



**Review of NDIS respite care decisions by
the Administrative Appeals Tribunal – a
resource for carers**

November 2018 (updated)

AN AUSTRALIA THAT VALUES AND SUPPORTS ALL CARERS

PURPOSE OF THIS RESOURCE

NDIS participants who do not agree with the support provided for in their plans are able to have planners' decisions reviewed.

- The first step in the review process is to ask for an “internal review” of the decision by the NDIA. The details of how to ask for an internal review are set out in the participants' plan and on the [NDIS website](#).
- If the participant is not satisfied with the outcome of the internal review process, they can apply to the Administrative Appeals Tribunal (AAT) for an independent review, external to the NDIA. The AAT is able to make decisions reasonably quickly. There is also no fee charged by the AAT to review NDIS decisions.
- AAT decisions can be appealed to the Federal Court of Australia (FCA) and, from there, the full FCA.

While the AAT is more accessible and less formal than a court, NDIA participants and/or their carers/families are advised to get legal advice about their applications. There are community legal services in every state and territory that can help.

This resource has been prepared to help carers and participants who have not been able to access (enough) respite care support or equivalent service (for example, in home and out of home care) in their plans, and would like to have those decisions reviewed. As the NDIS is a relatively new scheme, it is hoped that the information about past decisions by the AAT and FCA will help in the process.

In particular, there are a number of decisions already made by the FCA and AAT that participants and carers, or their legal representatives, may wish to refer to in their applications for internal or external review.

- In *McGarrigle v NDIA [2017] FCA 308*, the FCA decided that, once the NDIA had agreed that a support was “reasonable and necessary”, the legislation required that the costs be covered in full, rather than requiring carers/family members to contribute.
- The AAT has considered it appropriate to provide respite care, and to consider other family members, for example, to enable parents to spend more time together and with their other children.
- The AAT has extended in home care supports for families where a child requires 24 hour care.
- In one case, in home care to enable a parent to return to work was refused because the cost to the NDIS could affect its long term sustainability.

Relevant cases are detailed at Appendix 2.

This document will be updated following new decisions made by the AAT, and will be available on the [Carers Australia website](#).

BACKGROUND – RESPIRE CARE IN THE NDIS

Respite care is a term used by services and Government, including in aged care and social services, and research indicates that respite care benefits both the carer and person with care needs.¹ Positive outcomes for people with care needs that have been identified include:

- increased sensory stimulation and activities
- opportunities for social interaction and improved social skills
- increased independence
- aspirations for greater inclusion.²

Respite care is not specifically provided for under the *National Disability Insurance Scheme Act 2013* (the Act). However, section 31 provides for supports to build and strengthen the capacity of carers and families to support participants.³

In practice, the National Disability Insurance Agency (NDIA) avoids the use of the term “respite”, considering it to be pejorative. National Disability Insurance Scheme (NDIS) planners have often flatly told carers that respite care is not part of the NDIS and cannot be included in plans. Better informed carers have responded by asking for other supports, such as in home or out of home care for the participant, leading to inconsistent outcomes. The NDIA has recognised the need for carers to be supported, and has developed additional training material for delivery to planners and other decision makers. This will mean that carers who ask for respite care to be included in plans will be told about alternative supports that could have a respite effect, benefiting both them and NDIS participants.

In its reviews of decisions made by the NDIA about respite care, the Administrative Appeals Tribunal (AAT) has considered the difference between contributions and care ordinarily made by family members and carers and the additional supports provided to people with care needs. In formulating its decisions, the AAT has, in most cases, made it clear that respite care and other supports, including to allow time for carers to meet the needs of other family members, are legitimate considerations for inclusion in NDIS packages.⁴ These decisions are also consistent with a recommendation by the Productivity Commission, in its 2017 report on NDIS costs, that, “The National Disability Insurance Agency should:

- ensure planners take into account the amount of respite care that is reasonable and necessary under an individualised support package, based on the amount of informal care that is expected to be provided by informal carers
- label short-term accommodation supports provided in participants’ plans in a way that makes it clear that these supports can be used for respite
- better inform participants and their informal carers that core supports provided in individualised support packages can be used to fund additional in-home care or support in shared facilities to provide respite
- include specific measures to ensure a supply of respite services in its provider of last resort policies.”⁵

¹ http://ldihealtheconomist.com/media/understanding_and_addressing_the_impact_of_autism_on_the_family.pdf

² Ibid, p 7-8

³ Part 2, Division 2, Section 31 (d) and (da)

⁴ PNMJ and NDIA [2015] AATA 866, JQJT and NDIA [2016] AATA 498, LNMT and NDIA [2017] FCA 308, PNFK and NDIA [2018] AATA 692, QZHH and NDIA [2018] AATA 1465

⁵ <http://www.pc.gov.au/inquiries/completed/ndis-costs/report/ndis-costs.pdf> p58

ANALYSIS OF AAT AND FCA DECISIONS

While the Scheme is still being rolled out, and there have only been eight AAT decisions relating to respite care (detailed at Appendix 2), the first seven of those decisions have been consistent in their approach to considering the inclusion of respite care in NDIS plans.

While not all of these seven decisions varied the NDIS plan that was under review, as shown in the matrix (Appendix 1), the AAT gave similar consideration in each case to the level of care that would normally be provided by parents and other informal carers and support networks in reaching its decision.

The matrix also indicates that, in some cases, NDIS plans provided for the respite needs of carers and families. For example, in JQJT and NDIA, the plan provided for 28 nights of short term accommodation for a 13 year old boy with Autism Spectrum Disorder, in recognition of the constant attention and supervision needed by JQJT and the family's social isolation. Because of the long distances involved, the parent driving would need to wait during the outing, rather than driving home and back again, so that the parents missed the opportunity to spend some time together. At the same time, the NDIA argued that transport should not be provided for weekend outings, as the purpose of the support was to assist in social participation, not to provide respite care. In that case, the AAT varied the plan, recognising the respite effect of combining the transport and weekend outings provided a respite effect.

Reasonable and necessary support

Only one AAT decision about a plan has been heard by The FCA.⁶ the decision in *McGarrigle v National Disability Insurance Agency [2017] FCA 308*⁷ was not concerned with respite care, which was included in the plan by the NDIA decision maker, but related to costs of transport. However, the case is important because it decided the application of “reasonable and necessary support”.

NDIA planners have relied on “reasonable and necessary support”, set out in section 34(1) of the *National Disability Insurance Scheme Act, 2013* (the Act), and the *National Disability Insurance Scheme (Supports for Participants) Rules 2013*, which form part of the Act, to “take account of what is reasonable to expect families, carers, informal networks and the community to provide”. The provisions have been used by planners to exclude or limit the amount of in home replacement care, short term accommodation, and transport costs provided for in participants' plans.

In this case, the NDIA included 75 per cent of the costs of transport into the plan of the participant, a young adult living with his family, finding that it would be reasonable for his parents to provide some transport for their son. The AAT affirmed the decision. When the case was heard by Judge J Mortimer in the FCA, she overturned the AAT's decision on the basis that, once it is determined that a support is reasonable and necessary, the legislation is clear in stating that it “will be funded” by the NDIS, and that can only mean wholly or fully funded, with no references in the provisions for contributions from the participant or the participant's family or carers.

*In this case, the Tribunal accepted that five days' transport for Mr McGarrigle was a reasonable and necessary support: having done that, it could not determine that support should only be funded to 75% of its cost.*⁸

⁶ A second case appealing an NDIA decision related to eligibility for participation in the NDIS.

⁷ <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2017/308.html>

⁸ *Ibid*, 98

Judge Mortimer found that the Tribunal had not considered whether all five days' transport was reasonable and necessary but, rather, had considered whether the family could make up the shortfall.

The NDIA appealed the decision to the Full Court of the FCA, on the basis that it was a test case and that the decision could affect the long term sustainability of the NDIS.⁹ The appeal was dismissed on 21 August 2017.¹⁰

Despite the NDIA's acknowledgement that the case has set a precedent, it does not appear that the decision has been disseminated and adopted more broadly by NDIA planners. For example, in the recent case of David and NDIA,¹¹ with similar circumstances in respect of transport, Senior Member Cameron looked to the decision in McGarrigle to determine that transport costs are reasonable and necessary supports and should be funded in full.¹²

BIJD and NDIA [2018] AATA 2971¹³

The most recent AAT case has taken a different course than previous decisions.

The family in this case was at pains to use the language of the NDIA in seeking in home care to enable the mother to return to part time paid employment, contending that the care was for the benefit of the child and that going to work could not be characterised as respite care. Deputy President Humphries, formed the view that the care would, at least, have a respite affect. While finding that respite cannot be funded through the NDIS, he conceded that there can be a respite effect from supports provided to participants. In doing so, he considered an element of the findings in JQJT and NDIA.

The NDIA submits that the purpose of the community access support is to assist JQJT's social participation and not to provide his parents with respite. We accept that submission but, when considering the wellbeing of any family caring for a person with serious disabilities, the two cannot readily be separated; respite is a secondary benefit that goes to the well-being of the family.¹⁴

However, he did not acknowledge that the decision also referred to the provision of direct respite in JQJT's plan and was explicit in basing the decision to increase funds for transport to provide respite for JQJT's family.

Rule 3.4(a)(iii) requires us to consider the extent of any risks to the well-being of JQJT's family in providing the particular support. We accept his mother's evidence that his father suffers from depression, and between them they are struggling to care for JQJT. We accept that, regardless of whether they have the benefit of respite, the demands on them are substantial and exhausting. We accept that, without the inclusion of transport in his plan, transporting JQJT to community access support increases the burden on them, reduces the benefit of respite during those hours, and poses a risk to their wellbeing.¹⁵

⁹ https://ndis.gov.au/news/comp_00000040.html

¹⁰ http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2017/132.html?context=1;query=mcgarrigle;mask_path=au/cases/cth/FCAFC

¹¹ http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2018/2709.html?context=1;query=ndia%20respite;mask_path=au/cases/cth/AATA

¹² Ibid, paras 24-28

¹³ http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2018/2971.html?context=1;query=ndia;mask_path=au/cases/cth/AATA

¹⁴ <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2016/478.html>, para 44

¹⁵ Ibid, para 40

Other AAT cases, including PNFK and NDIA, and QZHH and NDIA, also referred to LNMT in their decisions about respite care, drawing very different conclusions than in this case. For example, PNFK and NDIA was very clear that additional respite care should be provided to enable the parents to spend more time together and with their other children:¹⁶

*(c) The NDIS will be responsible for support for children, families and carers required as a direct result of the child's or parent's disability, including supports that enable families and carers to sustainably maintain their caring role, including community participation, therapeutic and behavioural supports, additional respite, aids and equipment and supports to help build capacity to navigate mainstream services.*¹⁷

As with BIJD, both PNMJ and QZHH related to children who need 24 hours a day care. In QZHH, the latter case, the Member noted that the NDIS had, in an earlier plan, increased the provision for in home care on the basis of the earlier decision.¹⁸

Ultimately, the decision to affirm the NDIA plan was based on the view that providing in home care “represents relatively poor value for money”¹⁹ and “would compromise the financial sustainability of the NDIS”.²⁰

¹⁶ http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2018/692.html?context=1;query=national%20disability%20insurance%20;mask_path=au/cases/cth/AATA, para 124

¹⁷ <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2018/431.html>, para 44

¹⁸ http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2018/1465.html?context=1;query=national%20disability%20insurance%20;mask_path=au/cases/cth/AATA, para 15 to 16

¹⁹ http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2018/2971.html?context=1;query=ndia;mask_path=au/cases/cth/AATA, para 65

²⁰ Ibid, para 69

Appendix 1 – Matrix of AAT respite care decisions

Case	Date	Child/ adult	Primary carer	Care needs	NDIA plan	AAT decision	AAT considerations			
							Respite for carer	Support for other family	Carers' expected provision of care	NDIS financial sustainability
TKCW AATA 501	23/07/14	Under school age	Mother	ASD	No child care for brother	Affirmed	Original plan provided for up to 5 hours per month child care at home for parent respite.	Care for twin brother during appointments	Care is already provided by mother's support and only minor adjustment within normal parenting.	Not considered in respect of child care.
PNMJ AATA 866	11/11/15	Under school age	Father	24 hour	136 hours pw	Varied 168 hours pw (24 hour)	Mother is NDIS participant Father working pt and wants to increase. Suffers from depression and anxiety	13 year old child with behavioural issues.	Care is well beyond that provided by most parents.	Considered.

Appendix 1 – Matrix of AAT respite care decisions

Case	Date	Child/ adult	Primary carer	Care needs	NDIA plan	AAT decision	AAT considerations			
							Respite for carer	Support for other family	Carers' expected provision of care	NDIS financial sustainability
JQJT AATA 498	15/7/16	13 yo	Parents	ASD	Plan recognised respite needs with 28 nights' short term accommodation. No costs for transport to activities were included.	Varied	AAT agreed that transport for a return outing each weekend would have a respite effect and should be included.	AAT considered that, "respite is a secondary benefit that goes to the wellbeing of the family".	AAT considered transport exceeded reasonably expectations of families.	Considered. Family to provide school holiday transport as equivalent to school travel and would not diminish respite effect.
LNMT AATA 431	6/3/18	11 yo	Foster mother	Blind, cognitive disability, behaviour and epilepsy	Plan provided for 14 days' respite per year. Did not agree to 2 support workers to take LNMT swimming for 5 hrs a week or resi respite care 7 days every 6 weeks.	Varied	AAT decision that 2 support workers take LNMT swimming twice a week, both for her benefit and to provide respite. Decision provided for resi respite care.		AAT considered reasonable for carer to take LNMT swimming once a week with the help of one support worker.	Noted, but not discussed in decision.

Appendix 1 – Matrix of AAT respite care decisions

Case	Date	Child/ adult	Primary carer	Care needs	NDIA plan	AAT decision	AAT considerations			
							Respite for carer	Support for other family	Carers' expected provision of care	NDIS financial sustainability
PNFK AATA 692	28/3/18	Under school age	Parents	24 hour care	Plan's in home care was reduced by unspent funds in previous plan.	Varied	Hours of replacement care increased to enable mother to return to full time employment. Additional respite care provided to enable parents to spend time together.	Additional respite care provided to enable parents to spend time with their other children.		Stated that it was considered
DGJJ AATA 1263	8/5/18	Home school	Mother	24 hour care	Latest decision (made between review and AAT hearing) provided 16 hours a day care, 7 days a week	Set aside	The decision does not use the term "respite".	Two younger children in family need support and transport to school and other activities.	Mother able to care during school hours. Father expected to provide some care (currently none)	Considered. NDIS not to provide care while DGJJ is in hospital and receiving funded care.

Appendix 1 – Matrix of AAT respite care decisions

Case	Date	Child/ adult	Primary carer	Care needs	NDIA plan	AAT decision	AAT considerations			
							Respite for carer	Support for other family	Carers' expected provision of care	NDIS financial sustainability
QZHH AATA 1465	31/5/18	School age (5 years old)	Father	24 hour care	16 hours a day care, 7 days a week for 39 weeks each year. Eight days short term accommodation each month.	NDIS plan set aside	Father works part time and wants to increase hours. Also suffers from depression. Provision for travel to therapy. Support care increased to 24 hours a day for four days each week and 16 hours a day on the other three days, except for when at school. Unused support hours due to shifts that were unable to be filled could be "banked" and used at other times.	Father is also carer for Mother who is NDIS participant. Not able to provide independent care, but can interact with the child. One other child in the family.	Extended family child's grandparents) unable to have active role in care of the child, but help with care of her sister. Outline of all care and coordination roles undertaken by father, making clear that exceeded expected provision of care.	Considered in respect of employing nurses if paid carers not available and set conditions for employing nurses at higher rates.

Appendix 1 – Matrix of AAT respite care decisions

Case	Date	Child/ adult	Primary carer	Care needs	NDIA plan	AAT decision	AAT considerations			
							Respite for carer	Support for other family	Carers' expected provision of care	NDIS financial sustainability
BIJD AATA 2971	10/8/18	Under school age	Mother	24 hour	Refused in home care 2 days a week to enable carer to work.	Affirmed	In home care would enable Mother to take up part time work. Care to be primarily for benefit of participant but secondary respite effect permitted. AAT not satisfied in home care reasonable value for money		AAT decided reasonable to expect family/ other informal networks to provide interaction with non-familial adults.	Providing in home care “represents relatively poor value for money” and “would compromise the financial sustainability of the NDIS”.
MEDCALF AATA 3893	16/10/18	Adult	Parents	24 hour	Weekend out of home respite care	Varied for extra in home care, but not motel for parents	Out of home care not viable. Parents wanted substituted for in home care and motel accommodation for themselves		Adoptive parents in their late 60s, both providing significant care. Have own health issues, father receiving DSP	

Appendix 2 – Decisions on respite care in the AAT

TKCW AND NDIA [2014] AATA 501 (23 JULY 2014)²¹

Situation

Mother of a child with Autism Spectrum Disorder and his twin brother seeking carer support to enable the child to attend a recreational activity, a paid carer to look after the brother while the mother takes TKCW to therapy and other home support for the mother. The plan provided for only two hours of support each week for TKCW to attend recreational activities. The mother has a moderate to severe disability that makes it difficult for her to manage routine household tasks with the children and gets in-home support from Disability South Australia with household tasks and the support worker currently looks after the brother while the mother attends appointments with TKCW. However, the child care arrangement compromises the assistance the mother would otherwise receive for herself, and she would prefer some assistance in the evening, but is unable to change the times because of the therapy appointments.

Consideration

The Members considered that child care for the brother was not a reasonable and necessary support, but within reasonable expectations of support from families, carers and the community, so should not be funded through the NDIS. The members understood that the need was being met by the helper provided by Disability South Australia and likely would be for the duration of the current plan.

Decision – Senior Member J Toohey, Member Ian Thompson, Adelaide

The NDIA decision was affirmed, with no additional paid support provided to the carer.

PNMJ AND NDIA [2015] AATA 866 (11 NOVEMBER 2015)²²

Situation

Parents were seeking around the clock care for their 3 year old daughter born with multiple serious and complex disabilities who requires 24 hour care. They also have another, older child, who has behavioural problems, and the mother is a participant in the NDIS, with an episodic medical condition. She is studying part time. The father is a medical professional and able to administer injections, and has reduced his working hours to two hours a week. He has also been diagnosed with serious depression and anxiety. The NDIS plan provided for 136 hours per week of care for six months.

Consideration

The child has a serious neurological disorder, with uncontrolled epilepsy (up to 30 seizures per day, with up to three that are life threatening), crying for up to 15 hours a day, developmental delays, difficulty with feeding (requiring tube feeding), sight and hearing impairments, hypertonia (stiffness in limbs making it difficult to move), cannot support her own weight or move independently, recurrent pneumonia and other conditions, and requires 24 hour supervision and care.

²¹ http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2014/501.html?context=1;query=tkcw%20ndis;mask_path=au/cases/cth/AATA

²² <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2015/866.html>

Appendix 2 – Decisions on respite care in the AAT

The Members recognised that, while it is normal for parents to provide substantial care and support for their children, the parents are involved in every aspect of care, “well beyond that provided by most parents”. The members accepted that the parents’ severe stress affected the child’s wellbeing.

The Members considered that the current situation could not be sustained for another six months until the next NDIS review.

Decision – Senior Member JF Toohey, Member R Perton, Melbourne

The decision was varied to provide for 168 hours of care per week for six months and for the plan to be reviewed at the end of the six months.

JQJT AND NDIA [2016] AATA 498 (15 JULY 2016)²³

Situation

Thirteen year old JQJT, who lives with his parents, has severe autism, severe intellectual and language delay and attention deficit hyperactivity disorder. He is unable to talk, has behavioural issues including aggression, and needs constant supervision and help with daily living activities.

Consideration

While previous funding through a non-government service included travel costs for a support worker, the NDIA considered the transport to be the parents’ responsibility, although funding for JQJT to attend activities on school holidays and on weekends was continued through his plan.

The Members accepted the mother’s view that the respite benefit of the weekend outings would be undermined if she or the father had to drive him to the support worker and wait for him to return, over the NDIA’s view that the outings were to improve the child’s participation, not to provide respite care.

They also considered an NDIS fact sheet, setting out the transport costs that could be included, and those that could not, including, “transport that is substitute (sic) for parental responsibility”, and a fact sheet, directed to adult transport costs, that excludes costs for carers for “everyday commitments”.

Decision – Senior Member JF Toohey, Members Professor R McCallum and Dr L Bygrave, Sydney

The plan was varied to include a return trip each weekend, with a support worker, to community access support. The members considered that the transport exceeded that reasonably expected to be provided by families, related to his disabilities and a cost that his parents would not normally incur. They found that:

... transporting JQJT to community access support increases the burden on [his parents], reduces the benefit of respite during those hours, and poses a risk to their wellbeing ... respite is a secondary benefit that goes to the wellbeing of the family.

While the Members accepted the respite benefit of providing weekend transport, they decided that transport during school holidays should remain the parents’ responsibility as it replaced routine driving to and from school and, as it was provided in six hour blocks, there would still be a respite effect.

²³ <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2016/478.html>

Appendix 2 – Decisions on respite care in the AAT

LNMT AND NDIA [2017] FCA 308 (6 MARCH 2018)²⁴

Situation

Foster carer of 11 year old girl with blindness, epilepsy and cognitive impairments. Carer sought review of a number of decisions, including replacing 14 days per year of respite care with one week's respite care every six weeks, and two paid support workers to assist with taking the child to the swimming pool twice a week and one support worker once a week.

Consideration

The Member thought that, taking account of the foster mother's full time paid employment and other commitments, it was reasonable for two support workers to take the child swimming twice a week and for the foster mother to accompany the child, with a paid support worker, once a week.

With regard to the level of respite, the Member considered the NDIS' position that, under the COAG Principles, it is the responsibility of the state or territory to provide support for carers of children in out of home care. However, she found the Principles also provided for supports for a child in out of home care, where the supports are due to the impact of the child's impairment and enable sustainable caring arrangements, including additional respite care. The Member accepted the foster mother's (unchallenged) evidence that the child could not participate in the usual respite arrangements offered to children in foster care, but needed disability supported accommodation. The Member also considered that respite care would help the child "to pursue her goals, aspirations and objectives, in particular ensuring that her carer is supported to sustain their caring role", among other reasons.

Decision – Deputy President K Bean, Adelaide

The NDIA's decision was varied to include paid support workers to help with swimming activities and respite care.

PNFK AND NDIA [2018] AATA 692 (28 MARCH 2018)²⁵

Situation

PNFK, a toddler with severe impairments from birth, including cerebral palsy, seizures, visual and hearing impairments, inability to move without support, inability to feed independently, and global developmental delay, is cared for by her parents and has three older siblings. She needs around the clock care and cannot be left alone.

Not all the money in the first NDIS participant plan had been spent because the parents believed the baby would die within a few months. It was only after they realised that she would survive that they started using the money in the first participant plan. The second NDIS plan reduced the amount available for care by funds unspent during the period of the first plan.

The parents were seeking additional funds for home care, including replacement care, to enable the mother to return to full time employment, as well as direct cottage-style respite care.

²⁴ <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2018/431.html>

²⁵ <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2018/431.html>

Appendix 2 – Decisions on respite care in the AAT

Consideration

The Member considered that the hours of replacement care should be increased to 12 hours per day during the working week, enabling the mother to return to full time employment.

The NDIA's assertion that the meaning of the Support Rules provision for "additional respite" meant that families have responsibility for basic respite care was not accepted and the Member referred to [LNMT and NDIA \[2017\]](#) to find that additional respite care should be provided to that the parents could spend time together and with their other children.

Decision – Member R McCallum, Sydney

The agreement was varied to increase replacement and respite care, setting out detailed times during working days, weekends, public holidays and periods of annual leave.

DGJJ AND NDIA [2018] AATA 1263 (8 MAY 2018)²⁶

Situation

DGJJ is 13 years old and has suffered from a number of conditions since birth and, later, from illness and brain damage, and needs 24 hour care. DGJJ's mother is her primary carer. Her father works long hours to support the family and there are two younger siblings, aged 9 years and 7 years old respectively.

Consideration

An internal review increased the number of hours of in home care to allow 8 hours overnight, every night for 3 months, and then reducing to 5 nights a week, 4 hours of in home support each day and 2 hours' community access supports on weekdays. Prior to the hearing, the NDIA increased this support to 16 hours of in home support every day, including 8 hours overnight. The NDIA considered that the family should provide 8 hours of care each day.

The AAT found it difficult to determine the number of hours of care that the mother could provide without support. This was because she was the primary witness and her evidence was inconsistent and exaggerated at times, so she was found to be unreliable.

Decision – Senior Member J C Kelly, Sydney

The NDIA's decision was set aside to increase in home care to up to 18 hours' care a day, 7 days a week, including up to 8 hours' overnight care, except for hospital care funded by the NSW health system.

²⁶ http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2018/1263.html?context=1;query=DGJJ%20and%20National%20Disability%20Insurance%20Agency;mask_path=au/cases/cth/AATA

Appendix 2 – Decisions on respite care in the AAT

QZHH AND NDIA [2018] AATA 1465 (31 MAY 2018)²⁷

Situation

QZHH is a five year old child with complex conditions and needs including epilepsy, with frequent seizures every day, low muscle tone, hearing and sight impairments, recurrent pneumonia, inability to absorb oxygen during sleep, severe reflux, developmental delay and a number of other conditions. She has very little independent movement and cannot stand or sit without assistance, and is fed through a tube in her stomach.

QZHH lives with her parents and sister in a purpose built house. Her mother is also an NDIS participant, suffering from bipolar and her core support is home help for six hours a week to reduce stress and give her time for study and to spend with her children. The father is the primary carer of both QZHH and the mother and has been diagnosed with depression. There is concern for the sister's emotional and psychological wellbeing.

Consideration

There had been a number of NDIS plans and review decisions and the number of hours of home support care had varied at different times. These times ranged from 62 hours per week to 168 hours per week. At the time of the hearing, the plan provided for support care of 16 hours a day, seven days a week and additional funding for short term accommodation for eight days per month.

The father is a medical practitioner who was only able to work two shifts of 10 hours a week because of his caring responsibilities. The mother only had the capacity to provide secondary care, and that level of care fluctuated with her condition. The Member considered that the father was the primary carer and, under the current plan would have to provide direct care for the child eight hours a day, as well as filling shifts when support workers were unable to attend (due to illness, unavailability attrition), and some carer coordination and support activities, such as scheduling medical appointments and therapy. There was also a second child in the household who needed parenting.

Decision – Member Kim Parker, Melbourne

The NDIA's review decision was set aside and provided for additional supports in the four areas of support coordination, assistive technology, improved daily living and core supports. Improved daily living included provision for travel to therapy, to be used flexibly by the family. Support care was increased to 24 hours a day for four days each week and 16 hours a day on the other three days, except for when at school. Unused support hours due to shifts that were unable to be filled could be "banked" and used at other times.

²⁷ http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2018/1465.html?context=1;query=national%20disability%20insurance%20;mask_path=au/cases/cth/AATA

Appendix 2 – Decisions on respite care in the AAT

BIJD AND NDIA [2018] AATA 2971 (10 AUGUST 2018)²⁸

Situation

Parents of a three year old with congenital heart disease and development delay, who had a stroke, leading to loss of a kidney, damage to his spleen and an inability to fight infections, sought replacement care for two days a week to enable the mother to work part time and to develop independence and skills ordinarily expected through attendance at a child care centre. The parents are not able to use a child care due to the risk of infection. The NDIA refused this care on the basis that it was respite care and did not provide a direct benefit to the child.

Consideration

The Deputy President considered that in-home care could only be included in the plan if its primary purpose related to the child's ability to meet the goals set out in the plan, and that any respite affect could only be a secondary outcome. He discussed Judge Mortimer's FCA consideration of the application of "reasonable and necessary support" at length, and agreed that the in-home support would meet this purpose. However, he considered that that in home care would provide respite and that the child's development was best facilitated by care from his family.

In considering whether the in-home care represented value for money, the Deputy President had regard for the cost to the NDIS if two days of in-home care was provided in the plans of every child participant with congenital heart disease.

Decision – Deputy President Gary Humphries

The NDIA's decision to not include in-home care in the child's plan was affirmed on the basis that, while there would be some benefit of in-home care to the child, the circumstances did not warrant an outcome that could have costly implications for the NDIS.

MEDCALF AND NDIA [2018] AATA 3893

(16 OCTOBER 2018)²⁹

Situation

Philip Medcalf is a 25 year old with severe physical and intellectual disability, who requires 24 hour care. In addition to special equipment, the NDIS plan provided \$313,000 for core supports, comprising professional in home care (1.25 hours each morning, 3 hours each evening and 3 night shifts each week), respite care to help Peter transition to out of home care (12 weekends away from home), four hours' community access on Saturdays and Sundays, and 2 hours cleaning each fortnight.

²⁸ http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2018/2971.html?context=1;query=ndia;mask_path=au/cases/cth/AATA

²⁹ http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2018/3893.html?context=1;query=medcalf;mask_path=au/cases/cth/AATA

Appendix 2 – Decisions on respite care in the AAT

Peter's carers, his adoptive parents aged in their late 60s, sought a review of the NDIS funding, including for equipment, support coordination and core supports, with the core supports' component increased to \$375,000.

In respect of in home care and respite, they felt that, given Peter's needs, out of home care was not viable. Instead, they wanted Peter to have extra in home care – 5 hours each evening and overnight care for the weekends where he would have received out of home care. Rather than Peter having out of home care, his parents proposed to stay at a nearby motel four nights each week, allowing them undisturbed sleep, but able to return home quickly if they were needed.

Consideration

While the NDIA provided funding for weekend out of home respite care, the Senior Member agreed with the parents that out of home respite care was not viable. She considered that, as participants are able to exercise choice and control, funds for core supports could be used more flexibly, but that offsite respite accommodation for the participant's parents is not a reasonable and necessary support, as it does not help the participant to meet his goals and objectives.

Decision – Senior Member I O'Connell

The Senior Member agreed that funding for core supports should be increased to allow more professional care at home, in place of weekends in out of home care. The increase in funding for in home support would help the parents, so they could utilise offsite accommodation through other means.