

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH No. 2018100738

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH), on November 26, 2018, in Delano, California. Claimant was represented by his mother.¹ Kern Regional Center (Service Agency or KRC) was represented by its Assistant Director of Client Services, Kristine Khuu.

Oral and documentary evidence was received, and argument was heard.

The ALJ granted the Service Agency's request to leave the record open for submission of citations to authority requiring the payment for personal assistant services to be processed through a vendored agency and prohibiting payment to Claimant's mother. The Service Agency was given until close of business

¹ Names are omitted throughout this Decision to protect the parties' privacy.

November 30, 2018 to file and serve the citations. Claimant was given until close of business December 7, 2018 to file and serve any response.

On November 29, 2018, the Service Agency filed with OAH a written request for a one-week extension of time to compile and then file and serve the citations to authority.² Given the short time span previously requested for submission of the citation to authority, the ALJ granted the Service Agency's request to extend the submission deadline. The Service Agency was given until close of business December 7, 2018 to file and serve the citations. Claimant was given until close of business December 14, 2018 to file and serve any response.

On December 3, 2018, the Service Agency filed and served a letter with citations to authority and attached only the introduction page of a written guide to providing personal assistance services for adults; these documents were collectively marked as Exhibit 11 and lodged. Claimant did not file any response. The record was closed, and the matter was submitted for decision on December 14, 2018.

ISSUE³

Should KRC be required to resume funding 160 hours per month of Claimant's personal assistance services paid directly to his mother or must the funding be processed through a vendored agency and paid to a third person provider (not a parent)?

² The written request was marked as Exhibit 10, and was lodged.

³ At the fair hearing, in resolution of one of the issues in the Fair Hearing Request, KRC agreed to resume funding 24 hours per month of Claimant's personal assistance services paid to his uncle.

EVIDENCE

Documentary: Service Agency exhibits A through F, 10 and 11.

Testimonial: Claimant's mother.

FACTUAL FINDINGS

1. Claimant is a 12-year-old male client of KRC who lives with his parents and siblings. He qualifies for regional center services under the diagnosis of severe intellectual disability.

2A. Claimant requires 24-hour care and supervision, seven days per week. He is non-ambulatory and uses a wheelchair. He is able to sit independently, but needs support when kneeling or standing. Claimant is unable to complete any self-care tasks.

2B. Claimant must be attended at all times due to several medical issues. He has a history of gastroschisis⁴ and intestinal failure associated with liver disease. In August of 2007, Claimant received a combined liver and small bowel transplant. He requires a "gastro" tube, a central line shunt, and a colostomy bag. In about 2010, he underwent a tracheostomy, and he continues to eat only liquid foods. Claimant also suffers from hearing impairment and uses hearing aids. He was hospitalized twice in 2017, once for dehydration which caused a stroke, and later for three days after suffering from influenza.

3. When Claimant becomes frustrated or upset, he pinches, kicks or scratches people.

⁴ Gastroschisis is a birth defect in which an infant's intestines protrude outside the body through a hole in the abdominal wall.

4. Claimant does not attend school due his poor immune system and "being medically fragile." (Exhibit D, p. 25.) He receives in-home instruction through his school district.

5. Claimant receives 151 hours per month of In-Home Supportive Services (IHSS), and his mother is the service provider. She may earn up to \$1,510 per month through IHSS.

6. The Service Agency funds 25 hours per month of in-home respite services, and Claimant's uncle is his respite worker. Claimant's mother uses respite services to take care of personal errands.

7A. Beginning July 1, 2008, Claimant's mother received direct payment from KRC, up to \$33,120 per fiscal year, to provide 160 hours per month of personal assistant services for Claimant's care and supervision.

7B. Claimant's uncle also provided 24 hours per month of personal assistance services funded by KRC.

8. In Claimant's March 22, 2018 Individual Program Plan (IPP), the list of desired outcomes included that Claimant be "provided with a stable and nurturing home environment" and "continue to live with his family over the next 12 consecutive months." (Exhibit D, p. 30.) The plan to achieve that outcome included: "KRC will fund for 25 hours of parent respite, per month. . . [¶] . . . [¶] [and] will fund for 184 hours of personal assistance per month, per KRC's policies and procedures." (*Id.* at p. 31.)

9. Despite the plan set forth in the IPP, on July 1, 2018, KRC unilaterally discontinued funding Claimant's personal assistance services. When Claimant's mother requested resumption of the funding resume, her request was denied.

10. Claimant's September 5, 2018 IPP, listed the same desired outcomes as those in his March 22, 2018 IPP. However, notably absent from the plan to achieve those outcomes was KRC's funding for personal assistance hours. Nevertheless, the IPP inadvertently left in a notation that current funding authorizations included personal assistance. Under the question, "Should purchase [of personal assistance services] continue?" KRC marked "Yes" and listed the "Justification" as: "[Claimant] requires total care, which [Claimant's mother] provides." (Exhibit D, p. 38.)

11A. To explain the discontinued funding, KRC informed Claimant's mother that the direct reimbursement to her for the personal assistance services had been set up incorrectly and that the regional center cannot pay a parent directly for providing personal assistance services to her son because this service is considered part of parental responsibility in caring for a minor child. KRC indicated that moving forward it was implementing practices to correct this type of direct payment to parents. KRC stressed that it was not denying funding for personal assistance hours, but was unable to pay Claimant's mother to provide personal assistance to Claimant.

11B. KRC informed Claimant's mother that it could fund personal assistance hours provided by either nursing staff or by a parent-chosen provider whose payment is processed through Premier Health Care. KRC discussed with Claimant's mother the option of pursuing a nursing waiver to obtain additional nursing care support funded through the Department of Health Care Services, but she declined to pursue the nursing waiver. Claimant's mother informed KRC that she did not feel comfortable with a stranger coming into her home to provide personal assistance for Claimant either while she was home or while she was away.

12. Claimant's uncle provides Claimant's respite hours and 24 hours per month of personal assistance services. However, he is unable to provide any additional hours per month.

13A. On November 6, 2018, KRC sent Claimant's mother a Notice of Proposed Action, stating that KRC "has denied [your] request for increase of 160 hours of personal assistance and the continuation of 24 hours of personal assistance." (Exhibit A, p. 7.)⁵

13B. The NOPA's stated factual reason for the denial was: "Personal assistance is used for adults only. Parental responsibility is for minors under the age of 18." (*Ibid.*) KRC cited Welfare and Institutions Code section 4646.4, subdivision (a)(4), as the legal basis for its decision.

14A. Claimant's mother filed a Fair Hearing Request, in which she requested that the 160 hours of personal assistance be reinstated.

14B. Claimant's mother accurately noted that Claimant "needs extra care and [more] medical care than a normal child and the things I do for him are not things every parent provides by responsibility." (Exhibit A, p. 5.)

15A. At the fair hearing, the parties agreed that Claimant requires the 160 hours per month of personal assistance services. However, they disagreed on

⁵ The basis of this statement was incorrect, since Claimant's mother had not requested an increase of hours, but rather reinstatement of KRC's unilateral discontinuation of the previously-funded 160 hours per month of personal assistance. Additionally, as noted in footnote 3, following the issuance of the NOPA, KRC agreed to resume funding 24 hours per month of Claimant's personal assistance services paid to his uncle.

the process for funding personal assistance services and on who may receive payment for providing those services.

15B. KRC insisted that it cannot pay a parent directly, that it wanted to rectify its incorrect form of payment, and that the funding must be processed through a fiscal management service such as Premier Healthcare Service (Premier). However, KRC provided no citation to authority or KRC policy which mandated this third party processing.

15C. To support its position that a parent cannot receive payment for providing personal assistance services to her minor child, KRC (in its NOPA and in Exhibit 11) insists that personal assistance services are used only for adults. This argument runs contrary to KRC's agreement at the fair hearing to continue funding Claimant's personal assistance services provided by his uncle.

15D. (1). Additionally, in maintaining that personal assistance services are to be used only for adults, KRC argued:

During the hearing, [the ALJ] requested that KRC provide documentation which states that a parent of a minor child cannot be a provider for personal care assistant hours. Although there are no specific regulations, there is a guide dated 2002 published through a joint effort from the Department of Human Services and the Department of Developmental Services. On page (i) [the introduction page], it states that personal care assistant [*sic*] is directed for adult consumers who choose to live on their own with supported living services.

(Exhibit 11.)

(2). This argument was not persuasive. The single-page introduction from the 2002 guidebook does not specifically state that personal assistance services must be provided only to adults. The guidebook introduction merely states:

Personal assistance services (PAS) are used to help a person with a disability do tasks that he or she would normally do if there was no disability. . . . The focus of this document is PAS for adults with developmental disabilities who choose to live in their own home with supported living services.

This guide is not a prescription for the best way to do PAS. There are many "best ways" because the personal assistance services are as individual as each person receiving the services. It's a sharing of some thoughts on how to reach what is best for you or the person you are serving.

(Exhibit 11.)

(3). As indicated in the introduction page, while the guidebook is focused on personal assistance services for adults living in their own home, it notes generally that personal assistance services are used to help a "person" with a disability, and does not limit "person" to an "adult."

15E. KRC also argued that it is Claimant's mother's "family responsibility" to care for her minor child, which precludes direct payment to her for providing personal assistance services. The phrasing "family responsibility" is apparently

taken from the statute on which KRC relies in its NOPA, Welfare and Institutions Code section 4646.4, subdivision (a)(4), which mandates "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," and which also requires the regional center to "take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care." As accurately noted by Claimant's mother, Claimant requires extraordinary care and supports quite different from that of a minor child without disabilities, and that the personal assistance services she is providing are not what every parent would provide to a typically-developing 12-year-old. (See Factual Finding 14B.)

LEGAL CONCLUSIONS

1. Claimant's appeal of the Service Agency's discontinued funding of 160 hours of personal assistance services paid directly to Claimant's mother is granted. (Factual Findings 1 through 15; Legal Conclusions 2 through 5.)

2A. Where a change in services is sought, the party seeking the change has the burden of proving that a change is necessary. (See, Evid. Code, §§ 115 and 500.)

2B. Although KRC sought to frame its NOPA as a denial of Claimant's mother's request for an increase of services, this was inaccurate. Claimant's mother had not requested an increase of hours, but rather reinstatement of KRC's unilateral discontinuation of the previously-funded 160 hours per month of personal assistance. Thus, in terminating funding for previously-funded personal assistance services paid directly to Claimant's mother, the Service Agency bears the burden of proving by a preponderance of the evidence that the change is

required. The Service Agency has not met its burden as set forth more fully below.

2C. Additionally, KRC was required to send Claimant a notice of its proposed action before it discontinued funding, which would have notified Claimant's mother of her rights. (Welf. & Inst. Code, §§ 4701, subds. (a)-(d), and 4710, subd. (a)(1) [requiring 30-day notice prior to regional center acting "without the mutual consent of the service recipient or authorized representative to reduce, terminate, or change services set forth in an individual program plan."].) KRC failed to provide Claimant with the required prior notice.

3A. Welfare and Institutions Code section 4512, subdivision (b), provides, in part:

[T]he 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. Services and supports listed in the individual program plan may include, but are not limited to . . . personal care, day care, domiciliary care, special living arrangements, . . . child

care, . . . facilitating circles of support, habilitation, . . .
respite, . . . supported living arrangements. . . .

3B. Welfare and Institutions Code section 4648, subdivision (a)(2),
provides:

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.

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3C. Welfare and Institutions Code section 4685, subdivision (b),
provides, in pertinent part:

It is the intent of the Legislature that regional centers
provide or secure family support services that do all of
the following:

- (1) Respect and support the decision making authority of the family.
- (2) Be flexible and creative in meeting the unique and individual needs of
families as they evolve over time.

3D. Welfare and Institutions Code section 4651, subdivision (a),
provides:

It is the intent of the Legislature that regional centers shall find innovative and economical methods of achieving the objectives contained in individual program plans of persons with developmental disabilities.

3E. The stated basis for KRC's discontinuation of funding, Welfare and Institutions Code section 4646.4, subdivision (a), provides:

(a) Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan . . . or of an individualized family service plan . . . , 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. . . . [¶]
- (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.

4A. One of Claimant's desired outcomes in his March 2018 IPP is to be "provided with a stable and nurturing home environment" and "continue to live

with his family over the next 12 consecutive months.” (Factual Finding 8.) The plan to achieve that outcome included KRC funding 184 hours per month of personal assistance (24 hours provided by his uncle, and 160 hours provided by his mother). Despite KRC’s unilateral decision to terminate the funding, the justification for the personal assistance services remained the same at Claimant’s September 2018 IPP: “[Claimant] requires total care, which [Claimant’s mother] provides.” (Factual Finding 10.)

4B. Claimant suffers from severe intellectual disability and several serious medical issues. He is non-ambulatory, is unable to complete any self-care tasks, and needs 24-hour care and supervision, seven days per week. Claimant requires extraordinary care and supports quite different from that of a 12-year-old child without disabilities. Consequently, the personal assistance services Claimant’s mother had been providing are not necessarily “similar services and supports for a [12-year-old] child without disabilities.” (Factual Findings 14B and 15E.) Therefore, KRC has not established that Welfare and Institutions Code section 4646.4, subdivision (a)(4), prohibits regional center funding for Claimant’s mother to provide personal assistant services to Claimant.

4C. Additionally, KRC failed to establish by a preponderance of the evidence that personal assistance services are used only for adults. (Factual Findings 15C and 15D.)

4D. For 10 years, KRC funded direct payments to Claimant’s mother to provide 160 hours of personal assistant services to Claimant. KRC identified no statute, regulation, or written policy mandating the discontinuation of that payment structure. Despite the purported requirement of third-party processing, which KRC did not support with any evidence, KRC allowed an exception for a decade in order to provide services to Claimant by flexible and creative means to

meet his unique needs and the individual preferences of his family. KRC has failed to establish, either factually or legally, that the direct payment structure should no longer apply.

5. KRC provided no persuasive authority to support its termination of funding 160 hours per month of personal assistance services paid directly to Claimant's mother.

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ORDER

1. Kern Regional Center's termination of continued funding of 160 hours per month of personal assistance services paid directly to Claimant's mother is overturned. Claimant's appeal is granted.

2. Kern Regional Center shall resume and continue funding 160 hours per month of personal assistance services paid directly to Claimant's mother.

3. This funding shall be reviewed annually as part of the IPP process, or at any time a change in circumstances justifies a change in services.

NOTICE

This is the 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.

DATED: December 17, 2018

JULIE CABOS-OWEN

Administrative Law Judge

Office of Administrative Hearings