

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

CLAIMANT,

vs.

VALLEY MOUNTAIN REGIONAL
CENTER,

Service Agency.

OAH No. 2013100839

DECISION

This matter was heard by Administrative Law Judge Coren D. Wong, Office of Administrative Hearings, State of California, on November 6, 2013, in Stockton, California.

Claimant was represented by his mother, Y.L.

Anthony Hill, Assistant Director of Case Management, represented Valley Mountain Regional Center (VMRC).

Evidence was received, and the record was left open for claimant to submit documents after the hearing and for VMRC to submit a response to those documents.

On November 18, 2013, claimant submitted a copy of his blood test results from September 17, 2013, which is marked as Exhibit A for identification. On November 19, 2013, VMRC filed with OAH a copy of claimant's November 15, 2013 letter, which is marked as Exhibit B for identification. Exhibit B is written in Spanish. VMRC also filed 10 pages of claimant's medical records which claimant included with his letter. The medical

records are marked collectively as Exhibit C.¹ On November 21, 2013, OAH received an English translation of Exhibit B from Excel Interpreting & Translations, which is marked as Exhibit D. A Declaration and Certification signed by the person who translated Exhibit B is marked as Exhibit E.

On November 27, 2013, VMRC responded to claimant's documents. VMRC's response is marked as Exhibit 7.²

Neither party objected to the other's written submissions, and Exhibits A through E and 7 are admitted for all purposes.

ISSUE

May VMRC deny claimant's request for an additional 22 hours of in-home respite care?

FACTUAL FINDINGS

1. Claimant is a 7-year-old consumer of VMRC who is eligible for regional center services because he suffers from autism. He has also been diagnosed as nonverbal. Claimant lives at home with his parents and four-year-old brother. His father works in construction and is gone for most of the day, leaving claimant's mother as his primary caregiver.

2. Claimant is generally in good health, although recent blood tests showed that his triglyceride levels are elevated. Additionally, his mother described several recent

¹ Exhibits A and C are the subject of a separate Protective Order Sealing Confidential Records dated November 22, 2013.

² Exhibit 7 consists of 27 pages, and pages 12 through 22 are the subject of a separate Protective Order Sealing Confidential Records dated December 2, 2013.

episodes of diarrhea, vomiting, and other infections due to claimant biting everything “made out of wood” and putting “anything” he finds in his mouth.

3. Claimant is learning to feed himself. He can eat with utensils with a lot of spillage. He usually eats by feeding himself with his hands. He is a picky eater, and will smell food before eating it. Claimant’s favorite foods include fruits, bread, Doritos, popcorn, and tortillas.

4. Claimant is assigned to an autism classroom through the San Joaquin County Office of Education. He attends school Monday through Friday, and returns home at 3:00 p.m.

5. On August 21, 2013, claimant’s planning team met and developed an Individual Program Plan (IPP) for him. The planning team consisted of VMRC employees Wanda Farinelli (program manager) and Elizabeth Diaz (senior service coordinator), as well as claimant, his mother, Griselda Perez (family friend), and Irene Fernandez (translator).

6. During the planning team meeting, Ms. Diaz completed a Family Respite Needs Assessment based on information she obtained from claimant’s file, his mother, and Ms. Diaz’s personal observations of claimant’s activities at school for a couple of hours one day prior to the planning team meeting.

7. The Family Respite Needs Assessment is an assessment tool developed by VMRC to determine the number of hours of in-home respite care the particular consumer qualifies for. The assessment tool assigns the consumer a numerical score in eight areas – age of consumer(s), adaptive skills, mobility, day program attendance, medical needs, behavioral needs, utilization of natural and other supports, and family situation – based on different criteria for each area (each criterion is assigned a different numerical value). For instance, the following scores are awarded based on the following criteria for “age of consumer(s):” age 0 to 5 years is awarded a score of 0, age 6 to 12

years is awarded a score of 3, age 13 to 17 years is awarded a score of 5, and age 18 or older is awarded a score of 7. Claimant was awarded a score of "3" because he is seven years old. The scores for each of the eight areas are totaled, and VMRC funds in-home respite services according to the following chart:

0 to 5 points	routine supervision
6 to 10 points	12 hours per month
11 to 15 points	16 hours per month
16 to 19 points	18 hours per month
20 to 24 points	20 hours per month
25 to 30 points	24 hours per month
30 + points	Expanded Planning Team determination

8. The assessment tool has built in features to detect a consumer's "exceptional need" for in-home respite care, in which case an expanded planning team is convened to determine the number of hours of service the particular consumer qualifies for. If the consumer "requires more intensive medical monitoring or care including gastrostomy or nasal-gastric feedings, frequent suctioning, ventilator care, tracheostomy care and monitoring constant intravenous therapy or has met multiple medical conditions requiring constant vigilance ..." (medical needs), "if consumer displays severe behavioral excesses more often than weekly ..." "if consumer has not been successful in more traditional forms of in-home respite ..." (behavioral needs), or if the sum of the scores assigned for each criterion equals or exceeds 30, an exceptional need is triggered.

9. After completing the Family Respite Needs Assessment for claimant, Ms. Diaz reached a total "score" of 16. Therefore, VMRC agreed to fund in-home respite services for 18 hours per month for claimant.

10. At hearing, claimant's mother explained that she is requesting funding for an additional 22 hours per month (for a total of 40 hours per month) of in-home respite services because her son is exhibiting significant obsessive/compulsive behaviors. For example, she explained that he bites everything "made out of wood" and puts "anything" he finds in his mouth. He is constantly putting toilet paper in the toilet. When claimant is taken out in public, he needs constant supervision because he does not understand danger, touches strangers inappropriately, and grabs other people's food at restaurants.

11. Claimant's mother explained that claimant's behaviors negatively affect the family. She is constantly exhausted from chasing him around and has become depressed. Her husband comes home from work exhausted and does not want to go out with the family because of the amount of work involved with watching after claimant. Claimant's younger brother has begun mimicking claimant's negative behaviors, and the two boys often end up fighting with each other for their mother's attention. There is no extended family to help care for claimant.

12. VMRC has adopted and utilizes service standards for the purchase of consumer services (POS). The service standard for "respite services" provides the following regarding VMRC's purpose and philosophy behind such services:

Respite care is designed to intermittently and temporarily relieve families of the demands and constant responsibilities of caring for the consumer. This responsibility may exceed the demands and care needs of a non-disabled person his/her age in order to: 1) restore or maintain the family's well-being; 2) meet the emergency needs such as after a natural disaster; 3) assist during periods of crisis such as illness or death of a family member; 4) allow parents or

family members the opportunity to enjoy vacations or other activities of natural family life; 5) provide assistance at other times when the planning team, which includes the parent or family member, feels it is advisable. Respite is part of a network of support services for families. It is not meant to supplant other resources, including the parents' routine parenting responsibilities for minors.

Valley Mountain Regional Center acknowledges the family's contribution to the care and well-being of their minor children who are VMRC consumers. They are also generally expected to provide the same kinds of care and supervision to them as they would for any of their other children.

However, some families, because of their child's intensive needs, require additional supports and services, such as respite, which will enable them to maintain that child in their home.

VMRC recognizes the commitment of family members in maintaining their adult family member in their home. To ensure family stability additional supports and services, such as respite, may be necessary.

Assessing the need for respite is part of the planning team process of developing and monitoring a consumer's Individual Program Plan (IPP). Assessment of need will ensure that all available resources are explored in natural

support systems, such as extended family, as well as generic services, are well developed and utilized.

13. The service standard for respite services requires consideration of the following criteria when determining a consumer's eligibility for in-home respite services:

1. The need for the service is identified on the IPP.
2. Take into consideration the legal responsibilities of other agencies as resources for the consumer and family and developing a respite care plan (i.e. private insurance, Medi-Cal, IHS as, DSS funding, crisis nurses, etc.).
3. Family situation, such as the number of parents available to provide care, number of other children in the home, etc.
4. Verification of family's development of natural supports to provide respite such as extended family members, participation in cooperative childcare activities, etc.
5. Medical factors.
6. Mobility skills.
7. Consumer's adaptive skills.
8. Families receiving the AFDC Foster Placement rate for a minor placed in their home are not eligible for respite as they are considered a foster home.
9. Behavioral deficits unrelated to the consumer's age.
10. Hours of attendance at school/day program depending on the consumer's age.
11. Consider what the family is doing to include consumer routine family and community activities.
12. Is a family actively implementing the consumer's care plans identified in the IPP?

13. The Regional Center may purchase respite services that may not exceed 21 days of out of home respite in a fiscal year, nor 90 hours of in-home respite any quarter for a consumer [*sic*].

14. Once a consumer has been determined to be eligible for respite services, the service standard requires consideration of the following issues in selecting the type and amount of respite care services to provide:

1. Has the planning team considered family/consumer choice and need?
2. Has the planning team determined if the respite option is compatible with the family's lifestyle and commitments?
3. Have the consumer's medical and/or behavioral needs being considered?
4. If there is more than one family member who needs respite, (this would necessitate a multiple consumer rate for in-home respite) has a family respite plan been developed?
5. Are family members given the flexibility regarding the use of respite hours?
They may choose to exchange their out of home respite allocation on a dollar for dollar basis to fund camp if agreed by the planning team to meet the respite needs.
6. Families have the option of banking the respite allotment for up to an entire year and redeeming it all at one time. This need must be identified in the individual's IPP per the planning team. If this results in more than ninety hours being used in one quarter, it will require POS Exceptions Committee approval prior to authorization.
7. Is a family member a Valley Mountain Regional Center Board Member? If so, do they attend board-related meetings such as:
 - a. Committees
 - b. School/Day Program visits

- c. Conferences
- d. Retreats
- e. Any other VMRC meetings outside of regular Board Meetings.

Given these requirements are met; parents will receive up to ten (10) additional hours per month while they are active members on VMRC's Board of Directors.

The ten (10) additional Respite hours will be contingent upon the submittal records providing specific reasons for attendance for above-mentioned activities including, travel records, training materials, dates and times the activities were held. Board Members who require more than ten (10) additional hours per month may request an exception to obtain additional needed hours.

15. After VMRC has determined the number of hours of in-home respite care it will fund for a particular consumer, the consumer may appeal that determination if he believes it is illegal, discriminatory, or not in his best interests.

16. Based on the eligibility criteria and selection considerations outlined in the service standard for respite services, VMRC's Board of Directors developed the Family Respite Needs Assessment to determine a consumer's eligibility for in-home respite services and, if determined to be eligible, the number of hours of service to which he is entitled.

17. While claimant's mother made several arguments at hearing that Ms. Diaz did not accurately rate some of the eligibility criteria when completing the Family Respite Needs Assessment for claimant (in particular, the criteria of medical needs, behavioral needs, utilization of natural and other supports, and family situation), she did

not introduce any evidence of what she believed should have been the correct rating for any of those criteria.

18. In her November 15, 2013 letter (Exhibit D), claimant's mother expanded upon her hearing testimony about claimant's health, his behavior, and her husband's and her health. Claimant's mother explained that she and her husband are "very worried" about claimant's health because he is overweight and has an iron deficiency and is therefore on a special diet. She also explained that it is very difficult to give him medication orally because he is sensitive to different flavors and often vomits the medication given to him.

19. With regard to claimant's behavior, his mother explained that he always wants to watch the same four or five programs on television and becomes "aggressive" when the television is turned off. When claimant does not get his way, he starts pinching, pulling hair, and pushing people. His younger brother is often the target of his aggression.

20. Claimant's mother explained that caring for him has caused her and her husband to feel "very sad." She feels a "great sensation" of being tired and fatigued, feels sad and sometimes irritable, and is less able to concentrate. Her husband has become socially isolated because taking claimant out in public has become so difficult.

21. Based on the information provided in Exhibit D, Ms. Diaz completed another Family Respite Needs Assessment on November 26, 2013. The additional information provided did not result in a different score on the Family Respite Needs Assessment.

22. VMRC's service standard for respite services is reasonable. The service standard recognizes that VMRC's different consumers exhibit a broad range of behaviors and identifies which behaviors in VMRC's experience require what level of

respite care. In the absence of any evidence to indicate the service standard is unreasonable or inappropriate, it should be followed.

23. Ms. Diaz followed VMRC's service standard for respite services and completed the Family Respite Needs Assessment for claimant. Based on that assessment tool and the service standard, she determined that claimant is eligible for 18 hours of respite care each month. Claimant did not introduce sufficient evidence to establish otherwise. Therefore, VMRC's denial of claimant's request for funding an additional 22 hours of respite care each month is affirmed.

LEGAL CONCLUSIONS

APPLICABLE BURDEN/STANDARD OF PROOF

1. Claimant has the burden of proving by a preponderance of the evidence that VMRC should approve his request for funding an additional 22 hours of in-home respite care services. (*Lindsay v. San Diego Retirement Board* (1964) 231 Cal.App.2d 156, 161 [the party seeking government benefits has the burden of proving entitlement to such benefits]; Evid. Code, § 115 [standard of proof is preponderance of the evidence, unless otherwise provided by law].)

APPLICABLE LAW

2. Under the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.), the State of California accepts responsibility for persons with developmental disabilities and pays for the majority of the "treatment and habilitation services and supports" in order to enable such persons to live in the least restrictive environment possible. (Welf. & Inst. Code, § 4502, subd. (a).) The state agency charged with implementing the Lanterman Act is the Department of Developmental Services, which is authorized to contract with regional centers to provide developmentally disabled individuals with access to the services and supports best suited to them throughout their lifetime. (Welf. & Inst. Code, § 4520.)

3. In order to determine how an individual consumer is to be served, regional centers are directed to conduct a planning process that results in an IPP designed to promote as normal a lifestyle as possible. (Welf. & Inst. Code, §4646; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389.) The IPP is developed by an interdisciplinary team and must include participation by the consumer and/or his representative. Among other things, the IPP must set forth goals and objectives for the consumer, contain provisions for the acquisition of services (which must be based upon the consumer's developmental needs), contain a statement of time-limited objectives for improving the consumer's situation, and reflect the consumer's particular desires and preferences. (Welf. & Inst. Code, §§ 4646, subd. (a)(1), (2), and (4); 4646.5, subd. (a); 4512, subd. (b); and 4648, subd. (a)(6)(E).) The regional center must then "secure services and supports that meet the needs of the consumer" within the context of the IPP. (Welf. & Inst. Code, § 4648, subd. (a)(1).)

4. Although regional centers are mandated to provide a wide range of services to facilitate implementation of a consumer's IPP, they must do so in a cost-effective manner. (Welf. & Inst. Code, §§ 4640.7, subd. (b), 4646, subd. (a).) A regional center is not required to provide all of the services which a consumer may require, but is required to "find innovative and economical methods of achieving the objectives" of the IPP. (Welf. & Inst. Code, § 4651.) They are specifically directed not to fund duplicate services that are available through another publicly funded agency. This directive is often referred to as "supplanting generic resources." Where a service is available elsewhere, the regional center is required to "identify and pursue all possible sources of funding." (Welf. & Inst. Code, § 4659, subd. (a).) However, if the service specified in a consumer's IPP is not provided by a generic agency, the regional center must fill the gap (i.e., fund the service) in order to meet the goals set forth in the IPP. (Welf. & Inst. Code,

§ 4648, subd. (A) (1); *Association for Retarded Citizens v. Department of Developmental Services*, *supra*, at p. 390.)

5. Regional centers are required to adopt internal policies regarding the purchase of services for consumers. (Welf. & Inst. Code, § 4646.4, subd. (a)(1).) The Department of Developmental Services is required to review those policies prior to implementation by the service centers, and “shall take appropriate and necessary steps to prevent regional centers from utilizing a policy or guideline that violates any provision of” the Lanterman Act or any regulation adopted pursuant to it. (Welf. & Inst. Code, § 4434, subd. (d).)

6. A regional center may not deny a request for services based upon the application of an inflexible policy denying such services. Whether a consumer is entitled to a particular service depends upon consideration of all relevant circumstances. (*Williams v. Macomber* (1990) 226 Cal.App.3d 225, 231-234.)

7. VMRC is not required to fund an additional 22 hours of respite care per month for claimant. Claimant did not demonstrate extraordinary circumstances to justify an exception to VMRC’s service standard. Therefore, claimant’s appeal is denied.

ORDER

The appeal of the claimant is DENIED. Valley Mountain Regional Center is not required to fund an additional 22 hours of respite care per month for claimant.

DATED: December 3, 2013

COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Judicial review of this decision may be sought in a court of competent jurisdiction within ninety (90) days.