

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2013060387

C. S.,

Claimant,

vs.

NORTH BAY REGIONAL CENTER,

Service Agency.

DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on July 3, 2013, in Santa Rosa, California.

Jeanne M. Miskel, Attorney at Law, represented claimant who was not present.

Nancy Ryan, Attorney at Law, represented North Bay Regional Center, the service agency.

The record was left open until July 12, 2013, for submission of closing briefs. The briefs were timely received, marked for identification and considered.

The matter was deemed submitted for decision on July 12, 2013.

ISSUE

Must the North Bay Regional Center discontinue funding in-home respite for claimant's family because the Sonoma County Department of Social Services funds protective supervision hours as part of claimant's in-home supportive services?

FACTUAL FINDINGS

1. Claimant is a 35-year-old consumer of the North Bay Regional Center (NBRC) who lives at home with her mother and stepfather. Claimant is eligible for regional center services based upon diagnoses of mild intellectual disability, cerebral palsy and severe epilepsy. Claimant has been diagnosed with Rett syndrome,¹ scoliosis and Lennox-Gastaut syndrome.² Claimant has between 12 and 14 seizures per day, including up to two grand mal seizures per day lasting up to 40 minutes each. Many of claimant's seizures cause violent spasms and rocking and she has experienced serious injury as a result, including bone fractures and bruises. Claimant's seizures are unpredictable and her mother is frequently awakened three to four times each night to tend to claimant during and following a seizure. Claimant is incontinent and she requires supplemental diaper and clothing changes whenever she suffers a seizure.

2. Claimant is able to walk, but due to safety concerns with her seizures, she spends most of her day in a wheelchair. Claimant is non-verbal but makes her needs known with gestures. She needs physical assistance with all activities of daily living, such as dressing, bathing, personal hygiene, eating and toileting. Claimant requires close supervision when eating due to the high risk of choking.

3. NBRC agrees that claimant requires constant close supervision due to the severity of her care needs, including her multiple, frequent seizures.

4. Claimant has attended a day program in Novato for over 13 years. She attends the program for several hours, up to five days per week. The staff at the program know claimant well and can properly handle her intensive needs and multiple seizures. Claimant's mother drives her to and from the program and remains "on call" in the event that claimant suffers a grand mal seizure while at the program.

5. Claimant receives 260 hours per month of In-Home Supportive Services (IHSS) through the Sonoma County Department of Social Services. Of this amount, 118 hours per month are allotted to protective supervision. This equals approximately 29.5 hours per week, or 3.8 hours per day. Claimant's mother serves as claimant's sole IHSS caregiver.

6. Claimant's family moved from Marin County to Sonoma County on April 1, 2013. The move was prompted by a need to live in a single-level home because claimant cannot navigate stairs. After the move, claimant's case was transferred from the Golden Gate Regional Center (GGRC) to NBRC.

¹ Rett syndrome is a progressively disabling severe neurological disorder which causes global neurological decline, including cognitive impairment, difficulty with movements, and seizures.

² Lennox-Gastaut syndrome is a severe seizure disorder characterized by multiple daily seizures of different types and durations.

7. Over the years, GGRC has provided claimant's family with up to 90 hours per quarter of in-home respite services to give claimant's family a break from providing claimant with the constant supervision she requires. Claimant's family has trained two caregivers who are competent to care for claimant. The family hires these caregivers to provide in-home respite services as needed.³ Claimant's mother uses the in-home respite to spend time with her husband, either for dinner out or for an overnight away from home. After returning from the respite, claimant's mother feels refreshed and able to continue to provide the care her daughter needs. Claimant's mother testified persuasively that she needs a break from the constant demands of caring for claimant. In-home respite services have assisted the family in keeping claimant in the family home.

8. On April 8, 2013, claimant's new NBRC case manager and claimant's mother met to develop an Individual Program Plan (IPP). In the new IPP, NBRC and claimant's mother identified the need for claimant's mother to have occasional breaks from the claimant's care and supervision.

9. NBRC offered to fund out-of-home respite up to 21 nights per year; however, NBRC has been unable to locate a facility able to accept claimant for out-of-home respite because of her age and intensive needs. Claimant has not utilized out-of-home respite since she was 18 years old due to the lack of availability of an appropriate facility. Claimant's family is willing to take advantage of out-of-home respites services if an appropriate facility is located.

10. NBRC guidelines do not permit funding in-home respite services when a family receives IHSS that includes protective supervision hours that can meet the family's need for respite. Claimant's case manager therefore referred the matter to a supervisor for review. The NBRC supervisor determined that claimant's IHSS protective supervision hours are a generic resource that can meet the family's respite needs; therefore, NBRC proposed terminating in-home respite services. Claimant's mother disagreed with NBRC's decision.

11. NBRC felt it had a responsibility to continue funding up to 90 hours per quarter of in-home respite through June 30, 2013; however, on May 30, 2013, it issued a Notice of Proposed Action declining to fund in-home respite services after June 30, 2013. Claimant filed an appeal that was received by NBRC on June 7, 2013, and this hearing followed.

³ GGRC guidelines permit "parent-vendored" respite services; under this system, parents hire and pay the respite workers and the service agency funds the service through the parent. NBRC guidelines no longer permit "parent-vendored" respite services. Rather, NBRC funds respite services directly through its "employer of record" system. NBRC requires respite workers to undergo a background check and obtain a cardiopulmonary resuscitation certification. Family members and friends can be trained to provide respite in the NBRC "employer of record" program. Once approved, NBRC pays the respite workers directly.

LEGAL CONCLUSIONS

Procedural Issues

1. The standard of proof in this case is the preponderance of the evidence because no law or statute requires otherwise. A regional center seeking to terminate ongoing funding provided to a consumer has the burden of demonstrating its decision is correct. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9 [party asserting a claim or making charges generally has the burden of proof in administrative hearings].)

2. Pursuant to Welfare and Institutions Code section 4643.5, subdivision (c),⁴ whenever a consumer transfers from one regional center catchment area to another, the level and types of services and supports specified in the consumer's IPP shall be authorized pending the development of a new IPP.

In this matter, while claimant was a consumer of GGRC, her IPP authorized up to 90 hours per quarter of in-home respite services. Upon her transfer, NBRC determined that these services were not authorized under its guidelines. Because it felt it had a responsibility to continue services until the disagreement was resolved at hearing, NBRC continued funding in-home respite services through June 30, 2013, and issued a Notice of Proposed Action on May 30, 2013. Claimant filed a Fair Hearing Request on June 7, 2013.

NBRC seeks to terminate in-home respite services that have been provided to claimant; therefore, it bears the burden of proving by a preponderance of the evidence that terminating funding for in-home respite services is warranted. Because claimant's fair hearing request was received within 10 days of the Notice of Proposed Action, she is entitled to in-home respite services up to and including the tenth day after receipt by the recipient of the final decision in this matter. (§ 4715, subd. (a)(3).) (Factual Findings 10 and 11.)

The Lanterman Act

3. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act. (§ 4500 et seq.) 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 life of the community." (§ 4501.) Regional centers are charged with the responsibility of carrying out the state's responsibilities to the developmentally disabled under the Lanterman Act. (§ 4620, subd. (a).) The Lanterman Act directs regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP states the consumer's goals and objectives

⁴ All further citations are to the Welfare and Institutions Code, unless otherwise stated.

and delineates the services and supports needed by the consumer. (§§ 4646, 4646.5, & 4648.)

4. In-home respite is one type of service provided to consumers. It is defined under section 4690.2, subdivision (a), 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 the family members.

5. While regional centers have a duty to provide a wide array of services, they are directed by the Legislature to provide services in a cost-effective manner. (§ 4646, subd. (a).) In addition, regional centers may not fund services that are available through another public agency. This prohibition, contained in section 4648, subdivision (a)(8), provides:

Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.

6. Toward this end, regional centers must “identify and pursue all possible sources of funding for consumers receiving regional center services.” (§ 4659, subd. (a).) In addition, section 4646.4 requires regional centers when purchasing services and supports to ensure, among other things, 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.

7. The Lanterman Act, at section 4686.5, provides in relevant part:

(a) Retroactive to 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.

(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.

(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 as 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).

8. In this matter, NBRC and claimant's family agree that claimant is severely disabled and requires constant close supervision. (Factual Finding 3.) There is also no dispute that claimant has numerous seizures daily, including grand mal seizures, or that claimant's mother must get up three to four times each night to assist claimant. (Factual Findings 1 through 3.) NBRC and claimant's family also agree that although the law allows claimant's family to make use of out-of-home respite services of up to 21 days per year, those services are presently unavailable due to claimant's age and the severity of her condition. (Factual Finding 9.)

9. Often, IHSS protective supervision hours meet a family's need for in-home respite services. In this case, however, because of the severity of claimant's needs and the lack of availability of out-of-home respite services, this family's need for respite services is not met by the IHSS protective supervision hours. Section 4686.5, subdivision (a)(5), provides that a regional center shall only consider IHSS hours a generic resource when the respite need as identified by the IPP is met through those hours. In this case, it is not.

10. NBRC funds respite services through the "employer of record" system, rather than the "parent-vendored" system. The Lanterman Act does not require the service agency to fund respite through the family. Therefore, claimant's in-home respite services shall be awarded through NBRC's normal practice of "employer of record."

ORDER

Claimant's appeal is granted. NBRC shall fund up to 90 hours per quarter of in-home respite services through its normal practice as employer of record.

DATED: 7/23/13

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_____/s/_____
JILL SCHLICHTMANN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Judicial review of this decision may be sought in a court of competent jurisdiction within ninety (90) days.