

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

SAN DIEGO REGIONAL CENTER,

Service Agency.

OAH Nos. 2015090275, 2015090279,
2015120544, and
2016010361

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings (OAH), heard this matter in San Diego, California, on March 11, 2016, and April 11, 2016.

Claimant's mother, who is also his guardian, represented claimant, who was not present at the fair hearing. Claimant's mother was assisted by her husband.

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

On January 21, 2016, OAH issued an order consolidating these matters. The parties agreed on the first day of hearing that one decision would be written addressing all issues. Further, claimant withdrew OAH No. 2015090279, narrowed the scope of issues in OAH Nos. 2015120544 and 2016010361, and combined the issues sought in OAH Nos. 2015090275 and 2016010361. The issues are outlined below. Before the start of the second day of hearing, SDRC advised that it changed its position regarding claimant's request for 2:1 care and offered to fund eight hours per day of 2:1 care. Claimant did not accept that

offer and the hearing proceeded.

The parties' request to submit written closing arguments and keep the record open until May 6, 2016, was granted and a briefing schedule was established.¹ Claimant's rebuttal closing was not timely received, but SDRC did not object and it was considered. On May 6, 2016, the record was closed and the matter was submitted.

ISSUES

1. Should SDRC provide 2:1 emergency licensed vocational nursing (LVN) respite services to claimant due to his changing needs? As a corollary to that issue, are In Home Supportive Services (IHSS) a generic resource that claimant can use to fund one of the two LVN providers he requests?

2. Should SDRC fund one day per week of transportation services so that claimant can participate in community activities as part of his Applied Behavior Analysis (ABA) therapy and to meet his ABA therapy and Individual Program Planning (IPP) goals?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS AND PROCEDURAL HISTORY

1. On September 3, 2009, following an administrative hearing, SDRC was ordered to fund 310 hours per month of nursing respite services. The total number of monthly hours was divided between 95 hours of licensed vocational nursing (LVN) respite

¹ Claimant's closing argument was marked and received as Exhibit V, SDRC's closing argument was marked and received as Exhibit 29. Claimant's rebuttal closing argument was marked and received as Exhibit W. SDRC's rebuttal closing argument was marked and received as Exhibit 30.

services and 215 hours of certified nursing assistant (CNA) respite services. (OAH No. 2009040141, ALJ James Ahler.)

2. On November 2, 2010, SDRC and claimant participated in mediation. In the 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 again participated in mediation. In that Final Mediation Agreement 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.)

4. On November 14, 2013, following two days of hearing, claimant's appeal that the mediation agreement reached in OAH No. 2013031101 was being violated; that the order issued in OAH No. 2009040141 was being violated; and that the requested 24 hour, 2:1 respite services, was denied. The evidence did establish that claimant required 2:1 nursing care, but this was not a service SDRC funded. (OAH Nos. 2013070454 and 2013080101, ALJ Mary Agnes Matyszewski.)

5. On September 15, 2014, following an administrative hearing, claimant's appeal that SDRC fund 24 hours of 1:1 skilled LVN services for claimant, that SDRC fund eight hours of 2:1 skilled LVN services on Saturdays so claimant can go into the community and attend the library for recreation/leisure, and that SDRC have a registered nurse (RN) write a comprehensive plan of care, was denied. (OAH No. 2014070594, ALJ Mary Agnes Matyszewski.)

6. On January 9, 2015, following an administrative hearing, claimant's appeal was granted in part and denied in part. Claimant's appeal that he should be granted an exemption that would allow SDRC to fund claimant's request for nursing services was

denied. Claimant's appeal seeking 24 hour 1:1 LVN respite care was granted but the \$269,160.32 amount previously calculated was reduced because it included Saturday library outings that were denied in a prior hearing. Claimant's appeal that SDRC cannot locate a group home that can care for claimant was denied. Claimant's appeal that SDRC witnesses previously lied when testifying regarding SDRC's ability to provide a placement facility that would meet claimant's needs and the cost of placing claimant in such a facility was denied. (OAH Nos. 2014100467, 2014110273, and 2014100890, ALJ Mary Agnes Matyszewski.)

CLAIMANT'S SERVICES AND SUPPORTS

7. Claimant is a 27-year-old male diagnosed with epilepsy, autism, and severe mental retardation. He currently resides at home with his family and he receives SSI. Claimant asserted that his condition has changed and now he requires 2:1 LVN care; that IHSS is not a generic resource that can fund his 2:1 care; and that SDRC should fund one day per week of transportation services into the community to allow him to participate in community activities as part of his ABA therapy.

8. Claimant's SDRC records and his March 3, 2015, IPP documented his condition, therapies, and goals. Claimant participates in the Home and Community-Based Waiver for Individuals with Developmental Disabilities Program (HCBS Waiver Program.) SDRC funds 24 hour 1:1 LVN respite services. Claimant has been attending the TERI Inc. Center for the Arts and Adult Education since 2011. SDRC funds door-to-door transportation for claimant and his LVNs who attend TERI with him.

Claimant receives 263 hours of IHSS that SDRC does not fund. Claimant's mother testified that 160 of those hours are for protective supervision.² Claimant's mother is his IHSS care provider. Claimant's private insurer, Kaiser, approved 20 hours per week of

² The IHSS records were not introduced at the hearing.

ABA services, and SDRC funds the co-pays. Although Kaiser approved funding 20 hours per week of ABA services, claimant only received six hours per week due to lack of staffing at Easter Seals. Thereafter, when Easter Seals no longer provided ABA services, those services were to be provided by TERI. However, claimant's parents testified that they have not been receiving those services due to staffing issues. SDRC had no information about the ABA program because it was not funded by SDRC, so neither the program nor claimant provided SDRC with reports from it. In fact, one e-mail from claimant's mother advised SDRC that she would not be providing SDRC with any information from ABA because SDRC did not fund that service.

The SDRC records noted that in addition to claimant's complex seizures which often occur without warning, claimant also retains his urine, requiring catheterization. Claimant's urine retention and his constipation can trigger self-injurious behaviors (SIB). Claimant's mother reported that it is very important to maintain homeostasis to prevent SIBs. The family was considering outside placement to address claimant's needs. One of the goals identified in claimant's IPP was to decrease claimant's SIBs. Nothing in the IPP identified weekend community outings to address claimant's goals, nor did the IPP indicate that claimant's goals could not be met by his participation in the TERI program.

9. A September 8, 2014, Nursing Health Assessment noted that claimant required catheterization every 12 hours as needed for urinary retention and that 1:1 and sometimes 2:1 supports were required when claimant exhibited SIBs.

10. A December 28, 2015, Nursing Health Assessment noted that claimant's mother and caregiver reported that claimant is becoming stronger and it often takes two persons to hold him. His SIBs were reported as being more frequent in the past two months, especially during transport, requiring two persons to prevent SIBs. The report documented a "possible need for assist of two when exhibiting SIB." The report noted that claimant was approved to receive 30 hours per week of ABA therapy, but that TERI was

currently providing only 25-30 hours per week due to staffing issues.

11. A June 30, 2015, TERI Functional Behavior Assessment noted that claimant was approved for 20 hours per week of ABA services. The report documented claimant's history and behaviors and contained a Behavior Intervention Plan. Claimant's mother was noted as describing TERI as a "Godsend" and that her son was "thriving in this program." Notably, the report contained a "longitudinal data review" of claimant's SIBs since being at TERI, finding that the data showed "a descending trendline, indicating that [claimant's SIBs] have reduced over time." There had been "no notable changes" to claimant's behavioral intervention plan and there was a "dramatic reduction in behavior" correlated to his discontinuation of Seroquel during one hospitalization in March 2015. The report noted that claimant "would benefit from consistent transportation to access his community during the weekend. It is recommended that [claimant] receive transportation services on the weekend." An August 9, 2015, addendum noted that claimant sometimes requires 2:1 and 3:1 assistance; that prior to the TERI ABA services, claimant could rarely leave his home on the weekend; that even though claimant has thrived while enjoying the community during ABA services, this can be an antecedent to his severe SIBs, but should decrease when a predictable routine emerges; and that the LVN should "be trained to be less of a caregiver, and more of a teacher or guide to help further improve [claimant's] independence" as he "has often not received that level of support in his home making his situation a continual hardship for himself and his family."

12. A February 2, 2016, Consumer Placement Referral documented claimant's condition, medications, and needs. The family was requesting placement because it was difficult to meet his complex needs, uncontrolled seizures, and severe SIB.

13. Several medical records documented claimant's hospitalizations and his treating physician's opinions. On August 28, 2015, claimant's neurologist wrote that claimant required 1:1 24 hour LVN care and "may also need 2:1 LVN nursing care on an as

needed basis.”

14. Multiple e-mails and timelines documented the extensive efforts made to secure care for claimant.

15. On December 21, 2015, SDRC Executive Director, Carlos Flores, signed a letter that was submitted to the Department of Developmental Services (DDS) requesting that DDS “provide nursing respite services for our client, [claimant], because of the lack of sufficient service providers to comply with an Administrative Law Judge’s order for one to one nursing respite services, 24 hours per day.” Mr. Flores outlined the extensive efforts SDRC made to secure services and the issues encountered. At this hearing Mr. Flores was cross-examined about that letter and it was clear that claimant’s mother took great exception to the statements contained therein regarding nursing agencies’ “unwillingness to serve this family.” However, while it appeared that multiple issues were at play, nothing in Mr. Flores’s letter was inaccurate or untrue.

16. A January 30, 2016, letter from Kaiser documented claimant’s mother’s request that Kaiser provide round trip covered transportation services from claimant’s residence to his ABA provider affiliated with TERI. Kaiser advised that it would be collecting information and reviewing the request.

17. E-mails from claimant and TERI documented requests for Saturday transportation. An e-mail from the TERI Director of ABA Services noted that Saturday transportation was required because part of claimant’s “weekend program includes him going out in the community to work on generalizing his skills to different environments.” The director noted the “significant behaviors” that have occurred in the car making it unsafe to transport claimant. As such, the director wrote “an addendum to his behavior plan addressing this issue” and wanted to know what additional documentation she needed to provide to SDRC so that it could assist with weekend transportation.

18. Several e-mails in 2015 documented issues obtaining nursing coverage and

claimant's mother's reports of hospital visits and diagnoses.

19. 2015 SDRC case notes documented SIBs at TERI; SIBs during transport; a December ear injury caused by a sudden SIB; a fall during an SIB; nursing staffing issues; and efforts to locate a group home. Other notes documented concerns expressed about claimant's caregivers, scheduling issues, and billing concerns.

20. 2016 SDRC case notes documented a near fall caused by a sudden SIB; claimant's mother's request for a 1:1 provider in a group home; attempts to obtain additional vendors; difficulty finding a group home that would meet claimant's mother's requests; and client referrals from several nurses and providers SDRC contacted. A February 8, 2016, note documented difficulty transporting claimant and claimant's request that SDRC fund transportation because Kaiser had denied claimant's transportation request. A February 18, 2016, note confirmed that SDRC would fund a second nurse in February so that claimant's mother and her husband could go on a cruise. A February 24, 2016, note documented that SDRC sent correspondence to claimant's mother confirming it had "expanded the search for nursing respite providers to RNs but that none have yet agreed to work on the case" and that SDRC had offered one vendor "10 hours per month of funding for coordinating nursing schedules."

21. Claimant introduced documents demonstrating the complaints she filed with various agencies regarding issues with claimant's caregivers and documentation that one LVN on SDRC's list of vendors had a delinquent LVN license.

22. A March 10, 2016, letter from the Kaiser chief of urology stated that claimant "requires two licensed caregivers (LVN/RN) to catheterize the patient multiple times each day." No other information regarding that opinion was provided by the physician.

23. A memo documented that TERI will be closed 10 days in 2016 for holidays.

24. Incident reports from TERI documented three times when claimant's SIBs required 2:1 staff assistance. One event resulted in a call to emergency medical services per

claimant's mother's instructions.

25. The SDRC Purchase of Service Standards (POS) outlined the standards SDRC utilizes when purchasing consumer services. SDRC must "adhere to federal and state laws and regulations" and must offer services "within current laws and regulations." The transportation section noted that consumers requiring transportation services "should be encouraged to arrange and pay the cost of such service when possible." This section discussed transportation to and from day programs, something SDRC currently funds for claimant to attend TERI. The POS does not authorize funding private transportation for community outings. In fact, funding for such outings was specifically suspended by Assembly Bill 9, as codified at Welfare and Institutions Code section 4648.5

26. Nursing care notes written by claimant's providers documented claimant's condition, including his seizures, the medications administered, the care rendered, the two-person assistance needed to control claimant, and the times when the LVNs sought claimant's mother's assistance, often during the middle of the night. These documents corroborated the testimony offered by the caregivers and claimant's parents.

27. Seizure records documented the frequency, duration, and types of seizures claimant experienced. Claimant was often sleeping just before having a seizure. The records indicated that he has frequent seizures lasting up to one minute and that there seemed to be no pattern regarding when the seizures occurred; they appeared to be unpredictable.

28. Claimant introduced 2 DVDs containing "day in the life" clips. Like DVDs introduced at claimant's prior hearings, these, too, showed claimant at all hours of the day and night and demonstrated how unpredictable his seizures can be and the great deal of effort it takes to work with him. While the DVDs supported claimant's contention that two persons are often required to provide assistance, they did not demonstrate that the second person must be an LVN. Of note, the narration on the DVDs illustrated claimant's

mother's frustration with SDRC and there appeared to be many occasions where claimant's mother unnecessarily involved herself in claimant's care. The DVDs also contained claimant's mother's repeated assertions that SDRC was violating the law and not doing its job. However, as noted in prior decisions, SDRC is a funding agency, not a staffing agency, and the evidence showed both in this case, as in the others, that SDRC has made extraordinary efforts to provide care to claimant. Claimant's mother's anger towards SDRC is entirely misdirected.

WITNESS TESTIMONY

29. Four LVNs who work with claimant testified about claimant's condition, his needs, and the services they provide. Some of the LVNs testified about the images on the DVDs. The LVNs explained how claimant's seizures happen without warning, how it requires two people to catheterize him, and how it often requires two people to control him, especially during transportation to his day program. The LVNs explained that often times claimant's mother is the back-up person rendering aid and that SDRC officials have never interviewed them regarding the care they render. The caregivers testified that claimant's strength is increasing, making it more difficult to handle his SIBs with just 1:1 care. They all believed that claimant required 2:1 care.

Although some of the LVNs merely answered "yes" or "no" to the questions posed by claimant's mother, making their testimony not very persuasive, the fourth LVN who testified, a former marine, provided very compelling testimony about the recent changes in claimant's condition and the need for 2:1 care. This LVN was a young, very muscular, athletic-looking man, and he described in detail the difficulty he has handling claimant because of claimant's size and strength.

30. Claimant's parents testified about claimant's increasing needs and their belief that he requires 2:1 care. Claimant's mother provided additional testimony regarding the images on the DVDs beyond her narration on them, and she described her utter

exhaustion at being on constant call to provide 2:1 care for her son. Her medical records documenting her recent Post Traumatic Stress Disorder (PTSD) were introduced. Claimant's mother also cited to other OAH decisions during her testimony and in her closing argument. However, although instructive, those decisions were not controlling because they are not precedential. Claimant's father testified about his work as a chief with a fire department and how his schedule keeps him out of the family home several nights a week. Like the ex-marine LVN caregiver, claimant's father was also an athletic-looking, muscular male, and for him to admit that his son is stronger than him and that he cannot control him without 2:1 help was quite compelling.

31. Alexander Droz is a supervisor at TERI who testified about claimant's increasing needs and how 2:1 care is now required to handle him. Claimant attends the TERI program five days per week from 9:00 a.m. to 3:00 p.m. and travels 60 to 90 minutes from home to attend the program. During that time, TERI provides transportation into the community to allow claimant to participate in outings that meet his goals.

32. Lori Sorenson, SDRC Regional Manager for North County, testified that she watched the day in the life DVDs and now believes that claimant's needs have changed and that an additional eight hours per day of non-LVN respite care will meet his increased needs. Based upon her opinion, at the start of the second day of hearing, SDRC offered to fund eight hours per day of a backup aide to assist the 1:1 LVN respite worker. Ms. Sorenson explained how SDRC determined the additional eight hours based upon currently approved funding. Ms. Sorenson admitted that the calculations did not factor in the 10 days per year TERI is closed for holidays.

As to the request for ABA transportation, Ms. Sorenson explained that SDRC is funding the co-pays; the ABA services are provided by claimant's insurer, Kaiser. Claimant also receives behavior modification and community outings as part of his TERI program, and transportation for those services are provided by TERI. Because SDRC does not

provide the ABA services to claimant, SDRC cannot fund his request for transportation to that service.

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.

2. A preponderance of the evidence means that the evidence on one side outweighs the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed. In other words, the term refers to 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.) In order to prevail, the party with the burden of proof is only required to provide evidence that is more persuasive for his position than the evidence against.

3. "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' [Citations.] . . . The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the quality of the evidence. The quantity of the evidence presented by each side is irrelevant." (Glage v. Hawes Firearms Company (1990) 226 Cal.App.3d 314, 324-325.) "If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it [citation]." (People v. Mabini (2001) 92 Cal.App.4th 654, 663.)

THE LANTERMAN ACT AND REGIONAL CENTERS

4. 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.

5. 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.)

6. 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.)

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

8. Welfare and Institutions Code section 4646.4 requires the regional centers to consider generic resources and the family's responsibility for providing services and supports when considering the purchase of supports and services.

9. Welfare and Institutions Code section 4648, subdivision (a)(1), requires

regional centers to “secure services and supports that meet the needs of the consumer, as determined by the consumer’s individual program plan. . . .” Subdivision (8) prohibits regional center funds being used to “supplant the budget of any agency which has the legal responsibility to serve all members of the general public and is receiving public funds for providing those services.”

10. Section 4659 of the Welfare and Institutions Code requires regional centers to identify and pursue all possible sources of funding.

REQUEST FOR 2:1 LVN SERVICES

11. Claimant currently receives 24 hour 1:1 LVN respite services. In order for him to prevail on his request for a second LVN provider, he must demonstrate either that the intensity of his care and supervision needs are such that additional respite is necessary to maintain him in the family home or that there is an extraordinary event that impacts his family members’ ability to meet his care and supervision needs. (Welfare and Institutions Code section 4686.5, subdivision (a)(3)(A).)

The evidence established that claimant’s needs have changed due to his increasing size and strength and his parents advancing ages and his mother’s PTSD diagnosis. The most compelling testimony was offered by the former marine LVN and claimant’s father, both of whom admitted that despite their physical fitness, they lack the strength, alone, to control claimant. This testimony plus the testimony from the TERI supervisor, the DVDs, and the documents introduced at hearing established that recent changes in claimant’s condition now require that he receive 24 hour 2:1 care to keep him safe. Thus, SDRC must fund the second caregiver, but only as outlined below.

The evidence did not establish that the second caregiver must be an LVN. At most, the evidence established that it would be “ideal” to have an LVN, but did not demonstrate it was necessary that the second respite worker be an LVN. Catheterization can occur at regularly scheduled intervals and is not a sudden unexpected event. When performed, the

second caregiver does not need to be an LVN. Walking claimant around and holding his hands during a seizure does not require two LVNs. Thus, claimant's request that the second caregiver be an LVN is denied as is claimant's request that SDRC fund a second LVN as "gap care" until the 2:1 care is in place. Additionally, although claimant's argument in his closing brief was unclear, SDRC shall also not be ordered to fund infection-prevention training for the respite workers.

Claimant currently receives the following services: TERI: 30 hours per week, not including travel; ABA: 20 hours per week; and IHSS: 263 hours per month, 160 hours of which are for protective supervision. Claimant's 160 hours of IHSS-funded protective supervision are a generic resource that can be used to fund part of his 2:1 care as those funds are designed to ensure claimant's safety and the 2:1 care is being ordered to meet that objective. Claimant does not require a second respite worker when at TERI, as TERI employees provide that service. Claimant does not require a second respite worker during ABA therapy as the ABA worker provides that service. Furthermore, the Lanterman Act defines and requires regional centers to take "natural supports" into account. When claimant's already funded hours are taken into account, as well as the natural supports of his family, and those hours are removed from the equation, SDRC shall fund eight hours per day of a second non-LVN respite worker.

SDRC did not factor in the 10 days that TERI is closed when assessing claimant's current needs. Those vacation days leave 60 hours of non-funded 2:1 care. Thus, SDRC shall also fund 60 hours per year of non-LVN respite services to cover the 10 days per year that the TERI program is closed for holidays.

It is important to note that this order only requires SDRC to fund the 2:1 service, not staff the 2:1 service. SDRC cannot ensure that any of the hours funded will actually be staffed, or that there will not be breaks in care when caregivers quit or are terminated. In fact, the evidence overwhelmingly established that it is very difficult to find caregivers who

can meet claimant's needs and also satisfy claimant's mother's demands. The DVDs were replete with claimant's mother's complaints, most of which were quite filled with vitriol and appeared misdirected. Her repeated claims on the DVDs that SDRC violated the law were, quite frankly, wrong and were not supported by any of the evidence introduced in this hearing. Thus, to prevent any misunderstandings going forward, claimant's mother needs to understand that SDRC does not violate this order when caregivers fail to show up, quit, or are fired, as a regional center can only fund a service and then make its best efforts to vendor caregivers willing to provide those services. Regional centers cannot guarantee that caregivers will appear and provide those services or that consumers will be completely satisfied with the vendors who arrive. A regional center can only try its best and the evidence in this matter established that SDRC has made monumental efforts trying to meet this one consumer's needs and his mother's demands.

REQUEST FOR TRANSPORTATION FOR ABA SERVICES

12. Claimant's ABA services are provided by Kaiser. As such, SDRC's POS and Welfare and Institutions Code section 4512, subdivision (b), prohibit SDRC from funding the requested one day per week of transportation services so that claimant can participate in ABA community activities. Even assuming SDRC could deviate from its POS, Welfare and Institutions Code section 4648.5 suspended SDRC's ability to fund social recreation services absent an exemption. The evidence established that the requested service, although part of claimant's ABA therapy, is an outing in the community, a social recreation event, and claimant does not qualify for an exemption as the outing is not "a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability." Nor is it "necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs" given the other services offered to claimant, including the TERI day program. Claimant's appeal of SDRC's decision not to fund this service is denied.

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ORDER

Claimant's appeal that SDRC shall fund a second respite caregiver so as to provide 24 hour 2:1 LVN care is granted in part and denied in part. SDRC shall fund eight hours per day of a second non-LVN respite caregiver.

SDRC shall fund another 60 hours per year for a second non-LVN respite caregiver to provide services when TERI is closed for holidays.

Claimant's appeal that SDRC fund one day per week for transportation services so that claimant can participate in community activities as part of his Applied Behavior Analysis is denied. SDRC shall not fund that service.

DATED: May 17, 2016

_____/ s/ _____

MARY AGNES MATYSZEWSKI

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 ninety days.