

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

NORTH BAY REGIONAL CENTER,

Service Agency.

OAH No. 2015080026

DECISION

Administrative Law Judge Regina Brown, State of California, Office of Administrative Hearings, heard this matter on October 21, 2015, in Santa Rosa, California.

Claimant's mother, who is also his conservator, appeared on Claimant's behalf.

G. Jack Bengé, Attorney, represented service agency North Bay Regional Center.

ISSUE

Whether North Bay Regional Center (NBRC) properly denied claimant's request to (1) fund a parent-vendored Personal Assistant who provides nursing services at a rate of \$14 per hour and (2) fund start-up costs, payroll expenses, advertising, and training for a Personal Assistant?

FACTUAL FINDINGS

1. Claimant is a 48-year-old man who is eligible for regional center services based upon a diagnosis of Autism, Intellectual Development Disorder, and Post-Traumatic Stress Disorder. He has a history of behavioral issues, including self-injurious behavior, aggression, minor property destruction, forced defecation and emesis, and throwing things. He also suffers from neurogenic bladder which requires catheterization every four to six hours.

2. From 2005 to October 25, 2013, claimant resided at the Sonoma Developmental Center on an involuntary commitment. In October 2013, claimant was released to his mother's home. She is a registered nurse and claimant's primary caretaker. She has been performing claimant's catheterizations. By all accounts, claimant's mother has done an extraordinary job of providing him with a safe and nurturing environment. However, it was determined that supports to meet his medical needs outside of the family home needed to be developed.

3. On August 8, 2014, NBRC developed an individualized program plan (IPP) for claimant. The IPP indicated the following: "Personal care assistant hours were requested (198 hours minimum). The IPP does not address the needed personal care assistant hours."

4. NBRC and claimant's mother worked (and continue to work) to find services for claimant, including his medical needs. They encountered problems with finding service providers in the NBRC catchment area. They had earlier discussions about the possibility of the mother creating a Flexible Support Plan as a plan of last resort where she would seek to be vendorized to coordinate and meet claimant's personalized services and support needs. The ultimate outcome was to eventually have claimant live in his own home in the community and be successful, and a Flexible Support Plan would prepare claimant for separation out of the family home.

5. On May 11, 2015, claimant's mother submitted a Flexible Support Plan for claimant. In her budget, she requested personal care assistant services at the rate of \$14 per hour. She also included a request for the following additional costs: start-up for initial payroll, advertising and training at \$7,082; payroll through ADP including payroll taxes at \$1,774; and advertising at \$250 for startup and \$75 ongoing recruitment.

6. NBRC approved claimant's mother request to be vendorized to implement the Flexible Support Plan. In a draft proposed IPP addendum, dated June 16, 2015, NBRC indicated that in the absence of alternative resources, NBRC would fund, effective July 1, 2015 through December 31, 2015, the following: (a) claimant's mother for parent [vendored] personal care assistant services up to 283 hours per month at \$12 per hour. The purchase of service would be canceled upon claimant's move from the family home; and (b) claimant's mother for parent [vendored] license vocational nurse up to 151 hours per month at \$29.41 per hour. The purchase of service would be cancelled/reexamined upon claimant's move from the family home. Claimant's mother did not agree to or sign the addendum.

7. On June 22, 2015, NBRC sent claimant a Notice of Proposed Action, stating the following:

Denial of parent-vendor request to fund Personal Assistants at a rate of \$14 per hour. Denial of parent-vendor request for additional funding for start-up costs, payroll, advertising, and training; but not as part of the Flexible Support plan.

NBRC will fund parent-vendored Personal Assistant (Flexible Supports, Service Code 093) at a rate of \$12.00 per hour, per state mandated median rates, but not as part of the Flexible Support plan.

NBRC will fund vouchered Nursing Services, through a Financial Management Service agency, at the Medi-Cal rate of \$29.00 per hour.

Reason for action:

All costs incurred by a vendor are to be covered by the statewide median rate.

8. On August 3, 2015, a fair hearing request was filed.

9. Chad Graham, NBRC Senior Service Coordinator, testified at hearing. Graham was assigned to claimant's case in July 2014. Graham explained that for a Flexible Support Plan, the IPP team agrees on the services needed; however, the services are coordinated by the vendored parent who is responsible for recruitment and training of staff. Graham explained that the statewide median rate for parent-vendored personal care assistant is \$12 per hour, and NBRC is required to adhere to the recent median rate guidelines promulgated by the Department of Developmental Services (DDS). He acknowledged that there are exceptions to the median rate if there is a determination that it is required to protect the consumer's health or safety. Such a determination would require a medical assessment. A medical assessment was not performed in claimant's case.

10. Claimant's mother is extremely concerned that she will not be able to hire a personal care assistant to attend to claimant's intensive needs at the rate of \$12 per hour. Claimant's mother states that in 2008, NBRC approved her to be vendored to provide a Flexible Support Plan for claimant when it was expected that he would return to the family home. According to her, the approved costs of services included startup costs before claimant arrived home, including advertising, training, fingerprinting, background checks, and similar ongoing costs. She contends that she should be given the higher rates for service which had previously been approved in 2008.

11. Another issue raised by the Notice of Proposed Action was to the funding of vouchered nursing services at the Medi-Cal rate of \$29.00 per hour. California Code of Regulations, title 17, section 58886, established a process through which family members may become "employers" with an agency "co-employer" to provide certain direct services to consumers for nursing services. The co-employer, referred to as a fiscal management service (FMS) co-employer or fiscal management service fiscal/employer agent co-employer, handles payroll and other administrative duties.

In particular for nursing services, as a voucher recipient, claimant's mother is legally responsible for the selection and supervision of the nursing services (and the associated costs) for a consumer provided under any voucher. (Cal. Code Regs., tit. 17, § 54355.) NBRC seeks to use the Nursing Services company, Mains'l California, as the FMS. Mains'l handles fingerprinting, insurance, and payroll costs and would be considered the employer of record for the licensed vocational nurse.

Claimant's mother disagrees with using Mains'l because this service had not been discussed with her or in an IPP team meeting. She also states that she should not have to pay the costs associated with the recruitment and hiring of the licensed vocational nurse.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act. (Welf. & Inst. Code, § 4500, et seq.¹) The Lanterman Act (Act) provides that an "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community." (§ 4501.) The Act is one of entitlement, meaning that consumers have a right to needed services at the state's expense. (*Association for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384; *Williams v Macomber* (1990) 226 Cal.App.3d 225.) The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (§§ 4501, 4509, 4685), and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community (§§ 4501, 4750-4751). (*Association for Retarded Citizens v. Dept. of Developmental Services, supra*, at p. 388.)

2. DDS is the state agency charged with implementing the Act. Pursuant to the Act, DDS provides services to consumers through a network of regional centers. (§§ 4620, 4621.) Regional centers are charged with the responsibility of carrying out the state's responsibilities to the developmentally disabled under the Act. (§ 4620, subd. (a).) The Act directs regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP states the consumer's goals and objectives and delineates the services and supports needed by the consumer. (§§ 4646, 4646.5, & 4648.) In order to achieve the goals and objectives set forth in a consumer's IPP, regional centers "shall secure services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan . . ." (§ 4648, subd. (a)(1); see also §§ 4646.5, 4647.)

¹ All references are to the Welfare and Institutions Code unless otherwise indicated.

3. Under the Act, regional centers must also provide services delineated in an IPP within the financial guidelines set by DDS. Through the process of vendorization, a regional center may offer vouchers to family members to allow the consumer to procure their own services. Regional centers may not contract or issue a voucher for services and supports at a cost that exceeds the maximum rate of payment established by DDS. (§ 4648, subd. (a)(4).) Further, section 4691.9 addresses the rate to be paid to service providers. Section 4691.9 provides, in relevant part, as follows:

Notwithstanding any other provision of law or regulation, commencing July 1, 2008:

(a) No regional center shall pay an existing service provider, for services where rates are determined through a negotiation between the regional center and the provider, a rate higher than the rate in effect on June 30, 2008, unless the increase is required by a contract between the regional center and the vendor that is in effect on June 30, 2008, or the regional center demonstrates that the approval is necessary to protect the consumer's health or safety and the department has granted prior written authorization.

(b) No regional center may negotiate a rate with a new service provider, for services where rates are determined through a negotiation between the regional center and the provider, that is higher than the regional center's median rate for the same service code and unit of service, or the statewide median rate for the same service code and unit of service, whichever is lower. . . .

4. Although claimant's mother may have been vendorized in August 2008, she cannot be considered as an existing service provider under section 4691.9, subdivision (a). Claimant resided in the locked facility until 2013. His mother had to submit a new application to become a vendor in 2015. Therefore, she is not entitled to a rate higher than the statewide median rate for that service. Nor is she entitled to any additional costs associated with securing a personal care assistant for claimant.

Claimant's mother's contention that she cannot secure a competent provider for personal care assistant services at \$12 per hour is, at this point, premature because there is no evidence that she has attempted to secure such services. If she can find a qualified personal assistant at the specified rate, the issue is moot.

5. The Act recognizes that not all claimants can be served at the same rate, and that regional centers are obligated in exceptional cases to petition DDS for whatever amounts are necessary to ensure that consumers receive the services they require. If claimant's mother cannot reasonably secure a personal assistant at \$12 per hour, then NBRC must discharge its duty to investigate whether a higher rate is required by reason of claimant's medical condition in order to protect the consumer's health or safety. If demonstrated, then NBRC would need to request approval from DDS to pay a higher rate.

6. Accordingly, by reason of Factual Finding numbers 1 through 10 and Legal Conclusions 1 through 4, NBRC properly denied claimant's request to, (1) fund a parent-vendored Personal Assistant who provides nursing services at a rate of \$14 per hour, and (2) fund start-up costs, payroll expenses, advertising, and costs of training for a Personal Assistant.

Regarding the issue of the licensed vocational nurse, NBRC will fund [as stated in the Notice of Proposed Action] vouchered Nursing Services, through an agreed upon Financial Management Service agency, at the Medi-Cal rate of \$29.00 per hour. NBRC is not responsible for any associated costs incurred by the parent-vendor.

ORDER

The appeal is denied.

DATED: November 4, 2015

_____/s/_____
REGINA BROWN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Judicial review of this decision may be sought in a court of competent jurisdiction within ninety (90) days.