd. (c)(4)(B) prohibits California from adopting the statutory limitations found in section 4686.5 when a consumer has a Medicaid Waiver.

5. Service Agency contends that the level of respite recommended is consistent with Claimant's needs as rated on the Reference Guide. Service Agency also contends that mother may use part of the money she receives for performing IHSS duties to pay Lissette to provide respite. Finally, Service Agency contends that Claimant's sister is available to provide uncompensated support to Claimant.

[¶] … [¶]

6. In light of Factual Findings 1 through 12, and Legal Conclusions 1 through 3, Service Agency has not met its burden of proof to show that the reduction of monthly respite hours from 35 hours to 16 hours per month is warranted. Given the totality of the evidence, 24 hours is the appropriate level of in-home respite at this time. Although the Service Agency reached the number by applying the Guidelines, those Guidelines do not provide sufficient evidence that the previously approved level of respite hours was unwarranted. Given Claimant's recent psychiatric hospitalization, and her behavioral and personal care needs, Claimant places substantial demands on her parents who provide her daily care and

protection. Moreover, Service Agency acknowledges the need to provide the family with additional supports through behavior modification or DIR/Floortime to try to reduce Claimant's maladaptive behaviors. While there is some dispute as to why those services have not commenced, it appears everyone agrees it may be beneficial. Once such service or services are in place for a sufficient time for the IPP team to evaluate their effectiveness, Service Agency or the Claimant may reconvene an IPP to review whether a further change in respite services is warranted.

7. Service Agency contends that Lissette could provide uncompensated respite to assist her parents in caring for Claimant. Parents object to this because Lissette needs to be compensated for her work in order to pay for her college expenses. While the Lanterman Act requires a Service Agency consider the availability of natural supports, including the availability of a sister to provide respite to relieve her parents from the burden of caring for Claimant, nothing in the Act compels a family member to provide uncompensated services to a consumer.

8. While Claimant is entitled to 24 hours of in-home respite per month, she has not demonstrated that she is entitled to 35 hours per month. Moreover, Claimant has not demonstrated that she falls within one of the exceptions found at section 4686.5 subd. (a)(3)(A). While her recent hospitalization was an out of home placement, the parents are committed to providing Claimant with a loving home for the foreseeable future. And while parents' stress is a consideration, it is insufficient to show that an extraordinary event exists so as to support a finding that respite in excess of 90 hours per quarter is warranted. Given the totality of the evidence, Claimant requires 24 hours of respite service funded by the Service Agency per month.

9. Finally, Claimant asserts that 42 U.S.C. section 1396n, subd. (c)(4)(B) prohibits California from instituting a cap on respite services for Medicaid waiver eligible consumers. Section 1396n, subd. (c)(4)(B) provides in pertinent part:

> (c) Waiver respecting medical assistance requirement in State plan; scope, etc.; "habilitation services" defined; imposition of certain regulatory limits prohibited; computation of expenditures for certain disabled patients; coordinated services; substitution of participants
>
> [¶] … [¶]
>
> (4) A waiver granted under this subsection may, consistent with paragraph (2)—
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> [¶] … [¶]
>
> (B) provide medical assistance to individuals (to the extent consistent with written plans of care, which are subject to the approval of the State) for case management services, homemaker/home health aide services and personal care services, adult day health services, habilitation services, respite care, and such other services requested by the State as the Secretary may approve and for day treatment or other partial

hospitalization services, psychosocial rehabilitation services, and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness.

Except as provided under paragraph (2)(D), the Secretary may not restrict the number of hours or days of respite care in any period which a State may provide under a waiver under this subsection.

10. 42 U.S.C. section 1396n, subd. (c)(4)(B) prohibits the Secretary of Health and Human Services, not the state, from limiting the number of hours or days of respite that may be provided under a Medicaid Waiver.

11. In light of the forgoing, Service Agency shall fund 24 hours per month of in-home respite for Claimant; it may not reduce in-home respite to 16 hours per month. Service Agency correctly points out that mother may be able to use some of the IHSS hours she receives to care for Claimant to purchase additional respite services from Lissette or another service provider. This would afford Claimant's mother additional relief from the duties of care and supervision.

ORDER

Service Agency shall fund 24 hours of respite per month and may, therefore, reduce in-home respite hours from 35 hours per month to 24 hours per month.

Dated: January 24, 2012

DEBORAH M. GMEINER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

Under the Lanterman Developmental Disabilities Services Act, this is a 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.