

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

AUGUSTA C.,

Claimant,

vs.

SAN GABRIEL POMONA REGIONAL
CENTER,

Service Agency.

OAH No. 2013060314

DECISION

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on November 4, 2013, in Pomona, California.

Augusta C. (Claimant) was represented by her sister Juanita M., who is her Caretaker (Caretaker).¹ Claimant and her sister, Idothia (sister), attended the hearing.

Daniela Santana, Fair Hearing Manager, represented San Gabriel Pomona Regional Center (SGPRC or Service Agency).
Case Number 2013

Claimant's case was consolidated with Claimant sister's appeal (OAH case number 2013060306) for purposes of hearing only. Evidence was received and the matter was submitted for decision at the conclusion of the hearing on November 4, 2013.

ISSUE

Should Service Agency fund an additional 90 hours per quarter of in-home respite?

¹ Claimant and her sisters are identified by first name and last initial to protect their privacy.

FACTUAL FINDINGS

Jurisdictional Facts

1. Claimant is a 73-year-old woman who resides with her sister, Idothia, in the home of her 71-year-old sister and Caretaker, Juanita. Claimant is eligible for service under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.) on the basis of an intellectual disability.² Claimant's sister, who is 69-years-old, is also eligible for Lanterman Act services on the basis of an intellectual disability.

2. On May 24, 2013, the Service Agency gave Claimant notice of its proposed action (NPA) denying Claimant's request for Service Agency to fund respite services for Claimant separate from her sister. Service Agency's NPA stated:

SG/PRC has authorized in home respite services through California Respite Care in the amount of 90 hours per quarter at the sibling rate. [Claimant] receives 230 hours per month of In Home Support Services. [Claimant] attends Casa Colina [Adult Day Health Care (ADHC)] . . . on a daily basis which also provides relief for her care. Title 17 defines in-home respite as "intermittent or regularly scheduled temporary non-medical care and supervision provided in the consumer's own home." Respite care services are designed for a short period during planned or emergency situations. We believe the provision of in home respite services at the sibling rate is sufficient to meet [Claimant's] needs.

3. Service Agency determined that Claimant is eligible to continue receiving 30 hours per month of in home respite at the sibling rate of \$8.50 per hour. In support of its decision, Service Agency cited section 4646, subdivisions (a) and (d), section 4686.5, subdivision (a)(4), and section 4647, subdivision (a) as well as the San Gabriel Pomona Purchase of Service Policy which was adopted by the Service Agency Board on December 9, 2009 and approved by the Department of Developmental Services in July 2010.

4. Claimant timely filed a Fair Hearing Request on June 3, 2013. That request asked for additional respite and a skilled nurse respite provider.

5. On April 30, 2013, Service Agency Nurse Consultant, met with Claimant and her Caretaker at the request of Claimant's service coordinator. The purpose of this consultation was to determine the level of respite care needed. The Nurse Consultant concluded that the current arrangement for respite care, using a respite worker who is not authorized to administer medication is suitable so long as Caretaker is available to administer Claimant's medications. However, if Caretaker is not available for medications, then

² All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

Claimant's medical needs warranted a Home Health Aid/Licensed Vocational Nurse (HHA/LVN). Service Agency has agreed to fund Claimant's 30 hours of respite at the HHA/LVN rate. Service Agency agreed to fund the HHA/LVN for the already approved 90 hours of respite per quarter.

6. On July 10, 2013, Isabel York (York) Service Agency Manager of Client Services, met with Caretaker to discuss Claimant's appeal. Caretaker indicated that she would like Claimant cared for while Caretaker takes Claimant's sister to doctor's appointments and when Caretaker takes longer breaks from caring for Claimant and her sister. Caretaker also is concerned because Claimant is fragile and disoriented. At the time, York found Claimant was eligible to receive 245³ hours per month of In-Home Support Services (IHSS), including 30 hours to be used for Claimant's protective supervision care. Service Agency concluded that "[t]hese services are specifically designed to support the disabled individual and their family in the care and support in maintaining the disabled in their home. IHSS allows you to . . . hire someone to provide the care for the individual." Service Agency concluded that 245 hours of IHSS and 30 hours of sibling rate respite was sufficient to meet Claimant's respite needs and denied the informal appeal. This hearing ensued.

Background

7. Claimant has been diagnosed with moderate mental retardation, diabetes and dementia. She is ambulatory. She sees a nephrologist for kidney failure, and a psychiatrist for routine follow up and medication. She has had cataract surgery and since the surgery tends to keep her eyes closed increasing her risk of falling. Because of her health and dementia, Claimant has a complex oral medication regime. Oral medications include Amlodipine (once daily) for hypertension and angina, Diovan (twice daily) for hypertension, Atorvastatin (once daily) for cholesterol, Carvedilol (twice daily) for hypertension, Furosemide (twice daily) for fluid accumulation, Protonix (once daily) for acid reflux, Aspirin (once daily) for her heart, Vitamin D3 (once daily) for bone density, Celexa (once daily) for depression, Trazodone (once daily) for agitation and sleep, and Olanzapine (once daily) for agitation and sleep. She is also administered Humalog by injection twice daily for diabetes. Claimant's blood sugar is tested twice daily.

8. Claimant requires supervision and assistance with all self care needs. Caretaker assists her with bathing, washing her hair, and applying lotions to maintain skin health. Claimant can assist with dressing herself, but is unable to perform all dressing tasks without some assistance. She requires constant supervision to complete her grooming and to get dressed in the morning. Claimant can toilet but has accidents daily and needs assistance

³ Service Agency documents contain some discrepancies in the number of hours Claimant receives in IHSS services. For example, in the May 2013 NPA, Service Agency reported Claimant was receiving 230 hours of IHSS hours when she was actually receiving 236.27. In July 2013, York stated that Claimant was receiving 245.20 hours of IHSS services monthly when she was actually receiving 225.6. These discrepancies are found to be inconsequential to the outcome of this matter.

to clean her. She is resistive to toileting assistance from Caretaker, but accepts help more readily from staff at her day program. She wears diapers 24 hours per day.

9. Claimant is able to feed herself without assistance, but she does not prepare her own meals. Claimant will hide food in her room. Caretaker prepares Claimant a healthy diet consisting of no sugar or salt, and a lot of vegetables. Claimant does not have teeth or dentures and requires soft textured foods. Claimant is at risk of coughing, choking and gagging with food, liquids and some oral medications.

10. Claimant is able to express herself verbally, but her speech is difficult to understand. She does not initiate conversations and generally responds to questions with a yes or no. Claimant enjoys being around others. She can be aggressive becomes angered when she does not get her way. She fights with her Caretaker and her sister. In March 2013, Claimant and her sister got into a fight which resulted in her sister suffering a broken hip and spending a month in the hospital and a rehabilitation facility. To minimize conflict, Claimant is in a different activity group from her sister at their ADHC program.

11. Claimant requires constant supervision when in the community. Claimant likes pens, pencils and anything that is shiny, and will take and hide them. She becomes angry when Caretaker tries to have her return items. Caretaker has stopped taking Claimant to church because she can be disruptive. Caretaker provides very firm boundaries and a structured routine in order to maintain Claimant in a safe and loving environment.

12. Claimant attends the Casa Colina ADHC program. She is transported by bus and leave home at 8:30 A.M. She returns home at 1:30 P.M. Claimant enjoys the program, and likes to participate in the arts and crafts activities and show off her work at home.

13. Caretaker uses a single respite worker to care for both Claimant and her sister who has medical needs, self care needs, and behavioral problems very similar to Claimant. Caretaker trusts and relies on the respite worker to meet Claimant's general respite needs. Claimant's regular respite worker provides her services through California Respite Care, a vendored respite provider, at a rate of \$8.50 per hour per sister. The respite worker is not a trained nurse, but she is familiar with Claimant's needs. When she cares for Claimant, she places medication in Claimant's hand and prompts her to take the medication on her own. The respite worker is available on short notice, which proves to be a great help to Caretaker. She is not available to provide care during extended absences by Caretaker because she is not permitted to administer Claimant's medication and attend to Claimant's other medical needs.

14. Claimant's most recent Individual Program Plan (IPP), developed in 2012, includes an objective directed at ensuring Claimant continue to live in a loving and safe environment and to receive the supervision and care she needs. Her Caretaker is identified as the person who will meet most of Claimant's needs. In addition, the IPP provides that Claimant's caretaker will use IHSS and SSI support to assist in maintaining Claimant in the home. The IPP further provides that Claimant's service coordinator will explore alternative funding and program's to determine if generic resources are available for respite. If generic resources are not available, Service Agency agreed to fund 90 hours of respite per quarter in

accordance with the San Gabriel Pomona Regional Center Board Purchase of Service Policy (Policy).

15. Claimant is eligible to receive 245.2 hours per month of IHSS funding, including 30.27 hours of protective supervision. IHSS hours were temporarily reduced by a total of 8 percent on July 1, 2013 to 225.6 per month pursuant to section 12301.01. While 30.27 hours per week of protective supervision was authorized, Claimant is currently authorized to receive 27.85 hours per week due to the temporary reduction in benefits. Caretaker is the IHSS provider who provides all IHSS services to Claimant. An IHSS provider in Los Angeles County, where Claimant resides, receives \$9.50 per hour.⁴ Claimant receives \$1,332 per month in Survivor Insurance from Social Security. Medi-Cal is her health insurance provider. Her day program is funded by Medi-Cal. Claimant's sister receives the same IHSS, Social Security and Medi-Cal benefits.

16. Service Agency currently funds 90 hours of respite per quarter. Claimant's sister also receives 90 hours of respite per quarter. Service Agency funds the respite service for each sibling at the "sibling rate" because Claimant and her sister are typically together during respite. The sibling rate is lower than the individual rate. The sibling rate is authorized by California Code of Regulation, title 17, section 58140. Service Agency contracts with California Respite Care for Claimant's respite services.

Service Agency Contentions

17. Daniela Santana (Santana), SGPRC Fair Hearing Manager, testified that the Service Agency follows the Policy when determining the amount of respite that will be provided to a Claimant. Santana also testified that Service Agency is required to consider public resources that are available to purchase respite. In Claimant's case, these include her \$1,330 per month in Social Security benefits and \$2,143.20 in IHSS. According to Santana, Caretaker could purchase the services of her lower cost regular respite worker for routine respite needs while using a Service Agency funded higher cost HHA/LVN respite worker for extended absences.

18. Service Agency Policy addresses the provision of respite care.

Respite care services are designed to provide family members with temporary relief from the continual care of a person with a developmental disability. The Regional Center may only purchase respite services when the care and supervision of the person exceed that of an individual of the same age without developmental disabilities.

The number of respite hours will vary depending upon the needs of the individual and the family. Typically, a family's need for respite can be satisfied with 16 hours of in-home respite service per month or less. . . .

⁴ Administrative notice is taken of the Los Angeles County Department of Social Services website for IHSS at www.dpss.lacounty.gov/dpss/ihss/providers.cfm.

In addition, the Policy addresses the use of public resources to purchase services, including respite.

Public resources which are available to implement the service, as well as other sources of funding available, shall be investigated prior to regional center purchase of service. The Lanterman Act specifies that these include but are not limited to Social Security, Supplemental Security Income (SSI), In-Home Support Services, Medi-Cal, Medicare, private insurance, and trust funds. . . .

Claimant's Contentions

19. Claimant has always been cared for by a family member. She has lived with her current Caretaker for several years. Caring for Claimant and her sister is exhausting for Caretaker. Caretaker would like to take her doctor's advice and spend more time caring for herself and enjoying overnight visits with her grandchildren who live out of the area. Currently, Caretaker takes time away from her caretaking duties when she attends church, bible studies and goes to the movies. Service Agency has suggested out of home respite but Caretaker has declined the offer, believing it would be too disruptive to Claimant.

20. Claimant's Caretaker would like Service Agency to fund 90 hours per quarter of additional in-home respite to care for Claimant during Caretaker's extended absences from the home. Caretaker is concerned that if she makes time for an overnight or extended visit with family, it will deplete the amount of respite hours available for the remainder of the quarter. Caretaker uses time during the day when Claimant and her sister are at their day program to care for the home, shop, and attend medical appointments. Sometimes Caretaker takes Claimant or her sister to medical appointments while the other sister remains in day care. Caretaker uses the public funds Claimant and her sister receive to provide for their care. Caretaker testified that if she is required to use those funds to pay for a respite worker, she will be unable to continue to care for Claimant and her sister in her home.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Act governs this case. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a regional center decision. (§§ 4700-4716.) Claimant requested a fair hearing to appeal the Service Agency's decision to deny more than 90 hours of respite per quarter. Jurisdiction in this case was thus established. (Factual Findings 1 through 5.)

2. The standard of proof in this case is a preponderance of the evidence, because no applicable law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Because Claimant is requesting additional services she bears the burden of proof. In seeking government benefits, the burden of proof is on the person asking for the benefits.

(See, *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).)

Applicable Law

3. The Lanterman Act sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. As the California Supreme Court explained in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, the purpose of the Lanterman Act is twofold: "to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community" and "to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community." Under the Lanterman Act, regional centers are "charged with providing developmentally disabled persons with 'access to the facilities and services best suited to them throughout their lifetime'" and with determining "the manner in which those services are to be rendered." (Id. at p. 389, quoting from § 4620.)

4. To comply with the Lanterman Act, a regional center must provide services and supports that "enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (§ 4501.)

5. Regional centers provide "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." (§ 4512, subd. (b).)

6. The determination of which services and supports the regional center shall provide is 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." (§ 4512, subd. (b).) As the California Supreme Court recognized in *Association for Retarded Citizens, supra*, 38 Cal.3d at p. 390, while a regional center has "no discretion at all in determining whether to implement" an individual program plan, it has "wide discretion in determining how to implement" an individual program plan.

7. As set forth in section 4646, subdivision (a): "It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources."

8. Section 4646, provides (d): “Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer’s goals and objectives, and services and supports that will be included in the consumer’s individual program plan and purchased by the regional center or obtained by generic agencies shall be made by agreement between the regional center representative and the consumer or, where appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting.”

9. However, section 4646.4, subdivision (a), provides: “Effective September 1, 2008, regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to section 4646 and 4646.5, or of an individualized family service plan pursuant to section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following: (1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of section 4434. (2) Utilization of generic services and supports when appropriate. (3) Utilization of other services and sources of funding as contained in section 4659. 8. (4) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting. In this determination, regional centers shall take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care.”

10. In addition, a regional center is responsible for using its resources efficiently. Section 4648, subdivision (a)(2), provides that: “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.” Section 4659, subdivision (a) requires regional centers to “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 Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.(2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer.”

Respite

11. One of the services under the Lanterman Act that is available to consumers is respite. However, a regional center’s authority to purchase respite is not unlimited. section 4686.5, subdivision (a)(1) provides: “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.”

12. Section 4686.5, subdivision (a)(2), limits the authority of a regional center to purchases respite to not “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.” Section 4686.5, subdivision (a)(3)(A) provides: “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.” A family member is one who has a consumer residing with her, is responsible for 24- hour care and supervision of the consumer, and is not an unrelated licensed residential care facility or foster family service. (§ 4686.5, subd. (a)(3)(B).)

13. Section 4686.5, subdivision (a)(5) provides that “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).”

14. “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 goes on to state 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’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.”

In-Home Support Services

15. IHSS supportive services are provided in every county to disabled persons “who are unable to perform the services themselves and who cannot safely remain in their homes or abodes of their own choosing unless these services are provided.” (§ 12300, subd. (a).) Supportive services include among other things, domestic services, heavy cleaning, personal care services, accompaniment for travel to health-related appointments and protective supervision. (§ 12300, subd. (b).) Personal care services may be provided in the home or other approved locations. Personal care services include “(1) Assistance with ambulation. (2) Bathing, oral hygiene, and grooming. (3) Dressing. (4) Care and assistance with prosthetic devices. (5) Bowel, bladder, and menstrual care. (6) Repositioning, skin care, range of motion exercises, and transfers. (7) Feeding and assurance of adequate fluid intake. (8) Respiration. (9) Assistance with self-administration of medications.” (§ 12300, subd. (c).)

16. In addition to funding supportive services, IHSS may fund respite when a parent is providing services to a minor child, when the parent forgoes full time employment because no other suitable provider is available and where the inability of the parent to provide supportive services may result in inadequate care or out-of-home placement of a child. (§ 12300, subd (e).) IHSS is not authorized to fund respite for an adult child. Nothing in IHSS law or regulations prevents an IHSS recipient like Claimant from hiring a non-

family member to provide supportive services, thus giving family members relief from the demands of providing care.

Discussion

17. As set forth at Factual Findings 14 through 16 and Legal Conclusions 3 through 16, the IPP is central to the identification of Claimant and her family's needs and preferences. One of Claimant's IPP objectives acknowledges Claimant's desire to live in a safe and loving home and receive the care and supervision she requires. Claimant's IPP specifies that Claimant's service coordinator will explore appropriate funding and programs to support this objective and in particular, for respite. The IPP further provides that if no generic resources are available for respite, the Agency will fund up to 90 hours of in home respite per quarter. 90 hours per quarter of respite is the maximum permitted by law in the absence of exceptional circumstances.

18. IHSS is a generic resource that Claimant may use to purchase additional respite. (§ 4659 subds. (1) and (2).) IHSS has determined that Claimant required 245.2 IHSS hours including 131.07 hours of protective supervision per month. This amounts to 393.21 hours of protective supervision per quarter. In December 2012, IHSS reduced Claimant's hours by 3.6 percent. On July 1, 2013 Claimant's IHSS hours were again subject to an across the board cut. Claimant is currently receiving 225.6 IHSS hours, including 120.68 hours per month of protective supervision per month. This amounts to 362.04 hours of protective supervision available to Claimant each quarter. As a result of the reduction in funding, Claimant has 31.17 less hours of protective supervision each quarter.

19. Caretaker provides Claimant with a safe and loving home. There is no doubt that caring for Claimant and her sister is difficult. Service Agency is providing the maximum amount of respite permitted by law in the absence of exceptional circumstances. Despite the reduction in IHSS hours and in particular the cuts to protective supervision, Claimant still has 362.04 hours of protective supervision per quarter that Claimant can use to purchase respite to provide Caretaker with additional relief from her care. In addition, Claimant and her sister attend a day care program which gives the Caretaker five hours of relief each weekday. Moreover, because Service Agency has agreed to fund respite care utilizing a HHA/LVN, Caretaker can use these higher cost HHA/LVN services to take longer breaks from caring for Claimant and her sister, while using IHSS/Social Security funds to purchase lower cost non-nursing respite services for brief absences from the home to attend church, go to a movie, or otherwise enjoy some free time.

20. Nonetheless, the determination that Claimant needs 393.21 hours of IHSS protective supervision per quarter but is receiving only 362.04 (a deficit of approximately 31 hours), and the intensity of care Claimant and her sister require, establishes sufficient grounds to find that an exception under section 4686.5, subdivision (a)(3)(A) exists. In light of factual findings 1 through 20 and Legal Conclusions 3 through 19, Claimant has established 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" sufficient to warrant an increase in respite of 31 hours per quarter at the sibling rate. Respite services in excess of this may be purchased from Claimant's IHSS and Social Security benefits in accordance with the

Lanterman Act direction that the purchase of services be cost effective and take into account the availability of generic resources.

ORDER

Service Agency is order to fund an additional 31 hours per quarter of regular respite at the sibling rate. Service Agency is further ordered to fund the previously approved 90 hours per quarter of respite with services to be provided by an HHA/LVN at the sibling rate.

Dated: November 19, 2013

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.