

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT

and

SAN DIEGO REGIONAL CENTER

OAH No. 2019120405

DECISION

Marion J. Vomhof, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 22, 2020, in San Diego, California.

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

Claimant's mother represented claimant. Claimant's stepfather was also present for the hearing.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on January 22, 2020.

ISSUE

Can SDRC fund claimant's request for transportation from her home to her day program at a contract rate greater than currently authorized by the Department of Developmental Services (DDS)?

FACTUAL FINDINGS

Background and Jurisdictional Matters

1. Claimant is a 27-year-old female who qualifies for regional center services based on a diagnosis of Downs syndrome and nonverbal autism. She has an ileostomy as a result of Hirschsprung's disease¹ which she suffered as a young child. Claimant requires supervision at all times to maintain her health and safety. Claimant's mother and stepfather are her conservators, and claimant lives with them in the family home.

2. Claimant attends a day program in Escondido, which is a 30-minute drive, each way, from the family home in San Diego. SDRC has previously funded transportation for claimant to and from her program through two SDRC vendors, No Vacancy Inc. (No Vacancy) and AAA Transport (AAA). Given the safety issues claimant encountered with these two vendors, as noted more fully below, claimant's mother made arrangements as of September 27, 2019, for Care 4 U Mobility (Care 4 U) to

¹ Claimant's mother explained that Hirschsprung's disease is an abnormality in which nerve cells are missing from the colon.

transport claimant to and from her program at a cost of \$78 per day. This rate exceeds the transportation rate SDRC is authorized to pay. Claimant's parents are currently paying that rate, but have requested that SDRC fund this service.

3. On October 31, 2019, SDRC issued a Notice of Proposed Action (NOPA) stating that SDRC would fund mileage reimbursement for (claimant's) transportation to and from her day program. The reason given for this action was: "The family used two SDRC vendors for round-trip transportation to day program, and was very dissatisfied with their services. Family would like to use another SDRC vendor, whose rate is above the contracted limit."

4. Claimant submitted a Fair Hearing Request on December 6, 2019. The request stated the following under the heading, "Reason(s) for requesting a fair hearing:"

SDRC has not provided safe transportation. Suggested relocating to a different day program to accommodate transportation. This program would not be close to home or meet her needs.

The fair hearing request also asserted that the following was necessary to resolve the complaint:

Requesting current transportation be paid for by current SDRC vendor. SDRC is required by law to provide transportation to and from her program.

This hearing followed.

Evidence Presented at Hearing

5. Anthony Ferguson is SDRC's Community Projects and Transportation Manager, and has been with SDRC since 2003. He testified that claimant was initially transported to her day program by No Vacancy, when that arrangement "fell through," claimant was transported by AAA. He understood that due to some "miscommunication," AAA stopped providing services and the family found Care For U, which is currently transporting claimant at a rate of \$78 per day, paid for by her parents. Claimant's parents have requested that SDRC fund this transportation.

Mr. Ferguson explained that in 2008, the Legislature froze the rates regional centers can pay transportation vendors. The current rate SDRC is authorized to pay for transportation is \$15 per day. However, regional centers may fund vendors who had higher rates in 2008, like AAA, above the \$15 limit. In addition, AAA is classified as a limousine service so they have a higher rate. AAA is SDRC's most expensive transportation vendor.

Mr. Ferguson explained that because the Care For U rate exceeds the DDS authorized rate, SDRC would have to obtain a health and safety waiver through DDS. The waiver process requires that SDRC's case management team complete a portion of a spreadsheet provided by DDS; the spreadsheet is then submitted to the transportation vendor to provide certain financial information; and finally, the vendor must submit the completed spreadsheet to DDS for approval. Mr. Ferguson has found that with past waiver requests, DDS generally asks SDRC's transportation manager additional questions as to why SDRC is requesting the higher rate. Mr. Ferguson is not aware of DDS approving an SDRC waiver request. However, he confirmed that SDRC is currently preparing a waiver request on claimant's behalf but the request has not yet been submitted to DDS.

6. Mark Gates is a licensed clinical social worker (LCSW) and a Program Manager for SDRC. He has been with SDRC for over 20 years. Mr. Gates has been working with the transportation department to resolve this issue since September 2019. It is his opinion that claimant is currently in the most appropriate day program based on her needs.

7. According to SDRC's Consumer I.D. Notes,² claimant's family expressed concerns regarding the services of No Vacancy in late December 2017, and requested other transportation options, specifically AAA. By mid-March 2018, No Vacancy cancelled services with claimant, and advised SDRC that claimant had never been on the bus more than an hour, no other parents of children on the bus had complained, and claimant's mother had been late being home. SDRC's transportation coordinator requested AAA "as a last resort option," and AAA was approved.

In August 2019, AAA advised SDRC that as of August 30, 2019, they were no longer willing to transport claimant as the family repeatedly refused to receive claimant when the driver dropped her off and the driver waited for extended periods of time for claimant to be ready in the morning. SDRC spoke with stepfather who was "distraught" and stated that AAA was always late but claimant's parents had not complained.

On September 24, 2019, SDRC informed claimant's mother that they were unable to find a different vendor. She advised that she had contacted Care 4 U Mobility who was willing to transport claimant but was not satisfied with SDRC's rates,

² These are also referred to as Title 19s.

so claimant's parents were willing to pay the difference. A few days later, SDRC advised claimant's mother that Care 4 U was not approved.

On October 2, 2019, Mr. Gates informed claimant's mother that AAA was willing to transport claimant again, but mother stated that she was not willing to use AAA again due to their past issues. Mr. Gates suggested seeking a different day program for claimant with more transportation options; mother stated that she did not want claimant to change programs. Claimant's mother also asserted that SDRC's mileage reimbursement rate is too low. In late October, Claimant's parents met with Ms. Blumen and Mr. Gates, and discussed SDRC's NOPA and moving forward with the waiver process.

8. Claimant's mother testified that No Vacancy began transporting claimant about two years ago, with "no problems initially except" for "bathroom" accidents because claimant was on the bus³ for about one hour and forty-five minutes each way; lack of air conditioning in the back of the bus such that during the summer, claimant would come home "sweating;" and the bus was either early or late. One incident occurred when claimant's father was to pick her up, the bus driver brought claimant home three hours early. As her parents were not home, the driver left claimant with a neighbor, who the mother described as an alcoholic and who was not authorized to receive claimant. When the driver was questioned, he responded that he had a bad day and that he left claimant with the woman because she said she knew claimant's

³ During the hearing, both terms "van" and "bus" were used to describe the vehicles used to transport claimant. To avoid confusion, the term "bus" was used throughout this decision.

parents. Claimant's mother was understandably concerned for claimant's safety and terminated service with No Vacancy.

AAA then began transporting claimant. On the first day, after the bus was over an hour late bringing claimant home, mother contacted AAA's director, who was not initially able to locate the driver. Claimant's mother then learned that the driver was changing a flat tire and was in an area where he did not have cell phone service. Three hours later claimant was brought home. Another incident occurred about nine months later, when claimant was being "transported in the back seat of a Toyota Corolla with two adult males with behavioral issues." When claimant arrived home, the driver told her mother to "check her" because "the boys sitting on either side of her were fighting" during the ride. Claimant's mother checked claimant, but found no physical marks. She could not ask claimant what happened because claimant is nonverbal. Mother noted that claimant was the only female rider on the bus route. When AAA switched to a female driver, claimant's mother asked that claimant sit in the front seat of the vehicle, but her request was not honored. The new driver was "always late" and would "sometimes" notify claimant's mother. Claimant then came home with a "strange round mark" on her arm "like she had been bitten." A few months later, she came home with a "welt, and clear teeth marks" on her arm. Claimant's mother confirmed that nothing had happened to claimant at her program. The bus driver stated that claimant had been put in the backseat with a boy who had been known to bite. When claimant's mother complained, the driver advised that she would no longer transport claimant and said, "You'll have to pick her up."

9. Claimant's mother then found Care For U Mobility, which has been transporting claimant since September 27, 2019. Claimant's mother asserted that both

No Vacancy and AAA had safety issues and SDRC is required to provide safe transportation for claimant.

10. Claimant's stepfather has been claimant's stepfather for 20 years. Regarding No Vacancy, claimant would be on the bus for 90 minutes twice each day, at times she would become car sick and throw up when she arrived home. When the driver brought claimant home early and left her with the unauthorized neighbor, that neighbor threatened to call Child Protective Services (CPS) on claimant's parents because they were not home. With AAA, the male drivers "were ok," the problem was with one female driver. She never honored parent's request to sit claimant in the front seat, even though claimant was the only female in the vehicle. The "first time we questioned (the program manager) or (the female driver), we were suspended." Claimant's transportation services were suspended twice by AAA, even though claimant's parents were willing to work with AAA. When claimant was bitten for the second time, claimant's parents no longer felt safe using AAA. Since Care For U began transporting her, claimant has "had no issues" or "outbursts" at her program. The bus ride is usually 30 minutes each way, and she is picked up and dropped off on time. Claimant is easy to communicate with when she arrives home.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. In a proceeding to determine whether a regional center should fund certain services, the burden of proof is on the claimant to establish by a preponderance of the evidence that the regional center 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 Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq.

3. Welfare and Institutions Code section 4501 acknowledges that California has accepted responsibility for persons with developmental disabilities and that an "array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community." One goal is "to prevent the dislocation of persons with developmental disabilities from their home communities."

4. Welfare and Institutions Code section 4512, subdivision (b), provides that services and supports are "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." Determining which "services and supports are necessary for each consumer shall be made through the individual program plan process."

5. Welfare and Institutions Code section 4646 provides that the Legislature intended that the [IPP] and "provision of services and supports by the regional center system is centered on the individual and the family . . . and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and

stable and healthy environments.” The Legislature further intended that “the provision of services to consumers and their families be effective in meeting the goals stated in the [IPP], reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.”

6. Welfare and Institutions Code section 4646.4, subdivision (a), requires regional centers to establish an internal process that ensures adherence with federal and state laws and regulations, and when purchasing services and supports, ensures conformance with the regional center’s purchase of service policies.

7. Welfare and Institutions Code section 4646.5, subdivisions (a)(7)(A) and (B), provide that the planning process for the IPP described in section 4646 shall include the following:

(7)(A) The development of a transportation access plan for a consumer when all of the following conditions are met:

(i) The regional center is purchasing private, specialized transportation services or services from a residential, day, or other provider, excluding vouchered service provides, to transport the consumer to and from day or work services.

[¶] . . . [¶]

(B) To maximize independence and community integration and participation, the transportation access plan shall identify the services and supports necessary to assist the consumer in accessing public transportation and shall comply with Section 4648.35.

8. Welfare and Institutions Code section 4648 requires regional centers to ensure that services and supports assist consumers in achieving the greatest self-sufficiency possible; secure services and supports that meet the needs of the consumer, as determined by the IPP; and be fiscally responsible.

9. Welfare and Institutions Code section 4648.4, subdivision (b), provides that a regional center may not pay any provider of certain services, including transportation, at a rate that is greater than the rate that is in effect on or after June 30, 2008, unless the regional center demonstrates that the approval is necessary to protect the consumer's health or safety and DDS has granted prior written authorization.

10. Welfare and Institutions Code section 4648.35 provides:

At the time of development, review, or modification of a consumer's individual program plan (IPP) or individualized family service plan (IFSP), all of the following shall apply to a regional center:

(a) A regional center shall not fund private specialized transportation services for an adult consumer who can safely access and utilize public transportation, when that transportation is available.

(b) A regional center shall fund the least expensive transportation modality that meets the consumer's needs, as set forth in the consumer's IPP or IFSP.

(c) A regional center shall fund transportation, when required, from the consumer's residence to the lowest-cost vendor that provides the service that meets the consumer's needs, as set forth in the consumer's IPP or IFSP. For purposes of this subdivision, the cost of a vendor shall be determined by combining the vendor's program costs and the costs to transport a consumer from the consumer's residence to the vendor.

(d) A regional center shall fund transportation services for a minor child living in the family residence, only if the family of the child provides sufficient written documentation to the regional center to demonstrate that it is unable to provide transportation for the child.

Evaluation

11. Both parties are in agreement that claimant is attending the closest and most appropriate day program to achieve her IPP goals, and transportation to the program is a service that is appropriate for SDRC to fund.

SDRC has located and funded two different vendors to transport claimant to her day program. Although some contradictory evidence was provided as to the underlying circumstances, both vendors cancelled their services due to complaints from claimant's family, and claimant's parents believe that neither vendor provided the safe transportation to which claimant is entitled.

SDRC has diligently sought, but been unable to find, another vendor able to transport claimant at the DDS authorized rate. While it is understandable that

claimant's parents are frustrated by SDRC's refusal to fund the services of Care For U, SDRC is prohibited from funding transportation services at a greater rate without first obtaining a health and safety waiver from DDS.

SDRC has begun preparing a waiver request but it has not yet been submitted to DDS. Accordingly, SDRC properly denied claimant's request to increase its contract rate for transportation services, which can only occur if DDS first grants a health and safety waiver. (Welf. & Inst. Code, § 4648.4, subd. (b).)

ORDER

Claimant's appeal that SDRC fund transportation to claimant's day program at a rate that exceeds the authorized rate without a DDS waiver is denied. SDRC shall complete the DDS waiver process and submit it to DDS.

DATE: January 29, 2020

MARION J. VOMHOF

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.