

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018040862

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on September 19, 2018.

Stephanie Zermeño, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Claimant's mother appeared on behalf of claimant.

The matter was submitted on September 19, 2018.

ISSUES

Should IRC do the following: 1) reimburse claimant's mother for the expenses she incurred in having to transport claimant to and from school for the past two years; 2) seek a vendor to provide transportation to and from claimant's school in Fullerton; 3) obtain a health and safety waiver so that any vendor willing to transport claimant can obtain a higher rate for mileage than the rate permitted; 4) authorize a \$150 flat fee per trip in the event IRC cannot find a vendor so that claimant's mother can hire someone at that amount to transport claimant to and from school; 5) pay claimant's mother \$150

per trip and the mileage amount that would normally be paid to a personal assistant to claimant's mother if she has to transport claimant to and from school in Fullerton and cannot find anyone to do so; 6) increase claimant's respite hours or personal assistant hours by 196 hours per month; 7) pay all fees for express roads on the 91 freeway when transporting claimant to and from school; 8) pay all parking fees at claimant's school in Fullerton.

FACTUAL FINDINGS

BACKGROUND

1. Claimant is a 24-year-old woman who qualifies for regional center services based on a diagnosis of cerebral palsy, epilepsy, and intellectual disability. Claimant's mother is her authorized representative.

2. On March 6, 2018, IRC served claimant, through her mother, with a notice of proposed action (NOPA) denying claimant's request for an increase in respite hours (unspecified amount) and funding for transportation services from a non-vendored driver to transport claimant to and from school two days per week from Lake Elsinore to Fullerton.

3. On April 1, 2018, claimant's mother filed a Fair Hearing Request on claimant's behalf objecting to IRC's decision not to provide the above-referenced services. She wrote that her reasons for requesting a fair hearing were: IRC's denial to provide transportation; denial to pay fair rate to parent; denial to pay any available vendor willing to provide transportation; and denial to pay for a tailored day program and comparable services. In order to resolve the dispute, claimant's mother wrote that she wanted: IRC to issue a voucher or pay for a transportation vendor willing to provide transportation services; for IRC to pay a fair rate; and for IRC to increase respite/personal attendant hours (no amount specified).

4. In discussion subsequent to the Fair Hearing Request, IRC and claimant's mother further clarified and refined the issues to be resolved at the hearing. On the day of the hearing, prior to commencing the hearing, the issues to be resolved were agreed upon by the parties as follows: 1) for IRC to reimburse claimant's mother for the expenses she incurred in having to transport claimant to and from school for the past two years; 2) for IRC to seek a vendor to provide transportation to and from claimant's school in Fullerton; 3) for IRC to obtain a health and safety waiver so that any vendor willing to transport claimant can obtain a higher rate for mileage than the rate permitted; 4) for IRC to authorize a \$150 flat fee per trip in the event IRC cannot find a vendor so that claimant's mother can hire someone at that amount to transport claimant to and from school; 5) for IRC to pay claimant's mother \$150 per trip and the mileage amount that would normally be paid to a personal assistant to claimant's mother if she has to transport claimant to and from school in Fullerton and cannot find anyone to do so; 6) for IRC to increase claimant's respite hours or personal assistant hours by 196 hours per month; 7) for IRC to pay all fees for express roads on the 91 freeway when transporting claimant to and from school; 8) for IRC to pay all parking fees at claimant's school in Fullerton.

5. Prior to the hearing, IRC and claimant's mother also discussed issue number six. IRC stated that it was willing to provide an increase in personal assistant hours for claimant from 221 hours to 387 hours per month as well as an increase in respite hours from 30 to 60 hours per month. Claimant's mother agreed to these offers because the increases amounted to 196 hours total. Therefore, issue number six is considered resolved and, according to IRC, will take effect October 1, 2018. Accordingly, issue number six need not be determined in this decision.

CLAIMANT'S BACKGROUND

6. Claimant requires 24 hour care. Claimant currently receives 221 personal attendant hours per month; 14 hours per month of behavioral modification; 30 hours per month of respite; and 283 hours per month of In Home Supportive Services (IHSS). Claimant attends one class per week at the North Orange County Community College District School of Continuing Education (NOCCCD) in Fullerton. She requires a 1:1 aide. She has been attending since September 2016. Claimant has difficulty sleeping and cannot keep a schedule required for a normal day program, so the classes at the NOCCCD have helped her very much.

Claimant lives in Lake Elsinore and the school is in Fullerton, which is approximately 42.1 miles, by way of the 15 freeway, 91 freeway, and 57 freeway. There is a toll road on the 91 freeway that charges fees per mile. Claimant's school also charges parking fees. Claimant's mother has been transporting claimant to and from school since she began in 2016. Claimant's mother claimed that she only did this with the understanding that IRC would reimburse her at some point, although there is nothing in the evidence to suggest that payment for transportation to and from school was pre-approved by IRC. According to claimant's Individualized Program Plan (IPP), claimant's mother had requested assistance with the cost of transportation and IRC offered FMS, a financial management service that provides a flat rate for transportation costs. Claimant's mother told claimant's consumer services coordinator that it was not enough to cover "all" transportation expenses. Claimant's mother then requested a private transportation service, but IRC has been unable to find any vendors willing to transport claimant from Lake Elsinore to Fullerton because of claimant's medical needs. Claimant's mother obtained information from private transportation companies willing to transport claimant to and from school at various rates, but none of the companies are vendored – or have attempted to become vendored – with IRC.

Claimant's IPP states that claimant needs assistance walking and often uses a wheelchair. Claimant crashes into things and is unable to navigate slopes or driveways. Claimant is able to attend to her toileting needs but needs assistance with hygiene afterwards. Claimant has a visual deficit, which makes it impossible for her to be alone. Claimant is sensitive to some textures, but generally eats regular food with assistance and prompting. Claimant is on many medications that have side effects and must be closely monitored. Claimant does experience seizures. Claimant had been authorized to receive 31 hours per month of community support services, but IRC vendors could not find any staff to fulfill the hours. Claimant had also been evaluated in the past for independent living service providers, but was not accepted into either program because of her total care needs. Claimant's Client Development Education Report places her independence at 1.6 to 2.6 on a scale of 1 to 5, which is extremely low.

EVIDENCE PRESENTED BY IRC

7. Eric Hamler is the IRC Program Manager in the Resource Development and Transportation section. Mr. Hamler explained that IRC sent out requests for vendors but has been unable to find any vendor to provide transportation services to claimant due to her medical needs (total care requirement). As an alternative, IRC offered claimant's mother FMS, which is a financial management service that provides a flat monthly rate for transportation services. IRC offered claimant's mother \$128.14 per month based on the 42.1 mile trip twice per week.¹ Claimant's mother did not accept that offer.

IRC also provided a copy of the mileage rates set by the Department of Developmental Services for transportation services. Mr. Hamler explained that the

¹ The amount is obtained by utilizing a formula, which was not discussed at hearing.

mileage rates provided are statewide set rates and they can only deviate from those rates if they obtain a health and safety waiver to do so. A health and safety waiver is sought after a vendor is located that is willing to provide services, not before. FMS is also an alternative.

According to the statewide rates, for mileage under the category of personal assistance, it is \$0.37 per mile. For private transportation companies, the authorized mileage amount is \$1.98 per mile.

Mr. Hamler explained that although most vendors were unwilling to provide services to claimant because of her 1:1 medical needs, Mobility-R-Us was a non-vendored company willing to provide transportation, but not at the rate allowed. Mobility-R-Us also told IRC it was unwilling to pursue vendorization because they do not have an office in IRC's catchment area, and would also have to be vendored in Orange County's catchment area since that is where claimant's school is located.

Finally, Mr. Hamler stated that they cannot provide claimant's mother with the \$150 per trip that she estimated she would need to provide services herself or to hire an outside transportation company because the maximum allowed is \$1.98 per mile.

8. Cindy Arevalo is claimant's consumer services coordinator. Ms. Arevalo testified she met with claimant's mother on November 2, 2016, to discuss the FMS. They also discussed FMS on January 31, 2018. Claimant's mother was not interested because the amount was insufficient in her view. In order to receive any FMS, claimant's mother must file an application. Claimant's mother was provided with an application in May 2018, and FMS was again discussed at a follow up meeting on June 27, 2018. Claimant's mother told Ms. Arevalo that she was not in agreement with becoming an FMS vendor because she did not feel the flat rate of \$128.14 was appropriate. Although claimant's mother did fill out the application, she crossed out the allowed rate and wrote in her own rate of \$150 per month. Thus, the application cannot be processed.

9. Brandi Parhm is the IRC Program Manager in charge of the Transition Unit. Ms. Parhm testified that claimant's mother was provided with an FMS packet as far back as November 2016, but claimant's mother did not want to pursue FMS at the allowed rate. IRC encouraged claimants' mother to pursue FMS in the meantime while they could pursue vendors that might be willing to transport claimant to and from school. They met again in June 2018 but to date, claimant's mother has not accepted FMS at the allowed rate. Ms. Parhm also testified that any freeway tolls and parking is the responsibility of the student or parents because it has nothing to do with a person's disability.

10. E-mail communications provided by IRC show that IRC has continuously made an effort at trying to obtain transportation vendors for claimant, but all vendors declined to provide services for a variety of reasons, including claimant's need for a 1:1 aide, claimant's medical needs, and the distance between claimant's home and school.

EVIDENCE PRESENTED BY CLAIMANT

11. Claimant's mother testified that she contacted a few transportation companies on her own, and they all told her it would take too many resources for them to provide the services and it was not feasible to take claimant to and from Lake Elsinore and Fullerton at the rates provided. Claimant's mother did not accept the FMS because, in her mind, there was "always a belief" that IRC would put someone in place to provide transportation services. Claimant's mother also said that even though it is a flat rate that is provided, claimant's mother assumed she could negotiate. However, when she received the application, it was the same flat rate. Claimant's mother said she did not receive any application prior to May 2018, but she did fill it out and change the rate because the offered rate is not sufficient.

Claimant attends one class twice per week. She would like to attend more classes but the extended days would be too tough for claimant. Claimant's mother said

attending school has been wonderful for claimant who was in a very bad place just a few years ago. Claimant's father had left the family abruptly and the trauma set claimant back. The school has given her hope again and given her something to look forward to. She has friends and it has improved her communication skills.

12. Fay Devor is claimant's LVN. She has tended to claimant's needs for 25 years. Attending college has turned claimant around from being very introverted and almost suicidal to learning and communicating. Ms. Devor said they checked out many different programs, but the classes offered at the NOCCCD were by far the best for claimant's needs. Transportation is the most difficult part because of the distance, and because when insurance companies find out you are transporting a person with special needs, car insurance rates go up.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish by a preponderance of the evidence that IRC should fund the requested service. (Evid. Code, §§ 115, 500; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.)

THE LANTERMAN ACT

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) to provide 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. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

3. Welfare and Institutions Code section 4512, subdivision (b) defines "services and supports" as:

[S]pecialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option . . . Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.

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, DDS contracts with private non-profit community agencies, known as "regional centers," to provide the developmentally disabled 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.

6. Welfare and Institutions Code section 4646 requires that the Individual Program Plan and the provision of the services and supports be centered on the individual with developmental disabilities and take into account the needs and preferences of the individual and the family. Further, the provisions of services must be effective in meeting the IPP goals, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

7. Welfare and Institutions Code section 4648 requires regional centers to ensure that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and to secure services and supports that meet the needs of the consumer, as determined by the IPP. This section also requires regional centers to be fiscally responsible.

8. In implementing Individual Program Plans, regional centers are required to first consider services and supports in natural community, home, work, and recreational settings. (Welf. & Inst. Code, § 4648, subd. (a)(2).) Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family. (*Ibid.*) A regional center may, pursuant to vendorization or a contract, purchase services

or supports for a consumer in order to best accomplish all or any part of the Individual Program Plan. (Welf. & Inst. Code, § 4648, subd. (a)(3).)

9. The regional center is required to consider all the following when selecting a provider of consumer services and supports: A provider's ability to deliver quality services or supports to accomplish all or part of the consumer's individual program plan; provider's success in achieving the objectives set forth in the individual program plan; the existence of licensing, accreditation, or professional certification; cost of providing services or supports of comparable quality by different providers; and the consumers, or, where appropriate, the parents, legal guardian, or conservative of a consumer's choice of providers. (Welf. & Inst. Code, § 4648, subd. (a)(6).)

10. The regional center is also required to consider generic resources and the family's responsibility for providing services and supports when considering the purchase of regional center supports and services for its consumers. (Welf. & Inst. Code, § 4646.4.)

11. Welfare and Institutions Code section 4659, subdivision (c), prohibits a regional center from purchasing services available from generic resources, including IHSS, when a consumer or family meets the criteria of this coverage but chooses not to pursue this coverage. As the family is eligible for IHSS, but has not chosen to pursue it, IRC cannot fund the requested services.

12. California Code of Regulations, title 17, section 57300, sets forth rate-setting requirements applicable to all nonresidential service vendors.

13. Welfare and Institutions Code section 4648, subdivision (a)(3)(B), provides that a regional center may only provide reimbursement for services already provided where the service was provided by a vendor and was provided pursuant to an emergency vendor authorization.

EVALUATION

14. The Lanterman Act and the applicable regulations set forth criteria that a claimant must meet in order to qualify for regional center services. Claimant had the burden of demonstrating the need for the requested service or supports, and claimant did not meet that burden.

The rates permitted for transportation services to be provided are set by the Department of Developmental Services. A health and safety waiver to deviate upward from those rates may be obtained only after a vendor is found that is able and willing to provide transportation services. Despite a continuing effort by IRC, no vendor has been secured that is willing to provide transportation services to claimant because of claimant's medical needs and the distance from her home and the school claimant has chosen to attend – 42.1 miles. IRC continues to search for a vendor, and may file a health and safety waiver to deviate from the set transportation rates once a vendor is secured. That is IRC's obligation; no order is needed to require IRC to do what it is already legally obligated to do under the Lanterman Act.

The mileage rates allowed by the Department of Developmental Services for transportation are applicable statewide and provide uniformity in the rates permitted for the various transportation services provided. IRC is only permitted to provide the mileage reimbursement rate to vendors under the rates set by that schedule. For a personal assistant providing transportation, that amount is \$0.37 per mile. An FMS flat rate of \$128.14 per month is also an alternative way for claimant's mother to obtain reimbursement for future transportation she provides to claimant. However, IRC is not authorized to deviate from those rates.

Claimant's mother has provided transportation services to and from claimant's chosen school since 2016. This transportation was not provided by a vendor or pursuant to an emergency vendor authorization, and as such, reimbursement for the cost of

transportation claimant's mother has provided to claimant since November 2016 is not permitted by law.

Claimant has chosen² to attend a school 42.1 miles from her home, which requires freeway travel. The freeway claimant's mother travels on contains a toll road, and claimant's mother also must pay parking fees once at claimant's school. However, the toll road is not required to access claimant's school and parking is typically the responsibility of any student attending college. In other words, there is nothing about a toll or parking fees that are related to alleviating the effects of claimant's disability.

Claimant's mother clearly wants the best for claimant and it was clear from her testimony that transportation to and from claimant's school is difficult. However, on this record and under applicable law, claimant's appeal must be denied.

ORDER

1. Claimant's appeal for IRC to reimburse claimant's mother for the expenses she incurred in having to transport claimant to and from school for the past two years is denied.

2. Claimant's appeal for IRC to seek a vendor to provide transportation to and from claimant's school in Fullerton is denied. IRC is continuously seeking vendors as they are required to do and an order to do what IRC is already obligated to do is not needed.

² Although the program at the NOCCCD in Fullerton may be claimant's program of choice, if transportation problems make it a hardship, claimant certainly might want to explore other programs closer to home where public transportation for persons with special needs exists or where IRC might more easily be able to obtain a vendor to provide those services.

3. Claimant's appeal for IRC to obtain a health and safety waiver so that any vendor willing to transport claimant can obtain a higher rate for mileage than the rate permitted is denied. IRC has not been able to find a vendor willing to transport claimant to and from school. IRC cannot seek a health and safety waiver for a higher mileage rate until it first obtains a transportation vendor.

4. Claimant's appeal for IRC to authorize a \$150 flat fee per trip so that claimant's mother can hire someone at that amount to transport claimant to and from school is denied.

5. Claimant's appeal from IRC's determination that it will not pay claimant's mother \$150 per trip and the mileage amount that would normally be paid to a personal assistant to claimant's mother if she has to transport claimant to and from school, is denied.

6. Claimant's appeal for IRC to increase claimant's respite hours or personal attendant hours by 196 hours per month is denied.³

7. Claimant's appeal from IRC's determination that it will not pay all fees for express toll roads on the 91 freeway when transporting claimant to and from school is denied.

8. Claimant's appeal from IRC's determination that it will not pay parking fees at claimant's school is denied.

³ IRC agreed prior to the hearing to increase claimant's respite hours from 30 to 60 hours per month and claimant's personal assistant hours from 221 to 387 hours per month.

If IRC does not abide by that agreement, claimant's mother may file a new Fair Hearing Request.

DATED: October 1, 2018

KIMBERLY J. BELVEDERE

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.