

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Claimant,

vs.

VALLEY MOUNTAIN REGIONAL CENTER,

Service Agency.

OAH No. 2019010357

DECISION

This matter was heard before Administrative Law Judge (ALJ) Ed Washington, State of California, Office of Administrative Hearings (OAH), in Stockton, California, on February 15, 2019.

The Service Agency, Valley Mountain Regional Center (VMRC), was represented by Anthony Hill, Legal Affairs Advisor.

Claimant was represented by his mother.

Oral and documentary evidence was received. The record remained open through March 1, 2019, to allow additional documentation and written closing briefs to be submitted by the parties, and to allow those materials to be translated. The matter was submitted for decision on March 1, 2019.

ISSUE

Is VMRC required to fund additional respite hours for claimant?

FACTUAL FINDINGS

1. Claimant is a 20-year-old young man eligible for VMRC services based on a diagnosis of autism. He receives services and supports pursuant to the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 et seq.)¹

2. He can speak a few words at a time and receives weekly speech therapy. He has a history of property destruction and aggression and will raise his voice at his mother when annoyed. He exhibits disruptive social behaviors and needs to be supervised to ensure his safety.

3. Claimant cannot live independently on his own. He resides in the family home with his mother, father, and younger brother. He requires supervision and training to monitor personal care and enhance life and survival skills. Claimant is eligible for special education services but is being home schooled through California Virtual Academy. Claimant's mother requested that claimant be home schooled to provide a better learning environment. She assists claimant daily with his school work.

4. Claimant's VMRC Individual Program Plan (IPP) dated September 24, and November 26, 2018, provides that "respite benefits and maintains [claimant] in the least restrictive living environment." Claimant is eligible for 18 hours of in-home respite services per month per the family respite needs assessment. The IPP also notes as follows:

[RESPITE]

¹ Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

[Claimant's mother] is requesting 90 hours per month due to the demands of providing for [claimant's] care and educational needs and the impact this has on the care of [claimant's] sibling. [Claimant's mother] is interested in community integration respite as [claimant] needs further development of his community integration and social skills.

[RESIDENTIAL]

Currently there is some tension in the home as the family feels not enough attention has been dedicated to the younger [sibling] due to having to cater to claimant's needs. [Claimant's] younger sibling has run away from [home] several times.

[PERSONAL CARE]

[Claimant] is able to dress and bathe himself, however [claimant] requires multiple verbal prompts and reminders to complete these tasks thoroughly. He needs help with shaving while he transitions to an electric shaver. When brushing his teeth, he will only brush his front and bottom teeth. [Claimant] also needs help with combing his hair and remembering to brush his hair. [Claimant's mother] ... needs to constantly prompt [claimant] about completing tasks and provides guidance to complete tasks thoroughly. For example, [claimant] will often come out of the shower with shampoo still in his hair and [claimant's mother] will have to send him back.

[Claimant] is able to speak 3 to 4 words at a time. He's able to let his mother know what he wants or needs. [Claimant] receives [about 20 minutes of speech therapy once] a week, [claimant's mother] would like for [claimant] to receive more assistance with developing his communication skills. [Claimant] is often unsure/unconfident of what to say and will look to [claimant's mother] to speak for him.

[SOCIAL SKILLS]

[Claimant] does well in some social settings but has trouble following conversations. He will become excited and self-stimulate by talking to himself while others try to talk to him. He can answer questions if asked, but will be repetitive and does not know how to maintain interactions. Due to being home schooled [claimant] does not get as much social practice as needed. [Claimant] would benefit from practicing building relationships. [Claimant's mother] has requested a vendor to assist with social interactions and it was explained that there are not vendors that currently assist with developing social skills specifically. It was also explained to [claimant and his family] that ILS, future day program, and community respite could potentially include social skills. Family would like to factor in the fact that there are no specific social skills vendors into their appeal for additional respite hours as family will need to take the time to target his social skills goals.

[BEHAVIORS]

[Claimant] has a history of disruptive social behavior, property destruction and aggression. Mother states that [claimant] continues to have periodic behaviors but they have decreased. [Claimant] is resistive to un-preferred tasks. He also becomes annoyed when he does not need help and others try to assist. When he becomes annoyed he will raise his voice at [his mother]. [The parent] is not always sure how to redirect. Family has accessed [behavioral] counseling services through their insurance.

[SAFETY AWARENESS/MEDIC ALERT]

[Claimant] would benefit from learning basic street safety. [Claimant] is constantly supervised in all settings. The family is worried to let [claimant] go into the community for fear of him being taken advantage of while out. [Claimant] ... could easily be exploited. [Claimant] will work toward increasing his awareness of potential dangers around him. ... Safety awareness and community safety may also be address through his ILS assessment and ongoing supports.

5. During the November 26, 2018 IPP meeting, claimant's mother requested 90 hours of respite per month due to the demands of providing for claimant's care, education, and the impact these demands have had on the needs of claimant's younger sibling. On December 19, 2018, VMRC issued a Notice of Proposed Action (NOPA) denying claimant's request for "exceptional respite hours beyond the assessed family respite need." The reason for the action stated:

The Family Respite Need Assessment Tool was completed, which assess the consumer's medical condition, self-care needs, behavior concerns, age, mobility, and family situation to arrive at a respite service need. The assessment tool was properly administered, and reasonably relied upon by the service coordinator. The Family Respite Needs Assessment Tool has an exceptions feature that was not triggered, indicating that an exception is not warranted. This assessment tool is authorized by DDS and implemented agency wide when determining family respite service needs. There is no extraordinary event that impacts the parent's ability to provide care and supervision as required for any parent with the minor child.

6. Claimant's mother filed a Fair Hearing Request appealing VMRC's decision, on his behalf, which requests that VMRC provide the services requested. The reason for the requested hearing was as follows:

I requested 90 hours of respite which [allows for] three hours [or respite] per day. The regional center offered me 45 hours (one hour and 30 minutes per day) of respite, but they [did] not allow me to take the 45 hours of respite and appeal the difference [between the 45 hours of respite I requested in the 45 hours offered].

7. Stephany Medina is claimant's VMRC Service Coordinator. She has been assigned to claimant since September 2018. Ms. Medina testified regarding VMRC's procedures for providing respite services based on a consumer's assessed need. She

acknowledged the need for consumers' families to receive a break through respite from their caregiving responsibilities. However, she testified that the amount of respite provided to a family must be determined through the use of the Family Respite Needs Assessment tool. This tool is designed to objectively evaluate a family's respite needs, considering a consumer's age; activities of daily living; mobility; school, child care, or day program attendance; medical needs; behavioral needs; and special circumstance, such as the number of parents and children in the home, existing family crises, and the health of the caregiver.

8. VMRC obtained the information used to complete claimant's family respite needs, from his IPP. The IPP was prepared by Ms. Medina after completion of two IPP meetings that lasted approximately two hours each. She was joined at the meetings by claimant, claimant's mother, and David Vodden, VMRC Transition Unit Program Manager.

9. At hearing, Ms. Medina went step-by-step through the assessment tool and explained how she calculated claimant's need. She testified that the assessment tool determines the respite assessment score, which provides for a set number of monthly service hours, based on the following scoring criteria.

AGE OF CONSUMER:

Score 0 if three to five years old; score 3 if six to twelve years old; score 5 if thirteen to seventeen years old; and score 7 if eighteen years old or older.

ACTIVITIES OF DAILY LIVING:

Score 0 if no special care; score 1 if daily supervision; score 2 if daily hands-on assistance; score 5 if total care in some aspect of activities of daily living; and score 7 if total care.

MOTOR ABILITY:

Score 0 if independent with no equipment at home and in community with minimal care needs; score 1 if Independent with equipment at home or in community with minimal care needs; score 2 if Independent with equipment or chair (s) at home or in community with moderate care needs; score 3 if independent with equipment/chairs/lifting required at home or community with moderate care needs; score 5 if not independently mobile with equipment at home and in community, needs constant care; score 6 if not mobile, requires total care and repositioning every two hours.

SCHOOL/CHILDCARE/DAY PROGRAM ATTENDANCE

Score 0 if more than 20 hours per week; score 1 if 11 to 20 hours per week; score 2 if 5 to 10 hours per week; score 3 if chooses not to attend, home all day; score 5 if unable to attend, home all day (home/hospital instruction up to five hours per week).

MEDICAL NEEDS

Score 0 if no health problems (stable with preventative and routine care); score 2 if minimal mental or physical health problems (stable with ongoing medication); score 4 if moderate mental or physical health problems (stable with ongoing medication and continuing follow-up care); score 6

if major mental or physical health problems (constant monitoring by health professionals).

BEHAVIORAL NEEDS

Score 0 if behaviors are appropriate for age; score 1 if behaviors are easily redirected most of the time; score 3 if behavioral excesses require frequent redirection and is not always successful; score 5 if behavioral excesses unresponsive to redirection, requires intervention and close supervision; score 7 if behavioral excesses more often than weekly, require intervention and constant supervision.

SPECIAL CIRCUMSTANCES

Group 1 (Score 7 for one circumstance and 2 for any additional circumstances)

Caregiver has chronic or ongoing illness that affects providing of care and supervision (doctor's verification required)

Caregiver has acute or short term illness (doctor's verification required)

Family member in the home has acute illness or health crisis (doctor's verification required)

Caregiver has physical or mental disability (doctor's verification required)

Caregiver has advancing age-related decline

Caregiver is a regional center client

Multiple children with disabilities in the home needing respite

Single parent

Death of parent or child in the household within last year

Group 2 (Score 5 for one circumstance and 2 for any additional circumstances)

Birth or adoption within period of previous 6 months

Death of extended family member within period of previous 6 months

Health crisis of an extended family member

Intermittent Single Parent (spouse periodically absent or shared custody situations)

Loss of adult caregiver in the home (includes siblings) within period of previous 6 months

Group 3 (Score 3 for one circumstance and 2 for any additional circumstance).

Dependent adult in home that is not an adult child of the caregiver(s)

Recent (within 3 months) or imminent relocation

New caregiver in home within period of 3 months

Group 4 (Score 2 for this circumstance)

Two parents with two or more children

10. According to Ms. Medina's comparison of claimant's IPP to the criteria on the assessment tool, claimant scored a 7 in the Age of Consumer category; a 1 in the Activities of Daily Living category, a 0 in the Motor Ability category; a 5 in the School/Child Care/Day Program Attendance category; a 0 in the Medical Needs category, a 1 in the Behavioral Needs category, and a 2 in the Special Circumstances category, because claimant lives in a two-parent home with two or more children. Claimant's respite assessment tool score totaled sixteen, which, according to that form, corresponds with eighteen hours of in-home respite per month.

11. Mr. Vodden testified at hearing. He has worked for VMRC for 21 years and has worked in his current role as program manager for the past four years. He is very familiar with the respite assessment tool utilized by regional centers to determine the respite needs for a consumer's family. He testified that the respite assessment tool is subject to significant review by several interested groups before finalization. This includes the assessment tools initial proposal, consideration of public comments after the initial proposal, followed by review and approval by both the Department of Social Services and the VMRC Board, before implementation. The Board is comprised of community members, family members, and other interested parties.

12. Mr. Vodden participated in the planning team meeting in which claimant's parents requested 90 hours per month of respite services. Mr. Vodden took the request to the Purchase of Service Exceptions (POS) committee. In response, the committee

made a "compromise offer" of 45 hours of respite services per month. According to Mr. Vodden, the compromise offer was not based on any service need, but was based on an additional information claimant's mother conveyed to VMRC regarding an additional burden claimant's mother felt she had because she had been homeschooling her son for years and also due to a sibling of claimant's who had been running away from home. Claimant's mother reported that she did not have time to attend to the needs of claimant's younger sibling due to the necessity to attend to claimant's needs without sufficient respite.

13. Claimant's mother accepted the compromise offer of 45 hours of respite per month, and informed VMRC that she intended to appeal the denial of the balance of the respite hours requested through the fair hearing process. Mr. Vodden conferred with others at VMRC and was told that "it was not a legal option" for claimant's mother to accept the compromise offer of 45 hours of respite per month while retaining her right to appeal the denial of the additional respite hours requested to meet her stated needs. Mr. Vodden informed claimant's mother that she could either accept the compromise offer, and waiver her right to appeal, or exercise her right to appeal, but not receive the benefit of the 45 respite hours per month offered by VMRC to meet her family's needs.

14. Mr. Vodden testified that VMRC is required to have service standards and policies. These service standards and policies must be approved by the Department of Developmental Services prior to implementation. Service standards are useful in determining consumer IPP services, because they allow for "a nonbiased, fair, allocation of resources amongst the individuals [they] serve." VMRC has multiple service coordinators and managers who may have differing opinions regarding the appropriate amount of services that should be provided to a consumer. Service standards and policies "allows for consistency to the greatest extent possible of allocation of services."

15. Mr. Vodden testified that if a family is concerned with the current assessment tool or its results, the IPP is a living document. VMRC could always meet with the family and prepare an amendment that could include a re-completion of the family respite assessment if it was completed incorrectly or is in need of a change. Requests that exceed 30 hours per month of respite will go before the POS committee and typically require a respite assessment tool score in excess of 35 or specified family need.

16. Claimant's mother testified that she believes VMRC's denial of her increase for respite hours is improper for three reasons: (1) She asserted that regional centers, including VMRC, routinely provide less regional center services and supports to minorities than to non-minorities, and that this discriminatory provision of services is reflected in a respite service hours assessment that is significantly below what her family needs; (2) she asserted that VMRC should not be permitted to offer her 45 hours of respite services per month, in response to her request for 90 hours of respite services per month, and then retract their agreement that she accept the 45 hours of respite services, due to her desire to request a fair hearing to receive the full 90 hours of respite service requested; and (3) that the respite hours assessment form utilized by VMRC to determine claimant's respite needs, fails to provide VMRC with a comprehensive and useful assessment of claimant's needs when it does not consider in-depth and current information regarding claimant's challenges and needs.

17. Claimant's mother requested the 90 hours of respite services per month to address what she described as "two necessary services" for claimant; socialization and respite. Although she felt the 45 hours of respite offered by the POS committee was insufficient to meet her family's needs, she accepted the offer, pending a resolution of her request for 90 respite hours each month. VMRC refused to provide her with this option.

18. Claimant's mother testified that she is "having a lot of difficulty at home." For 20 years claimant's mother has provided ongoing and regularly assistance and support to him on a daily basis. Claimant's father also lives in the household, however, he is not available to provide nearly as much support as claimant's mother because he works from 7:00 a.m., to 6:00 p.m. Claimant's mother asserted that, because of the attention claimant requires, she has neglected her younger son's care.

19. Claimant's mother explained that claimant understands small simple sentences, but not more complicated sentences. Although claimant can "speak a little," he cannot express himself like others his age. As claimant is home schooled, claimant's mother spends the bulk of each day explaining to claimant what things mean. She "help[s] him all day using things like sticks and little balls" to help him understand his schoolwork because claimant is taking high school courses but his understanding is not at high school level.

20. Claimant becomes frustrated and engages in disruptive behaviors due to his difficulty communicating and because his mother has to help him with everything. His frustrations are frequently expressed aggressively.

21. To support her testimony, claimant's mother was allowed to show two video recordings at hearing. The videos were brief and were not entered into evidence. VMRC did not object to claimant's mother showing the video to support her claims. One video reflects claimant repeatedly and forcefully slamming his hand down onto a table with school supplies. Claimant's mother testified that the recording represents one example of claimant's aggressive behaviors due to difficulties communicating. The second video shows claimant moving around a room in what appeared to be an abnormal fashion. Claimant's mother testified that this videos reflects claimant's level of discomfort when there are minor changes to his regular routine.

22. According to claimant's mother, claimant engages in these types of aggressive behaviors approximately four times a week. Claimant's mother has been very reluctant to report the frequency of claimant's aggressive behaviors to VMRC or show VMRC representatives video recordings of claimant's behaviors, because she is afraid "they will take [claimant] away from [her] due to his aggressive nature." She is extremely concerned that claimant could be taken from their family due to his behaviors.

23. Claimant's mother testified that "[she] will always be there for [claimant] and he will always have [her] support, but [she] need[s] help from the regional center because [she is] tired ... [she is] tired and [her] younger son needs help.

24. Rubi Saldana and Elizabeth Gomez testified at hearing. They are both co-founders of the Integrative Community Collaborative, a 501(c)(3) organization formed by parent volunteers to support and advocate for parents in navigating the regional center system. They are both parents of children with intellectual disabilities who stated they have experience and training within the California intellectual disability community. Both Mses. Saldana and Gomez expressed that there have been long-existing regional center purchase of service disparities when comparing services received by minorities to non-minorities, that has had a significant effect on Latino families. They asserted that these disparities, as they apply to VMRC, are reflective in VMRC's failure to provide claimant with appropriate services and supports, including providing a comprehensive assessment of the family's need for respite services.

25. Ms. Saldana also testified that although she has known claimant's family for approximately one year, she met claimant for the first time on the day of the hearing. She spent approximately two hours with claimant and observed multiple behaviors that claimant's mother could not effectively manage. Ms. Saldana was fearful of claimant's mother's safety because claimant would stand over his mother dominantly and because

claimant "is large and does not know about personal space." She stated that claimant became anxious, agitated and was openly rude to his mother due to his agitation.

26. Ms. Gomez participated in claimant's last IPP meeting. She testified that claimant's mother provided VMRC with complete information to support her request for increased respite services. Ms. Gomez feels that the regional center "did the best they could" in assessing claimant's needs, but failed to understand claimant's needs because they have not "lived a day in the life" of claimant's family. She emphasized that the needs of a family with a child with an intellectual disability are "more than just a bunch of standardized questions." She added that the respite needs assessment tool is not sympathetic to the way families who receive regional center services and supports truly live as the challenges they face cannot all be made to fit neatly within the seven categories specified on the respite assessment form.

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LEGAL CONCLUSIONS

1. The Lanterman Act sets forth the regional center's responsibility for providing services to persons with development disabilities. An "array of services and supports should be established ... to meet the needs and choices of each person with developmental disabilities ... to support their integration into the mainstream life of the community ... and to prevent dislocation of persons with developmental disabilities from their home communities." (§ 4501.) The Lanterman Act requires regional centers to develop and implement an IPP for each individual eligible for regional center services. (§ 4646.) The IPP includes the consumer's goals and objectives as well as required services and supports. (§§4646.5 & 4648.)

2. Section 4646, subdivision (a), provides:

(a) It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

3. Section 4646.4, subdivision (a), in pertinent part provides:

Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

(1) Conformance with the regional center's purchase of service policies, as

approved by the department pursuant to subdivision (d) of Section 4434.

4. When all the evidence is considered, claimant's mother established that VMRC must fund additional respite hours for claimant. Through witness testimony and documentary evidence, she established that claimant's respite needs exceed those reflected during claimant's October 2018 respite needs assessment. Whether that is due to the failure of claimant's mother to fully communicate claimant's challenges and the commitment she makes to meet those challenges, or the failure of the claimant's service coordinator to consider sufficient information to make a more comprehensive assessment of claimant's current needs; the October 2018 assessment of 18 respite hours per month appears inadequate based on the evidence presented at hearing. The provision of services and supports by the regional center must take into account the needs and preferences of the individual and family, promote community integration, independence, and living in productive and healthy environments. (§ 4646, subd.(a).)

5. That 18 respite hours is insufficient is reflected in VMRC's POS committee's compromise offer to provide claimant 45 respite hours, based on additional information claimant's mother provided. Presumably, the POS committee approved 45 hours per month of respite service for claimant based on all the information available to the committee, including claimant's challenges and the obligations of claimant's family to meet those challenges, in full consideration of the regional center's obligation to provide services and supports pursuant to their Lanterman Act responsibilities and restrictions. In short, in November 2018, VMRC agreed to provide claimant with 45 hours of respite based on his assessed need. Claimant and his family are entitled to the benefit of that assessment.

6. There was no evidence offered at hearing that there has been any change in circumstances that would affect the POS committee's determination claimant should receive 45 hours of respite services per month, other than claimant's mother expressing

her desire to utilize the fair hearing process to secure the additional respite hours requested. VMRC provided no authority or evidence at hearing to support that a consumer may lose the benefit of appropriate services and supports by engaging in the fair hearing process. 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 argued that to allow claimant to receive additional respite hours over and above the 18 hours of respite assessed in September 2018 would be tantamount to disregarding "service standards [and] policies [and instead] rely[ing] on speculation, hunches, guesses, feelings, and emotions as methods to measure consumers service needs," which would result in "a chaotic and ineffective system encouraging inescapable abuse of power [and] destroying public trust." This argument was not persuasive for two reasons. Claimant's mother is not seeking to have regional center service standards or policies disregarded in favor of "speculation, hunches, or guesses." She is requesting that the application of existing regional center service standards and policies incorporate comprehensive and useful information from consumers and their families in furtherance of Lanterman Act goals. This argument also fails because the VMRC POS committee had already concluded that claimant is entitled to additional respite hours, based on information provided to them regarding claimant's needs.

8. Both parties submitted evidence which indicates that a purchase of services expenditure disparity exists when comparing statewide regional center expenditures for minorities when compared to non-minorities. However, claimant did not establish that this disparity affected his respite needs assessment in any way or that

claimant's race played any role in VMRC denial of claimant's request to receive 90 hours of respite services a month.

ORDER

1. VMRC shall immediately fund 45 hours of respite services per month for claimant, as determined by its Purchase of Service Exceptions committee in November 2018.

2. Within thirty days of receipt of this Decision, VMRC shall take all necessary action to convene its best practices committee or IPP review committee, with comprehensive input from claimant's mother, to develop a plan to address claimant's behavioral outbursts, need for improved communication skills, increased socialization and independence.

DATED: March 15, 2019

ED WASHINGTON

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of this decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)