

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Claimant,

and

THE SAN DIEGO REGIONAL CENTER,

Service Agency.

OAH No. 2013070454

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings (OAH), heard this matter in San Diego, California, on August 20, 2013 and October 10, 2013.

Claimant's parents, who are also his guardians, represented claimant who was not present for the fair hearing.

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

On August 6, 2013, this matter was consolidated with OAH No. 2013080101 and these two cases were heard together. On October 25, 2013, this matter was submitted.

ISSUES

1. Did SDRC comply with the Order issued in OAH No. 2009040141 requiring SDRC to fund 310 hours of nursing respite services per month?
2. Should SDRC fund 24 hours of 2:1 LVN respite services for claimant?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On August 29, 2009, claimant requested that SDRC fund 288 hours of nursing respite services per month. Claimant requested 192 hours per month of licensed vocational nurse (LVN) services and 96 hours per month of certified nurse assistant (CNA) services. SDRC denied claimant's request, and an administrative hearing ensued before an Administrative Law Judge (ALJ). The ALJ issued an order on September 3, 2009. The ALJ ordered SDRC to fund 310 hours per month of nursing respite services. The total number of monthly hours was divided between 95 hours of LVN respite services and 215 hours of CNA respite services. (OAH No. 2009040141, ALJ James Ahler.)

2. On November 2, 2010, SDRC and claimant participated in mediation. The parties executed a Final Mediation Agreement. SDRC agreed to fund nursing respite services "up to the total amount of \$148,564 for 12 months." As written, the agreement expired on November 2, 2011. (OAH No. 2010060987, ALJ Vallera Johnson.)

3. On May 2, 2013, SDRC and claimant participated in mediation. The parties executed a Final Mediation Agreement. Among other terms, SDRC agreed to annually fund \$219,564 of LVN respite services. Claimant's mother agreed to terminate her vendorization as a parent vendor. The mediation agreement became effective on June 1, 2013. (OAH No. 2013031101, ALJ Roy Hewitt.)

MOTION TO QUASH

4. Claimant subpoenaed SDRC records to be produced at the first day of hearing. SDRC complied. Claimant's request to review the documents and conduct a second day of hearing was granted. After reviewing the documents, claimant issued additional subpoenas to SDRC. SDRC filed a motion to quash. At the start of the second day of hearing, SDRC's motion to quash was granted. The subpoenas did not comport

with the laws governing subpoenas and sought documents not relevant to the issues in this matter. Claimant did not object to the order quashing the subpoenas.

EVIDENCE PRESENTED AT HEARING

5. Claimant is a 24-year-old male diagnosed with epilepsy, autism and severe mental retardation. He resides at home with his family. The family lives in a remote area of the county, and it has been difficult securing LVNs and CNAs to provide care to claimant. In addition to the location issue, claimant's parents have been dissatisfied with many of the caregivers who arrived at their home. Some of claimant's parents' concerns were justified, but some were not. SDRC attempted to locate LVNs and CNAs, but as SDRC correctly asserted at hearing, SDRC is a funding agency, not a staffing agency. The evidence did not establish that SDRC had done anything to hinder claimant from obtaining the ordered nursing respite services.

6. Numerous communications from claimant's mother documented her concerns regarding claimant's care. Claimant's mother repeatedly asserted that SDRC was not fulfilling its obligations to provide the ordered nursing respite services. However, while claimant's frustration was certainly understandable, the evidence did not establish that the failure to secure services was due to any SDRC wrongdoing.

7. In July of 2013, claimant's mother became overwhelmed with caring for claimant, largely due to her exhaustion from caring for claimant without relief. Claimant's mother called 911, and emergency responders transported claimant to a local hospital. Claimant remained hospitalized for several weeks because claimant required 24 hours per day of 2:1 nursing care. The hospital would not discharge claimant until that care was secured. Claimant seeks that 2:1 care in this appeal.¹

¹ Testimony and documents regarding interactions between hospital personnel, claimant's parents, claimant's caregivers, and SDRC personnel was introduced. This

8. Claimant introduced several documents from websites pertaining to DDS and regional center matters, including costs of care. However, those documents were not persuasive and were irrelevant to the issues in this case. Nothing in those documents demonstrated that SDRC was violating the 2009 order.

9. Several medical records documented claimant's significant needs and the assistance he requires. Several treaters documented claimant's need for 2:1 care. DVDs depicted claimant's condition and the care claimant requires. Documents from claimant's family members contained their concerns with finding appropriate care for claimant. SDRC documents identified claimant's significant demands, behaviors, and need for 2:1 care. SDRC documents also identified the day programs that refused to accept claimant because of his condition. The evidence established that claimant requires 2:1 care. However, that finding was not dispositive of the issues on appeal, as noted more fully below.

10. A letter from claimant's treater (Exh. 39) documented that claimant required "2:1 support services on [a] daily basis for most of the entire day because of his severe medical and behavioral problems." Claimant "is very difficult to manage without this 2:1 support." Other records referenced the 2:1 care claimant required. The evidence established that claimant has extremely intense medical needs. However, the issue in this case was respite, a service that is intended to provide temporary relief to caregivers. Respite is not intended to provide 24-hour nursing care to consumers. While claimant does require 2:1 nursing care, respite is not the appropriate service for providing that care. Moreover, the nursing care claimant requires is not a service that SDRC funds.

evidence established that the interactions between these individuals were often fraught with emotion. However, those documents did not establish that SDRC had violated the order issued in this matter.

11. Claimant was upset with SDRC's discussions and inquiry regarding placement of claimant. However, SDRC's discussions and inquiries were reasonable given claimant's extraordinary needs. Claimant requires 2:1 care, and he lives in a remote area of the county. Securing LVN and CNA care has been extremely difficult. Claimant now requires 2:1, 24-hour, nursing care, a service SDRC does not fund. SDRC was merely investigating options to address claimant's needs. While regional centers must respect a consumer's choices, regional centers must also be fiscally responsible. The evidence demonstrated that placement appears to be a viable option for claimant, unless claimant's parents are willing to assume the majority of his care. As the evidence established, the prospect of claimant's parents providing that care is not feasible.

12. Claimant qualified for the Home and Community Based Services Waiver (HCBS waiver). Claimant requested that his 2:1 nursing services be paid from those funds. However, claimant misunderstood how the HCBS waiver worked. As SDRC explained, under that program, California receives federal funds. Those funds are deposited into a general fund that is used by the Department of Developmental Services to provide services to numerous consumers. The funds are not specifically earmarked for use by HCBS-qualifying consumers. However, the HCBS issue was not relevant. The evidence did not establish that SDRC was refusing to fund the annual amount ordered at hearing. The evidence demonstrated that because of several issues, none of which were caused by SDRC, claimant has been unable to secure LVN and CNA respite services.

13. Claimant also asserted that because Carlos Flores, SDRC's Executive Director, is married to Nina Garrett, SDRC Associate Director of Case Management Services, a conflict of interest existed. Ms. Garrett is involved in SDRC decisions pertaining to claimant. Claimant argued that if he appealed one of Ms. Garrett's decisions, the appeal would be heard by Mr. Flores, thereby creating a conflict. However, claimant did not introduce any evidence that Mr. Flores has ever overseen any of Ms.

Garrett's decisions. Claimant has never filed an appeal that was heard by Mr. Flores. Claimant's argument was based solely on supposition and conjecture. In response to that claim, SDRC introduced its Conflict of Interest Policy, Personnel Policies, Conflict of Interest Reporting Statement, and the Notice of Approval of Emergency Regulatory Action submitted to the Office of Administrative Law. Those documents identified various areas of potential conflicts of interest for regional centers and how those conflicts are to be addressed. Mr. Flores and Ms. Garrett testified. Mr. Flores is aware that this matter pertains to nursing services but has not had any discussions with his wife regarding claimant's funding or requested services. Mr. Flores was not involved in the SDRC decision-making for this case. Mr. Flores has no incentive not to fund the ordered services because he receives no financial benefits if SDRC expenses fall below its projected budget. In sum, the evidence did not establish that an actual conflict of interest existed. A mere hypothetical conflict is insufficient; there must be some identifiable potential conflict. (*Havasu Lakeshore Investments, LLC v. Fleming* (2013) 217 Cal.App.4th 770, 778.) Claimant's argument was simply too tenuous to meet his burden of establishing that a conflict of interest existed. Moreover, Mr. Flores would not be involved in a review of his wife's decisions should an issue regarding her decisions arise.

14. Claimant introduced a disparaging comment that was posted on his mother's blog page. Claimant asserted that someone at SDRC posted it. However, no evidence to support claimant's allegation was introduced.

15. SDRC documents referenced that in 2010 SDRC spent approximately \$133,000 on claimant's respite services. Claimant questioned Ms. Garrett regarding her April 2013 e-mail in which she authorized an expenditure of \$133,000 for respite. Claimant argued that Garrett improperly reduced the amount of respite previously agreed upon at mediation. However, as Ms. Garrett correctly pointed out during her testimony, there was no mediation agreement in effect in April 2013. The 2010

mediation agreement expired in 2011, and the May 2013 mediation had not yet taken place.

16. Numerous correspondence and records were introduced that depicted the multiple discussions that took place between SDRC, claimant, vendors, and various caregivers. Arguments were made regarding unsigned IPPs. The evidence established that there have been many interactions between the parties regarding claimant's care and his services. Many of those interactions have been extremely emotional. However, the documents were neither persuasive nor relevant to the issues at hearing.

17. Several SDRC employees testified. Their testimony was consistent with the documents introduced. Nothing in their testimony demonstrated that SDRC did not comply with the Order issued in OAH No. 2009040141.

18. Claimant's parents and two of his caregivers testified. Their testimony established that claimant has intense needs and behaviors. However, the testimony did not demonstrate that respite was the appropriate service to meet those needs. Claimant's parents discussed their frustrations securing necessary services for claimant. However, nothing in their testimony established that SDRC did not comply with the Order issued in OAH No. 200904014 or that additional nursing respite services were the proper services to meet claimant's medical and supervision needs.

LEGAL CONCLUSIONS

BURDEN AND STANDARD OF PROOF

1. "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court; except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.) In this matter, claimant had the burden of establishing that SDRC did not comply with the Order issued in OAH No.

2009040141 and that SDRC should fund 24 hours of 2:1 LVN respite services for claimant.

THE LANTERMAN ACT AND REGIONAL CENTERS

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (the Lanterman Act), which is found at Welfare and Institutions Code section 4500 et seq.

3. The Lanterman Act provides 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. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

4. The Department of Developmental Services (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, the DDS contracts with private non-profit community agencies, known as "regional centers," to provide developmentally disabled consumers with "access to the services and supports best suited to them throughout their lifetime." (Welf. & Inst. Code, § 4620.)

5. A regional center's responsibilities to its consumers are set forth in Welfare and Institutions Code sections 4640-4659. Regional centers must meet consumer's needs and be cost-effective.

EVALUATION

6. A preponderance of the evidence did not establish that SDRC failed to comply with the Order issued in OAH No. 2009040141, requiring SDRC to fund 310 hours of nursing respite services per month. SDRC is a funding, not a staffing, agency. The evidence established that forces beyond SDRC's control resulted in claimant not receiving his allotted hours. SDRC stands ready, willing and able to fund the services should claimant be able secure caregivers.

A preponderance of the evidence did establish that claimant requires 2:1 nursing care. However, respite is not nursing care. Respite is a service designed to provide temporary relief to caregivers. It is not intended to provide around the clock nursing care. Moreover, the evidence established that SDRC does not fund 24 hour, 2:1 nursing care for its consumers.

Accordingly, claimant's appeal must be denied.

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ORDERS

Claimant's appeal concerning SDRC's alleged violation of the order issued in OAH No. 2009040141 is denied. SDRC did not violate that order.

Claimant's request that SDRC fund 2:1, 24 hour, respite services is denied.

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.

DATED: November 14, 2013

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings