BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: Patrick P., Claimant, vs. Harbor Regional Center, Service Agency.	OAH No. 2013020621

DECISION

Administrative Law Judge Jerry Smilowitz, State of California, Office of Administrative Hearings, heard this matter on April 23, 2013, in Torrance, California, at the offices of Harbor Regional Center (HRC or Service Agency).

Patrick P. (Claimant) was present. He was represented by his mother, Marisa P.[1]

Gigi Thompson, Manager Rights Assurance, represented the Service Agency.

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on April 23, 2013. Before the record was closed, Claimant and Service Agency entered a stipulation on the record that the period for filing of the decision is extended by five business days.

ISSUE

The parties agreed on the following statement of the issue to be decided: Should the Service Agency be ordered to continue funding of License Vocational Nurse (LVN) shift nursing for Patrick? Here, shift nursing refers to the services of an LVN who accompanies and stays with Claimant while he is attending a day program.

[1] Initials are used to protect the privacy of Claimant and his family.

EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1-14; Claimant's exhibits A-F.

Testimony: For Service Agency, Gigi Thomson, Santiago Zapeda-Ortiz, a Program Manager with HRC; for Claimant, Marisa P. and Gilvan P, parents and care providers.

FACTUAL FINDINGS

1. Claimant is a 32-year old unconserved man, who, at the age of 4, was diagnosed with Duchenne muscular dystrophy, a progressive muscular degenerative disorder. As a result, he must be on a ventilator 24 hours a day and is unable to move any of his extremities. His condition qualifies him to be a consumer of the Service Agency, with an eligibility diagnosis of having a condition similar to mental retardation. Claimant lives with his parents and an adult brother in a single-family home. He has a close relationship with each of them, and they take turns tending to his needs. Claimant's primary caregiver, his mother, Marisa P., was commended by the Service Agency as having "done an outstanding job of coordinating Patrick's care." Claimant is usually in a good mood, is very animated and talkative and has a number of friends.

2. Patrick's medical condition is very involved and fragile, requiring 24-hour care and monitoring. An assessment prepared for the Service Agency by a nurse vendor in January of this year stressed the need for an LVN skilled in interventions and the operation of equipment including how to handle emergencies and malfunctions in the home environment. In her report, this nurse noted that while the parents are "very knowledgeable and competent in caring for him, they are exhausted and overwhelmed from his continual day and night care." The report referred to Claimant's medical needs as being "vast," with the intervention component something which could only be addressed by a licensed skilled nurse.

3. Due to the intensity of his medical needs and as noted in an Individual Family Service Plan (IFSP)[2] dated May 9, 2012, Claimant requires "constant supervision…" The IFSP team determined that Claimant "is not physically able to independently complete any activities of daily living. He is not able to complete any household chores and is dependent on others for completion of all personal hygiene tasks including bathing, feeding, dressing, medication administration and grooming. Patrick's care is provided by his family and nurses (funded by both Medi-Cal and HRC). He requires manual assistance with bowel management. He requires assistance from two people with transfers to wheelchair, bed, shower, van/bus, etc."

4. Since 2001, Claimant has attended a day program, Hillside Enterprises, a division of Advocacy for Respect and Choice (ARC) in Long Beach. Hillside provides pre-

[2] "Individual Family Services Plan" (IFSP) is HRC's name for the interdisciplinary process identified as an Individual Program Plan (IPP) in the Lanterman Act.

vocational and vocational training to developmentally disabled adults. Because this program is not a therapeutic one, it requires Claimant to be accompanied by an LVN at all times. Claimant, being social and outgoing, enjoys participating in the program, even though he has a higher mental functioning than most others there. Service Agency has paid for Claimant's overall transportation needs, including transit to the day program. Service Agency pays for 8 hours a day 5 days a week for a total of 40 hours a week to secure the services of an LVN to accompany Claimant to Hillside Enterprises and stay with him while he is there. The IFSP characterized the shift care nursing services as being "vital for both as a respite for mother/family and also to assist in maintaining and monitoring Patrick's condition and in lieu of hospitalizations.**"** The IFSP also states that Claimant received additional shift services paid by Medi-Cal through In Home Operations (IHO), a program administered by the state Department of Health Care Services. The LVN nurses were provided by Universal Home Care, an HRC vendor. These two sources of funding were intended to enable "Patrick to enjoy his daily work program at ARC-Long Beach, enjoy family life in his own home, and do community activities, such as Muscular Dystrophy Association events."

5. At the time the IFSP was completed, Claimant was receiving 15 hours a day, seven days a week services through the IHO program. The IFSP does not show a breakdown of the Medi-Cal funding between shift nursing and other services. However, the IFSP states that "Patrick receives 16 hours of shift nursing care funded by HRC and Medi-Cal, and it is therefore reasonable to conclude that eight of the 15 daily hours paid by Medi-Cal is for shift nursing services.

6. In-Home Support Services (IHSS) funds "personal care," which includes basic tasks such as bowel and bladder care, bathing, grooming and paramedical services. It is administered through the **[S]**tate Department of Social Services and county welfare units. Medi-Cal funds are available to developmentally disabled persons for the hiring of personal care providers, which can include family members. IHO pays $9 per hour for personal care. The Service Agency pays to the registry vendor $29 per hour for a shift LVN.

7. Each day, Claimant requires from his family a huge devotion of time and effort just for his personal care. For example, it takes up to two hours to feed him a meal due to his limited jaw movement. He is on nineteen medications. He requires repositioning during the night. His nighttime routine takes three hours if done independently by his mother. He is washed in his bed daily. When taking a shower, two people are needed to carry him. It takes at least one hour to complete cleaning.

8. Various "menu options" were offered to Claimant and his family on how to divvy up the hours for an LVN nurse and personal care paid for by Medi-Cal. At some time following the last IFSP, Claimant was placed in the Nursing Facility/Acute Hospital (NF/AC) waiver which allows for an award of more service hours. Patrick and his family chose a menu option of 450 hours per month of personal care services, and 234 hours per month of LVN level care. When calculated on a weekly basis, this award amounts to 14.5 hours a day, 7 days a week of personal care, and 7.5 hours a day, 7 days a week of LVN services. This is a significant number in total hours, from approximately 465 hours per month to 684 hours per month, but provides slightly fewer LVN hours. The NF/AC Waiver

was meant to provide Medi-Cal beneficiaries who have long-term medical conditions with the option of remaining in their homes in the community in lieu of hospitalization.

9. Service Agency discovered that Patrick only attends his day program on average 2-3 times each week. Over the past fiscal year, except for one month, HRC has been paying for the full 40 hours a week. In a team meeting with the family, Service Agency discussed turning some of the personal care hours into addition LVN hours so that, in addition to time spent in the family's home, an LVN could accompany Patrick to the day program. This met with resistance by the family members who responded that they relied on the funding for performing personal care services to supplement their income.

10. Patrick's counselor stated in various internal Service Agency memos that Marisa P. had told her that she, Marisa P., had chosen to decline some LVN hours electing to provide services herself, and that Marisa P. had refused to provide certain documents requested by the Service Agency, including the menu of options. During one communication between the two, the counselor reported that Marisa P. "yelled that I'm trying to take away the nursing and that she needs the nursing to have a break and that she needs the IHSS to pay the bills." In response, the counselor "explained to her that in the eyes of the State those funds are to provide care to Patrick only."

11. During the hearing, Marisa P. explained that Patrick's absences from the day program were attributable to a number of circumstances, including the failure of LVNs to show on given days, bad weather for Patrick to endure, and frequent visits to see physicians and undergo tests at Rancho Los Amigos Rehabilitation Center.

12. Marisa P. had issues with many of the LVNs who "worked for money, and not love," and who did not take training well on how to deal with Patrick's very specific condition. She uses the personal care payments to provide a home for Patrick and regards such payments as income necessary to maintain the home. She had not been told by anyone in the Service Agency that using personal care hours would result in a cut to LVN hours. She did not refuse to provide Service Agency with documentation, and in fact had signed an authorization for Service Agency to get any documents it required. It is open to question whether Marisa P. signed the authorization since the only copy provided by Service Agency as evidence in the hearing was dated May 9, 2012, and not executed.

13. The last IFSP, completed in May of 2012, noted that Gilvan P., Claimant's father, worked an irregular schedule as a limousine driver, the brother was not then employed but was looking for employment, spending much of his time helping to care for Claimant, and Marisa P. was a full-time homemaker and primary caregiver to Patrick.

14. Service Agency's position was that "the family could turn some of the personal care services into some additional LVN services so that in addition to the time in home of the LVN there would be additional time for a LVN to attend program."

15. In February of 2013, Service Agency issued a notice of proposed action in letter form to discontinue funding for LVN services because Claimant was not attending his

day program on a five-day, forty-hour basis. Claimant's mother and representative, Marisa P., timely filed a Fair Hearing Request on February 12, 2013.

CONCLUSIONS OF LAW AND DISCUSSION

1. Welfare and Institutions Code section 4648 describes those services and support**[s]** which a regional center shall secure to achieve the stated objectives of a consumer's individual program plan. The section states the intent of the Legislature that services and supports should assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices, live as independently as possible in the community, allow for interaction with persons without disabilities in positive, meaningful ways, and to fully participate in programs.

2. As set forth in Factual Findings 1, 2, 3, and 4, Claimant, his family, and HRC all look with great favor on Claimant's involvement in the day program as well as the shift nursing, enabling Claimant not only to attend the day program, but also maintaining and monitoring his frail condition, and keeping him out of permanent hospitalization. As stated in the IFSP, the provision of LVN services is "vital" to the welfare of Claimant.

3. HRC's Service Policy describes in-home nursing services as including "periodic home visits by a licensed nurse for the purpose of monitoring and evaluating an individual's overall medical condition in order to identify potential medical emergencies and the need for changes in care and treatment and/or to provide training to the primary caregiver in the techniques required to provide care." It also includes "regularly scheduled nursing shifts of 4 or more hours for the purpose of supplementing the care given by the parent or relative who has been trained to administer nursing care and treatment for his/her family member."

3. The goals of the Lanterman Act are expressed in HRC's Service Policy on In-Home Nursing Services and mirror the situation in consideration here: "Medically fragile and technology dependent children and adults with a developmental disability may have intensive physical support and medical needs that require nursing care, treatment and monitoring. The severity of their condition may indicate that regular monitoring and frequent treatment or interventions are required in order to sustain life. Hospitalization or specialized living environments are often required for these children and adults unless the family can manage the needed care for their family member at home. When such an individual is residing with parents or relatives, in-home nursing services may be necessary to maintain the living arrangement."

4. Welfare and Institutions Code section 4648, subdivision (a)(8), states, "Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." This proscription applies to this case.

5. In an attempt to reconcile this prohibition with its stated aim of minimizing the possibility for hospitalization, HRC provides, "If there is another funding source for in-home nursing services, Harbor Regional Center may purchase the difference between the hours provided by the other source and the number of hours identified in the individual family service plan or 16 hours per day, whichever is less."

6. As set forth in Factual Finding 8, Medi-Cal provides funding for 7.5 hours daily 7 days a week to cover LVN nursing, regardless of whether LVNs attend the home to deal with Claimant's myriad medical problems or to accompany Claimant to the day program and stay with him there for whatever days and hours he attends.

7. To the extent that the current level of Medi-Cal funding for skilled nursing services is already being provided, Service Agency is prohibited from supplanting that funding with its own. However, Service Agency agreed to fund Claimant's attendance at his day program at the rate of 40 hours per week, which agreement recognized that there was an unmet need from the generic resource. Since neither Claimant's needs nor the number of LVN hours provided IHO have materially changed since the last IFSP meeting, there is no reason to change the established funding formula. Accordingly, Service Agency shall continue to fund Claimant's attendance at the Hillside program at the rate of eight hours per day for five days per week.

8. Service Agency argued that Claimant's family should convert some of the personal service hours into LVN hours, presumably to reduce Service Agency's funding obligation. However, Service Agency has not established that the hours it wishes Claimant's family to convert to LVN care are unnecessary to provide for Claimant's personal care needs.

ORDER

The appeal of Claimant is sustained and Service Agency shall continue to fund LVN shift hours to enable Claimant to attend the day program at Hillside Enterprises at the rate of eight hours a day, five days a week.

Dated: 5/7/13

JERRY SMILOWITZ
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.