

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2014100483

CLAIMANT

vs.

HARBOR REGIONAL CENTER,

Service Agency.

DECISION

Administrative Law Judge Angela Villegas, State of California, Office of Administrative Hearings, heard this matter on December 8 and 15, 2014, in Torrance, California.

Gigi Thompson, Manager, Rights Assurance, represented Harbor Regional Center (HRC or Service Agency).

Attorney Toni DeAztlan represented Claimant.¹ Claimant was also present for both sessions of the hearing, with his care provider, Will Rivas.

The record was held open through December 17, 2014, for the parties to submit simultaneous written closing arguments. Both parties made timely submissions. HRC's closing argument was marked for identification as Exhibit 1; Claimant's closing argument was marked for identification as Exhibit CC; both were accepted as legal argument. The matter was submitted on December 17, 2014.

¹ Claimant's name is not disclosed in order to protect his privacy.

ISSUE

Whether HRC must fund additional hours of supported living services (SLS) provided by Personalized Arranged Living Services (PALS), LLC.

EVIDENCE RELIED UPON

Documentary: HRC's Exhibits 2 through 23;² Claimant's Exhibits A through BB. As legal argument: HRC's Exhibit 1; Claimant's Exhibit CC.

Testimonial: Hiram Bond, Program Manager, Older Adults, HRC; Patricia Zalenski, RN, HRC; Edwin Gutierrez, respiratory therapist; Claimant's sister; and Rodney Mojarro, Program Director and owner, PALS.

FACTUAL FINDINGS

1. Claimant is a 65-year-old male who qualifies for regional center services based on a diagnosis of mild intellectual disability. (Exhibit 15.) He lives in his own home, and would like to continue to do so.

2. Claimant has been a client of HRC since 1976. In 2001, following an administrative hearing and decision (Exhibit A), Claimant began receiving SLS from his chosen vendor, PALS.³ One of Claimant's PALS providers has been with him since before

² HRC's Exhibit 24 was a copy of Welfare and Institutions Code section 4685, which, by its terms, applies to children, not adults such as Claimant.

³ PALS is an approved vendor for East Los Angeles Regional Center, and provides services to Claimant through a guest-vendor arrangement with HRC.

2001.⁴ Claimant is happy with PALS, and it was undisputed that PALS provides Claimant with quality service.

3. From January 2010 through the present, HRC's arrangement with PALS has been to pay PALS a flat monthly fee, which presently totals \$1,854, in exchange for PALS' providing at least four hours of SLS every day (or at least 28 hours of SLS per week), pursuant to Claimant's Individual Family Service Plan (IFSP)⁵. (Exhibits 15 and F.) According to Rodney Mojarro, PALS' Program Director, PALS staff typically provide five hours of SLS per day. Other estimates placed the number of SLS hours being provided at approximately, or slightly over, two hours per day (i.e., between 14 and 16 hours per week), but these estimates were less credible than Mr. Mojarro's. Mr. Mojarro has not only worked with Claimant, as PALS' Program Director, since 2001, but also is in a position to know PALS' internal information about its staffs time usage. Moreover, Mr. Mojarro's estimate matched the provisions set forth by HRC itself in January 2010. (Exhibit F.) At PALS' standard hourly rate of \$28, \$1,854 would pay for approximately 15 hours of SLS per week, but as noted previously, PALS is paid by the month, not the hour, for the services it renders to Claimant.

4. Over the years, as Claimant has grown older, he has developed health problems, including type II diabetes, for which he takes medications and tries to follow the dietary and lifestyle recommendations of his physicians. He needs encouragement and assistance to do these things, and well as help monitoring and communicating his progress. Claimant also suffers from glaucoma, obesity, hypothyroidism, hypertension, hyperlipidemia, gout, and gastroesophageal reflux disease, for all of which he takes

⁴ See Exhibits A (noting that Gregory Merkle worked with Claimant beginning in 1994) and S (noting that Merkle was, as of September 2014, still working with Claimant).

⁵ HRC uses the term IFSP instead of Individual Program Plan (IPP).

medications and/or supplements. He needs assistance to do so. He is not a good assessor or reporter of symptoms, and has speech difficulties; therefore, he needs help to communicate with health care providers about his various conditions. He also needs help comprehending and remembering physician orders.

5. Claimant's age and health problems have curtailed his participation in some community activities he used to enjoy, including being the mascot for a local baseball team. Nevertheless, Claimant still enjoys watching baseball and participating in other community activities, especially watching aircraft. He also enjoys PALS events and parties. Claimant needs assistance to access community activities, because of his developmental delay, health problems, and glaucoma, which has rendered him legally blind (he has pinhole vision), so that navigating unfamiliar areas is difficult, and potentially dangerous, for him. In addition, Claimant's developmental delay and blindness make it difficult for him to engage in meaningful self-advocacy in connection with accessing services, both generally and those specific to the needs created by his disability, and he requires assistance in that regard.

6. Claimant also requires assistance with domestic tasks such as housecleaning and laundry; meal selection, preparation, and cleanup; shopping; household financial management; and personal hygiene. With regard to hygiene, Claimant has, in recent years, become less able to manage his toileting needs, such that he has increasingly had "accidents"—at least once or twice per week—for which he requires cleanup assistance.

7. In addition to Claimant's SLS, he also receives In-Home Supportive Services (IHSS), not funded by HRC, at a rate of 56.7 hours per month (approximately 13 hours per week). Both of these services (SLS and IHSS) assist Claimant with activities of daily living (ADLs). But the IHSS worker's ability to assist with some ADLs, such as attending medical or dental appointments, evaluating and managing service providers,

assisting with self-advocacy, and facilitating community integration, is limited by restrictions on the scope of work authorized by IHSS and the compensation it provides. Moreover, PALS, as the SLS provider, is required to be available to Claimant around the clock to respond to emergencies, a service IHSS does not provide. The total number of hours of care currently authorized for Claimant, including both SLS (28 hours per week; approximately 121 hours per month) and IHSS (approximately 13 hours per week; 56.7 hours per month), is roughly 41 hours per week, or 177 hours per month.

8. On August 9, 2014, Claimant was admitted to Lakewood Regional Medical Center (Lakewood Regional) with altered mental status, shortness of breath, and swollen eyelids, after friends found him groggy and incoherent at home. While at Lakewood Regional, Claimant was diagnosed with severe pulmonary hypertension, a progressive and incurable condition, in addition to his pre-existing diagnoses (see Factual Finding 4). At Lakewood Regional, Claimant was also evaluated and treated for a urinary tract infection, dehydration with renal failure, muscle breakdown and elevated liver function due to prolonged immobility, heart attack, congestive heart failure, and enlarged heart. After being stabilized, on August 21, 2014, Claimant was discharged to Rose Villa, a skilled nursing facility, where he stayed until September 3, 2014, when he was discharged home.

9. Before entering Lakewood Regional, Claimant had been ambulatory without assistance. Upon Claimant's discharge home from Rose Villa, he needed a walker, a bedside commode, and a shower chair. In addition, based on Claimant's new diagnosis of pulmonary hypertension, he was prescribed a Bi-Level Positive Airway Pressure (BiPAP) machine to use while sleeping. The BiPAP machine was to address Claimant's elevated carbon dioxide (CO₂) levels, which his pulmonologist identified, along with Claimant's pulmonary hypertension, after Claimant suffered an episode of unresponsiveness following sedation (for a cardiac catheterization test) while he was in

Lakewood Regional. The pulmonologist suspected obstructive sleep apnea and obesity hypoventilation syndrome as the underlying causes of Claimant's elevated CO₂ levels, but has not yet been able to confirm or rule out that suspicion with a sleep study. Claimant attempted a sleep study on October 13 and 14, 2014, but was unable to complete it because he was unable to sleep more than 31 minutes in the laboratory environment. HRC suggested that there was uncertainty as to whether Claimant continues to need the BiPAP machine. This suggestion was not supported by the evidence, which did not include any order from Claimant's physician(s) to discontinue the BiPAP machine; moreover, at least as of late November 2014, Claimant still had it. (See Factual Finding 15.)

10. Upon Claimant's discharge home from the skilled nursing facility, PALS provided him with 24-hour-per-day care for two weeks, until September 17, 2014. The evidence did not disclose why the skilled nursing facility released Claimant home when he still required 24-hour-per-day care, and the facility's post discharge plan of care was inconsistent as to whether home health follow-up was recommended. (Exhibit V.) PALS provided the 24-hour care without additional compensation, and, Claimant is not requesting that HRC compensate him or PALS for its additional service during this period.

11. From September 18 to September 30, 2014, as Claimant became stronger, PALS provided him with 16 hours of care per day, again without additional compensation.⁶ Since September 30, 2014, PALS has returned to the previous level of service: i.e., approximately five hours per day. (See Factual Finding 3.)

12. Claimant no longer needs a walker, commode, or shower chair, but still needs encouragement and assistance using his BiPAP machine, including "constant

⁶ Again, no request for such compensation is made in this proceeding.

reminders to keep [the] mask on” (Exhibit 11) and monitoring overnight to make sure he does not remove the mask. He also requires assistance at night getting to and from the toilet when he needs to use the restroom. Considering the nature of Claimant’s hospital diagnoses, several of which were secondary to prolonged immobility, and considering the fact that friends, rather than a PALS or IHSS worker, found Claimant (see Factual Finding 8), it is reasonable to conclude that Claimant requires assistance and monitoring beyond the amount he currently receives. On October 3, 2014, Claimant fell while outside at home and injured himself slightly (small scrapes on forehead and elbow).

13. In addition to the BiPAP machine, Claimant also has new medications following his hospitalization and increased contact with his doctors, which include not only his primary care provider and dentist, but also an ophthalmologist, cardiologist, nephrologist, gastroenterologist, pulmonologist, and podiatrist. (Exhibits 10, 11, and 15.) Among Claimant’s medications is an antihypertensive that he should not take if his systolic blood pressure measures less than 110. He needs more assistance with his current medications than he required with the ones he was taking before his hospitalization, and with an increased number of doctor visits, he has a commensurately increased need for assistance with scheduling and attending those visits.

14. (a) On September 23, 2014, HRC’s nurse vendor performed a nursing reassessment and a “nurse evaluation of IHSS care needs” (Exhibit 11), both of which set forth findings essentially consistent with Claimant’s IFSP and the testimony of Rodney Mojarro as to Claimant’s care needs. (See Factual Findings 4 - 9.) HRC’s nurse vendor was not asked for, and did not express, any opinion as to the number of SLS hours Claimant should receive, but, in the nursing re-assessment (Exhibit 10), recognized the need for SLS, and, in the IHSS evaluation (Exhibit 11), opined that Claimant needed 135.8 hours per month of IHSS care—an increase of 79 hours per month over his current

rate— in recognition of Claimant’s near-total dependence on assistance in performing ADLs.

(b) Even so, many of the time estimates reflected in the nurse’s IHSS evaluation for the completion of ADLs appeared unreasonably low. For example, the nurse estimated one hour per week was needed for laundry, which appeared optimistic even for a person without a disability, and unrealistic for a person who regularly has bladder and/or bowel “accidents,” necessitating immediate laundering of clothing and/or linens. Likewise, the nurse allocated only half an hour per week to “errands” (*id.*), which appeared impracticable considering that most errands involve transportation time and, frequently, waiting time at retailers and other service locales. Similarly, the nurse allocated only 15 minutes per day for bathing, which purportedly would include not only the shower or bath itself, but also all of the attendant tasks, such as getting out and putting away bath products, as well as drying off and applying grooming products such as deodorant and lotion, and which did not include time spent dressing. Even assuming a quick and efficient shower or bath, 15 minutes per day for the entire bathing process appeared an unduly low estimate, particularly for someone who needs extra help.

(c) Moreover, for attendance at doctor and dentist appointments, the nurse appeared to underestimate the number of appointments Claimant would require. For example, she estimated Claimant would see his pulmonologist “[t]wice yearly” (Exhibit 11), but Exhibits 12 and 13 indicated the pulmonologist was following Claimant more closely than that. He had appointments with the pulmonologist on October 3 and November 17, 2014, with follow-up recommended within a month of November 17.⁷

⁷ The evidence indicated that, at the time of the hearing, Claimant had not yet returned to the pulmonologist for his one-month follow-up, and HRC suggested this indicated Claimant did not actually require the pulmonologist’s services. But it had not yet been a month since his last appointment on November 17, 2014. Moreover, even if

Likewise, the nurse's IHSS evaluation did not mention Claimant's need for follow-up with his gastroenterologist or podiatrist, even though her nursing re-assessment noted, "His toenails are elongated and need debridement[,] and recommended that the "SLS worker assist client in scheduling a podiatry appointment. . . . Client may require every 2 - 3 months podiatry intervention." (Exhibit 10.)

(d) In addition, the nurse's IHSS evaluation of Claimant's need for assistance with medical appointments allocated only travel time—not time spent scheduling and/or arranging such appointments, and not time spent at appointments—because IHSS does not provide compensation for the services omitted. Yet, as noted previously, Claimant needs someone to help him schedule and attend medical appointments, because of his difficulty assessing and communicating his own symptoms and conditions, and in comprehending and remembering physician recommendations. (See Factual Finding 4.) Thus, even though the nurse's IHSS evaluation recognized Claimant's need for more hours of care than he currently receives, it underestimated the number of hours required.

15. (a) On November 26 and 29, 2014, an HRC-contracted assessor performed an "independent living assessment" of Claimant (Exhibit 14), noting his need for assistance with activities of daily living. The assessor misidentified Claimant's BiPAP machine as a "CPAP⁸ machine" (*id.*), but noted that Claimant "does not use the machine, because he does not know how to use it by himself." (*Id.*) The assessor's recommended response to that problem was for Claimant to be given training in how to use the BiPAP machine, or to have PALS "research a machine appropriate for his independent use."

Claimant had not yet scheduled a follow-up, there was no evidence that the reason for this failure was an absence of medical need.

⁸ CPAP is an acronym for "continuous positive airway pressure."

(*Id.*) The assessor did not note whether Claimant had already received such training, or whether simplified BiPAP machines are available.

(b). Since medical devices are not typically provided to patients without training, it appears unlikely that Claimant would have been given his BiPAP machine without training in how to use it. Likewise, Claimant's health care providers, who were aware of his developmental delay, would likely have provided or recommended a simplified machine if one were available. Hence, the assessor's recommended solution to Claimant's difficulties with his BiPAP machine appeared unrealistic. The assessor concluded that Claimant should receive 10 hours per week of SLS (two hours per day, five days per week, totaling approximately 43 hours per month) "to provide training and facilitate support from IHSS worker." (*Id.*) The "independent living assessment" grossly underestimated Claimant's need for assistance, both in light of the assessor's own observations and the findings of HRC's nurse vendor, in addition to the testimony of Rodney Mojarro.

16. Claimant's local family members are not in a position to provide care to him, and although it was Claimant's friends who found him ill before his hospitalization, the evidence did not establish that they are available to provide Claimant with care or assistance regularly. PALS and HRC have, for years, tried to persuade IHSS to increase Claimant's IHSS entitlement, without success. IHSS conducted a re-evaluation of Claimant's needs on October 27, 2014. The results are pending, and were not available at the time of the administrative hearing.

17. On September 24, 2014, Claimant proposed increasing his SLS hours to 17 per day, to reflect his increased need for assistance, both generally and in light of his hospitalization. On September 30, 2014, HRC rejected Claimant's proposal, instead offering to fund, for up to 60 days, a "personal care assistant to be present in the home, 12 hours a day to include the 8 - 10 hours that [Claimant] is sleeping." (*Id.*) Claimant

rejected HRC's proposal because the "personal care assistant" would have been provided through a vendor other than PALS, and Claimant's preference was to continue using PALS exclusively as his provider of HRC-funded services.

18. At the administrative hearing, Rodney Mojarro estimated, based on his experience as PALS' Program Director throughout Claimant's time as PALS' client, that Claimant's current care needs total between 14 and a half and 15 hours per day (equaling approximately 102 to 105 hours per week, or 440.6 to 453.6 hours per month). These figures were based on Mr. Mojarro's estimation that Claimant required eight hours per day for overnight care and monitoring (i.e., 56 hours per week), to meet Claimant's BiPAP and restroom needs, plus two to four hours per week, on average, for medical appointments and related activities (e.g., scheduling, transportation, waiting);⁹ nine to 10 hours per week for medication compliance, monitoring, and assistance; 15 hours per week for food shopping, meal selection, exercise encouragement and assistance, and other health-promoting activities; and 20 hours per week for other ADLs, including but not limited to errands, self-advocacy, and community integration.

19. Mr. Mojarro's estimates appeared realistic, and were consistent in almost all respects with the needs identified by HRC's own nurse vendor and Claimant's IFSP. Mr. Mojarro's testimony was credible given his long experience managing the provision of SLS to Claimant. The credibility of his testimony was not undermined by the fact that his company stands to gain financially from an increase in SLS hours. The many hours of

⁹ Mr. Mojarro estimated that Claimant has approximately two medical appointments per week. The evidence did not make clear whether that estimate was accurate, but the number of hours per week estimated to be needed for matters relating to medical appointments appeared realistic in light of the large number of health care providers Claimant has and his recent hospitalization and updated diagnoses.

uncompensated service PALS has provided Claimant in an effort to ensure his proper care indicate that PALS' actions are not driven primarily by its own profit motive. Mr. Mojarro confirmed that PALS' standard hourly rate of \$28 (see Factual Finding 3) for SLS is both below market (the market rate for SLS being \$31 per hour) and negotiable. Based on the monthly fee currently paid to PALS for four to five hours per day of SLS, HRC has already been receiving a significantly discounted hourly rate—between \$12.28 and \$15.32—for PALS' services.

LEGAL CONCLUSIONS

1. HRC must fund additional hours of SLS provided by PALS.
2. Claimant has the burden to prove, by a preponderance of the evidence, that he is entitled to receive additional hours of SLS through PALS. (Evid. Code, §§ 115; 500.) Claimant met his burden.
3. Claimant met his burden with regard to preference for PALS as his SLS provider. That issue was not only decided in Claimant's favor in the 2001 administrative decision (Factual Finding 2), but it is also consistent with the Lanterman Developmental Disabilities Services Act (Lanterman Act), which mandates that regional centers consider Claimant's preferences and choices when providing services and selecting vendors for those services. (Factual Findings 2 and 17.) (Welf. & Inst. Code, §§ 4501; 4512; 4646, subd. (a); 4646.5, subd. (a)(2); 4648, subds. (a)(1), (a)(6)(E), and (a)(12); 4685, subd. (b)(1).) Indeed, HRC did not contend at the hearing that a different SLS provider should be substituted for PALS.
4. HRC did argue, correctly, that generic and natural supports must be maximized, and that the most cost-effective option for providing regional center services must be selected, consistent with Claimant's reasonable preferences and choices. (E.g., Welf. & Inst. Code, §§ 4648, subds. (a)(2), (a)(6)(d), (a)(6)(E), (a)(8), and

(a)(13)(C); 4659, subds. (a)(1) and (c); 4689, subds. (1) and (p)(l); and 4689.7, subd. (c); Cal. Code Regs., tit. 17, § 54349, subd. (g).)

5. HRC was incorrect, however, to contend that the cost of PALS' SLS services should be compared, in terms of cost-effectiveness, to the rates that would be charged if Claimant were to move into a family home or residential care facility for the elderly. Even if a family home or residential care facility would be less expensive than SLS, Claimant cannot be required to accept such a living arrangement. (E.g., Welf. & Inst. Code, §§ 4646, subd. (d); 4648, subd. (a)(1); and 4689.) In this instance, Claimant's undisputed preference is to continue living in his own home. (Factual Finding 1.) Hence, the relevant question is not whether a different living arrangement would be less expensive than Claimant's preferred living arrangement, but what is the most cost-effective manner of supporting Claimant in his preferred living arrangement.

6. Furthermore, the evidence showed that, as of the administrative hearing, Claimant's natural supports (i.e., Claimant's family and friends) and generic supports (i.e., IHSS) had been maximized. Claimant's family and friends are not able to provide significant care or assistance (Factual Finding 16), and Claimant's IHSS entitlement remains at 56.7 hours per month. (Factual Findings 7 and 16.) It is possible that, at some future point, Claimant will be awarded additional IHSS hours (Factual Finding 16), but this Decision cannot speculate what that award will be. Meanwhile, PALS provides Claimant with SLS of undisputed quality at a very competitive rate (Factual Findings 2 and 19), making it the most cost-effective option presently available for providing the services Claimant requires.

7. Claimant further met his burden of demonstrating that additional SLS hours are needed. Under the Lanterman Act, SLS services are to be provided according to the consumer's need (considering the available natural and generic supports), and his or her reasonable preferences, regardless of the severity of the disability. (Welf. & Inst.

Code, § 4689.) In this case, Claimant established that the roughly 177 hours per month of care (IHSS and SLS) he currently receives (Factual Findings 3 and 7) are inadequate to meet his needs, and that he requires 15 hours per day of care and assistance (eight of which would be overnight), for a total, on average, of 453.6 hours per month. (Factual Findings 4 - 19.) Claimant's showing was consistent with the data presented by HRC, including Claimant's current IFSP (Welf. & Inst. Code, § 4648, subd. (a)) and the various recent assessments and evaluations performed by HRC's vendors, though HRC's interpretation of that data varied from Claimant's. (Factual Findings 4 - 19.) Claimant's interpretation of the data was more persuasive than HRC's. (*Id.*)

8. The figure of 453.6 hours per month is partially offset by the 56.7 hours per month of IHSS currently allocated to Claimant, since many of the ADLs with which SLS provides assistance overlap with the assistance that IHSS, a generic support, can provide. (Welf. & Inst. Code, § 4659, subds. (a)(1) and (c).) (Factual Findings 7, 14, and 16.) Accordingly, Claimant established that he presently requires SLS hours totaling 396.9, rounded to 397, per month, or approximately 13 and one-quarter hours of SLS per day. If Claimant's IHSS re-assessment entitles him to additional IHSS hours, a further offset against his SLS hours may be appropriate. At present, however, no such additional offset can be made. (Factual Finding 16.) The compensation to be paid to PALS for the increased number of SLS hours is beyond the scope of this Decision.

9. To the extent HRC contends that SLS should not be used to assist Claimant with ADLs, community integration, self-advocacy assistance, and the like, that contention is incorrect under the provisions of the Lanterman Act and its implementing regulations, which define SLS to include all of those things. (E.g., Welf. & Inst. Code, § 4689, subd. (c); Cal. Code Regs., tit. 17, §§ 54349, subd. (d), and 58614, subds. (a) and (b).) Hence, Claimant's request for additional SLS hours is not barred simply because he

might use some of those hours to assist with ADLs and/or facilitate community integration and self-advocacy.

10. To the extent Claimant's health or other conditions improve, such that his needs can be met with fewer hours of care and assistance, those changes can be evaluated and accounted for in Claimant's future IFSPs. (Welf. & Inst. Code, §§ 4646; 4646.5, subds. (a)(8) and (b).).

ORDER

Claimant's appeal is granted.

Harbor Regional Center shall provide Claimant with no less than 397 hours of supported living services per month, through Personalized Arranged Living Services, LLC, to include eight hours of overnight monitoring and assistance every day, with the additional service hours to be allocated according to Claimant's need and coordinated with his generic supports.

Dated: December 22, 2014


ANGELA VILLEGAS

ANGELA VILLEGAS

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.