

BEFORE THE
DEPARTMENT OF DEVELOPMENTAL SERVICES
STATE OF CALIFORNIA

In the Matter of the Appeal of the Audit
Involving:

K.O.,

Appellant,

vs.

SAN DIEGO REGIONAL CENTER,

Respondent.

OAH No. 2013110355

PROPOSED DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 27, 2014, in San Diego.

Ron House, Attorney at Law, represented the San Diego Regional Center (SDRC).

Brett J. Schreiber, Attorney at Law, represented appellant K.O.

The matter was submitted on May 27, 2014.

FACTUAL FINDINGS

Parties and Jurisdiction

1. SDRC conducted a review of nursing respite services that were authorized for appellant from October 2011 through November 2012 in order to verify whether the bills appellant submitted for these services were in compliance with California Code of Regulations, title 17, section 50606, subdivision (b)(2). This regulation requires regional centers to conduct audits to verify that service billings submitted by a service provider are supported by the provider's consumer attendance and service records.

After reviewing appellant's billing records, SDRC discovered that appellant billed for hours provided by her son, M.O., at a certified nursing assistant (CNA) rate although he was

not a CNA. In a Final Audit Report, SDRC determined that the overpayment was \$21,430.61.

On August 1, 2011, appellant submitted an appeal of the SDRC's Final Audit Report to the California Department of Developmental Services (DDS), the state agency that oversees the funding and implementation of services for the developmentally disabled. DDS conducted an informal administrative review of this matter pursuant to California Code of Regulations, title 17, section 50732. On October 17, 2013, DDS issued a Letter of Findings. DDS modified SDRC's Final Audit Report and reduced the overpayment from \$21,430.61 to \$16,533.60. The reasoning for DDS's modification is provided below.

DDS determined that both SDRC and appellant were responsible to ensure that purchased services were for only allowable services for the October 2011 through September 2012 period. The rate for a Personal Care Assistant (PCA) was \$11.85 an hour; the rate for a CNA was between \$18.10 and \$18.66. Because SDRC and appellant were deemed equally responsible for the overpayment during this period, DDS reduced by half the sum M.O. would have been paid at the PCA rate of \$11.85 per hour between October 2011 through September 2012. The total hours provided for this period at the PCA rate, as DDS assessed it, totaled \$9,794.02. Half of this figure is \$4,897.01. DDS then deducted \$4,897.01 from the total overpayment of \$15,086.21 for the October 2011 through September 2012 period to arrive at a modified overpayment of \$10,189.20 for the October 2011 through September 2012 period. DDS did not modify the overpayment for October 2012 and November 2012 because DDS found that SDRC informed appellant on September 2012 that she could not utilize M.O. as a CNA. Despite SDRC's advisement to appellant, appellant continued to utilize M.O. as a CNA for these two months. The overpayment for these two months was \$6,344.40. DDS then added \$6,344.40 to the modified overpayment of \$10,189.20 for the total overpayment sum of \$16,533.60. At the hearing, SDRC did not dispute DDS's modification of the amount owed. Thus, the issue in this proceeding is whether there was an overpayment of \$16,533.60.

Appellant appealed DDS's Letter of Findings and, pursuant to California Code of Regulation, title 17, section 50750, requested a formal administrative hearing in order to challenge the reimbursement sought by the SDRC.

Background

2. J.G. is a 24-year old male diagnosed with epilepsy, autism and severe mental retardation. He resides at home with his family. To help ensure that J.G. could remain safely in his family home, regional center authorized nursing respite care hours.

3. Appellant is J.G.'s mother and on June 9, 2010, she applied to become a vendor for nursing services as a family member. As part of this process, appellant signed a disclosure form in which she acknowledged that she could hire only a Licensed Vocational Nurse (LVN), Registered Nurse (RN), or certified nurses' aide (CNA) to provide nursing

services for J.G.¹ In a letter dated June 16, 2010, SDRC approved appellant's June 9, 2010, Vendor Application. Effective June 16, 2010, appellant was added to the current list of approved vendors. As a vendor, appellant was allowed to directly hire and supervise licensed nurses to provide care to J.G.

SDRC's Audit

4. Leticia Alda is the Internal Auditor for SDRC and testified on behalf of the SDRC regarding her review of SDRC's payments for J.G.'s nursing care services from October 2011 through January 2013. Ms. Alda reviewed the CNA nursing services appellant billed to SDRC to assess whether they were substantiated with the purchase of services required under California Code of Regulations, title 17, 50606, subdivision (b)(2).

Ms. Alda's audit revealed that SDRC overpaid appellant for nursing services in the amount of \$21,430.61. Ms. Alda's conclusions were based on Respite Services Billing statements appellant submitted from October 2011 through November 30, 2012. These statements contain certifications signed by M.O. for 1,166.5 hours of nursing services at the CNA rate of \$18.10 from October 2011 through August 2012, and then at the CNA rate of \$18.66 for part of August 2012 through November 2012. At all times, M.O. was not a CNA. M.O. signed the billing forms, and appellant submitted them to SDRC. SDRC paid appellant at the CNA rates of \$18.10 and \$18.66 through November 2012.

Appellant's Evidence

5. Appellant explained that J.G. has the functional capacity of a 13-month old and requires 2:1 care. J.G. is severely autistic and has epilepsy.

Appellant testified that, prior to appellant becoming vendorized, she had significant difficulties procuring the level of nursing services that J.G. required. As a result, she "had to do what she had to do," to secure adequate nursing services for J.G. Starting October 2011, due to J.G.'s complex needs and because CNAs were not available to care for J.G., appellant said she needed to have M.O. take care of J.G. as a matter of J.G.'s health and safety. M.O. was the only person who knew J.G.'s needs and could take care of him. Appellant emphasized that she never represented in the billing statements that M.O. was a CNA or LVN.

Appellant expressed frustration both regarding the lack of CNAs and LVNs to care for J.G. and regarding the persons referral agencies sent to help care for J.G. She noted that referral agencies improperly sent persons who were not licensed CNAs. Appellant suggested that SDRC audited her because referral agencies had sent individuals to provide CNA services for J.G. who were not CNAs.

¹ California Code of Regulations, title 17, section 54342, subdivisions (a)(46), and (a)(51), identify the vendor qualifications for a Licensed Vocational Nurse and a certified nurse's aide or assistant.

Appellant did not disagree that she submitted the billing statements certified by M.O. in the amount of \$16,533.60.

Appellant claimed that she had an “understanding” with SDRC that M.O. could be paid at the CNA rate. This understanding consisted of her belief that she mentioned that M.O. was providing CNA services for J.G. to her regional center worker and that this worker didn’t think it was “any big deal.” Appellant explained that she mentioned “briefly” to J.G.’s previous case coordinator, Mary St. John, that her son was working as J.G.’s CNA caregiver in 2010. Ms. St. John told appellant not to mention anything because “it” was too complicated. When confronted with the fact that the audit period did not concern 2010, appellant sought to clarify her testimony. Appellant said that she told Ms. St. John that she would end up having to use M.O. There is no documentation to substantiate appellant’s testimony.

To the contrary, SDRC records show that the earliest appellant informed SDRC that she was using the CNA rate to pay M.O. was September 17, 2012. SDRC told appellant she could not pay M.O. at the CNA rate but that she might be able to pay him at the personal care assistant rate. Subsequently, appellant communicated with J.G.’s case coordinator, Susan Aguilar (Ms. Aguilar), regarding paying M.O. for Personal Assistance care. In a September 12, 2012, email, appellant communicated her difficulty getting CNAs and LVNs to cover open shifts to care for J.G. Ms. Aguilar immediately responded to assist appellant with setting up a Personal Assistant contract for M.O.

Appellant’s Arguments

6. Appellant argued that the doctrine of equitable estoppel applies because she relied on representations that she had “to do what she had to do” to get adequate nursing services for J.G., and no one at the SDRC noticed that M.O. was not a CNA despite the billing forms she submitted.

Appellant is incorrect. According to appellant’s own testimony, SDRC did not mislead her to believe that her son could bill for nursing services as a CNA. The doctrine of equitable estoppel “provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment.” (*Morrison v. California Horse Race Bd.* (1988) 205 Cal.App.3d 211, 218-219 citing *Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725.) Appellant testified only that she told Ms. St. John that “she would end up having to use (M.O).” This statement cannot reasonably be interpreted to mean that SDRC led appellant to believe that she could pay M.O. at the CNA rate.

Appellant also argued that the overpayment should be \$1,133.51, the difference, applied retroactively, between the \$17.15 rate referenced in a time card she obtained from SDRC and the rate of \$18.10 M.O. received. This argument is also not persuasive. Appellant cited no legal authority to support the argument for such a retroactive offset.

SDRC's Argument

7. SDRC argued that the case is relatively simple: appellant was not entitled to be paid as a CNA or LVN because her son was not a CNA or LVN as defined in California Code of Regulations, title 17, section 54342, subdivisions (a)(46), and (a)(51).

LEGAL CONCLUSIONS

1. Welfare and Institutions Code section 4648.1 and California Code of Regulations, title 17, section 50705 authorize DDS and the regional centers to monitor the services and supports purchased for and provided to regional center clients. DDS is authorized to conduct fiscal reviews and audits of the regional center's service vendor records. DDS is also entitled to recover funds paid when DDS or a regional center determines that services were not provided in accordance with the regional center's contract or authorization.

2. Pursuant to California Code of Regulations, title 17, section 50730, a party may request DDS to conduct an administrative review of an audit report issued by a regional center and, upon this request, pursuant to California Code of Regulations, title 17, section 50732, DDS is required to issue a Letter of Findings. The Letter of Findings will be final unless a request for a formal hearing is made pursuant to California Code of Regulations, title 17, section 50750.

3. Pursuant to California Code of Regulations, title 17, section 50758, subdivision (k), a regional center has the initial burden of proof, to demonstrate by a preponderance of the evidence, that its audit findings were correct. Once the regional center has presented a prima facie case, the burden of proof shifts to the appellant to demonstrate by a preponderance of the evidence that the appellant's position was correct and that the audit findings and/or reimbursement order were incorrect.

Evaluation

4. SDRC made a prima facie showing, pursuant to California Code of Regulations, title 17, section 50758, subdivision (k), that appellant was overpaid for nursing services in the amount of \$16,533.60, as DDS determined in its Letters of Findings. Respondent sustained its burden of proving that the findings in the audit were correct. The burden then shifted to appellant to demonstrate that her arguments that refuted the audit findings were correct. Appellant failed to meet that burden. A preponderance of the evidence demonstrated that appellant employed M.O. for 1,166.50 hours between October 2011 and November 2012 and billed those services at a CNA rate although her son was not a CNA.

Cause therefore exists pursuant to Welfare and Institutions Code section 4648.1 and California Code of Regulations, title 17, section 50705, to sustain the DDS's Letter of

Findings dated October 17, 2013, ordering appellant to reimburse the SDRC in the amount of \$16,533.60.

ORDER

The appeal is denied. Appellant K.O. shall reimburse SDRC \$16,533.60.

DATED: July 24, 2014.

_____/s/_____
ABRAHAM M. LEVY
Administrative Law Judge
Office of Administrative Hearings