

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DEBORAH H.,

Claimant,

OAH No.: 2012040993

and

HARBOR REGIONAL CENTER,

Service Agency.

DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Torrance, California on September 13, 2012.

Mary H., claimant Deborah H.'s mother, represented claimant.¹

Gigi Thompson, Manager Rights Assurance, represented Harbor Regional Center (service agency or HRC).

Testimonial and documentary evidence was received, the case argued and the matter submitted for decision on September 13, 2012. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUE

The issue presented is whether the service agency may reduce claimant's monthly personal care service hours from 140 hours to 46 hours.

¹ Initials are used to preserve confidentiality.

FACTUAL FINDINGS

1. Claimant is a non-conserved, 35-year-old consumer of HRC based on her qualifying diagnoses of mental retardation and cerebral palsy with spastic quadriplegia. She has stable strength in her upper extremities. She is capable of bearing weight while in a standing position. She uses a front wheeled walker with bilateral forearm troughs to assist with her balance and support of her trunk. Although claimant has bilateral ankle-foot orthotic braces, she does not wear them because they cause her discomfort and she fears developing blisters. Claimant is non-ambulatory and uses a power wheel chair for mobility. Claimant has a history of urine and bowel incontinence. Accidents occur daily. She does not wear diapers. Claimant holds a volunteer position at a public elementary school working in the computer lab and shelving books in the library from 9:30 a.m. to 1:30 p.m. Monday through Friday.

2. HRC currently funds weekly support living services (SLS) and 140 hours per month of personal assistant services for claimant. Claimant's SLS plan provides for assistance with the management of her financial affairs, her medical and dental appointments, her diet for weight reduction, her searches for appropriate services, and her maintenance of emergency preparedness skills. Claimant's personal assistant provides care to claimant Monday through Friday from 7:00 a.m. to 1:30 p.m. Claimant's personal assistant helps claimant to transfer out of bed and into her wheel chair or, with the aid of a walker, into the bathroom for toileting, bath, and grooming in the mornings. After preparing and serving claimant her breakfast, the personal assistant prepares and packs claimant's lunch before cleaning up the kitchen. The personal assistant additionally ensures that claimant safely boards the Access Services vehicle that transports her to her volunteer work site. During the course of claimant's volunteer work, the personal assistant helps claimant to maneuver her wheel chair between and around classroom desks, tables, and students. The personal assistant helps to retrieve books and supplies from places difficult for claimant to reach from her wheel chair, carries, distributes, and cleans up supplies claimant uses for projects with students, opens doors to enable claimant's access to classrooms, staff lounge, and restroom. The personal assistant properly positions and repositions claimant's wheel chair as needed to ensure claimant's and children's safety in the classroom. The personal assistant additionally tends to claimant's personal needs including her toileting needs.

3. Claimant additionally receives generic services including 275.1 hours of In-Home Supported Services (IHSS). Claimant receives IHSS support Monday through Friday from 2:00 p.m. to 9:00 p.m. and on Saturday and Sunday from 8:00 a.m. to 1:00 p.m. and from 4:00 p.m. to 9:00 p.m. Claimant's IHSS worker cleans her residence, does her laundry, prepares her meals, and attends to her personal care needs, including toileting. Claimant's IHSS worker does not accompany claimant to her volunteer work site.

4. By letter dated April 10, 2012, HRC notified claimant of its proposed action to reduce claimant's 140 hours of personal assistant services to 46 hours per month.² The April 10, 2012 proposed action letter provides in pertinent part the following:

Harbor Regional Center is proposing that we will fund 46 personal care hours through Cambrian Services. That would provide you with two hours per day of support while at your volunteer job to assist you with using the restroom if needed. You have IHSS hours available to you to be utilized from 7:00 A.M. to 9:00 A.M. in order to assist you with using the restroom before you leave for your volunteer job. In addition you will have IHSS hours available when you arrive home from 2:00 P.M. to 8:30 P.M. which adds up to 8.5 hours per day Monday through Friday (including both IHSS and Cambrian hours). On Saturday and Sunday, you would have 9 hours per day of IHSS support that you would be utilizing.

5. Claimant opposes the proposed action and filed a Fair Hearing Request on April 16, 2012. Thereafter, these proceedings ensued.

6. Until recently, claimant resided alone in a home that was ill-equipped to accommodate her needs. The narrow doorways impeded her wheel chair's access. Inappropriately-sized furnishing obstructed her mobility. The high kitchen counters hindered her preparation of meals. Inaccessible bathroom showers precluded her from showering daily. In August 2011, claimant relocated to her current dwelling in a United Cerebral Palsy (UCP) apartment complex that is specifically designed to accommodate the needs of individuals dependent on wheel chairs. Claimant no longer faces the structural limitations of her prior residence. HRC contends that claimant's move to the UCP apartment complex is a change in circumstances requiring a reduction of claimant's personal assistance service hours because her apartment is environmentally designed to maximize her independence. Such a determination cannot be made, however, absent a current occupational therapy (OT) assessment of claimant. Claimant was last assessed for OT five years ago in 2007, and she has not made herself available for any updated assessment.

7. HRC additionally contends that, with claimant's move to the UCP apartment complex, claimant now has a network of support that was previously unavailable to her to meet her personal needs. HRC specifically points to claimant's neighbors and their IHSS workers, some of whom, HRC presupposes, might be willing and available to assist claimant with her personal needs between 7:00 a.m. and 9:00 a.m. HRC's supposition ignores the fact that IHSS workers are retained to work for specific clients and cannot be expected to assume additional responsibilities for the consistent, reliable care of other persons.

² On at least two other occasions, HRC unsuccessfully sought a reduction in claimant's personal assistant services. See *In the Matter of Deborah H. v. Harbor Regional Center*, Nos. 2008120749 and 2010090269.

8. On previous occasions, claimant unsuccessfully searched for service workers to assist her for an isolated two-hour work shift in the morning. Claimant established that an isolated, two-hour morning shift is likely unappealing to workers having to expend a relatively exorbitant amount of money for gas and transportation to earn a minimum wage. Hence, HRC's proposed rearrangement of claimant's personal assistant service and IHSS hours set forth above in Factual Finding 4 is untenable.

9. Without the aid of a personal assistant during the entirety of her volunteer hours between 9:00 a.m. and 2:00 p.m., claimant will not be able to meet her toileting needs. Nor will claimant be able to navigate the classroom safely, access supplies and books, and maintain a clean, organized learning environment for the students with whom she works. Without a personal assistant, claimant would have to abandon her volunteer work of choice.

10. Claimant's mother testified that claimant was "never scheduled trained for bowel elimination; they tried and it didn't take." Claimant's mother maintains that claimant "shouldn't have to wear diapers and be left in urine and feces until someone comes to change it."

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Services Act (Lanterman Act), developmentally disabled persons in California have a statutory right to treatment and habilitation services and supports at state expense. (Welf. & Inst. Code, §§ 4502, 4620, 4646-4648; *Association for Retarded Citizens—California v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389.) The Lanterman Act mandates 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 of life in the community." (Welf. & Inst. Code, § 4501.)

2. Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Regional centers are responsible for developing and implementing individual program plans for consumers, for taking into account individual consumer needs and preferences, and for ensuring service cost effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

3. Services and supports for persons with developmental disabilities are defined as "specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals

stated in the individual program plan, and the cost-effectiveness of each option.” (Welf. & Inst. Code, § 4512, subd. (b).)

4. Services and supports listed in the individual program plan may include, *inter alia*, personal care and supported living arrangements. (Welf. & Inst. Code, § 4512, subd. (b).). Supported living services consists of any individually designed service or assessment of the need for service, which assists an individual to “live in his or her own home, with support available as often and for as long as it is needed.” (Cal. Code Regs., tit 17, § 58614, subd. (a) (1).). Such services are tailored to meet the consumer’s evolving needs and preferences for support without having to move from the home of their choice, and include but are not limited to assisting with common daily living activities such as meal preparation, including planning, shopping, cooking, and storage activities; performing routine household activities aimed at maintaining a clean and safe home; selecting and moving into a home; acquiring household furnishings; becoming aware of and effectively using the transportation, police, fire, and emergency help available in the community to the general public; managing personal financial affairs; recruiting, screening, hiring, training, supervising, and dismissing personal attendants; dealing with and responding appropriately to governmental agencies and personnel; asserting civil and statutory rights through self-advocacy; building and maintaining interpersonal relationships, including a circle of support; participating in community life; and 24-hour emergency assistance. (Cal. Code Regs., tit 17, § 58614, subd. (b).).

5. “In implementing individual program plans, regional centers, through the planning team, shall first consider services and supports in natural community, home, work, and recreational settings. Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family.” (Welf. & Inst. Code, § 4648, subd. (a) (3).)

6. As the party seeking a modification of an existing service or support, HRC bears the burden of proving by a preponderance of evidence that a change is warranted. (Evid. Code, §§ 115 and 500.) HRC has not met its burden.

7. There is no evidence that a change in claimant’s living arrangement resulted in any change in the physical limitations accompanying her developmental disabilities. There are nonetheless legitimate questions whether claimant is better able to function given the structural accommodations of her new residence. For example, whether the height of kitchen counters facilitates claimant’s preparation of her own meals while seated in a wheel chair. No doubt, the results from an OT assessment would be informative. No OT assessment, however, is necessary to discern that it is unrealistic, if not inhumane, to expect a wheel chair-bound individual with known incontinence to function an entire work day without assisted access to the restroom as needed. Moreover, the absence of a personal assistant during the entirety of claimant’s work hours would render her volunteer efforts an exercise in futility. Claimant simply cannot function in the classroom unless supported. Claimant’s demonstrated need for supports and services are unlikely to be met if the work shifts of those supporting her are apportioned into undesirable two-hour intervals. To allow claimant to live

safely in her own home, and to support claimant's integration into the mainstream of life in her community, it is established that in this instance a personal assistant for claimant on Monday through Friday during the hours 7:00 a.m. to 1:30 p.m. is the most cost-effective option to meet claimant's needs and choices. Such an option is consistent with the Lanterman Act's express objective of supporting developmentally disabled individuals like claimant to achieve and maintain independent, productive, normal lives.

8. Cause does not exist for HRC to reduce claimant's personal assistance service hours to 46 hours per month by reason of Factual Findings 1 through 10, inclusive, and Legal Conclusions 1 through 7, inclusive.

ORDER

WHEREFORE, THE FOLLOWING ORDERS are hereby made:

1. Claimant Deborah H.'s appeal is granted.
2. Harbor Regional Center shall not reduce claimant Deborah H.'s monthly personal care service hours from 140 hours to 46 hours.

Dated: October 11, 2012



JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.