

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

Alta California Regional Center,

Service Agency.

OAH No. 2013070290

DECISION

This matter convened for hearing before Marilyn A. Woollard, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on September 5, and November 12, 2013, in Sacramento, California.

Claimant's mother appeared on behalf of claimant.

Julie A. Ocheltree, Attorney at Law, appeared on behalf of Alta California Regional Center (ACRC). ACRC's Director of Children's Services, Lorie Banales, was also present.

On November 12, 2013, oral and documentary evidence was presented and the parties offered oral closing arguments. The record remained open for submission of evidentiary objections and responses. On November 14, 2013, OAH received ACRC's letter brief identifying its objections to claimant's evidence, which was marked for identification as Exhibit 25. On November 18, 2013, OAH received claimant's responses to objections and objections to ACRC's exhibits, which was marked for identification as Exhibit AA. On November 19, 2013, OAH received ACRC's reply to claimant's objections, which was marked for identification as Exhibit 26.

Based on a review of these objections and responses, (1) ACRC's Exhibits 1 through 24 are admitted; and (2) all of claimant's Exhibits A through Z are admitted, except for the following: Exhibits E (pp.125-143); H (pp. 151-208); N through Q (pp. 738-816(b)); T (pp. 848-1147); V-2 (pp. 1168-1246); V-9 (pp. 1263-1271); V-10 (p. 1272); and W-11 (page 1399). Official Notice is taken of claimant's Exhibits N through Q. Claimant's Exhibit W (pp. 1276 -1398) was marked for identification only. ¹

The record was then closed and the matter was submitted for decision on November 19, 2013.

ISSUES AND CONTENTIONS

I. *Issues:* As reflected in the October 22, 2013 Prehearing Conference (PHC) Order, the following issues were identified for hearing:

- A. In the absence of an appropriate out-of-home (OOH) respite provider, is ACRC required to fund in-home respite in lieu of OOH respite through the vendor Elder Options for claimant's parents respite vacation(s)? The issue encompasses the following sub-issues:
 - a. Is in-home respite feasible given claimant's need to take oral medications?
 - b. If in-home respite is required, can ACRC refuse to fund Elder Options based on its assertion that it is not a cost-effective provider due to its hourly rate?
- B. If claimant is in an OOH respite facility located outside of the transportation area served by her school district, is ACRC responsible for providing or funding her transportation to and from school while her parents are on respite vacation?

¹ Claimant withdrew Exhibits D (pp. 92-93), F (pp. 143-147), J (pp. 223- 678), and W-12 through W-16 (pp. 1400-1679).

II. *Contentions.* Both at hearing and during the October 22, 2013 PHC, ACRC argued that claimant's issues were too vague and were not ripe for hearing. In its view, in-home respite services as an alternative to OOH respite services are to be used only in exceptional cases. In this case, ACRC ultimately offered to provide claimant with in-home respite during her parents' potential 18-to-21-day Grand Canyon trip, which was scheduled to occur in late April and early May 2014, subject to certain conditions. ACRC contended that, if claimant's parents choose to go on a vacation while school is in session and claimant is placed in an OOH respite placement that is not within her school district, claimant's family is responsible for funding the cost of her transportation to and from school.

Claimant argued that a hearing is appropriate because she has experienced problems receiving respite services that are authorized by her Individual Program Plan (IPP) for years and an alternative solution to the lack of available OOH respite placements is required to allow respite services to be used by her family. Because the alternative in-home respite solution with Elder Care was not authorized by ACRC until shortly before the hearing, claimant's family lost the opportunity to take the Grand Canyon trip. Claimant argued that if an OOH respite placement is found that is outside of claimant's school district, ACRC is required to fund the costs of transportation to and from this placement during respite vacations that might occur during the school year.

FACTUAL FINDINGS

PROCEDURAL FINDINGS

1. On June 19, 2013, claimant's mother wrote to ACRC's supervising counselor Sharon Wiggins summarizing her understanding of ACRC's decisions: (1) not to extend claimant's OOH respite benefits for fiscal 2012 into fiscal 2013 even though no OOH respite providers were available to her; and (2) to pay for in-home respite in lieu of

OOH respite only if claimant's family became vendorized, hired a care provider, and then sought reimbursement (known as Employer of Record or EOR), rather than through its existing in-home respite provider Elder Options.

2. On July 1, 2013, claimant's mother filed a Fair Hearing Request (Request), which identified the following reasons for requesting a hearing:

Request for 18 days of out of home (OOH) respite placed 05/01/13, request for alternative OOH respite solution, and request for rollover of denied OOH respite benefits to fiscal 2014 were all denied without adequate notice, all violations of court order to provide adequate notice per OAH 2012100530 decision dated 04/04/13.

Claimant described the actions needed to resolve her Request as follows: "(1) Rollover improperly denied fiscal 2013 respite benefits to fiscal 2014 [later referenced as issue 1A], and authorize alternative respite solution if required [later referenced as issue 1B]. (2) Impose appropriate penalty for repeated regional center failure to deliver adequate notice."

3. On July 9, 2013, the matter was set for hearing, and subsequently continued for hearing to September 5, 2013, pursuant to a claimant's time waiver.

4. On August 6, 2013, ACRC's counsel wrote to claimant's mother and acknowledged its failure to issue a Notice of Proposed Action (NOPA) in response to her June 19, 2013 email to Ms. Wiggins. The letter clarified ACRC's positions: (a) providing claimant with 10 additional OOH respite days for the 2013-2014 fiscal year due to its failure to issue a NOPA and the fact that claimant was unable to use much of her OOH respite allotment for 2012-2013 fiscal year; (b) clarifying that ACRC continues to seek OOH respite placements for claimant; (c) offering to fund in-home, overnight respite for

claimant under an EOR procedure; and (d) denying her request for in-home respite from Elder Options as an alternative to OOH respite, because it was not a cost-effective option. Further, ACRC offered to consider funding Elder Options as an in-home overnight respite provider if claimant requested OOH on specific dates within the next two months and there were no OOH respite providers available.

5. *Motion to Dismiss.* On August 30, 2013, ACRC filed a motion to dismiss the Request, which was opposed by claimant that same date.

As documented in the September 4, 2013 Order Re: Motion to Dismiss (Dismissal Order), claimant's issue/proposed resolution number two was dismissed as outside the jurisdiction of the fair hearing process. The Dismissal Order denied ACRC's request for dismissal of claimant's issue/proposed resolution numbers 1A and 1B.

6. *September 5, 2013 Hearing.* On September 5, 2013, the first hearing date, no evidence was taken. The parties discussed the issues that were not dismissed and they reached a resolution on claimant's proposed resolution 1A, the request for rollover of unused respite benefits authorized by claimant's 2012 – 2013 Individual Program Plan (IPP).² Specifically, the parties stipulated that:

ACRC will provide claimant with 18 days of respite that remain unused from her 2012 – 2013 IPP [Individual Program Plan] year. These 18 days of unused respite will remain available to claimant's family through August 2, 2014.

² The parties agreed that the issue/proposed resolution 1A does not address the 10 days of "compensatory" OOH respite services ordered in the April 4, 2013 Decision in OAH Case No. 2012100530. Official Notice is taken of this Decision (hereafter April 2013 Decision).

Claimant reserves the right to request that these 18 days of respite service continue to be available after August 2, 2014, in the event that they are not used by that time.

Claimant's proposed resolution 1B, that ACRC "authorize alternative respite solution if required" was determined to be vague and to require further clarification prior to hearing. Claimant's concerns were discussed in the context of the potential Grand Canyon small-capacity river trip, scheduled to occur in late April and early May 2014, for which claimant's parents had requested respite services. The matter was referred back to the IPP team to discuss both the availability of OOH respite and of in-home respite as an alternative to OOH respite for claimant's family, based on the lack of available OOH respite providers. A prehearing conference was scheduled to further clarify issues for hearing if the matter was not resolved by the IPP team. (See September 6, 2013 Case Status Order.)

7. *October 22, 2013 Prehearing Conference.* The IPP team met on two occasions after the September 5, 2013 hearing, but did not resolve the Request. Issues for hearing were identified, as set forth above. The parties were requested to submit briefing on ACRC's legal obligation to fund transportation to and from claimant's school from an OOH respite facility located outside of her school's transportation area while her parents are on respite vacation.

8. *November 12, 2013 Hearing.* At the hearing, ACRC called the following witnesses: claimant's mother and ACRC employees Adia Cunningham, Sharon Wiggins and Lori Banales. Claimant's mother provided additional testimony on claimant's behalf. The testimony of these witnesses is paraphrased as relevant below.

CLAIMANT'S BACKGROUND

9. Claimant is a 16-year-old girl who lives with her parents in rural El Dorado County. She is an only child. Claimant is eligible for regional center services based upon her diagnosis of cerebral palsy and intellectual disability. She has also been diagnosed with generalized convulsive epilepsy without intractable epilepsy, low bone density, insomnia, and visual impairment. Claimant's last reported grand mal seizures were in September 2011 after her grandfather's death. Previously, claimant had eight years without seizures. It was believed that these seizures were due to stress, and claimant's seizure medication was increased. Currently, claimant takes Depakote (Divalproex Sodium) by opening the capsule and sprinkling the contents on her food.

Claimant requires 24-hour care and supervision due to her physical and cognitive limitations. She "lacks executive function decision making skills and is especially vulnerable as she is physically fragile and cognitively unable to discern dangerous situations or people." Toilet training "has been attempted" but [claimant] continues to be fully incontinent." According to her mother, it is difficult to find caretakers due to the intensity of claimant's toileting needs and her constant defecation. She requires up to eight changes a day. Her care is not appropriate for male providers.

Claimant has an expressive vocabulary of about 55 words, "but is not always accurate with her vocalizations and is not able to verbally communicate many of her needs." She has successfully used a Picture Exchange Communications Systems (PECS) for several years "at home to ask for items or activities that she cannot verbalize," but this system is "too physically cumbersome to move between environments or to accommodate her growing receptive vocabulary." Claimant's receptive vocabulary is "dramatically larger than her expressive vocabulary."

Claimant "is functionally non-ambulatory in that she is not able to independently recognize and remove herself from an emergency situation in under two minutes.

[Claimant] has poor depth perception and when in unfamiliar environments with uneven terrain, she is prone to tripping and falling, and consequently requires a hand to hold.”

Claimant is a special education student who attends high school in Shingle Springs, California. Her education program is funded through the El Dorado County Office of Education (EDCOE)/El Dorado County Special Education Local Plan Areas (SELPA).

Pursuant to her special education Individualized Education Plan (IEP), claimant receives transportation to and from her home and school provided by EDCOE.

10. One of claimant’s IPP goals is to continue to live with her family. To achieve this goal, her family has been provided respite services.

Claimant’s current IPP, for August 2012 through August 2013, provides that “ACRC will fund 90 hours per quarter of in-home respite through Elder Options...” and “will fund 20 days per fiscal year for out-of-home [OOH] respite to be provided by a residential placement that is consistent with the assessed level of care.” As part of this objective, ACRC has agreed to work “to identify an available and appropriate OOH respite placement” for claimant. On July 23, 2013, the parties amended the IPP to provide OOH respite to claimant by the Durant Small Family Home from July 29, 2013 through July 30, 2013.

APRIL 2013 DECISION

11. As addressed in the April 2013 Decision (see footnote 2), ACRC opposed claimant’s OOH respite placement at the Hanaway Family Home (HFH) in June and September 2012.³ The HFH was determined to be an appropriate respite provider if it

³ The HFH is the only OOH respite care provider that has successfully provided respite care to claimant, and it did so for up to 25 days in 2010 and 2011. Following the April 2013 Decision, ACRC located the Durant home and, in late July 2013, claimant had

had a vacancy. Specifically, the April 2013 Decision ordered, *inter alia*, that “if a future vacancy occurs at Hanaway Small Family Home and there are no changes in its licensing or vendored capacity and/or the number of children in the home, ACRC shall authorize claimant’s out-of-home respite placement on her request, and shall provide and/or pay for additional staffing if determined necessary by the IPP team to ensure claimant’s health and safety during the respite stay.” The IPP team was further ordered to identify the “conditions and processes necessary to efficiently respond to and implement claimant’s requests for out-of-home respite services.”

In addressing claimant’s request for compensatory respite services, ACRC argued in that case that additional in-home respite services could be substituted for claimant’s OOH respite. It also argued that, in light of the goals of respite services, OOH respite services are not designed to “provide entertainment” to claimant or provide an opportunity for her to become acclimated to a care home in anticipation of residential placement. The Decision awarded claimant compensatory respite and provided that “Claimant’s parents may elect to use these compensatory services via additional in-home respite services.”

RIPENESS

12. As explained by the Supreme Court in *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 170-171, “the ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions. . . It is rooted in the fundamental concept that the proper role of the judiciary does not extend to an overnight visit at this home. While claimant’s parents were pleased with the Durant home, they observed claimant to exhibit sleep disturbance after this stay. ACRA made efforts to provide behavioral support to claimant to ameliorate this condition; however, the Durant family eventually elected not to provide further OOH respite to claimant.

the resolution of abstract differences of legal opinion.” The Court stated that “the controversy ‘must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts.’” (*Ibid*, quoting *Aetna Life Ins. Co. v. Haworth* (1937) 300 U.S. 227, 240-241; internal citations omitted.)

ACRC’s assertion that claimant’s fair hearing request is not ripe for adjudication is not persuasive. As indicated in the April 2013 Decision, claimant experienced problems throughout 2012 in obtaining OOH respite services from ACRC.⁴ Claimant has not been able to use any of the respite services provided in her IPP in 2013. To require claimant to file a fair hearing request for each requested respite stay that is unsuccessful perpetuates a cycle in which claimant’s family is not able to access the respite services that are intended to support them in keeping claimant living in her home. The impediments to claimant’s use of respite services are sufficiently concrete to address. Further, unless claimant is allowed to pursue her Request, her efforts to achieve resolution will be capable of repetition yet escaping review.

RESPITE SERVICES UNDER THE LANTERMAN ACT

13. The Lanterman Act, Welfare and Institutions Code section 4550 et seq., expresses the Legislative finding that “children with developmental disabilities most often have greater opportunities for educational and social growth when they live with their families...”⁵ Consequently, the “Legislature places a high priority on providing

⁴ It was not established that claimant was denied respite services in 2010.

⁵ Unless otherwise indicated all undesignated statutory references are to the Welfare and Institutions Code.

opportunities for children with developmental disabilities to live with their families, when living at home is the preferred objective in the child's individual program plan." (§ 4685, subd. (a).) In order to provide opportunities for children to live with their families, the "department and regional centers shall give a very high priority to the development and expansion of services and supports designed to assist families that are caring for their children at home, when that is the preferred objective in the individual program plan. This assistance may include, but is not limited to... respite for parents ..." (§ 4685, subd. (c)(1).)

"Respite" is thus included among the Lanterman Act's "services and supports for persons with developmental disabilities." (§ 4512, subd. (b).) "The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option."

14. *In-Home Respite*. Section 4690.2, subdivision (a), defines "in-home respite" services as follows:

... "In-home respite services" means intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client's own home, for a regional center client who resides with a family member. These services are designed to do all of the following:

- (1) Assist family members in maintaining the client at home.

- (2) Provide appropriate care and supervision to ensure the client's safety in the absence of family members.
- (3) Relieve family members from the constantly demanding responsibility of caring for the client.
- (4) Attend to the client's basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by the family members. (*Accord*: Cal. Code Regs., tit. 17, § 54302, subd. (a)(38).)

The standards for in-home respite service agency vendors are set forth in California Code of Regulations, title 17 (17 CCR), section 56776 et seq. Regional centers may waive the service standards for in-home respite agencies in specified areas, as long as such waivers "will not adversely affect the health and safety of the consumers or place the consumers in a more restrictive environment." (17 CCR § 56778.)

15. *Out-of-Home (OOH) Respite*: The Lanterman Act expressly authorizes "out-of-home respite services" in section 4686.5, subdivision (a)(2). The purposes of these OOH respite services are set forth in 17 CCR section 54342, subdivision (58), which also outlines the requirements for a vendor to be designated as an OOH respite services provider. In addition to being licensed, vendored and appropriately trained, such a vendor:

- (E) Provides out-of-home respite services which consist of intermittent or regularly scheduled temporary care to individuals in a licensed facility and which:
 1. Are designed to relieve families of the constant responsibility of caring for a member of that family who is a consumer;
 2. Meet planned or emergency needs;

3. Are used to allow parents or the individual the opportunity for vacations and other necessities or activities of family life; and
4. Are provided to individuals away from their residence.

16. Section 4686.5, subdivision (a), limits the purchasing authority of regional centers regarding respite services. First, a regional center "may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities." Second, "a regional center shall not purchase more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer." A regional center may grant an exception to these requirements "if it is demonstrated that the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer."

17. Both in-home and out-of-home respite workers must have "received Cardiopulmonary Resuscitation (CPR) and First Aid training. . .' and must have "the skill, training, or education necessary to perform the required services." (17 CCR § 54342, subd. (40) and (58).)

Pursuant to section 4686, in-home respite workers "may perform incidental medical services for consumers of regional centers with stable conditions, after successful completion of training as provided in this section." The "incidental medical services" subject to this statute are expressly limited to: "(1) Colostomy and ileostomy: changing bags and cleaning stoma; (2) Urinary catheter: emptying and changing bags and care of catheter site; [and] (3) Gastrostomy: feeding, hydration, cleaning stoma, and adding medication per physician's or nurse practitioner's orders for the routine medication of patients with stable conditions." Section 4686 does not include providing

oral medications to consumers as part of the authorized incidental medical services in-home respite workers may provide.

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TESTIMONY OF CLAIMANT'S MOTHER

18. Claimant's mother provided the following testimony about claimant's school year, her vacations and respite requests, and her family's experience with obtaining respite services.

Claimant attends school during the academic year, as well as summer school. She typically has a one-week break from school for spring (in February or March); a one-week to 10-day break after school ends and before summer school begins; a four-week break between the end of summer school and the beginning of the new school year (typically from the second week in July to the second week in August); one week during Thanksgiving; and approximately a four-week break over Christmas and New Year holidays. Claimant is thus not in school for 10 to 11 weeks each year. Any OOH respite during these school breaks would not require her to be transported from the OOH respite provider to and from her school.

19. In 2012, claimant's parents had two vacations without her. In July 2012, during her pre-summer school vacation, claimant's parents drove her to her camp, and then had a six-day vacation without her. On another occasion in the summer of 2012, claimant stayed at the HFH, and her parent privately paid for this respite for seven to nine days after ACRC denied respite at that facility.

Claimant has requested OOH respite from ACRC twice since the April 2013 Decision: first for a total of 18 days in May or June 2013⁶ and, second, for the 18-to-21-day Grand Canyon trip in April and May 2014. In both cases, ACRC did not respond to their request until it was too late and claimant's parents lost their vacation opportunities. Typically, claimant's parents would request a two-week vacation.

20. Claimant's mother recounted how she had told claimant's service coordinator in early 2012 that they would have to place claimant out of home when she turned 18 because she believed ACRC was not meeting claimant's needs or her parents' needs. She is very concerned that there are no suitable homes for claimant in El Dorado County, because she does not want her daughter to lose the supports they have developed for her over the years. Claimant's parents are considering developing their own residential facility. Claimant's mother believes it would be more cost-effective for ACRC to meet their respite needs than to pay for claimant's residential placement.

21. Claimant's IPP provides for 90 hours of in-home respite services each quarter. Claimant's parents regularly use their in-home respite services for a five-hour period each Saturday.

22. Claimant's mother is employed as claimant's In-Home Health Services (IHHS) worker. When claimant is in school, she is out of the home eight hours a day. Claimant's mother cares for her in the evening. Claimant's mother typically provides nine to 10 IHHS hours of care to claimant on weekend days and seven to nine hours on weekdays when claimant is in school.

Claimant's father is self-employed as an owner/builder. Both of claimant's parents have some flexibility in determining when to take vacations. Kayaking is their favorite

⁶ This was not a request for 18 continuous days. Claimant's mother provided suggestions to Ms. Dalton and Ms. Wiggins on how these days could be broken up.

respite activity. The Grand Canyon trip was a unique opportunity to experience the river in an eight-person craft. This trip required a permit and extensive preplanning. Claimant's parents have not requested any other specific respite dates this year. Some preplanning would be required for other vacations; however, claimant's mother did not know how much preplanning would be necessary. Due to the uncertainty about access to respite care, claimant's parents have not planned any vacations through August 2014. If the HFH had a respite opening in January 2014, they would be interested in taking respite then.

23. Claimant's family has no available natural supports to help with claimant's in-home care as respite workers designated through an Employer of Record arrangement or to otherwise relieve her parents.⁷ Claimant's paternal grandmother is in her 80s, is frail and now lives in Colorado. Other, more local family members are not able to provide in-home respite care to claimant due to their physical issues (brother and sister-in-law) or because of employment/degree program issues (adult niece). These family members were available as emergency contacts to claimant's camp during her parents' vacation last year, when her parents were not available by telephone.

⁷ The Lanterman Act defines "natural supports" to mean "personal associations and relationships typically developed in the community that enhance the quality and security of life for people, including, but not limited to, family relationships, friendships reflecting the diversity of the neighborhood and the community, associations with fellow students or employees in regular classrooms and workplaces, and associations developed through participation in clubs, organizations, and other civic activities." (§ 4512, subd. (e).)

24. Claimant's current oral medications are given to her at 9:00 a.m., at mid-day, and at 9:00 p.m. Her morning medications include a multi-vitamin, a calcium supplement and Depakote sprinkles. She receives another calcium supplement at mid-day. In the evening, she receives Amitriptyline 10 mg (for sleep/excessive drooling), Depakote sprinkles, calcium and a vitamin D.

25. Claimant's parents have been teaching claimant to take medications that are placed on a tray before her. She is prompted to pick them up from the tray. Claimant does not go to the cabinet and select her own medications. She is being taught to open her Depakote capsule, to sprinkle its contents on her food and throw the capsule away. She is able to pick up her chewable multi-vitamins and eat them with food on command. Amitriptyline is a small pill claimant will take with food. Claimant does not object to taking her medication. Claimant's parents want to continue claimant's training with the goal that she will be able to independently self-medicate.

26. Elder Options regularly provides claimant's in-home respite each Saturday. Claimant does not require oral medications during these respite hours. Elder Options has never provided overnight respite to claimant. Elder Options CEO Carol Heape told claimant's mother that they cannot touch the medication boxes for claimant.

Claimant's parents developed a plan for natural supports to help administer oral medications to claimant while in home-respite is provided by Elder Options during their anticipated Grand Canyon trip: (1) a neighbor agreed to help throughout the day on weekends and in the evening during school days, and (2) claimant's school agreed to give her vitamins and Depakote in the mornings on school days. Claimant's mother provided the school with a written medication plan and pupil medication form for this purpose.

TESTIMONY OF ADIA CUNNINGHAM

27. Ms. Cunningham is a Community Services Specialist for ACRC. Her duties include working with children's day care and respite services. ACRC typically provides OOH respite by working with its residential living options committee (RLOC) which meets twice a week. She is on the RLOC on a rotational basis. The RLOC can tell what licensed and vendored placements are available and it attempts to match consumers with facilities. Licensed community care facilities for children are typically at level-three or level-four and are divided into ambulatory and non-ambulatory beds or facilities. Claimant is considered a non-ambulatory child who requires a level-four facility.⁸ The daily rate for level-four non-ambulatory 24-hour OOH respite care is \$150 a day.

28. Ms. Cunningham was involved in ACRC's efforts to identify an OOH respite facility for claimant. In Ms. Cunningham's experience, these homes will typically not

⁸ ACRC uses the definition of "nonambulatory persons" found in Health and Safety Code section 13131, as "persons unable to leave a building unassisted under emergency conditions. It includes any person who is unable, or likely to be unable, to physically and mentally respond to a sensory signal approved by the State Fire Marshal, or an oral instruction relating to fire danger, and persons who depend upon mechanical aids such as crutches, walkers, and wheelchairs. The determination of ambulatory or non-ambulatory status of persons with developmental disabilities shall be made by the Director of Social Services or his or her designated representative, in consultation with the Director of Developmental Services or his or her designated representative . . ."

The parties disagree about claimant's characterization as non-ambulatory; however, this is not an issue for hearing and, as reflected in Ms. Banales' testimony, it does not practically affect the availability of OOH respite providers to claimant.

“hold” beds for respite. They take placements as they come up and prefer long-term placements. Several homes were identified to meet claimant’s needs. These were the Durant family home, the Evangeline home and the Nenia Malayo home. Ms. Cunningham acknowledged that there have been some problems reaching both the Evangeline home and the Malayo home. She was not sure whether there was any actual availability at either the Evangeline or Malayo homes. During the hearing, Ms. Cunningham received updated contact information for the Malayo home and provided it to claimant’s mother for follow up. She was informed that there is an opening in the Malayo home. She was aware that the HFH may have an opening in January 2014. None of these homes is located within claimant’s school district.

29. In addition to searching within its catchment area, ACRC has a specific person who researches the availability of residential facilities for OOH respite in the catchment areas of other regional centers. That person has been instructed to look for such openings for claimant on an on-going basis.

30. Elder Options is not vendored to provide overnight respite care. It provides short-term interim in-home respite generally during the day. Its CEO Ms. Heape has informed ACRC that Elder Options’ daily rate for in-home 24-hour respite care is \$308 a day.

31. Respite providers are not allowed to dispense oral medications to consumers. Based on her six years of experience in this position, Ms. Cunningham opined that dispensing includes placing medications before a consumer to take or pre-pouring medications. Respite providers can give a verbal reminder to consumers to take their medications but they cannot open medication containers or hand medications to consumers. Providing oral medication is a medical service. In-home respite services are nonmedical services. Oral medications would be provided by enhanced respite provider, such as a nurse.

TESTIMONY OF SHARON WIGGINS

32. Sharon Wiggins is ACRC's supervising counselor for the Placerville and South Lake Tahoe offices. In this capacity, she supervises 12 service coordinators, including claimant's service coordinator, Mary Jo Dalton. Ms. Wiggins has supervised claimant's case for approximately six years, during which time claimant had two service coordinators. She attended the IPP meetings between the two hearing dates, which convened on September 16, and 19, 2013.

33. Ms. Wiggins first learned that claimant was on Depakote and Amitriptyline at the September IPP meetings and then realized that this created a problem for in-home respite providers. After the September 19, 2013 IPP meeting, claimant's mother gave ACRC her medication plan, using claimant's school and her neighbor to dispense her oral medications. This medication plan is not opposed by ACRC because claimant's parents can use "natural supports" to ensure claimant receives her oral medications while they are on respite vacation. According to Ms. Wiggins, ACRC supports the desire of a consumer to learn to self-medicate if she is able to do so.

34. Ms. Wiggins spoke to Amy Hanaway from the HFH before the hearing and confirmed that, although she has no current openings, the HFH is happy to provide respite to claimant. She anticipates a possible opening at the end of January 2014, but this is dependent on the outcome of a court hearing regarding family reunification.

There are no ACRC vendored facilities for children in El Dorado County. Ms. Wiggins has asked Ms. Dalton to regularly check with the Evangelino and Malayo homes about their availability for respite placement and she has asked the RLOC to search for OOH respite options outside ACRC's catchment area on an ongoing basis. Ms. Wiggins also acknowledged that there was a problem with the Evangelino telephone several months ago but that there is currently no problem reaching them.

TESTIMONY OF LORI BANALES

35. Ms. Banales has been ACRC's Director of Children's Services since 2005. She provides administrative oversight to counselors, like Ms. Wiggins, who supervise service coordinators. Ms. Banales was previously employed as a supervisor of the Children's Unit for In-Home Services. She holds a Master's Degree in counseling psychology. Ms. Banales becomes involved in specific cases when there are unresolved issues that need to move forward.

36. In Ms. Banales' experience, arranging OOH respite has not typically been a problem for ACRC's consumers. Typical requests for OOH respite are for two-to-four-day periods, although some families try to schedule longer vacations in advance. OOH respite is more cost-effective than in-home respite. A level-4 OOH respite typically costs \$146 per day. Elder Options 24-hour continuous care rate is \$308 a day.

Ms. Banales acknowledged that there are no available level-3 or level-4 (either ambulatory or non-ambulatory) children's residential facilities in ACRC's catchment area. When a family's request for OOH respite is unmet, ACRC pushes out its search parameters to surrounding areas. This has been done for claimant on an ongoing basis. Ms. Banales has been informed that there are no available level-3 or level-four children's residential homes in the adjacent counties. There are a few resources in Stockton, but these are full. Ms. Banales noted that there is a general shortage of residential homes for children and that some of these resources were lost during the recent foreclosure crisis. ACRC has issued requests for proposal (RFPs) for children's residential facilities; however, these are for the highest level of care (e.g., children with dual diagnosis of mental health and severe behavioral issues).

37. In-home respite is typically not used for overnight respite, and in-home respite providers are prohibited from dispensing oral medications. Elder Options is an agency that is vendored to provide in-home respite, not 24-hour overnight care.

Facilities licensed to provide residential services to children and for OOH respite can dispense oral medications and provide 24-hour care.

Ms. Banales reiterated that ACRC is not opposed to claimant's mother's medication plan of using claimant's school and her neighbor to dispense oral medications if overnight in-home respite is provided. In this case, ACRC would not assume any liability for claimant's medications if there is a problem with the plan and it cannot give the in-home respite provider the authority to dispense medications to claimant. She noted that the regional centers generally do not fund in-home nursing services. They seek out generic resources which include the Early Periodic Screening and Diagnostic Testing program (EPSDT), a Medical-funded program providing services to consumers up to age 22. Consumers who have medical needs can qualify for a certain number of nursing hours. Ms. Banales had no knowledge of whether claimant qualified for EPSDT services. In her opinion, it would be cost-prohibitive for ACRC to pay for a nurse to come into the home three times a day to dispense medication and to pay Elder Options 24-hour rate of \$308.⁹

38. In this case, ACRC offered to provide Elder Options for in-home respite to claimant in lieu of OOH respite during her parents' anticipated Grand Canyon trip, using their natural supports medication plan. Ms. Banales emphasized that this is an exception that should not be routinely offered, unless the family has exhausted all OOH respite possibilities. If claimant sought a specific vacation time and there was no available OOH respite place, ACRC would authorize in-home respite through Elder Options.¹⁰

⁹ Because ACRC has accepted claimant's natural support medication plan, it is not necessary to address the issue of nursing services.

¹⁰ ACRC acknowledged that claimant's parents do not have natural supports to provide in-home respite that might make use of an Employer of Record feasible.

TRANSPORTATION

39. As a special education student, claimant is entitled to a free and appropriate public education with related services. (Gov. Code §§ 56040, 56031, 56345.) As reflected in her IEP, claimant is entitled to transportation to and from her home to school which is provided by the EDCOE through the El Dorado County SELPA.

40. Claimant's mother testified that, in the past, she only requested OOH respite when claimant was not in school. She then discovered a Memorandum of Understanding (MOU) between ACRC and various SELPAs, including the El Dorado County SELPA, signed in January 2013, which she believes obligates ACRC to pay for claimant's transportation to and from school while she is in a respite placement that is outside the transportation area of El Dorado County SELPA. She argued that ACRC's recent amendment to the MOU places a significant liability on claimant's family and is not legally correct.

Claimant's mother reiterated that school is very important and instrumental to claimant's development. Claimant is now receiving instruction from an excellent teacher on using assisted augmentative communication with her I-pad. The family has never elected to take claimant out of class unless she is ill or needs to go to the doctor.

41. The HFH is located outside of claimant's school district. It is a one-hour drive each way. One transportation provider, Macy's, informed Ms. Wiggins that it could transport claimant to and from school each day for a cost of \$200 a day. This would be in addition to the daily rate of \$150 for the OOH respite. As indicated in Ms. Cunningham's testimony, the other homes identified as possible OOH respite providers are also outside claimant's school district.

42. The January 2013 MOU, under "Transportation for Respite Services," provided that "when a respite placement is outside the district's ability to transport, ACRC will both notify the district and assure provision of transportation from the respite

facility to and from school when school is in session..." The MOU was signed by ACRC and by Davis Toston, El Dorado County SELPA's Executive Director. On August 23, 2013, Mr. Toston signed a letter about this MOU which provided in pertinent part:

With regard to the provisions included on page 9 of 20 of that MOU, which are related to out-of-district, out-of-home respite for students, ACRC never represented to me or to anyone in my presence that it had agreed to fund for transportation to and from school under those circumstances. The purpose and intent of the provision related to transportation is to make it clear that even if a child has transportation included in his or her IEP, the district cannot provide such transportation if the child is placed for respite in a location outside of the district.

On October 30, 2013, ACRC and Mr. Toston signed an Amendment to the MOU's Transportation for Respite section, which provides, in pertinent part, that: "ACRC will assist with coordinating transportation, but will not fund transportation to and from school." Ms. Banales declared that this Amendment was determined to be necessary to ensure that its intended meaning was not misunderstood.

43. The Lanterman Act's definition of OOH respite services does not include transportation to and from school. (17 CCR § 54342, subd. (a)(58).) The Lanterman Act defines "services and supports for persons with developmental disabilities" to include both "respite" and "transportation services necessary to ensure delivery of services to persons with developmental disabilities." (§ 4512, subd. (b).)

In purchasing or obtaining services and supports for consumers, regional centers are required to consider "generic resources" that are available to them. As part of its

internal process in purchasing services and supports, regional centers must ensure, *inter alia*, the “utilization of generic services and supports when appropriate” and “the utilization of other services and sources of funding...” (§§ 4646, subds. (a)(2), (a)(3), and (d); 4648, subd. (a)(8).) Regional centers shall also ensure “consideration of the family’s responsibility for providing similar services and supports for minor children without disabilities. . .” (§§ 4646, subd. (a)(4).) In addition, the regional centers “shall identify and pursue all possible sources of funding for consumers receiving regional center services” including “[g]overnmental or other entities or programs required to provide or pay the cost of providing services, including....school districts...” (§ 4659, subd. (a)(1).)

Claimant’s IEP transportation services are such generic resources. While school transportation to and from an out-of-county OOH respite placement may be appropriate under certain circumstances (including, for example, to meet emergency respite needs), there are sufficient opportunities for respite during claimant’s school breaks to ensure the delivery of these services.

DISCUSSION

44. It is undisputed that there are insufficient level-three or level-four residential placements for children in ACRC’s catchment area, as well as in the surrounding areas served by other regional centers. Respite beds in such scarce facilities are further limited due to provider preferences for long-term placements.

45. Since the April 2013 Decision, ACRC has made diligent attempts to locate an OOH respite provider for claimant. These efforts have included identifying several OOH facilities and providing this information to claimant’s family to pursue; offering to provide behavioral assistance to claimant regarding sleep disruption after her trial stay at the Durant home; expanding the scope of their OOH respite search to all level-three and level-four children residential placements in the catchment areas of other regional

centers; and by offering to fund Elder Options for the Grand Canyon trip as an exception to its OOH respite policy subject to certain conditions. (See also Factual Finding 4.)

46. Similarly, claimant's family has worked diligently with ACRC to contact or to attempt to contact facilities identified for respite (including by claimant's trial overnight visit in the Durant home), and to find cost-effective solutions to the lack of OOH respite placements. There is no evidence that claimant's family has unreasonably refused viable OOH respite options. Claimant's mother testified that she was happy to follow up with the new information provided to her about possible respite at the Malayo home.

47. The parties agree that the preferred respite placement for claimant is in an appropriate licensed and vendored OOH respite home. As indicated in the April 2013 Decision, the HFH is such an appropriate potential OOH respite, but it does not currently have a respite bed available for claimant.

48. While ACRC eventually offered to fund Elder Options as an in-home respite alternative solution to OOH respite, its offer came well after the time period when claimant's parents had to make a commitment to this trip. During the September 5, 2013 hearing, claimant's mother expressly advised ACRC that she had until the end of October 2013 to make this decision and that the decision depended on the availability of respite services for claimant. By the time she received ACRC's Offer shortly before the November 12, 2013 hearing, claimant's mother had notified the trip provider that they could not participate and their spots on the trip were filled by other individuals.¹¹

¹¹ Claimant's mother rejected as unethical counsel's suggestion that she should have simply made a commitment to the trip and then cancelled it if respite was not ultimately available.

49. As indicated in the April 2013 Decision, "Claimant's IPP team has not fully addressed the process for implementing her OOH respite care services in the IPP and it must do so. . . Given claimant's school schedule, opportunities to use these services occur within narrow time parameters and require careful planning and coordination. Preadmission visits should be expressly incorporated into claimant's IPP with an estimate of the time required to accomplish such visits. . . This is necessary to alert ACRC staff of the need to work promptly and with sufficient lead time to allow such a visit to occur before a requested respite stay." (Footnote omitted.)

50. It is determined that a specific protocol is required to effectuate claimant's access to the OOH respite services set forth in her IPP, and that in-home respite services must be provided as an alternative to OOH respite services under certain conditions, as set forth in Order 2 below. This protocol is to remain in effect for the duration of claimant's current IPP cycle through the end of August 2014.

51. ACRC is not required to fund transportation to and from an OOH respite placement. Claimant has transportation provided to her through EDCOE as part of her special education IEP. As indicated in her mother's testimony, claimant enjoys and is benefiting from her educational program. There are at least 10 weeks every year when claimant is on vacation from school. If claimant's parents choose to go on vacation when claimant is in school and she is placed in an available OOH respite home that is outside her school district, they must pay for her transportation.¹²

LEGAL CONCLUSIONS

1. California Evidence Code section 500 states that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or

¹² For short-term respite during school days, Claimant's parents may elect to have claimant participate in independent study at the OOH respite placement.

nonexistent of which is essential to the claim for relief or defense that he is asserting.” As no other statute or law specifically applies to the Lanterman Act, ACRC has the burden of establishing that its internal process for responding to claimant’s requests for OOH respite services are appropriate and it must do so by a preponderance of the evidence. (Evid. Code, § 115.)

2. As set forth in the Factual Findings and Legal Conclusions as a whole and, particularly, in Factual Findings 44 through 50, if an appropriate OOH respite provider is not available for claimant during the IPP cycle ending in August 2014, ACRC is required to fund in-home respite in lieu of OOH respite through the vendor Elder Options for claimant’s parents respite vacation(s). This requirement is subject to the conditions outlined in Order 2, below.

3. As set forth in the Factual Findings and Legal Conclusions as a whole and, particularly, in Factual Findings 39 through 43 and 51, ACRC is not responsible for funding claimant’s transportation to and from school if her parents elect to go on a vacation during school days and she is placed in an OOH respite facility located outside of the transportation area served by her school district.

ORDER

1. Claimant’s appeal is GRANTED in part and DENIED in part.

2. Claimant’s request for in-home respite services through the vendor Elder Options as an alternative solution to out-of-home respite placement is GRANTED SUBJECT TO CONDITIONS which will remain in effect through August 30, 2014. If an appropriate out-of-home (OOH) respite provider is not available for claimant during current IPP cycle, ACRC is required to fund in-home respite in lieu of OOH respite through the vendor Elder Options for claimant’s parents respite vacation(s), up to a maximum of 20 days, subject to the following conditions:

- (a) Claimant's parents shall notify ACRC of their request for respite services on specific dates at least 30 days prior to the requested respite dates, and they shall diligently investigate potential OOH respite providers offered to them by ACRC;
- (b) If an appropriate OOH respite provider is not confirmed as being available to provide respite care 15 days before the dates requested in Order 2, subdivision (a), ACRC shall fund 24-hour, in-home respite through Elder Options for claimant as an alternative option to OOH respite subject to the following conditions:
 - (1) Elder Options in-home respite providers shall not dispense oral medications to claimant or provide medication reminders;
 - (2) Claimant's parents shall provide ACRC with their natural supports medication agreement which will provide for claimant's receipt of necessary oral medications; and,
 - (3) Claimant's parents shall sign an authorization designating an individual, other than an employee of ACRC or Elder Options, who is authorized to consent or or to withhold consent to medical treatment for claimant during their vacation(s).

3. Claimant's request for an order for ACRC to fund transportation to and from school is DENIED. If claimant's parents choose to request respite services while claimant is in school and she is placed in an OOH respite placement that is outside the EDCOE/El Dorado County SELPA transportation area, claimant's family is responsible for funding the cost of her transportation to and from school.

4. All other requests for relief are denied.

DATED: November 26, 2013

MARILYN WOOLLARD
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).)