

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

In the Matter of:

CLAIMANT,

vs.

TRI-COUNTIES REGIONAL CENTER,

Service Agency.

OAH No. 2021010590 (PRIMARY)

OAH No. 2021010593 (SECONDARY)

DECISION

Marlo Nisperos, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard these consolidated matters by videoconference on April 7, and April 8, 2021. Danelia Walker, Fair Hearing Specialist, represented Tri-Counties Regional Center (TCRC or Service Agency). Claimant was represented by Parent.

Testimony and documents were received in evidence. Claimant's request to submit a written closing statement was granted. The record was left open and both parties were permitted to submit written closing briefs by April 12, 2021. Claimant

timely filed a closing brief, marked as Claimant's Exhibit T. The record closed and the matter was submitted for decision on April 12, 2021.

ISSUES

1. Whether TCRC must grant Claimant's request for an increase of his in-home respite hours to 40 hours per week?

2. Whether TCRC must grant Claimant's request for rate exception of \$25 per hour for caregiver?

EVIDENCE

Documentary: For case number 2021010590 (Primary) – Service Agency Exhibits 1, 2, 4 through 11, 13, and 14. For case 2021010593 (Secondary) – Service Agency Exhibits 1, 2, 4 through 6, 8 and 9. Claimant's exhibits A through O and Q through T.

All references to TCRC's exhibits are to the primary case, unless otherwise noted.

Both parties submitted documentary evidence that contained information obtained during the confidential mediation. Evidence regarding the discussions between the parties during mediation was not considered in this decision.

Testimonial: Jody Bruno, TCRC Service Coordinator; Mindy Mosher, TCRC Service Manager; Danielle Shami, Family Support Specialist at Channel Islands Social Services (Channel Islands); Edith Wysinger, Program Director at Channel Islands; and Parent.

FACTUAL FINDINGS

1. Claimant is a nine-year-old male client of TCRC. He qualifies for regional center services under a diagnosis of quadriplegic cerebral palsy and has been diagnosed with cortical visual impairment.

2. Claimant lives with his parents and twin brother at the family home. Claimant is non-ambulatory and requires full assistance with all physical tasks. Parent contends he needs constant supervision.

3A. According to Claimant's most recent Individual Program Plan (IPP), dated May 28, 2020, Parent is at home full time and provides educational instruction during home schooling. At the time of hearing, Claimant was in the fourth grade and he was attending an independent public charter school. Prior to the COVID-19 pandemic, Claimant was attending school in-person two days per week to socialize with peers and was home schooled by Parent on the other days. Parent received training in the Orton-Gillingham method and has seen a marked improvement in Claimant's reading skills since implementing this program. (Exhibit 5.)

3B. Parent does not intend to send Claimant back to school until the threat of COVID-19 infection has diminished. Claimant's physician recommends he not attend in-person school because Claimant is at high risk for complications of respiratory infections. (Exhibit L.)

3C. Claimant receives In-Home Supportive Services (IHSS), and Parent is his IHSS provider. Claimant receives approximately 201 IHSS hours per month. (Exhibit 8.)

3D. Claimant receives 20 hours per week, 86 hours per month, of respite through Channel Islands. (Exhibit 5.) Claimant's request for respite was approved by

TCRC pursuant to an IPP amendment/addendum-exception (IPP exception). Claimant has had an IPP exception authorizing 20 hours per week of respite since September 2017.

4. In June 2019, Jody Bruno, TCRC Service Coordinator, was assigned to assist Claimant. To acquaint herself with Claimant's needs, Bruno reviewed his IPP and IPP exception. IPP exceptions are required to be reviewed every three to six months, or as necessary. (Exhibit 14, pp. 5-6.) Bruno reviewed Claimant's IPP exception for respite every one to three months. (Exhibit 6.) Bruno's review was consistent with TCRC policy and procedures. Bruno reviewed Claimant's respite to ascertain why Parent was not utilizing all respite hours and to determine whether Claimant's needs were changing.

5A. In the years 2015 through 2020, Parent utilized between zero and 315 hours of respite per year, up to 31 percent of the hours that were provided pursuant to the IPP exception. (Exhibit S.)

5B. Bruno contacted Channel Islands, the employer of Claimant's respite providers, to investigate the reasons Parent was not utilizing the respite hours. Channel Islands Program Director, Edith Wysinger, confirmed that Parent was not currently utilizing all respite hours. (Exhibit 6.) Wysinger was unaware of any problems Parent was experiencing that would explain why the respite was not being utilized.

5C. Parent informed Bruno that she experienced difficulty finding reliable respite providers who met the family's requirements for safety and professionalism. Bruno suggested they discuss reducing the respite hours not being used. Parent asked that the respite not be changed so that it would act as a safety net for her in case she needed them. Bruno agreed to not change the IPP exception granting respite. Bruno

referred Parent to other agencies to help Parent locate caregivers who would meet the family's needs and permit the family to utilize the respite.

6. Parent accepted Bruno's recommendation and worked with a different agency for a brief period. The agency was not successful in recruiting a respite provider that met Parent's specifications, so Parent returned to Channel Islands.

7A. Wysinger informed Bruno that historically Parent found her own providers and did not accept the providers who were referred by Channel Islands. Parent informed Bruno that she did not ask Channel Islands to refer respite providers to her because on the few occasions that providers were referred, they were not a good match and did not meet the family's preferences.

7B. At the August 15, 2019 Planning Team Meeting, Bruno determined that Parent's explanation of the assistance needed was beyond what a respite caregiver was authorized to provide. As a result, Bruno asked whether Parent had looked at other generic services provided by IHSS, California Children's Services or a certified nursing assistant provided by her medical insurance provider, to locate professionals who could provide the care and support Claimant needed. Parent did not provide Bruno with information related to other generic services that she explored. TCRC authorized another IPP exception of 20 hours of respite for January 1, 2020 to March 31, 2020, to permit Parent to continue to work with Channel Islands to find a respite provider who met the needs and preferences of the family. (Exhibit 6, pp. 16-19.)

REQUEST FOR 40 HOURS OF RESPITE PER WEEK

8. On September 25, 2020, Parent requested an additional 20 hours of respite because she needed assistance while Claimant was not attending school in-

person as a result of school closures due to the COVID-19 pandemic. Parent requested a total of 40 hours per week of respite. (Exhibit E.)

9A. In order to determine whether to grant Parent's request for 20 additional hours of respite, TCRC asked Parent to provide an updated schedule of services. TCRC intended to use the schedule to determine if a need existed after considering the generic services offered to Claimant.

9B. TCRC asked Parent for the schedule to include when the IHSS hours were being applied, when Claimant attended his various therapy sessions, and what services were offered to him by the school district pursuant to his Individualized Education Program (IEP).

9C. On November 21, 2020, Parent provided Claimant's current IEP dated August 27, 2020. (Exhibit Q). Parent prepared a weekly schedule and provided it to TCRC. (Exhibit 9, p. 6.)

9D. The weekly schedule reflected that Parent was requesting respite support during the school day from 8:30 AM to 3:30 PM. (Exhibit 9, p. 6.) Parent explained that the respite provider would help Claimant complete schoolwork while Parent taught the lesson. Alternatively, the respite provider would prepare Claimant's work in a visually appropriate format using the PowerPoint computer program to accommodate Claimant's visual impairment.

9E. Parent intended for the respite caregiver to provide hand over hand assistance to Claimant to write his schoolwork, read schoolwork to him and help him work with math manipulatives. Parent needed the respite provider to obtain school materials for Claimant online or in his desk. Parent also wanted the respite provider to help Claimant during lunch break, bathroom breaks, or recess breaks outside. (Exhibit

9, p. 6.) Parent said she wanted the respite provider to partner with her and help with all tasks involving Claimant during the school day.

10. TCRC's purchase of service policy for in-home respite services, entitled Service Policy Guidelines, Policies and Guidelines – 11501, states in pertinent part:

Regional Center will use creative and innovative approaches to meet objectives contained in the person's IPP that are cost-effective use of public funds. Family support services for school-age individuals may be purchased when: . . . there are few or no natural supports or generic supports available to provide necessary supervision during times when the parent(s) are away . . . Family support services may include . . . in-home respite care . . . Exception Policy: TCRC recognizes that some individual needs are so unique that they may not be addressed in this Service Policy and may require an exception. Such request for an exception to a Service Policy will be made through the Planning Team process. . . For [children without severe behavioral challenges], an exception will be required for more than 25 hours of respite per month. (Exhibit 14, pp. 3-4.)

11A. TCRC determined that additional respite was not appropriate for the need Parent expressed in the schedule provided. Respite is intended to be a fun, safe and interactive time with the child, while giving both the Parents and child a break. Respite is not intended to be used for school or educational purposes because the respite providers are not trained to assist in schoolwork.

11B. TCRC reviewed Claimant's IEP and observed that he was offered paraprofessional support through remote learning as well as during in-person synchronous learning. (Exhibit Q, p. 61.) On November 21, 2020, Parent consented to the provision of speech and language, orientation and mobility, and vision services; Parent did not consent to all services offered by the school district. (Exhibit R.) Parent did not believe that paraprofessional support delivered virtually would be helpful based on Claimant's needs.

11C. Parent contended that the IEP reflected the school district's refusal to provide in-home paraprofessional support to Claimant during the COVID-19 pandemic. (Exhibit Q, p. 61.) Parent believed that TCRC was required to provide Claimant paraprofessional support during the school day so he could access his education. Parent argued TCRC isn't supplanting services from the school district because the school district has refused to provide these services.

11D. TCRC asserted that the respite provider could not provide care during school hours because that would overlap with services the school district was responsible for providing pursuant to Claimant's IEP. Although Parent refused the virtual paraprofessional support offered, TCRC determined that it was a generic service that was not being utilized. TCRC concluded that providing respite during the school day would result in it supplanting the services of the school district.

12A. The schedule provided by Parent did not explain where personal care support provided by IHSS was being utilized. TCRC scheduled a meeting with Parent to discuss how IHSS hours were being implemented. TCRC also wanted to discuss with Parent the possibility of utilizing a personal assistant rather than respite provider because that would be more in line with the needs described by Parent.

12B. TCRC proposed that Parent, Bruno and Mindy Mosher, TCRC Service Manager, hold a Planning Team Meeting so they could discuss the difference between a personal assistant and respite caregiver and answer any questions Parent may have. At the meeting, TCRC intended to review Claimant's schedule and learn when the IHSS hours were being applied.

13A. On December 14, 2020, Bruno, Mosher and Parent held a Planning Team Meeting. They discussed the reasons underlying Parent's request to increase respite to 40 hours and how TCRC must consider generic services provided by IHSS and Claimant's school district pursuant to his IEP prior to approving the request. Parent and TCRC recorded the meeting; Parent provided a transcript of the meeting. (Exhibit I.)

13B. TCRC informed Parent that the Department of Developmental Services (DDS) was allowing extra support and supervision to consumers due to the COVID-19 pandemic. TCRC explained there was more flexibility for personal assistant, respite and day care hours. TCRC was granting extra supervision during the school day, however these services could not be used for educational purposes.

13C. At the meeting, Mosher explained to Parent that adding a personal assistant as a service in Claimant's IPP was more in line with the additional support Parent requested. A personal assistant provides hand over hand assistance with toileting, hygiene, mobility or other personal needs of the consumer. Mosher explained that neither respite nor personal assistant services can be used for completing schoolwork because that would supplant services that should be provided by the school district.

14. The parties did not reach an agreement during the Planning Team Meeting regarding Parent's request for 40 hours of respite. TCRC asked parent to provide additional information related to the IHSS hours and when they were being utilized.

15. On December 15, 2020, Parent provided Mosher with a Notice of Action from IHSS. (Exhibit 8.) TCRC requested this document so it could create a schedule of services to show when each generic service was being implemented in Claimant's daily schedule. The Notice of Action did not reflect when the generic resources were being utilized. Based on the information provided, TCRC was unable to identify an unmet need in Claimant's schedule.

16. On December 16, 2020, TCRC sent Parent a Notice of Proposed Action (NOPA) notifying her that it was denying the request for 40 hours per week of respite services. Parent filed a Request for Fair Hearing, and this matter (Case No. 2021010590 – Primary) ensued.

17A. After requesting a fair hearing, Parent agreed to have an informal meeting with TCRC. On March 9, 2021, Parent provided TCRC an updated schedule describing when respite would be utilized. (Exhibit 9, p. 4.)

17B. The new schedule showed that Claimant would receive homeschooling from 7:00 AM to 9:00 AM every day of the week. The new schedule showed respite hours from 10:00 AM to 5:00 PM Monday through Thursday, and 10:00 AM to 4:00 PM on Friday and Saturday. Based on this new schedule, Mosher opined that TCRC would approve an IPP exception for Claimant's request for 40 hours of respite.

REQUEST FOR RATE EXCEPTION

18. At the Planning Team Meeting, Parent also requested to increase the hourly wage for Claimant's respite providers to \$25 per hour.

19A. At fair hearing, Parent explained she researched the salary for special-needs caregivers at private companies and learned the average hourly wage was between \$21 and \$38 per hour. (Exhibit M, pp. 5-6.)

19B. Parent contended that Channel Islands' \$17 hourly rate was not adequate to attract professional caregivers that could meet Claimant's needs. Parent argued that a pay rate of \$25 per hour would allow Claimant to access a private agency with full-time trained staff that could assist him with activities of daily living. Parent explained that based on Claimant's severe disability he requires a mature professionally trained caregiver.

20. Parent shared that one of Claimant's current respite providers is entering graduate school. Parent believed that an increase in pay would increase the likelihood of retaining this valuable provider or locate a similarly qualified caregiver. Parent gave examples of the difficulty she experienced in recruiting and retaining respite providers because the cost of living in the area was high and the hourly wage was too low to attract quality applicants.

21. Parent testified that Claimant needs a health aid that is trained on all daily living needs. Parent shared her negative experiences with the paraprofessionals at Claimant's school who on two occasions caused Claimant to faint because they did not position him properly in his equipment.

22A. Parent explained the annual respite hour usage records supports her contention that she has not found a consistent and reliable care giver. Although Parent has been authorized 20 hours of respite each week since 2017, the hours have not been utilized based on her inability to locate dependable caregivers. (Exhibits O and S.)

22B. Parent goes long periods of time without caregivers because the vetting process is time consuming and exhausting for her because she is simultaneously caring for and educating Claimant. Parent shared that some caregivers are dissuaded from employment with Channel Islands because the hiring process takes a long time, and the caregivers give up.

23. Parent rejected TCRC's recommendation to use a personal assistant rather than a respite caregiver because the compensation was \$12 to \$14 per hour. Parent objected to paying a personal assistant less when they were tasked with bathing, feeding, toileting, and diapering Claimant. Parent believed that a personal assistant should be paid more for providing a higher level of care.

24. Parent does not leave respite caregivers alone with Claimant for long periods of time. Nor does Parent allow them to take Claimant out of the home with his electric wheelchair. Parent is concerned they will be inattentive, and Claimant will be injured by the 300-pound wheelchair falling on his 60-pound body if Claimant accidentally drives off a curb. Parent believes it would be negligent for her to leave Claimant alone with a respite caregiver based on his needs.

25. Parent described her schedule as busy and demanding and she needs a caregiver that is consistent and dependable. Parent described her frustration with caregivers that are late, are frequently and unpredictably absent, are morbidly obese which affects their ability to assist Claimant, or they lack a professional demeanor that

is expected from the family. Parent wants a caregiver that is reliable, trustworthy and dependable. Parent would also like to work with a company that can get an adequate and timely replacement if Claimant's caregiver is unavailable.

26. After the Planning Team Meeting, Mosher researched TCRC's policy and procedures to authorize a rate exception. Mosher learned that the process for increasing the wage for a service provider was explained in the DDS Health and Safety Waiver Process guide. (Exhibit 8, secondary case).

27. The Health and Safety Waiver Process stated in pertinent part: "Welfare & Institutions Code sections 4681.6, 4648.4(b), 4681.5, 4684.55, 4689.8, 4691.6 and 4691.9 authorize the DDS to approve exemptions to rate freezes for the purpose of mitigating risks to consumer health and safety. . . ." (Exhibit 8, secondary case.)

28A. Wysinger explained how the hourly wage was established for Channel Islands. When the company was founded, it submitted a cost assessment to the DDS reflecting costs to administer the program. DDS considered the information and set the hourly wage for service providers based on the data collected. Channel Islands is not able to change the hourly rate of \$17 for respite caregivers without permission from DDS.

28B. Channel Islands offers longevity pay increases and may compensate its employees for mileage if they possess automobile insurance. According to Wysinger, Channel Islands pays the highest wage for respite caregivers in the county.

29. Bruno contacted Wysinger to inquire if respite caregivers expressed concern that there was a risk to Claimant's health and safety. No employee had expressed to Wysinger that Claimant's needs were challenging or that his health or safety were a concern. Channel Islands employs caregivers that serve consumers with a

wide range of needs; some consumers have similar needs as Claimant, and some have more needs than Claimant.

30. Channel Islands Family Support Specialist, Danielle Shami, had worked with Claimant and his family since 2016. During that time no caregiver had expressed that Claimant's needs are challenging or have expressed concern for Claimant's health or safety.

31. On December 16, 2020, TCRC sent Parent a NOPA notifying her that it was denying the request for a rate exception for Claimant's respite provider to be paid \$25 per hour. Parent filed a Request for Fair Hearing, and this matter (Case No. 2020010593 – Secondary) ensued.

LEGAL CONCLUSIONS

1. An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Developmental Disabilities Services Act (Lanterman Act) to appeal a regional center decision. (Welf. & Inst. Code, §§ 4700-4716.) Claimant timely requested a hearing following the Service Agency's denial of funding, and therefore, jurisdiction for these appeals was established.

2A. When a party seeks government benefits or services, he bears the burden of proof. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) Where a change in services is sought, the party seeking the change bears the burden of proving that a change in services is necessary. (See Evid. Code, § 500.) The standard of proof in this case is a preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (See Evid. Code, § 115.)

2B. In a case where a party is seeking funding for services not previously provided or approved by a regional center, that party bears the burden of proof. Although Claimant is not seeking funding for a new service, he is seeking an increase in funding, representing a change to the service. In seeking increased funding for additional respite hours (increased to 40), Claimant bears the burden of proof that the increased funding is necessary to meet his needs. Claimant has met his burden. (Factual Findings 17A and 17B.)

2C. In seeking a rate exception of \$25 per hour for his caregiver, Claimant bears the burden of proof that the rate exception is necessary to mitigate risks to consumer health and safety. Claimant has not met his burden.

3. A service agency is required to ensure the provision of services and supports to consumers that meet their individual needs, preferences, and goals as identified in their IPPs. (Welf. & Inst. Code, §§ 4501; 4512, subd. (b); 4646, subd. (a).)

4. In securing services for its consumers, a service agency must consider the cost-effectiveness of service options. (Welf. & Inst. Code, §§ 4646, subd. (a); 4512, subd. (b).)

5. Additionally, when purchasing services and supports, service agencies are required to ensure the "utilization of generic services and supports when appropriate." (Welf. & Inst. Code, § 4646.4, subd. (a)(2).)

6. Welfare and Institutions Code section 4646.4 provides, in pertinent part:

(a) 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. . . , 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.

(2) Utilization of generic services and supports when appropriate. . . .

(3) Utilization of other services and sources of funding as contained in Section 4659.

Claimant's Request for Increased In-home Respite Hours to 40 Hour Per Week

7A. TCRC's purchase of service policy for in-home respite services permits the purchase of family support services for school-age individuals when there are few or no natural supports or generic supports available to provide necessary supervision during times when parent(s) are away. For Claimant, an IPP exception is required for more than 25 hours of respite per month. In December 2020, Parent provided TCRC a weekly schedule which did not account for generic supports including IHSS and Claimant's IEP. As a result of this omitted information, TCRC correctly denied Parent's request for 40 hours of respite.

7B. In March 2021, Parent provided TCRC a new and different schedule that reflected respite needs outside of the school day. Based on the new schedule, Claimant met his burden of proof, and TCRC determined that Claimant demonstrated a need for respite care for 40 hours per week as no generic supports were available to provide the necessary supervision. TCRC conceded that Claimant had met his burden of proving his need for 40 hours of respite based on the schedule provided on March 9, 2021.

Claimant's Request for Rate Exception of \$25 Per Hour for Caregiver

8. Per DDS's Health and Safety Waiver Process, for Claimant to receive a rate exception to pay his caregivers \$25 per hour instead of the rate for Channel Islands vendors of \$17 per hour, Channel Islands must submit a request to DDS. In the request for an exception to the current pay rate, Channel Islands must explain to DDS the risk to Claimant's health and safety that justifies the rate increase. DDS would consider the request and determine whether justification exists to grant the increase in pay rate. Channel Islands has no concerns regarding Claimant's health and safety while receiving respite and has elected not to pursue a health and safety waiver from DDS. Consequently, Claimant has not met his burden of demonstrating that a health and safety risk exists that would require Channel Islands to request a Health and Safety Waiver.

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ORDER

1. Case No. 2021020590 (Primary): Claimant's appeal of the Service Agency's denial of increased in-home respite hours to 40 hours per week is granted.
2. Case No. 2021020593 (Secondary): Claimant's appeal of the Service Agency's denial of request for rate exception of \$25 per hour for caregiver is denied.

DATE:

MARLO NISPEROS

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.