

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs

SAN DIEGO REGIONAL CENTER,

Service Agency,

and

DEPARTMENT OF DEVELOPMENTAL  
SERVICES,<sup>1</sup>

Necessary Party.

OAH No. 2015110980

DECISION

Vallera J. Johnson, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on July 14, 2016, in San Diego, California.<sup>2</sup>

Ronald R. House, Esq., represented San Diego Regional Center.

Wendy Dumlao, Esq., represented Claimant.

Joy C. Rosenquist, Senior Staff Counsel, represented the Department of Developmental Services.

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<sup>1</sup> The Department of Developmental Services was joined as a party to this matter on March 22, 2016.

<sup>2</sup> The Department of Developmental Services' Exhibit III is admitted.

The record was closed on August 9, 2016.<sup>3</sup>

## ISSUE

Whether the Department of Developmental Services' denial of the health and safety waiver request submitted by the San Diego Regional Center, required for Claimant's contracted transportation service with Care 4 U Mobility, was appropriate?

## FACTUAL FINDINGS

1. Claimant is a 46 year-old male and a client of the San Diego Regional Center, with intellectual disability, cerebral palsy and quadriplegia with spastic arm movement.

He lives with his parents in Encinitas, California.

Claimant uses a large power wheelchair for mobility and is inconsistently able to move the wheelchair himself. He needs to be lifted out of and strapped in his wheelchair by others for transportation. He can maneuver his wheelchair safely on flat even surfaces only. He is unable to back up or maneuver turns with his wheelchair. He has limited use of his hands. He is completely dependent on others to provide activities of daily living. He requires constant adult supervision for safety.

2. In September 2001, Claimant began attending UCP-Networks II ADC Day Program, the closest appropriate site-based program, 27 miles from his home.

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<sup>3</sup> The record remained open for receipt of written closing argument. On July 28, 2016, San Diego Regional Center and Claimant each filed closing arguments, marked Exhibits 20 and A-12, respectively. The Department of Developmental Services filed its closing argument on August 4, 2016; this document was marked Exhibit IV. None of the parties elected to file final closing argument. On August 9, 2016, the record was closed, and the matter was submitted.

Claimant's need for door-to-door transportation was established as early as 2003. Claimant's IPP has a "transportation access plan" to address transportation needs to the day program and states: "Due to [Claimant's] severe physical limitations and need to be supervised at all times, the planning team has determined that the most appropriate form of transportation to get him to/from the day program is contracted services".

3. In May 2002, after SDRC obtained three bids, the lowest bidder (American Red Cross) was selected to provide transportation to the day program at a cost of \$115 per day. In June 2003, the American Red Cross Transportation Department ceased transportation operations.

In November 2003, after SDRC obtained three bids, the lowest bidder (Moises Martinez Transportation) was selected to provide transportation for Claimant to the day program at a cost of \$150 per day.

In May 2011, Moises Martinez Transportation could no longer transport Claimant. SDRC obtained three bids, and the transportation contract was awarded to the lowest bidder (Care 4 U Mobility), at a cost of \$180 per day.

4. Pursuant to Welfare and Institutions Code section 4648.4, no regional center may pay any provider of transportation service a rate that is greater than the rate that was in effect on or after June 30, 2008, unless the regional center demonstrates that the service is necessary to protect a consumer's health or safety, and the department has granted prior written authorization.

5. Regional Centers are prohibited from paying more than the statewide or regional center median rate for transportation (for SDRC, the rate is \$27 per day) without a health and safety waiver.

6. The Department of Developmental Services is the agency of the State of California responsible for approval of waiver requests, as DDS issues state funds to the regional center, which in turn pays the vendor providing the service.

7. On September 20, 2014, the SDRC submitted a request to DDS for a health and safety waiver for authorization to fund transportation service for Claimant at the rate of \$180 per day, to and from his day program.

8. In or about July 2015, UCP-Networks II ADC Day Program closed. After exploring alternate day program options, Claimant elected to attend Mountain Shadows Day Program in San Marcos, 12 miles from Claimant's home.

9. With the change in the day program, Claimant's transportation provider was changed to North County Transit District's LIFT program. However, there were problems with LIFT transportation provider, including: (1) inconsistency of assigned drivers; (2) assigned drivers would not provide hands on assistance for Claimant while entering or exiting the vehicle; (3) Claimant had difficulty entering and exiting the LIFT transport vehicle; Claimant had trouble positioning himself after entering the vehicle; (4) Claimant bumped his head and knees while being transported; and (5) inconsistency of pick up and drop off times.

With the problems experienced with LIFT, Claimant's parent contacted LIFT's management to discuss concerns. The LIFT supervisor informed Claimant's parent that the LIFT program is not suited for Claimant, and they could not transport him and maintain any schedule.

10. Again, the SDRC attempted to obtain three bids for transporting Claimant to and from his day program. Care 4 U Mobility submitted a bid of \$110 per day. In addition, Mountain Shadows Day Program submitted a bid of \$245 per day. Based on the questioning from SDRC in response to questions from DDS, other vendors refused to provide a bid and referred to the inquiry as "fiscal harassment." Therefore, the SDRC did not obtain a third bid for transporting Claimant to and from his day program.

Care 4 U Mobility is the only identified transportation provider that meets Claimant's health and safety needs and provides the service at this time.

11. After no response from DDS regarding the health and safety waiver filed on September 20, 2014, on August 5, 2015, SDRC submitted a second request for a health and safety waiver to provide transportation for Claimant to and from his day program at the rate of \$110 per day because the day program was closer to Claimant's home.

12. SDRC considered other transportation alternatives, including asking the day program to provide a bus attendant, without luck.

13. In order to implement Welfare and Institutions Code section 4648.4, DDS developed criteria to be used to ascertain whether a waiver should be granted and issued a memorandum, dated October 23, 2007, that set forth the criteria. The memorandum states, in part:

Current trailer bill language provides a mechanism for regional centers to obtain written authorization from the Department of Developmental Services (Department) granting ... a rate increase to other services subject to the rate freeze to protect the consumer's health and safety.

This memorandum details the information that must be submitted by the regional center when seeking the Department's written authorization granting approval ... for other service rate increases.

**Required Information for All Service Level Rate and/or Increase Requests**

- Vendor number
- Service code and type
- Vendor name and address

- Capacity
- Current rate
- Unit of rate – For example, \$25 per day or \$10 an hour
- Proposed Rate and supporting justification
- An estimate of the fiscal impact of the rate increase for both current year and subsequent fiscal year
- Complete explanation of health and safety basis of the request and ramifications of a denial
- Signed statement from the regional center Executive Director that he/she concurs with the information and request being submitted to the Department
- Proposed effective date of implementation and, if temporary, the end date.

14. SDRC made a reasonable effort to comply with the requirements of the 2007 memorandum, repeatedly responding to requests from DDS.

15. By letter, dated November 16, 2016, DDS denied the request for a health and safety waiver. In its letter denying the request, DDS stated, in part:

Based on the information provided in your correspondence of August 5, 2015, email correspondence from August 17, 2015 to September 10, 2015, and telephone conversation on September 1, 2015, the Department of Developmental Services (Department) denies your request to increase the 2008 SDRC daily frozen rate of \$27.04 per consumer, per day, to \$180.00 per consumer per day. The receipts SDRC submitted in response to the June 17, 2015, correspondence do not provide the necessary cost details associated specially to [Claimant]. ... The request appears to be a rate increase for

the service provider, rather than for the health and safety needs of the consumer.

16. In reviewing waiver requests, DDS uses a cost basis to ensure that the rates paid to private vendors are supported by actual costs.

Relying on the 2007 memorandum, under the bullet point that reads "Proposed rate and supporting justification", Rapone Anderson, DDS's Regional Center Branch Manager, established that DDS approves a request if the rate is the actual cost, plus 15% for overhead; further the vendor can submit a bid based on the Internal Revenue Service's guidelines for deduction of car expenses in income tax returns.

Based on the documentation provided by the SDRC from Care 4 U Mobility Mr. Anderson testified that the cost to provide the transportation service for Claimant is \$75.79, less than \$110, the rate SDRC proposes to pay for transportation service for Claimant.

17. Claimant needs unique transportation and supervision during transportation before, during and after pickup and drop off at his home. DDS assumed that Care 4 U would not transport Claimant for a rate less than \$110.

18. DDS did not dispute that, without the requested rate increase, Claimant cannot be safely transported from his home to the closest appropriate site-based day program; and without specialized transportation, he would not be able to attend required programming to address his self-care skill needs and to increase his emotional and communication needs.

19. DDS did not dispute that the SDRC sought the least expensive vendor that can provide the service in a safe manner.

20. DDS offered no option for exceptions to its cost basis analysis policy when a client's IPP identifies a service and support for which the vendor does not satisfy the DDS criteria.

21. Even though the cost of the service is less than the rate requested, and the transportation service is necessary for Claimant's health and safety, DDS offered no option for Claimant to be safely transported to and from the day program.

22. With the foregoing facts in mind, DDS denied the SDRC's waiver request.

23. On November 12, 2015, the SDRC issued a Notice of Proposed Action, informing Claimant and his family that door-to-door transportation had been requested to replace LIFT, to and from Claimant's day program; under reason for proposed action, SDRC stated: "No contract service provider is available. Voucher Services have been offered as well as a change in day program in order to attempt to accommodate the request."

24. On November 18, 2015, Claimant filed a Fair Hearing Request, requesting that the SDRC provide him with safe, secure and timely transportation, consistent with his health needs.

25. Following an informal meeting on December 9, 2015, SDRC notified Claimant that, since DDS had denied the health and safety waiver for a rate increase, SDRC could not fund transportation services through Care 4 U Mobility for his transportation to and from his day program.

26. Effective May 2, 2016, DDS approved SDRC's request for a health and safety waiver on a temporary basis (for at least 90 days) at the rate of \$110 per day.

## LEGAL CONCLUSIONS

### BURDEN AND STANDARD OF PROOF

1. Each party asserting a claim or defense has the burden of proof for establishing the facts essential to that specific claim or defense. (Evid. Code §§110, 500.) The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.) A preponderance of the evidence means that the evidence on one side outweighs or is



more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

## LANTERMAN ACT

2. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

3. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through a regional center, accepts responsibility for providing services and supports to that person to support his integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

4. The supports and services to be provided to a consumer are determined by a team of individuals, the IPP team, and are based on the needs and preferences of the consumer. Among other things, the IPP team considers the options of services and supports available, the expected effectiveness of each service and support to meet the consumer's needs, and the cost-effectiveness of each option. The services and supports to be provided to the consumer are contained in an IPP. (Welf. & Inst. Code, §4512, subd. (b).)

5. The term "services and supports" includes "transportation services necessary to ensure delivery of services to persons with developmental disabilities."

(Welf. & Inst. Code, §4512, subd. (b).)

6. Welfare and Institutions Code section 4648 provides, in part:

In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities, including, but not limited to, all of the following:

(a) Securing needed services and supports.

(1) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. The regional center shall secure services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan, and within the context of the individual program plan, the planning team shall give highest preference to those services and supports which would allow minors with developmental disabilities to live with their families, adult persons with developmental disabilities to live as independently as possible in the community, and that allow all consumers to interact with persons without disabilities in positive, meaningful ways.

[¶] . . . [¶]

(3) A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer from any individual or agency that the regional center and consumer or, when appropriate, his or her parents, legal guardian, or conservator, or authorized representatives, determines will best accomplish all or any part of that consumer's program plan.

[¶] . . . [¶]

- (5) In order to ensure the maximum flexibility and availability of appropriate services and supports for persons with developmental disabilities, the department shall establish and maintain an equitable system of payment to providers of services and supports identified as necessary to the implementation of a consumers' individual program plan. The system of payment shall include a provision for a rate to ensure that the provider can meet the special needs of consumers and provide quality services and supports in the least restrictive setting as required by law.
- (6) The regional center and the consumer, or when appropriate, his or her parents, legal guardian, conservator, or authorized representative, including those appointed pursuant to subdivision (a) of Section 4541, subdivision (b) of Section 4701.6, or subdivision (e) of Section 4705, shall, pursuant to the individual program plan, consider all of the following when selecting a provider of consumer services and supports:
- (A) A provider's ability to deliver quality services or supports that can accomplish all or part of the consumer's individual program plan.
- [¶] . . . [¶]
- (D) The cost of providing services or supports of comparable quality by different providers, if available, shall be reviewed, and the least costly available provider of comparable service, including the cost of transportation, who is able to accomplish all or part of the consumer's individual program plan . . . shall be selected.
- [¶] . . . [¶]
7. Welfare and Institutions Code section 4648.35 provides, in part:
- At the time of development, review, or modification of a consumer's individual program plan or individualized family

service plan, all of the following shall apply to a regional center:

[¶] . . . [¶]

- (b) A regional center shall fund the least expensive transportation modality that meets the consumer's needs, as set forth in the consumer's individual program plan or individualized family service plan.
- (c) A regional center shall fund transportation, when required, from the consumer's residence to the lowest-cost vendor that provides the service that meets the consumer's needs, as set forth in the consumer's individual program plan or individual family service plan. For purposes of this subdivision, the cost of a vendor shall be determined by combining the vendor's program costs and the costs to transport a consumer from the consumer's residence to the vendor.

8. Welfare and Institutions Code section 4629.7, subdivision (c), requires that "service providers and contractors, upon request, shall provide regional centers with access to any books, documents, papers, computerized data, source documents, consumer records, or other records pertaining to the service providers' and contractors' negotiated rates."

9. Welfare and Institutions Code section 4648.4, subdivision (b), provides, in part:

Notwithstanding any other provision of law or regulation, except for subdivision (a), no regional center may pay any provider of the following services or supports a rate that is greater than the rate that is in effect on or after June 30, 2008, unless the increase is required by a contract between

the regional center and the vendor that is in effect on June 30, 2008, or the regional center demonstrates that the approval is necessary to protect the consumer's health or safety and the department has granted prior written authorization:

[¶] . . . [¶]

(2) Transportation, including travel reimbursement.

10. Welfare and Institutions Code section 4648, subdivision (g), provides that "[W]hen there are identified gaps in the system of services and supports or when there are identified consumers for whom no provider will provide services and supports contained in his or her individual program plan, the department may provide the services and supports directly."

#### REGULATIONS

11. California Code of Regulations, title 17, section 50604, describes the financial and service records vendors are required to maintain.

12. California Code of Regulations, title 17, section 58540, subdivision (c), provides: The regional center shall maintain, pursuant to Section 58512, the following information:

(1) A written explanation for the selection of the vendor; and

(2) A written analysis showing that transportation service will be provided in a cost-effective manner.

#### EVALUATION

13. Claimant is a client of the SDRC. Pursuant to the terms of his IPP, he attends a day program five days a week and requires specialized transportation to and from his

day program. SDRC reviewed available options and costs associated with providing specialized transportation service to Claimant. In so doing, the SDRC determined that Care 4 U Mobility was the most cost effective provider of safe and reliable transportation service for Claimant.

In order to fund the transportation service, SDRC applied for a health and safety waiver with DDS in order to pay \$110 per day, in excess of the median rate of \$27 per day. There are no statutes or regulations that specify the criteria DDS shall consider when it grants or denies "written authorization" for a health and safety waiver. The document that provides guidance is the 2007 memorandum for DDS to "Regional Center Executive Directors." SDRC made an extraordinary effort to comply with this memorandum.

DDS approves a waiver request if the rate is the actual cost, plus 15% for overhead; the vendor may submit a bid based upon the IRS guidelines for the deduction of car expenses in income tax returns. However, the cost to provide the transportation service is \$75.79, less than \$110, the rate the SDRC proposes to pay for transportation service for Claimant. DDS has no policy for evaluation of exceptional situations, such as this one, i.e., there is no vendor who will provide the transportation service for Claimant for cost plus 15 percent, but the requested rate is necessary to protect Claimant's health and safety.

Considering the purpose of the Lanterman Act, the lack of policy for exceptional situations, and the facts of this case, DDS abused its discretion when it withheld approval of the health and safety waiver. Therefore the DDS's denial of the waiver request submitted by SDRC required for Claimant's contracted transportation service with Care 4 U Mobility was inappropriate.

If the health and safety waiver is denied, SDRC cannot provide the transportation service for Claimant to and from his day program. Therefore, there will be a gap in services, and DDS may provide the transportation service.

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## ORDER

1. Claimant's appeal from San Diego Regional Center's determination to terminate funding of Care 4 U Mobility transportation service is granted.

2. The Department of Developmental Services shall issue a written authorization to San Diego Regional Center to fund Care 4 U Mobility for Claimant at the rate of \$110 per day for transportation to and from his day program. In the alternative, the Department of Developmental Services shall provide appropriate transportation so Claimant can safely get to and from his day program.

DATED: August 19, 2016

\_\_\_\_\_/s/\_\_\_\_\_  
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VALLERA J. JOHNSON

Administrative Law Judge

Office of Administrative Hearings

## 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 ninety days.**