

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

In the Matter of:

CLAIMANT

v.

CENTRAL VALLEY REGIONAL CENTER, Service Agency

OAH No. 2021080784

DECISION

Jessica Wall, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference and telephone on December 3, 2021, from Sacramento, California.

Tamara Salem, Appeals and Compliance Manager, represented the Service Agency, Central Valley Regional Center (CVRC).

Claimant's mother represented claimant.

Oral and documentary evidence was received. The record closed and the matter submitted for decision on December 3, 2021.

ISSUE

May CVRC reduce claimant's personal attendant¹ (PA) hours from 106 hours per month to 69 hours per month?

FINDINGS OF FACT

Background

1. Claimant is a five-year-old boy who qualifies for CVRC services based on a diagnosis of Autism Spectrum Disorder. He has substantial handicaps in the areas of communication, self-care, and self-direction. He has received services and supports from CVRC under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welfare and Institutions Code Section 4500 et seq.) since shortly before his third birthday.

2. Claimant's diagnoses include attention-deficit/hyperactivity disorder, a speech disorder, and fine motor delays. He requires supervision to prevent him from attempting to elope from his home or caregivers, as well as prompting and assistance to complete daily living needs such as dressing, hygiene, and toileting. Claimant cannot brush his teeth independently or use the toilet for bowel movements. He engages in aggressive behavior toward caregivers, and self-injurious behavior, such as throwing himself against doors, biting, and hitting himself. Claimant has interrupted

¹ The terms "personal attendant" and "personal assistant," abbreviated as "PA," are used interchangeably to refer to the same service.

sleep patterns and gets between three to seven hours of sleep each night. He resides at home in Tulare, California with his mother. His mother is his primary caregiver, with paid assistance from his paternal grandmother and periodic visits from his father in mornings and evenings.

3. In claimant's July 2020 Individual Program Plan (IPP), his prior Program Manager, Barbara Newman, discussed PA support with claimant's parents and determined that 106 monthly PA hours per month was an appropriate amount of support for claimant to assist claimant with his daily living needs. The PA hours were in addition to claimant's other monthly activities and support services, accounted for as follows: 77 hours at a transitional kindergarten (T-K) program at a private school in Fresno, California; 280 hours of in-home support services (IHSS) provided by his mother; 40 hours of respite provided by his paternal grandmother; 180 hours of sleep; and 23 hours of applied behavior analysis (ABA), for a total of 706 hours in a month.

4. In claimant's July 2021 IPP meeting, CVRC, claimant, and claimant's mother agreed to the following objectives for the program year:

- a. Claimant will be safe at home and in his community.
- b. Claimant will be toilet trained and progress in other areas of daily hygiene skills.
- c. Claimant will increase his skills to be better able to learn from a typical learning environment. Claimant will decrease his excessive behavioral challenges to increase his learning and social opportunities.
- d. Claimant will make progress on his educational goals.

- e. Claimant will continue overall good health, while also receiving specialist supports needed to maintain health.

The July 2021 IPP describes claimant's monthly services and supports as follows: 283 hours of IHSS provided by his mother; 106 PA hours and 40 respite hours provided by his paternal grandmother; and 28 hours of ABA. The IPP describes that claimant attends a private T-K program² in Fresno from 8:30 a.m. to 1:00 p.m. every Monday through Friday where he is assisted by a registered behavioral technician.

5. On September 19, 2021, CVRC issued a Notice of Proposed Action (NOPA) that it would reduce claimant's PA hours from 106 to 48 hours per month. CVRC explained that "[c]ombined with generic resources through IHSS, school, and insurance for therapies, hours where coverage is being provided is equal to or exceeds the number of hours in a month." According to CVRC's calculations, there are 720 hours in a month, composed of thirty 24-hour days, and claimant had been receiving an excess of services. CVRC totaled claimant's monthly hours of activities and support as follows: 90 school hours; 180 sleeping hours; 283 IHSS hours; 106 PA hours; 40 respite hours; 10 ABA hours; 8 speech therapy, physical therapy (PT), and occupational therapy (OT) hours; and 40 transportation hours. This calculation totaled 757 hours per month, an excess of 37 according to CVRC.

² Claimant and the Tulare City School District (TCSD) could not come to an agreement regarding claimant's Individualized Education Program (IEP). Claimant is pursuing due process challenges to the IEP and attends private school while the dispute proceeds through the legal system.

6. In a September 23, 2021 letter from Tamara Salem to claimant's mother, CVRC amended the NOPA by decreasing the PA hours from 106 to 69 each month, rather than the initial decrease to 48. This letter also stated that CVRC is not able to continue to fund 106 hours per month of PA that include transportation because Welfare and Institutions Code section 4648.35, subdivision (d), "states that the regional centers are not able to fund for transportation."

7. CVRC informed claimant of his appeal rights. Under Welfare and Institutions Code section 4715, a claimant is entitled to continued provision of services if he files a timely request for hearing, that is, within 10 days of notice that a service will be discontinued. The fair hearing request was timely filed and services remain in place pending final determination. This hearing followed.

CVRC's Evidence

8. Tamara Trevino is a Program Manager at CVRC and has worked in the field for about twenty years. She has a Master's in Rehabilitation Counseling and a second Master's in Marriage and Family Therapy. She manages CVRC's Transitional Unit, supervises service coordinators, oversees case managers, and performs crisis and case management. She testified at hearing that PA hours address the daily living needs of CVRC consumers. For minors, PAs help the child with self-care tasks that a child without a substantial handicap would be able to perform independently. A child must be present with the PA for all hours CVRC reimburses. Hours in which a PA assists a child cannot overlap with other supportive and generic services, such as IHSS, respite, or school hours.

9. Ms. Trevino testified at hearing about CVRC's reasoning for issuing the NOPA. CVRC concluded claimant was receiving an excess of service hours each month

based on its calculation of claimant's average schedule, meaning that some service hours overlapped with the provision of generic resources in violation of Welfare and Institutions Code section 4648, subdivision (a)(8). Furthermore, CVRC took the position that claimant was not present during all PA hours utilized. CVRC relied on a "Consumer I.D. Note" from the July 21, 2021 IPP meeting, where claimant's mother allegedly made statements that the PA hours were "for [her]" "to use as [she] so deemed."

Additionally, Ms. Trevino testified that CVRC believed that claimant's PA hours may be overlapping with his therapy, school, or transportation hours based on the timesheets documenting claimant's PA hours. She conceded that CVRC does not have records of claimant's T-K attendance to substantiate the argument that PA hours were used while he was at school. Rather, she mentioned that a vendor report indicated PA hours were used while claimant was at ABA.

10. In the Consumer I.D. Note documenting the July 21, 2021 IPP meeting, claimant's mother expressed a need for additional PA hours and requested clarification about how PA hours could be used, as her independent research indicated that the PA could be used for grocery shopping and meal planning. The CVRC Service Coordinator assigned to claimant, Sylvia Marroquin, instructed claimant's mother that the hours must be for the PA to directly assist the claimant, rather than his caregivers, and therefore the claimant must be present during all PA hours used. Claimant's mother and CVRC did not reach an agreement as to the number of PA hours claimant should receive.

11. At hearing, Ms. Trevino expressed that CVRC takes an individualized approach to what activities a PA may perform, rather than applying strict, "cookie cutter" rules. If a consumer needs more PA hours in a month, CVRC would be flexible to the situation and adjust PA hours and support, so long as those hours do not

overlap with another generic resource. Similarly, CVRC views parental responsibility hours to be individualized, depending on the severity of the consumer's disability, care needs, medical challenges, and family dynamics. For transportation challenges, CVRC instructs consumers to look at whether family members outside of the household can assist and offers mileage reimbursement and bus passes, rather than offering assistance or resources. Ms. Trevino stated that a PA could travel with a consumer to provide necessary support during transportation.

Claimant's Evidence

12. Claimant's mother testified on his behalf. Claimant's mother explained that she is the primary caregiver for claimant, as claimant's father has not accepted claimant's diagnosis and received appropriate training. Claimant's father no longer lives with claimant and his mother. His participation in claimant's life is limited by his own mental health and addiction issues. Claimant's mother relies on assistance from claimant's paternal grandmother, who provides respite and PA services. Without the funding for PA and respite hours, claimant's grandmother would need to pursue additional employment and could not assist claimant.

13. Claimant's mother has been suffering from multiple health challenges, which have limited her ability to provide a consistent schedule for claimant. She suffers from severe anemia, requiring blood and iron infusions, as well as rheumatoid arthritis and psoriasis. She submitted a July 26, 2021 letter from her Family Nurse Practitioner, Cynthia Shipp-Rowell, documenting the toll that her illness has taken on her ability to care for claimant as a single mother. Her frequent medical appointments and declining health have prevented her from being able to drive claimant to school in Fresno. Transporting claimant can be challenging and take much longer than expected if claimant has a tantrum and engages in self-injurious behavior. Claimant's mother must

pull off the road and stop the car to address the behavior, as she is alone in the car with claimant. Claimant's paternal grandmother does not drive.

14. Claimant's mother struggled to find claimant a school that would offer T-K to a child with claimant's needs. The private school in Fresno he attends is run by a former special education teacher and accepts claimant on a day-by-day basis. The school is not required to keep him for the entire day. Claimant has been able to attend school about 33 percent of the time, but has not gone recently because his mother's illness renders her unable to transport him that distance. In addition to the transportation challenges, claimant has been sick for three weeks. He cannot attend school while symptomatic and his compromised immune system has made attendance riskier during the pandemic. Claimant's mother is exploring home-schooling options and has applied to closer private and charter schools while she appeals claimant's IEP with the TCSD.

15. Claimant's mother testified that claimant's schedule differs in material respects from the calculations relied upon by CVRC. She explained that his medications and insomnia prevent claimant from habitually sleeping six continuous hours. Additionally, her medical appointments and claimant's recent illness have prevented claimant from regularly attending school. Finally, claimant's OT hours have been reduced from weekly services to every other week because the therapist's lack of availability. Based on these issues, claimant's mother does not believe that it is feasible for her to care for claimant alone with a reduction in PA hours. Additionally, she would like CVRC to offer more guidance on the services offered to consumers and guidelines on how consumers can effectively use these services.

16. Claimant's mother submitted two letters from claimant's physician, Anne Berens, M.D., who has cared for claimant at Stanford Children's Health Developmental

Behavioral Pediatrics Clinic since 2018. The July 29, 2020 letter documents claimant's history of wandering from safe environments to seek items of interest, such as roads and water bodies, that pose a risk to his safety. Based on this elopement, Dr. Berens wrote it was medically necessary that claimant have close and constant adult supervision at all times. In the November 16, 2021 letter, Dr. Berens documented claimant's increase in aggression and self-injury because of family stress and routine changes caused by serious parental illness. Dr. Berens wrote that decreasing claimant's services and supports at this time could compromise claimant's wellbeing.

PRINCIPLES OF LAW

1. Where a change in services is sought, the party seeking the change has the burden of proving that the change in services is necessary by a preponderance of the evidence. (See Evid. Code, §§ 115 and 500.) In this matter, the burden is on CVRC to establish by a preponderance of the evidence that good cause supports reducing claimant's PA hours.

2. The Lanterman Act sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. As the California Supreme Court explained in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, the purpose of the Lanterman Act 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." Under the Lanterman Act, regional centers are "charged with providing developmentally disabled persons with 'access to the facilities and services best suited

to them throughout their lifetime” and with determining “the manner in which those services are to be rendered.” (*Id.* at p. 389, quoting Welf. & Inst. Code, § 4620.)

3. Determining which services and supports the regional center provides is 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.” (Welf. & Inst. Code, § 4510.) A service agency is required to ensure the provision of services and supports to consumers that meet their individual needs, preferences, and goals as identified in their IPPs. (Welf. & Inst. Code, §§ 4501; 4512, subd. (b); 4646, subd. (a).)

4. In securing services for its consumers, a service agency must consider the cost-effectiveness of service options. (Welf. & Inst. Code, §§ 4646, subd. (a); 4512, subd. (b).) Specifically, under Welfare and Institutions Code section 4648, subdivision (a)(8), “[r]egional center funds shall not be used to supplant the budget of an agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.”

5. Welfare and Institutions Code section 4659, subdivision (a), provides:

Except as otherwise provided in subdivision (b) or (e), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.

(2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer.

6. Welfare and Institutions Code section 4646.4, subdivision (a), provides:

Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, 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. The individualized family service planning team

for infants and toddlers eligible under Section 95014 of the Government Code may determine that a medical service identified in the individualized family service plan is not available through the family's private health insurance policy or health care service plan and therefore, in compliance with the timely provision of service requirements contained in Part 303 (commencing with Section 303.1) of Title 34 of the Code of Federal Regulations, will be funded by the regional center.

(3) Utilization of other services and sources of funding as contained in Section 4659.

(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.

7. Welfare and Institutions Code section 4648.35 provides in relevant part:

At the time of development, review, or modification of a consumer's individual program plan (IPP) or individualized family service plan (IFSP), 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 IPP or IFSP.

(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 IPP or IFSP. 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.

(d) A regional center shall fund transportation services for a minor child living in the family residence, only if the family of the child provides sufficient written documentation to the regional center to demonstrate that it is unable to provide transportation for the child.

ANALYSIS

1. CVRC had the burden of demonstrating by a preponderance of the evidence that claimant's PA hours should be reduced to 69 hours per month. CVRC's calculations indicated that claimant received an excess of services, based on the assumption of an ideal, regular schedule. Evidence presented at hearing indicated that this schedule does not accurately assess claimant's current hours of transportation,

therapy, and school. Given claimant's recent inability to attend school because of his illness and his mother's medical needs, claimant spends less than 90 hours per month in school and less than 40 hours per month in transportation. Additionally, the evidence supports that PA hours may be used during transportation to attend to claimant's self-injurious behavior while his mother drives.³ Given that claimant is not excluded from using PA services for assistance during transportation, there is not proof that an excess of at least 37 hours of PA services exists even when he is well enough to be in school and able to receive weekly OT.

2. Claimant requires a high level of supervision and support because of his self-injurious behavior, insomnia, elopement, and inability to perform daily hygiene and self-care tasks independently. While the IPP relies on support from both of claimant's parents, his father's presence is unpredictable and his mother's health has worsened. Based on his mother's current health challenges, additional support is essential to claimant's ability to meet the IPP goals of being safe at home and in his community, progress in his daily hygiene skills, and continued overall good health. The evidence does not support that claimant's needs have changed to justify a reduction in PA hours.

³ Should claimant's mother's health decline such that she is no longer able to drive, Welfare and Institutions Code section 4648.35, subdivision (d), requires CVRC to fund transportation services for claimant once his mother provides sufficient written documentation.

3. The above matters having been considered, CVRC has not met its burden to establish that claimant's PA hours should be reduced, except for hours in which claimant is not present to receive assistance.

LEGAL CONCLUSIONS

1. CVRC did not meet its burden to establish claimant's PA hours should be reduced to 69 hours per month.

ORDER

Claimant's appeal is granted. CVRC is required to continue funding claimant's PA services for 106 hours per month, provided those hours are used in the presence of claimant.

DATE: December 10, 2021

JESSICA WALL

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.