

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

In the Matter of the Fair Hearing Request of:

CLAIMANT,

vs.

NORTH LOS ANGELES COUNTY REGIONAL CENTER,

Service Agency.

OAH No. 2022030387

DECISION

Eileen Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard this matter on June 13, 2022, by videoconference. Three cases were consolidated for hearing, OAH No. 2022030387, OAH No. 2022030388 and OAH No. 2022030390. The record was closed, and each case was submitted for a separate decision at the conclusion of the hearing.

Claimant was represented by advocate and supportive living services (SLS) provider, Leon Brown. Claimant was not present.

Stella Dorian, Fair Hearing Representative, represented the North Los Angeles County Regional Center (service agency).

ISSUE

Is the service agency obligated to pay the Covid-19 quarantine hourly rate for Claimant's caretaker of \$48.06, 24-hours a day, for more than the 11 days offered by the service agency?

SUMMARY

Claimant requests service agency fund the Covid-19 quarantine rate of \$48.06 an hour, over a 24-hour period, for 20 days. Service agency offered eleven days. Claimant failed to meet Claimant's burden of proof for the number of days in excess of service agency's offer.

EVIDENCE RELIED ON

In making this Decision, the ALJ relied on the following exhibits for the consolidated hearing: service agency's Exhibits 1 through 33, and Claimant's Exhibits A (emails), and B (emails). Claimant's Exhibits C (ID Notes), D1 (Fair Labor Act), D2 (Fair Labor Act), Exhibit E (java script); Exhibit F (ID Notes) were withdrawn. Service agency relied on the testimony of Diane Lotivio, M.A., Self-Determination Specialist (SDP specialist) and consumer service coordinator (CSC). Claimant relied on the testimony of Leon Brown.

FACTUAL FINDINGS

Parties, Jurisdiction and Background

1. The service agency determines eligibility and provides funding for services and supports to persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Lanterman Act), among other entitlement programs. (Welf. & Inst. Code (Code), § 4500 et seq.)

2. Claimant is a 25-year-old unconserved adult who is eligible for services under the Lanterman Act as an individual with moderate intellectual disability. Claimant lives with his younger brother, ex-step-father, who are also other clients of the service agency, Leon Brown, his SLS provider, and a roommate. Claimant has been participating in the self-determination program (SDP) for approximately three years. He receives up to 212 hours of support from a generic resource and government program, In-Home Supportive Services (IHSS), supplied by Leon Brown. He also receives approximately \$200 monthly in social security income (SSI). Claimant works three days a week at Smart N Final for a total of 20 hours a week. He has expressed his interest in using his funds to hire services to support him at work and at home. Acumen has been retained as his Financial Management System (FMS). Claimant utilizes the Sole Employer Model. Claimant has an annual spending plan which includes funding for community living supports/independent support staff to support Claimant in his home in the total amount of \$129,800.00 per year out of a total budget of \$145,312.98. (Exs. 16, 17, 19.)

3. Claimant was exposed to Covid-19 in or about January 1, 2022. Mr. Brown notified the service agency's service coordinator on February 9, 2022 and provided more detailed information on February 14, 2022. (Ex. 6 & 10.) He informed

her Claimant complained on January 1, 2022, of a "headache, sore throat and had, uncontrollable coughing, fever, and fatigue." (Ex. 10.) He contacted Claimant's family doctor, Dr. Mark Braunstein of Claimant's symptoms. According to Mr. Brown, Dr. Braunstein advised him to obtain formal Covid-19 testing "immediately." He also advised him, based upon Claimant's symptoms, Claimant had Covid and needed to quarantine, and anyone living with him and exhibiting symptoms should quarantine. (Ex. 10.)

4. Mr. Brown maintained he could not secure a formal test at any Covid-19 test site and could only obtain one home test which was administered to the roommate who was not a service agency consumer or family member.

5. The roommate took a formal Covid-19 test on January 6, 2022 and was informed he tested positive on January 13, 2022.

6. Mr. Brown advised Dr. Braunstein, Claimant was quarantined. On February 8, 2022, Dr. Braunstein confirmed by letter he was aware Claimant was quarantined "due to covid exposure" from January 1, 2022 through January 22, 2022. Mr. Brown informed the service agency he was quarantined for a total of 20 days. (Exs. 4 & 12.)

7. Claimant had been fully vaccinated in March and April of 2021. He received a booster in late January 2022. He is otherwise healthy and successfully accesses his health providers using his Medi-Cal, Denti-Cal and additional funding from the service agency.

8. Mr. Brown remained in isolation with Claimant.

9. On February 17, 2022, Mr. Brown on Claimant's behalf requested payment at a higher hourly rate for the duration of Claimant's quarantine which he represented was 21 days. (Ex. 11.)

10. The directive of the Department of Developmental Services, number 01-010821 dated January 8, 2021 (the Directive). That directive authorizes Service Agencies under Welfare and Institutions Code section 4639.6 to reimburse SLS providers at a rate of \$48.06 per hour "when necessary to provide 24 hour per day supports to an individual who has either tested positive for, or must quarantine as a result of exposure to, Covid-19." The directive was in effect at the time of Claimant's quarantine and applies to SLS providers who isolate with the consumer. (Ex. 2)

11. The usual hourly rate of SLS providers is \$29.21.

12. Mr. Brown on Claimant's behalf did not follow the general protocol for notifying the service agency when a special incident occurred, such as exposure to Covid-19. Claimant's failure to do so was not intentional but was due to the confusion about protocols and the circumstances of the exposure. Mr. Brown only discovered additional funding was available for support services after the quarantine had ended and immediately contacted the service agency. Following the service agency's direction, he filed the Special Incident Report (SIR) required under California Code of Regulations, title 17 (CCR) section 54327 for serious and unplanned incidents, including "disease outbreak." (Ex. 9.)

13. Under the SDP Claimant is responsible for a budget to be used for his services and supports developed through the Individual Planning Program (IPP) process. The budget is managed by an outside FMS agency, a vendor of the service agency. Extraordinary expenses, such as an increased Covid-19 hourly rate for SLS

providers, require an adjustment to the budget. The FMS agency should also be notified because they are responsible for managing the spending plan and ensuring it is followed and cannot pay for services that have not been authorized in the spending plan. The FMS also is responsible for the completion of the SIR. (See Exs. 3 & 13.) Mr. Brown on Claimant's behalf also failed to notify the FMS. (See Exs. 13 and 14.)

14. As with Claimant's failure to file an SIR there is no evidence the failure to report to the FMS was intentional or evidence of an attempt to mislead the service agency. Claimant had not notified the Service Agency or the FMS provider with a Special Incident Report (SIR) when Claimant initially became ill, as required.

15. The Service Agency had not known there was a roommate living with Claimant and the other service agency consumers living in the same household, could not independently verify the information provided by Mr. Brown and was uncertain about the number of appropriate number of days to authorize. Mr. Brown only supplied an unclear picture of a home test result from the roommate and never secured formal testing of Covid-19 from Claimant.

16. Claimant was obligated to disclose the members of the household to the Service Agency. The presence of a roommate could have had an impact on services depending on the roommate's participation in the household or community as a generic resource. The omission was not intentional and did not affect the outcome of this dispute.

17. The service agency was uncertain about how to respond to Mr. Brown's request. According to Ms. Lotivio, the service agency had never received a request for the increased hourly rate due to Covid-19 and given the absence of clear confirmation of Claimant's medical status and a timely SIR for guidance she reviewed the Directive

dated January 8, 2021 from the Department of Developmental Services (the DDS Directive), consulted with other staff about the guidelines from the United States Department of Health and Human Services Centers for Disease Control (CDC), Los Angeles County and eventually the Department of Developmental Services.

18. The CDC guidelines endorse a five-day quarantine for those who are not up to date with vaccines, did not have Covid-19 in the past 90 days or test positive. The CDC recommends getting a Covid-19 test on or after day 5 only if there are symptoms of Covid-19, and quarantine only with a positive test positive or symptoms for at least five days. The CDC contemplates the situation where the individual is unable to get a test; in those situations, the individual can leave home after day five if there are no symptoms. (Ex. 33.) Service agency also reviewed CDC guidelines and found the "CDC guidelines endorse a 14-day quarantine for those who have tested positive, or 10 days as long as there are no symptoms for three days. (Ex. 3.) Service agency consulted the web-site of the County of Los Angeles Public Health and found is was similar to the CDC. It further established a way of counting the days of quarantine: day zero is the date of exposure and day one starts the day after. (Ex. 15.)

19. In an email dated February 15, 2022, Katie Hornberger of the Department of Developmental Services provided more specific guidance to the service agency.

¶...¶

Here is my take on it. It could all be sketchy but in an effort toward safety I would go with the consumer exposed and therefore should quarantine with the one SLS worker per the directive. Given that the person with Covid isn't a consumer or employee I can see why they don't want to

share the test result. That being said – I don't think the quarantine period is still at 2 weeks. I think whatever it is now should be what is authorized.

But I also think it warrants further discussion once the safety thing is taken care of.

For example, no SIR was submitted[.] [T]hat's a problem and warrants a QA investigation and maybe corrective action. No one told RC who was living with the consumer – also important because that may go to a natural support. It also goes to an evaluation of how SLS is keeping the consumer safe during Covid. In essence, lots of questions and investigations into what went on here and maybe some remedies related to that if appropriate.

That's my two cents. Hope it's helpful.

(Ex. 8.)

20. On February 28, 2022, service agency received Claimant's request for a fair hearing. Service agency filed the fair hearing request with OAH on March 7, 2022.

21. All jurisdictional requirements have been met for this matter to proceed to fair hearing.

22. On May 5, 2022, service agency Claimant with a Notice of Proposed Action advising Complainant "in alignment with public health guidance, NLACRC agrees that for health and safety reasons, an appropriate quarantine period for vaccinated individuals to be 11 days (10 days quarantine plus day zero) and thus is in

agreement to fund for 11 days at the increased SLS rate. (Ex. 30.) In its NOPA, service agency noted the absence of adherence to Lanterman Act protocols to provide an SIR so that an emergency IPP could be held to discuss a rate increase pursuant to Welfare and Institutions Code section 4646, subdivision (d). As previously noted, Claimant's failure to follow protocols was inadvertent and any procedural violations did not impact the disposition of this dispute.

23. At the time of the hearing, service agency had not funded the 11 days it agreed to provide for 24-hour care at the rate of \$48.06.

24. During the hearing, Mr. Brown commented about the delay between his request for a NOPA in mid-February, his fair hearing request and service agency's response. Service agency is required to provide Claimant with "adequate notice" in writing of its action within 20 days of its receipt of a complaint. (W&I Code, §§ 4701, 4731, subd. (b).) Ms. Lotivio explained during the hearing this was the first time such a request was made to the service agency and her need to investigate an appropriate response and possible resolution. Service agency was obligated to provide a timely NOPA. Service agency's failure to do so is not relevant to the resolution of the dispute or the jurisdiction of the Office of Administrative Hearings.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a contrary regional center

decision. (Code §§ 4700-4716.)¹ Claimant appealed the service agency's denial of a service request, and therefore jurisdiction exists for this appeal.

2. The standard of proof in this case is the preponderance of the evidence because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) This standard is met when the party bearing the burden of proof presents evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

3. When one seeks government benefits or services, the burden of proof is on the party (See, e.g., *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) In this case, Claimant requested an increase in Claimant's current funding and services, and therefore Claimant has the burden of proving by a preponderance of the evidence that Claimant is entitled to them. Claimant failed to meet Claimant's burden of proof.

Applicable Provisions of the Lanterman Act

4. A. Code section 4685.8 governs regional center consumers participating in the SDP. The purpose of the SDP is to provide consumers (also referred to as participants) and their families, within an individual annual budget, increased flexibility and choice, and greater control over decisions, resources, and needed and desired services and supports to implement their IPP. (*Id.*, subd. (a).)

B. "Self-determination" is defined in the statute as a voluntary delivery system consisting of a defined and comprehensive mix of services and supports,

¹ Undesignated statutory references are to the Welfare and Institutions Code.

selected and directed by a participant through person-centered planning, in order to meet the objectives in their IPP. Self-determination services and supports are designed to assist the participant to achieve personally defined outcomes in community settings that promote inclusion. (*Id.*, subd. (c)(6).)

C. When developing the individual budget, the IPP team determines the services, supports, and goods necessary for each consumer, based on the needs and preferences of the consumer, and when appropriate the consumer's family, and the effectiveness of each option in meeting the goals specified in the IPP, and the cost effectiveness of each option, as specified in section 4648, subdivision (a)(6)(D). (*Id.*, subd. (b)(2)(H)(i).)

D. The participant shall utilize the services and supports available within the SDP only when generic services and supports are not available. (*Id.*, subd. (d)(3)(B).) Generic services and supports should be used when appropriate. (Code § 4646.4.) It is the intent of the Legislature in implementing the IPP, the planning team first consider services and supports in the natural community, home, work and recreational settings. (Code § 4648, subd. (a)(2).)

E. Services and supports mean specialized services and supports or adaptations of generic services and supports directed toward the alleviation of the developmental disability or toward the social, personal, physical or economic habilitation or rehabilitation of an individual with a developmental disability...and shall include, but are not limited to, the diagnosis, evaluation, treatment, personal care, daycare, domiciliary care, special living arrangements, physical, occupational, and speech therapy, training, education, supported and sheltered employment, mental health services, recreation, counseling...adaptive equipment and supplies, ...behavior modification... ." (Code § 4512.)

F. Other sources of funding including government, such as Medi-Cal, Medicare, school districts, federal supplemental security income, and other entities or programs should be used for regional center services. (Code § 4659.)

G. DDS Directives provide guidance to the regional centers on the application of the SDP to the IPP and services and supports. (See Factual Finding 10.)

5. Pursuant to Code section 4685.8, subdivision (n)(1), the IPP team shall determine the initial and any revised individual budget for the participant using the following methodology:

(A)(i) Except as specified in clause (ii), for a participant who is a current consumer of the regional center, their individual budget shall be the total amount of the most recently available 12 months of purchase of service expenditures for the participant.

(A)(ii) An adjustment may be made to the amount specified in clause (i) if both of the following occur:

(I) The IPP team determines that an adjustment to this amount is necessary due to a change in the participant's circumstances, needs, or resources that would result in an increase or decrease in purchase of service expenditures, or the IPP team identifies prior needs or resources that were unaddressed in the IPP, which would have resulted in an increase or decrease in purchase of service expenditures.

(II) The regional center certifies on the individual budget document that regional center expenditures for the individual budget, including any adjustment, would have occurred regardless of the individual's participation in the Self-Determination Program.

6. In requiring a regional center to certify its expenditures would have occurred regardless of the consumer's participation in the SDP, it is clear that other provisions of the Lanterman Act not expressly exempted in Code section 4685.8 still apply to funding determinations within the SDP process. For example, there is nothing in section 4685.8 exempting the Legislature's intention set forth in Code section 4646, subdivision (a), "to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources."

Disposition

7. Claimant failed to provide sufficient evidence of the number of days required to quarantine and isolate with the SLS provider. Claimant failed to secure any testing over the course of the stated quarantine, informal or formal, and did not secure any evidence from a medical practitioner other than a superficial letter from Dr. Braunstein, confirming from Mr. Brown's report, the number of days of quarantine. Claimant was not required to have Covid-19 to receive the benefits of the higher rate over a 24-hour period for his service provider. Exposure to Covid-19 was sufficient to justify the increased rates based upon the DDS Directive. Claimant has a special responsibility to be vigorous as a participant in the SDP to report any extraordinary circumstances to the FMS and service agency requiring budget increases. Claimant

might have been able to supply more evidence of the need to quarantine beyond the time recommended by public health authorities if guidance was sought earlier. Based upon the evidence presented, Claimant failed to provide sufficient evidence warranting an exception to the general guidelines provided by public health agencies including the CDC and County of Los Angeles Public Health.

8. Service agency made a responsible decision to offer 11 days of 24-hour care for the time Claimant and the service provider spent in quarantine at the higher hourly rate of \$48.06 based upon the information provided by Claimant through Mr. Brown and the referenced guidelines from public health agencies.

ORDER

1. Claimant's appeal of the service agency's denial of the request to fund the Covid-19 hourly rate of \$48.06 for a 24-hour period in excess of the eleven days offered by the Service Agency is denied.

2. Service Agency shall authorize an increase in the FMS budget to accommodate the Covid-19 rate of \$48.06 for payment to the SLS worker, for a 24-hour period of time, for a total of 11 days.

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3. Service Agency shall make sure funding is secured so that payment is made to the SLS worker within 14 days of this decision if payment has not already been made.

DATE:

EILEEN COHN

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.