

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

In the Matter of:

CLAIMANT

v.

ALTA CALIFORNIA REGIONAL CENTER,

Service Agency.

OAH No. 2021050537

DECISION

Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference and telephone on January 20 and 27, and February 8, 2022, from Sacramento, California.

Erin Donovan, Attorney at Law, represented Alta California Regional Center (ACRC or regional center).

Laurence Padway, Attorney at Law, represented claimant. Claimant's brother and representative, E.N., was present throughout the hearing.

Oral and documentary evidence was received. The record was held open to allow the parties to file closing briefs, which were received and admitted as argument. On May 2, 2022, the record closed and the matter was submitted for decision.

ISSUES

Is ACRC required to reimburse claimant for Supported Living Services (SLS) his brother provided him between the time SLS was approved and claimant's self-determined program was initiated? If so, what is the reimbursement rate?

FACTUAL FINDINGS

Background

1. Claimant has been receiving regional center services since 2011. He is eligible for services based on an intellectual disability caused by a brain infection he suffered when he was 14 years old. He is now 56 years old. Claimant rents a room from his brother, E.N., with whom he lives full-time. Claimant is not conserved.

2. Claimant receives \$1,097 in Social Security Disability Income; E.N. is the representative payee for these funds. Claimant also receives 283 hours of In-Home Supportive Services (IHSS) per month, funded by the county. E.N. provides the services and is paid accordingly. The regional center approved 90 hours of respite services, but claimant opted not to use the hours in 2020 due to concerns related to the pandemic. Prior to the pandemic, claimant attended a day program, but the program was interrupted in March 2020.

3. In his June 2020 Individual Program Plan (IPP) meeting, claimant was described as "needing constant supervision to remain safe while at home and in the community." Claimant lived with his brother, E.N., and sister-in-law, who was available to supervise him. E.N. and his wife were listed as claimant's "natural supports." Claimant's IPP stated that with "financial assistance, IHSS, [PA] services if needed and respite, [claimant] will continue to live with his family through 6/2021."

4. Later that year, however, claimant's brother and sister-in-law divorced, and she moved out of state. At that point, E.N. contacted the regional center to request additional services because E.N. works full time for the State of California and cannot provide claimant constant supervision. In July 2020, E.N. requested ACRC fund SLS. He had learned from claimant's case manager that SLS was intended for clients who lived independently, not with family members. E.N. insisted he was not claimant's natural support.

5. On August 25, 2020, ACRC's Living Options Committee approved claimant for SLS. ACRC sent packets to vendors in and near claimant's county regarding claimant and his needs. The vendors could then identify service providers. Between July 23, 2020,¹ and August 31, 2021, claimant did not receive SLS services through an ACRC vendor. Rather, his brother E.N. was his primary care provider, despite working full time. E.N. now requests ACRC reimburse him for the 3,329.25 hours of SLS he provided claimant. That number represents every hour of the day minus E.N.'s work hours and the hours he is paid by the county to provide IHSS.

¹ E.N. asserted he should be reimbursed from a reasonable time after SLS was requested, rather than the date on which it was approved, which was in August 2020.

6. On March 30, 2021, ACRC issued a Notice of Proposed Action (NOPA) to claimant denying E.N.'s request to "fund participant-directed personal assistant services for [claimant] at an hourly wage of \$21.39." On May 17, 2021, claimant filed a request for a fair hearing and attached a complaint identifying six issues to be determined in his favor.

7. On May 28, 2021, ACRC filed a Motion to Dismiss claimant's fair hearing request based primarily on the lack of ACRC NOPAs regarding many of the issues in the complaint attached to claimant's fair hearing request. Claimant opposed. In its June 22, 2021 ruling, OAH denied the motion to dismiss, finding that issues regarding providing services to claimant, self-vendorization, SLS, and participant directed PA had been on-going for more than a year. The order stated that the particular services requested, whether or not addressed in the NOPA, "are inextricable from and fundamental to whether Service Agency has denied claimant timely provision of necessary services and supports over the last year."

8. In July 2021, the Self Determination Program (SDP) was implemented throughout California. Rather than the regional center identifying service providers and paying them, SDP allows a client and the regional center to develop a budget to address his needs. The client can then choose how and with whom to spend the budget dollars. The SDP creates more flexibility and often more options for clients to find the best-suited services. Claimant was enrolled in SDP in August 2021.

9. By enrolling in the SDP, five of claimant's six identified issues were addressed. At hearing, ACRC argued the remaining issue was whether ACRC should fund participant-directed personal assistant (PA) services. For the reasons addressed in the Order Denying Motion to Dismiss, the issues addressed at hearing involved ACRC's obligation to provide services, rather than the particular type of service the NOPA

denied. Because E.N. provided services from July 2020 through August 2021, he requested reimbursement for his time at either his State-job rate or at a rate he attempted to negotiate with ACRC.² At hearing, he stated that rate was \$21.39.

Regional Center's Evidence

SHARON WIGGINS' TESTIMONY

10. Sharon Wiggins is a Client Services Manager for ACRC, where she has worked in various capacities for more than 14 years. Ms. Wiggins was a case manager, but as a supervisor, she is no longer assigned individual clients. In 2020, after E.N. informed ACRC his wife would be moving and claimant would need emergency services should E.N. be incapacitated, Ms. Wiggins became more involved in the case, though claimant was assigned a case manager. Ms. Wiggins testified at hearing.

11. Ms. Wiggins testified that in the summer of 2020, E.N. informed ACRC claimant would need services in addition to his day program, respite hours, PA services, and transportation. Claimant was not using respite or PA hours due to Covid. Claimant needed constant supervision; E.N.'s wife was leaving and E.N. worked full time. In his request for SLS, E.N. told Ms. Wiggins claimant was receiving 437 monthly hours of "unfunded protective supervision provided by [E.N.]."

² E.N.'s requested rate is unclear. In Exhibit U, produced at hearing, he asserted the SLS rate should be \$33.92 per hour. ACRC's NOPA declined to pay SLS providers \$21.39 per hour. E.N. conducted a salary survey and determined \$21.39 was the average rate for service providers in El Dorado County.

12. Initially, the regional center informed E.N. that claimant was ineligible for SLS because claimant lived with a natural support: family member E.N. In August 2020, however, the SLS committee approved 437 hours of SLS for claimant and Ms. Wiggins began the process of connecting claimant to vendors. Once the vendors received Ms. Wiggins' information on a client, it was their choice whether to work with the person. Ms. Wiggins was aware of a shortage of workers in the rural area in which claimant lives, especially in 2020, and on-going.

13. In October 2020, Joyce Murumi, CEO of NorCal Individual Care, Inc. (NorCal), accepted claimant as a client. Ms. Wiggins began communicating with Ms. Murumi during the process, and believed E.N. wanted to be the paid SLS provider. NorCal, in its discretion, declined to provide services because it viewed E.N. as claimant's "natural support." Due to the issues between E.N. and NorCal, NorCal withdrew its offer to provide SLS. Following NorCal's withdrawal, Ms. Wiggins began her search again to find a vendor for claimant.

14. Ms. Wiggins met with E.N. in January 2021 to discuss other options to provide claimant supervision. The 437 hours per month that were remaining after the 283 IHSS hours could be provided through a day program, PA services, natural support, or respite hours. They did not all need to be SLS. Ms. Wiggins explained that there was a statewide exception during Covid that allowed family members to choose what service providers, in particular PAs, could come into a client's home. This was a "participant directed services" exception that allowed the family to choose the worker and use someone already in the home. The regional center pays \$22.80 per hour for PA services, and of that, \$16.25 goes to the employee. E.N. requested the employee rate to be \$21.80 per hour instead of the \$16.25. He declined to accept \$16.25 when

ACRC refused to pay \$21.80, and began to conduct his own wage survey. This option was not implemented.

15. Ms. Wiggins continued to seek SLS vendors for claimant. On May 3, 2021, Jeanne Dalman of On My Own agreed to provide services for claimant and had identified a provider who could work 8-to-10-hour shifts. Prior to a scheduled intake appointment, E.N. spoke with Ms. Dalman and informed her that he would not agree to the care provider sharing any daily reports about claimant with ACRC. Shortly thereafter, Ms. Dalman withdrew her offer of working with claimant due to conflict between E.N. and ACRC.

16. Additionally, E.N. refused any workers who would provide less than 24 or 48 hour shifts as he wanted the time to go to his home in Reno. Ms. Wiggins could only identify workers who could work less than 24-hour shifts.

17. In December 2020, E.N. submitted a "Letter of Interest" to vendorize claimant so that claimant could be an ACRC vendor and hire an SLS worker with regional center funding. ACRC provided E.N. with the vendor contract, which E.N. refused to allow claimant to sign. When E.N. submitted his own contract, ACRC referred the matter to its outside counsel.

ALAN ZUCKERMAN'S TESTIMONY

18. Alan Zuckerman has been a real estate attorney for 38 years and has represented regional centers as outside counsel for 27 years. ACRC contacted him regarding a contract E.N. proposed in lieu of the standard vendor contract. Mr. Zuckerman testified at hearing.

19. Mr. Zuckerman understood that SLS is based on the needs of a client who wants to remain in his home and requires assistance to do so. By law, ACRC may only engage someone to provide SLS if they are a regional center vendor. When Mr. Zuckerman started communicating with E.N., E.N. informed him that claimant would need to be vendorized and as a state employee, California Code of Regulations, title 17, section 54314, prohibited E.N. from being a regional center vendor. Thus, claimant would be self-vendorized and would hire service providers.

20. The regional centers use standard contracts when they contract with vendors. The contracts are tailored toward commercial vendors, which are the regional centers' primary contractors. Indeed Mr. Zuckerman is not aware of any self-vendorized regional center client in his 27 years' experience. Mr. Zuckerman received E.N.'s custom contract to self-vendorize claimant, which he reviewed for the regional center. E.N. wrote his own contract because ACRC's did not encompass claimant's needs as a self-vendored client. Because there are statutory and regulatory restrictions on what must be included in the regional centers' contracts, instead of trying to work with E.N.'s noncompliant contract, Mr. Zuckerman amended the ACRC contract.

21. There is a regulatory provision to allow a vendor to provide services to only one home. In those cases, the regional center may, in its discretion, waive the "service design" and "training" requirements that other vendors must meet. ACRC may not waive the audit requirement. ACRC, however, declined to waive the service design and training requirements. E.N. began referring to this type of vendor as "waiver vendorization" or a "waiver SLS agency," neither of which exist under the law. A regional center may, in its discretion, waive certain legal requirements that apply to commercial vendors for vendors that service only one home. But it does not have to waive those requirements and there are some, like the audit requirement, that cannot

be waived. E.N. did not agree to permit claimant to sign a contract that did not waive all vendor requirements until May 2021.

22. Under California Code of Regulations, title 17, section 58610, subdivision (a), regional centers may only purchase SLS from a vendor under a signed contract. Mr. Zuckerman explained that DDS sets the rate caps for vendors and regional centers. Generally, for services such as SLS and PA, the regional center provides an “overall rate,” of which the amount paid to the employee is a subset.

Claimant’s Evidence

E.N.’S TESTIMONY

23. Claimant has lived with E.N. “on and off” since claimant was 18 years old. Claimant now pays rent³ to E.N. and lives with him full time in El Dorado County. Claimant’s condition is progressive and his needs increase as his capabilities decrease. At this time, claimant requires “constant supervision,” and either help with or reminders for his activities of daily living. E.N. provides supervision, but he also works full-time for the State of California.

24. E.N. is the only family member who provides constant care for claimant. They have a sister who assisted on an emergency basis when E.N. was incapacitated. E.N. does not consider himself a “natural support,” as ACRC asserts, and describes himself as an unwilling SLS provider. Supervising claimant negatively impacted E.N.’s career because of the amount of time it required. He was unable to pursue independent projects.

³ E.N. declined to provide the amount claimant pays in rent.

25. Once ACRC approved claimant for SLS in August 2020, E.N. became involved in speaking to vendors to identify an appropriate provider. Some had a waiting list and some were not responsive. E.N. met with Ms. Murumi who expressed interest in providing SLS. E.N. agreed to find caretakers and be the house manager if Ms. Murumi could take claimant as a client. As house manager, E.N. would create a house manual, supervise the providers, train them, and be paid for his services.

26. E.N. disagrees with ACRC's characterization of the reason for Ms. Murumi's withdrawal. He believes Ms. Murumi decided not to take claimant as a client after speaking with Ms. Wilhelm at ACRC, who stated ACRC would not approve a family member as a supervisor, and that family members should not be paid SLS providers. He believes Ms. Murumi was intimidated by ACRC.

27. E.N. continued to search for a vendor, but the most he was able to find were PAs or respite workers who were able to cover a "few hours here and there." E.N. stated, "I don't need a few hours. I need two, three, four days to go to Reno and get my work done."

28. E.N. also believes the rate at which ACRC was willing to pay was not attracting service providers. After exhausting the available vendor options, E.N. determined he would pursue self-vendorization for claimant. ACRC only had a contract for commercial vendors, so E.N. "researched the law and wrote [his] own." ACRC did not accept the contract. E.N. did not sign ACRC's amended contract until May 2021.

29. E.N. provided claimant SLS from the time he requested SLS to August 2021, when claimant was approved for SDP. He did not willingly provide the services; he did it out of necessity. Thus, E.N. stated claimant was approved for SLS and ACRC did not provide and pay for the services. Rather, E.N. provided the approved services

and should be compensated. He calculated he should be compensated for 3,329.25 hours. He believes he should be compensated at the rate the State of California pays him, which is \$53.11 per hour. In the alternative, ACRC could reimburse him for what he calculated was ACRC's fiscal year 2019/2020 mean payment rate, which is \$33.92. Under his state rate, he is owed \$176,802.52. If under ACRC's mean rate: \$112,928.25.

Supported Living Services

30. California Code of Regulations, title 17, section 58614, describes SLS and for whom the services are appropriate:

(a) Supported Living Service, as referenced in Title 17, Section 54349(a) through (e), shall consist of any individually designed service or assessment of the need for service, which assists an individual consumer to:

(1) Live in his or her own home, with support available as often and for as long as it is needed;

(2) Make fundamental life decisions, while also supporting and facilitating the consumer in dealing with the consequences of those decisions; building critical and durable relationships with other individuals; choosing where and with whom to live; and controlling the character and appearance of the environment within their home.

SLS is different for each person. Generally, the regulation states SLS includes support such as: assisting with common daily living activities, household upkeep and activities, scheduling medical appointments, managing financial affairs, screening,

hiring, and training personal attendants, participating in community life, and other services as required. (*Id.* at § 58614, subd. (b).)

31. Regional centers are obligated to fund SLS, but must do so following the provisions of California Code of Regulations, title 17, section 58610:

(a) Regional centers shall purchase SLS as defined in Title 17, Section 54349(a) through (e), only:

(1) From a SLS vendor; and

(2) Pursuant to a written contract as specified in Sections 58670, 58671, and 58672.

32. Thus, a regional center may only purchase services from an SLS vendor. To reimburse E.N., either he or claimant must be a vendor. California Code of Regulations, title 17, section 54314, prohibits certain persons or entities from being vendors. First, as E.N. identified to Mr. Zuckerman, a state employee is prohibited from being a regional center vendor. (Cal. Code Regs., § 54314, subd. (a)(1). E.N. is unable to be a vendor. Hence, E.N.'s application to "self-vendorize" claimant so that claimant may then pay him, or another, to provide SLS.

33. Under the same regulation, however, another class of persons is prohibited from being a vendor:

(a)(2) Any applicant in which an officer or employee of the State of California has a financial interest, as defined in the Government Code, Section 87103, except as permitted by Public Contract Code, Section 10430(g), effective January 1, 1992[.]

34. Government Code section 87103 defines a “financial interest:”

[¶] . . . [¶]

(c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.

35. Government Code section 82030 defines income:

(a) “Income” means, except as provided in subdivision (b), a payment received, including, but not limited to, any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage . . .

(b) “Income” also does not include:

[¶] . . . [¶]

(2) Salary and reimbursement for expenses or per diem, and social security, disability, or other similar benefit payments received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from

taxation under Section 501(c)(3) of the Internal Revenue Code.

Analysis

36. At hearing, in the exhibits, and in their closing briefs, the parties provided a plethora of evidence and argument regarding whether E.N. was a natural support, whether this issue is properly before this tribunal, whether claimant should have SLS, whether it was ACRC or E.N. who thwarted claimant's attempts to find a provider, and how much E.N. should be reimbursed, if he is so entitled. The issue, however, is whether the regional center should pay E.N. for services provided to his brother while the parties searched for SLS providers. ACRC's NOPA stated: "This is to advise you that ACRC is denying your brother's request to fund participant-directed personal assistant services for you at an hourly wage of \$21.39."

37. Participant-directed PA services were a temporary, pandemic-related solution to the problem of services needed in a time when concerns were high related to bringing strangers into a home. The complexity of the issues and the history of the parties' efforts, however, requires a determination of the embedded issue of whether the approved services that E.N. provided should be reimbursed. As stated in OAH's June 22, 2021 Order Denying Motion to Dismiss, "claimant's specific requests for reimbursement are inextricable from and fundamental to whether Service Agency has denied claimant timely provision of necessary services and supports." Thus, though not specifically addressed in the NOPA, the issue of whether ACRC should have provided services and the consequence of the lack of services are appropriately addressed here.

38. ACRC is limited as to from whom and how it may purchase services for a client. As discussed above, SLS "shall" be purchased from a vendor under a valid contract. There is no apparent exception to this requirement.

39. Thus, to be paid for SLS, one must be a vendor. E.N. cannot be a vendor under California Code of Regulations, title 17, section 54314. He is a state employee and specifically prohibited.

40. Claimant cannot be a vendor because he is an applicant "in which an officer or employee of the State of California has a financial interest." E.N. has a financial interest in claimant because claimant is a source of income to him under Government Code section 87103 and 82030.⁴ E.N. did not disclose the amount claimant pays in rent. The threshold, however, is \$500 in the preceding 12 months. This determination is based on the reasonable assumption that claimant pays more than \$41.66 per month in rent.

41. Given these legal restrictions, there is no mechanism for ACRC to reimburse either claimant or E.N., whether for past or future services. Claimant's request to reimburse E.N. for SLS provided in 2021 and 2022 must be denied.

42. The parties' other arguments and issues raised were not before this tribunal, made moot by the determination, or were not persuasive. Claimant requested attorney fees, but given the denial of his appeal, the matter need not be reached.

⁴ While there is an exception for "immediate family," Government Code section 82039 defines immediate family as one's spouse and dependent children.

LEGAL CONCLUSIONS

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 the regional center should fund the requested service. (Evid. Code, §§ 115, 500; *McCoy v. Board. of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052; *Lindsay v. San Diego Retirement Board* (1964) 231 Cal.App.2d 156, 161 (party seeking government benefits has the burden of proving entitlement to such benefits)).

2. Thus, the burden was on claimant to establish he is entitled to reimbursement for SLS his brother provided. As discussed in Factual Findings 36 through 42, ACRC may only pay a vendor for SLS. (Cal. Code Regs., tit. 17, §58610, subd. (a)(1).) Neither claimant nor his brother E.N. are legally permitted to be regional center vendors. (Cal. Code of Regs., tit. 17, section 54314.)

3. Claimant did not meet his burden of proof. His request for ACRC to reimburse E.N. for SLS, at any hourly rate, is denied.

ORDER

Claimant's appeal is DENIED.

DATE: May 9, 2022

HEATHER M. ROWAN

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. (Welf. & Inst. Code, § 4712.5, subd. (a).)