

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT

and

SAN DIEGO REGIONAL CENTER, Service Agency

OAH Nos. 2021050149 & 2021050151

DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter telephonically on June 23, 2021.

Claimant's mother represented claimant with the assistance of a court-certified Tagalog language interpreter.

Ronald House, Attorney at Law, represented San Diego Regional Center (SDRC).

Oral and documentary evidence was received. The record was closed, and the matter submitted for decision on June 23, 2021.

ISSUES

1. Should SDRC increase claimant's respite care hours to 210 hours per quarter?
2. Should SDRC fund personal assistance services for claimant?

FACTUAL FINDINGS

Background

1. Claimant is a six-year-old boy who qualifies for regional center services based on diagnoses of autism spectrum disorder. Claimant lives at home with his mother and father.
2. On April 23, 2021, SDRC served claimant with a Notice of Proposed Action denying his request to fund respite at 210 hours per quarter on a permanent basis.
3. On the same date, SDRC served claimant with a Notice of Proposed Action denying his request to fund personal assistance services.
4. On April 29, 2021, claimant's mother filed two Fair Hearing Requests appealing SDRC's denials. The matters were consolidated for hearing.

Evidence Presented by SDRC

5. Sue Morasse is a Program Manager for SDRC who supervises claimant's Service Coordinator. Pursuant to a Notice of Resolution dated November 18, 2020, SDRC agreed to fund 120 hours per quarter (40 hours per month) of respite in addition

to 120 hours per quarter of emergency/COVID respite to be assessed on a month-to-month basis and discontinued when claimant returns to school. Previously, claimant received 75 hours per quarter of respite with an additional 75 hours per quarter for emergency/COVID respite. Ms. Morasse testified that the COVID hours were authorized as part of the State of Emergency because students were not able to attend in-person learning. Claimant returned to hybrid instruction at his school in March 2021.

SDRC utilizes a respite assessment to help assess the respite needs of its clients. The assessment considers such factors as claimant's age, medical issues, activities of daily living, mobility, educational/behavioral needs, safety situation, family situation, and day program attendance. For each category, a point value is assessed. Based on the total point value, there is a range of respite hours listed. The assessment is a tool used to help determine respite needs. The assessment, which was submitted as evidence, shows that claimant received a score of 1 out of 5 for occasional medical appointments; a score of 4 out of 5 showing he needed prompting for at least three activities of daily living; a score of 4 out of 5 for behavior needs; a score of 5 out of 5 for elopement; a score of 7 out of 7 for the family situation because father has a brain injury and attends regular medical appointments; and a score of 1 out of 3 because claimant attends a hybrid school program for three hours on Mondays through Thursday. The total score of 23 fell in the range of 26 to 30 hours of respite per month, which is 78 to 90 hours per quarter. Ms. Morasse testified that she believed that the assessment scores were quite generous, meaning that they scored him higher in some categories. SDRC previously agreed to fund claimant at 120 hours per quarter, 30 hours more than the highest amount in the assessment. Additionally, claimant continues to receive the additional 40 hours per month of COVID hours, even though he returned to school in March. SDRC continued the COVID hours because schools were not necessarily

consistent in the in-person learning, and school has ended for the summer, although claimant could have returned for an extended school program during the summer. Since the Notice of Resolution, there has not been any significant changes with claimant or the family situation, except that claimant returned to school, which should have resulted in a reduction of hours. Finally, Ms. Morasse testified that respite is a service to provide family members a break from caring for claimant. A respite provider is to care for the child in the home. It is not intended to be used to take claimant into the community, to teach skills, or work on safety training.

6. Ashlie Stephenson is a Regional Manager for SDRC, who supervises a team of Program Managers. Personal assistance services help consumers be successful in their home and community by assisting a person with developmental disabilities with completing tasks necessary for daily living. SDRC approved a draft policy for funding personal assistance services that is now before the Department of Developmental Services (DDS) for approval. Under the policy, SDRC will fund personal assistance for children on an exceptional basis, when the needs of the client are such that it requires more than one person to provide the needed care. There may be exceptional circumstances as a result of the severity and/or intensity of the developmental disability that may impact the family's ability to provide care and supervision for maintaining the child in the family home. Ms. Stephenson testified that claimant does not meet the qualifications for personal assistance services because claimant's level of functioning does not meet the standards. Moreover, personal assistance services is not intended to address behavioral issues. Personal assistants are not trained to provide behavior intervention. Instead, they simply perform tasks a consumer cannot perform himself.

7. Melissa Melgar is SDRC's coordinator of behavioral services. Claimant receives Applied Behavioral Analysis (ABA) funded through claimant's insurance. Ms. Meglar reviewed treatment plans prepared by claimant's ABA provider. The most recent treatment plan dated May 28, 2021, indicated claimant was receiving 11.5 hours per week of direct service from a behavioral technician, nine hours per month of supervision from a certified behavior analyst, and four hours per month of parent training. Claimant also receives speech and occupational therapy since February 2020. Claimant met 11 goals during the assessment period, 5 goals were discontinued, and 10 new goals were added. Claimant's mother is present during each session and observes and assists with behavioral intervention techniques. Ms. Melgar testified that claimant has made progress in many areas, and there has been a reduction of negative behaviors. Ms. Melgar testified that ABA therapy is the appropriate type of therapy to work with his behavior issues. In contrast, personal assistance services do not implement any behavioral goals and the providers do not receive any behavior training. While claimant's mother is seeking the service in order to help her with claimant engage in community activities, that is not the role of a personal assistant. Accordingly, personal assistance services is inappropriate for claimant's needs.

8. Under claimant's last Individual Program Plan (IPP) from October 2020, claimant requires assistance with toileting, personal hygiene, dressing, and eating. He engages in self-injurious behavior such as head banging, hitting the wall, hitting himself, and throwing himself on the floor. Claimant's father suffered a brain injury in the Navy and his mother is a stay-at-home parent. There is no other extended family or support in the area. Claimant exhibits a lot of "fearless" behaviors such as jumping from high places. Claimant finds ways of escaping from the house.

Claimant's Evidence

9. Claimant's mother testified and submitted a written statement, pertinent portions of which are summarized as follows: Claimant needs constant supervision and monitoring. In public, he has tantrums and constantly tries to elope. The ABA provider comes to the house twice per week. Occasionally, they will work with claimant and herself outside the home. For example, they went to a retail store to help address his behaviors outside the home. Claimant has made progress with the ABA therapy and occupational therapy. However, she has to be present during all of the sessions. They have three respite caregivers. However, she ends up spending the first couple hours of her respite with the provider to make sure claimant is behaving. They have utilized all of the respite hours authorized and want to make the COVID hours permanent. Claimant will be repeating Kindergarten when school resumes in-person in August. They are requesting a personal assistant because claimant is very difficult to deal with in public. She needs another person to help supervise claimant. She wants claimant to be involved in community activities such as sports, but claimant needs a support person to assist him. Claimant's mother testified that she was recently approved to receive 245 hours per month of In-Home Supportive Services (IHSS). Claimant's mother will be the IHSS provider.

10. Claimant's father testified and submitted a written statement; pertinent portions of which are summarized as follows: Claimant's father suffered a head injury in the Navy and is rated as 100 percent disabled by the Veterans' Administration. One of the symptoms of his injury is to be hypersensitive to external stimulus. This makes it challenging when he goes outside. It makes it very difficult for him to focus. He is not able to provide the type of supervision that claimant requires. He is unable to perform many household chores such as grocery shopping. As a consequence, claimant's wife

uses a lot of the respite hours to run errands. Even when the hours are being used, his wife has to be present to make sure the respite provider is not having any issues with claimant's behavior.

11. Claimant submitted several letters from individuals who have observed his behavior on outings, where claimant has engaged in dangerous behavior or has been hard to manage.

12. A letter from the respite care provider stated the agency cannot take claimant out into the community unless a family member is present because claimant has no safety awareness, attempts to elope, and engages in self-injurious behavior. The provider believes these behaviors are too dangerous for them to take claimant into the community.

13. Claimant submitted a June 8, 2021, report from the occupational therapy provider outlining claimant's improvements and remaining challenges.

LEGAL CONCLUSIONS

Burden of Proof

1. In a proceeding to determine eligibility, the burden of proof is on the claimant to establish he or she meets the proper criteria. The standard is a preponderance of the evidence. (Evid. Code, § 115.)

Relevant Law and Regulations

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and

services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: To prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

3. DDS is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.) In order to comply with its statutory mandate, DDS contracts with private non-profit community agencies, known as "regional centers," to provide the developmentally disabled with "access to the services and supports best suited to them throughout their lifetime." (Welf. & Inst. Code, § 4620.)

4. Welfare and Institutions Code section 4512, subdivision (b) defines "services and supports" as:

[S]pecialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and

maintenance of independent, productive, normal lives. The 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 . . . Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.

5. A regional center's responsibilities to its consumers are set forth in Welfare and Institutions Code sections 4640-4659.

6. Welfare and Institutions Code section 4646 requires that the Individual Program Plan and the provision of the services and supports be centered on the individual with developmental disabilities and take into account the needs and preferences of the individual and the family. Further, the provisions of services must be effective in meeting the IPP goals, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

7. Welfare and Institutions Code section 4646.4, subdivision (a), requires regional centers to establish an internal process that ensures adherence with federal

and state law and regulation, and when purchasing services and supports, ensures conformance with the regional center's purchase of service policies.

8. Welfare and Institutions Code section 4648 requires regional centers to ensure that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and to secure services and supports that meet the needs of the consumer, as determined by the IPP. This section also requires regional centers to be fiscally responsible.

9. A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer in order to best accomplish all or any part of the IPP. (Welf. & Inst. Code, § 4648, subd. (a)(3).)

10. The regional center is also required to consider generic resources and the family's responsibility for providing services and supports when considering the purchase of regional center supports and services for its consumers. (Welf. & Inst. Code, § 4646.4.)

11. The regional center is required to identify and pursue all possible sources of funding for consumers receiving regional center services, including governmental entities such as Medi-Cal. (Welf. and Inst. Code, § 4659, subd. (a).) A regional center is prohibited from purchasing services available from generic resources, including Medi-Cal, "when a consumer or family meets the criteria of this coverage but chooses not to pursue this coverage." (*Id.* at subd. (c).)

Evaluation

12. Claimant had the burden to show by a preponderance of the evidence that SDRC should increase the funded respite hours to 210 per quarter. Claimant failed

to meet his burden. In November 2020, SDRC agreed to increase respite hours from 70 to 120 hours per quarter, with an additional 120 hours of emergency/COVID hours while claimant remained out of school. There has been no material change since that date justifying making the COVID hours permanent. Claimant returned to hybrid school in March, although he is now out of school for the summer. SDRC has continued to fund the COVID hours during these periods. When claimant returns to school in August, the COVID hours should terminate, as claimant will be in school during the day. The evidence also established that claimant's behaviors have improved through ABA therapy. While the testimony of claimant's parents about the challenges they face was sincere, and it is clear that they are presented with many difficulties, the amount of permanent respite hours they receive exceeds what is typically provided for similarly situated families. SDRC must also consider natural parental responsibilities to provide childcare, which is a cost borne to the individual family. Put another way, a family with a child without a developmental disability would be expected to provide childcare and supervision while the child is out of school. Respite hours can only be authorized to the extent and proportionate to the level of supervision exceeding that of a child without a developmental disability. Finally, the award of 245 hours per month of IHSS is a generic resource that must be considered. There is no requirement that claimant's mother need to be the sole IHSS provider, and her current respite provider could provide care under the auspices of IHSS, rather than respite. In other words, there is a generic resource available that could be used in a way that would meet claimant's needs and provide claimant's mother with a break. In conclusion, the 120 hours per quarter of respite is appropriate for claimant's situation.

13. Claimant had the burden to show by a preponderance of the evidence that SDRC should fund personal assistance services. The type of assistance claimant is seeking, is inconsistent with personal assistance services. Personal assistants perform

tasks for a consumer that the consumer cannot perform by himself. In a child of claimant's age, a consumer would have to have severe deficiencies such that a single person could not provide care for his activities of daily living. From their testimony, it appears claimant's parents are seeking help supervising claimant in the community. However, personal assistants are not trained to provide any behavioral intervention or training. They only provide rote tasks a consumer cannot perform for himself, such as feeding and dressing. Claimant is receiving ABA therapy, which the evidence established is the best support to assist claimant with his behavior issues in the community.

ORDER

1. Claimant's appeal from San Diego Regional Center's determination that it will not fund 210 hours of respite per quarter is denied.
2. Claimant's appeal from San Diego Regional Center's determination that it will not fund personal assistance services is denied.

DATE: July 7, 2021

ADAM L. BERG
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 90 days.