

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs

SAN DIEGO REGIONAL CENTER,

Service Agency,

and

DEPARTMENT OF DEVELOPMENTAL
SERVICES

Necessary Party.

OAH No. 2016010851

DECISION

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 19, 2016, in San Diego, California.

Ronald R. House, Attorney at Law, represented San Diego Regional Center (SDRC).

Wendy Dumlao, Law Offices of Wendy Dumlao, represented claimant, who was not present during the hearing. Claimant's mother and father were present during the hearing.

W. Jason Scott, Assistant Chief Counsel, Department of Developmental Services, represented the Department of Developmental Services (DDS). DDS was joined as a party to this matter on March 23, 2016.

The parties asked to submit written closing arguments and to keep the record open until June 10, 2016. Their request was granted, and the parties submitted their briefs by June 10, 2016. On June 10, 2016, the record was closed and the matter submitted.

ISSUES

1. Did DDS properly deny SDRC's request for written authorization to increase the transportation rate to transport claimant to and from his day program?
2. If DDS did not properly deny the health and safety waiver, what is the appropriate amount that should be authorized for transportation costs and from what source should the cost of transportation be paid?
3. May SDRC terminate funding of claimant's transportation supports and services?

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a 27 year-old man with multiple disabilities and medical conditions. He is non-verbal. He uses a wheelchair, but he cannot move the wheelchair on his own. He does not have control of his arms, and he can slip down in the wheelchair. He relies completely on others for all of his daily life activities, including feeding, toileting, dressing, grooming, and taking medications. He requires constant supervision during waking hours.

Claimant lives one week with his mother and one week with his father in a continual rotation. He attends a day program that is 17 miles from his mother's home and 24.5 miles from his father's home. There are no day care programs closer to either parent's home that are suitable for claimant.

2. Claimant's Individual Program Plan (IPP) requires he be provided "reliable" transportation to and from his day program through June 2018. It further provides that "SDRC will fund Transportation Access Plan." The notes state that the IPP team determined that the contracted transportation, Care 4 U Mobility, was safe and "the most cost effective, as determined by the transportation department after researching several vendor's rates, and they are the only company that would agree to provide transportation based on both parents' addresses."

3. Claimant had used the services of a different provider before Care 4 U, but the services proved to be unreliable and unsafe. There were instances where the provider dropped claimant off unattended and/or at the wrong house. The former provider was no longer acceptable to provide transportation services for claimant.

4. To locate reliable, safe, and cost effective transportation for claimant, SDRC requested bids from three transportation vendors to transport claimant to and from his day program depending upon which residence he was living in. The lowest bid was submitted by

Care 4 U Mobility. Care 4 U agreed to transport claimant to and from his mother's home for \$97.55 per day and to and from his father's home for \$121.78 per day. The DDS contracted rate for non-ambulatory clients is the 2008 established rate of \$27.04 per day. SDRC could find no vendors who would transport claimant for the contracted rate.

5. In compliance audits of SDRC's records for fiscal years 2010 – 2012 and 2013-2014, DDS found SDRC to be out of compliance because it was paying an amount in excess of the contracted rate for claimant's transportation needs. It reiterated that SDRC must obtain a health and safety waiver from DDS to pay transportation costs beyond the 2008 rates.

6. On September 26, 2014, Carlos Flores, Executive Director, SDRC, requested a health and safety waiver for claimant's transportation costs.¹ Mr. Flores listed the medical and safety reasons the waiver was required, including that another transportation vendor had left claimant, who cannot fend for himself in any way, unattended and on occasion at the wrong house. The request stated, "Without this requested rate increase [claimant] cannot be safely transported to the closest, appropriate day program. Without specialized transportation services, he would not be able to access needed programming to address both his self-care skill deficits and to increase his level of community activity."

7. Mr. Flores and DDS representatives exchanged information regarding SDRC's request, but DDS did not approve or deny this request.

8. On July 30, 2015, Mr. Flores re-submitted the request for a health and safety waiver.

9. From January 2015 through September 2015, DDS requested financial and other information about Care 4 U. SDRC forwarded DDS's questions to Care 4 U; received Care 4 U's responses and provided the requested information to DDS to support its request for written authorization for the increased transportation rates. DDS contended SDRC had not succeeded in establishing claimant's need for a health and safety waiver.

10. By letter dated November 16, 2015, Brian Winfield, Acting Deputy Director, Community Services Division, denied SDRC's request for a waiver. Mr. Winfield noted that SDRC "entered into a negotiated rate (California Code of Regulations, Title 17, § 58540) with care 4 U Mobility on behalf of [claimant]" after obtaining bids from other transportation vendors. He stated that SDRC, however, had not provided sufficient cost details to justify the increased rate and that the travel times used to support the rate included another SDRC client without deducting the mileage for that client. The letter concluded that "[t]he request appears to be a rate increase for the service provider, rather than for the health and safety needs of the consumer."

¹ Welfare and Institutions Code section 464.4, subdivision (b), requires "written authorization" from DDS.

11. On January 12, 2016, SDRC notified claimant that funding for his transportation to and from his day program would terminate on March 1, 2016.

12. On January 18, 2016, claimant's father filed a Fair Hearing Request, in which he objected to the reduction of transportation services. On January 25, 2016, claimant's mother filed a Fair Hearing Request in which she sought to require SDRC to fund claimant's transportation to and from his day program.

13. In February 2016, in a separate case but with a similar issue, a motion was filed to add DDS as a necessary party to this and two other pending cases. In response to that motion, DDS agreed to be joined as a party to the three cases.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. Each party asserting a claim or defense has the burden of proof for establishing the facts essential to that specific claim or defense. (Evid. Code §§110, 500.) The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.) A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

The Lanterman Act

2. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

3. When an individual is found to have a developmental disability as defined under the Lanterman Act, the State of California, through a regional center, accepts responsibility for providing services and supports to that person to support his or her integration into the mainstream life of the community. (Welf. & Inst. Code, § 4501.)

4. The supports and services to be provided to a consumer are determined by a team of individuals, the Individual Program Plan [IPP] team, and are based on the needs and preferences of the consumer. The IPP team considers, among other things, the options of services and supports available, the expected effectiveness of each service and support to

meet the consumer’s needs, and the cost-effectiveness of each option. The supports and services agreed to be provided to the consumer are contained in an IPP. (Welf. & Inst. Code §4512, subd. (b).)

5. The term “services and supports” includes “transportation services necessary to ensure delivery of services to persons with developmental disabilities.” (Welf. & Inst. Code §4512, subd. (b).)

6. Welfare and Institutions Code section 4629.7, subdivision (c), requires that “service providers and contractors, upon request, shall provide regional centers with access to any books, documents, papers, computerized data, source documents, consumer records, or other records pertaining to the service providers’ and contractors’ negotiated rates.”

7. Welfare and Institutions Code section 4648 provides, in part:

In order to achieve the stated objectives of a consumer’s individual program plan, the regional center shall conduct activities, including, but not limited to, all of the following:

(a) Securing needed services and supports.

(1) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. The regional center shall secure services and supports that meet the needs of the consumer, as determined in the consumer’s individual program plan, and within the context of the individual program plan, the planning team shall give highest preference to those services and supports which would allow minors with developmental disabilities to live with their families, adult persons with developmental disabilities to live as independently as possible in the community, and that allow all consumers to interact with persons without disabilities in positive, meaningful ways.

[¶] . . . [¶]

(3) A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer from any individual or agency that the regional center and consumer or, when appropriate, his or her parents, legal guardian, or conservator, or authorized representatives, determines will best accomplish all or any part of that consumer’s program plan.

[¶] . . . [¶]

(5) In order to ensure the maximum flexibility and availability of appropriate services and supports for persons with developmental disabilities, the department shall establish and maintain an equitable system of payment to providers of services and supports identified as necessary to the implementation of a consumers' individual program plan. The system of payment shall include a provision for a rate to ensure that the provider can meet the special needs of consumers and provide quality services and supports in the least restrictive setting as required by law.

(6) The regional center and the consumer, or when appropriate, his or her parents, legal guardian, conservator, or authorized representative, including those appointed pursuant to subdivision (a) of Section 4541, subdivision (b) of Section 4701.6, or subdivision (e) of Section 4705, shall, pursuant to the individual program plan, consider all of the following when selecting a provider of consumer services and supports:

(A) A provider's ability to deliver quality services or supports that can accomplish all or part of the consumer's individual program plan.

[¶] . . . [¶]

(D) The cost of providing services or supports of comparable quality by different providers, if available, shall be reviewed, and the least costly available provider of comparable service, including the cost of transportation, who is able to accomplish all or part of the consumer's individual program plan . . .

[¶] . . . [¶]

8. Welfare and Institutions Code section 4648, subdivision (g), provides that "[W]hen there are identified gaps in the system of services and supports or when there are identified consumers for whom no provider will provide services and supports contained in his or her individual program plan, the department may provide the services and supports directly."

9. Welfare and Institutions Code section 4648.4, subdivision (b), provides, in part:

Notwithstanding any other provision of law or regulation, except for subdivision (a), no regional center may pay any

provider of the following services or supports a rate that is greater than the rate that is in effect on or after 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:

[¶] . . . [¶]

(2) Transportation, including travel reimbursement.

10. Welfare and Institutions Code section 4648.35 provides, in part:

At the time of development, review, or modification of a consumer's individual program plan (IPP) or individualized family service plan (IFSP), all of the following shall apply to a regional center:

(a) A regional center shall not fund private specialized transportation services for an adult consumer who can safely access and utilize public transportation, when that transportation is available.

(b) A regional center shall fund the least expensive transportation modality that meets the consumer's needs, as set forth in the consumer's IPP or IFSP.

(c) A regional center shall fund transportation, when required, from the consumer's residence to the lowest-cost vendor that provides the service that meets the consumer's needs, as set forth in the consumer's IPP or IFSP. For purposes of this subdivision, the cost of a vendor shall be determined by combining the vendor's program costs and the costs to transport a consumer from the consumer's residence to the vendor.

11. Welfare and Institutions Code section 4691.9 provides, in part:

(a) Notwithstanding any other law or regulation, commencing July 1, 2008:

(1) A regional center shall not 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.

Regulations

12. California Code of Regulations, title 17, section 50604, describes the financial and service records vendors are required to maintain.

13. California Code of Regulations, title 17, section 58501 defines "route miles" as the number of miles driven, while consumers are in the vehicle, during the provision of transportation service." "Transportation Service" is defined as "the conveyance of a consumer including boarding and exiting the vehicle."

14. California Code of Regulations, title 17, section 58544 provides, in part, that "[a] vendor may refuse to transport a consumer only if the transportation of the consumer poses a threat to the health and/or safety of the consumer, driver, transportation aide or other passengers."

15. California Code of Regulations, title 17, section 58540, subdivision (a), authorizes a regional center to enter into a contract for transportation services "in which the rate of payment, including the rate for transportation aide services, if any, is negotiated."

16. California Code of Regulations, title 17, section 58540, subdivision (b), provides that "[t]he proposed rate negotiated between the regional center and the vendor shall not be subject to the review and approval of the Department."

17. California Code of Regulations, title 17, section 58540, subdivision (c), provides:

The regional center shall maintain, pursuant to Section 58512, the following information:

- (1) A written explanation for the selection of the vendor;
- and
- (2) A written analysis showing that transportation service will be provided in a cost-effective manner.

Evaluation

18. Claimant is entitled to transportation services and supports to and from his day program as provided in his IPP. (Welf. & Inst. Code § 4512, subd. (b).) Transportation to and from the day program allows claimant to lead a productive life in the least restrictive

setting possible. By all accounts, claimant has a fulfilling and happy life living with his parents on a weekly rotating basis.

19. To determine appropriate transportation for claimant, SDRC must first consider public transportation, and if that is not appropriate, it must consider the least expensive appropriate transportation method.

20. Claimant had been using transportation services provided by a vendor that proved to be unreliable and unsafe; there were documented incidents where the transportation service left claimant, who is non-verbal and totally dependent on others, unattended and/or at the wrong address. Claimant was unable to safely use that transportation vendor, and SDRC was required to obtain the services from another transportation vendor.

21. SDRC made appropriate attempts to find the least expensive alternative vendor to provide the required transportation service to claimant. It solicited and received three bids. The lowest bid was submitted by Care 4 U, and they have been providing safe and reliable transportation services to claimant. The cost for transporting claimant to and from his day program exceeds the \$27.04 daily rate, which was established in 2008 and frozen at that amount by Welfare and Institutions Code section 4648.4.

22. In a spreadsheet provided to DDS by SDRC, the daily cost to transport claimant, depending upon which parent's home he was leaving from and returning to, were \$97.55 and \$121.78. SDRC requested a health and safety waiver of \$100 and \$130 per day.

Health and Safety Requirement

23. To obtain a health and safety waiver, the requesting agency must establish that "approval is necessary to protect the consumer's health or safety and the department has granted proper written authorization." (Welf. & Inst. Code §4648.4, subd. (b).) DDS contended that SDRC failed to establish that claimant "is at risk," or has needs different from others in wheelchairs; and therefore, the rate waiver must be denied.

24. DDS's contention is rejected. The legislation does not require a showing that a consumer is at risk or has different needs than other wheelchair bound clients. The requested increase in rate must be shown necessary to protect a consumer's health or safety. Claimant is a non-verbal, severely disabled young man. SDRC established that the only other less expensive transportation option, which was utilized by claimant in the past, was unreliable and unsafe, and, in fact, put claimant's safety at risk. SDRC established that specialized transportation is required to protect claimant's health and safety.

Negotiated Rate

25. DDS's denial letter characterized SDRC's agreement with Care 4 U as a negotiated rate agreement under California Code of Regulations, title 17, section 58540.

Although, the parties did not assert that section 58540 applied in this matter, it is noted that section 58540 permits a regional center to negotiate rates for transportation services. When a regional center negotiates a rate for transportation, it must maintain “(1) A written explanation for the selection of the vendor; and (2) A written analysis showing that transportation service will be provided in a cost-effective manner.” Section 58540, subdivision (b) specifically provides that the “proposed rate negotiated between the regional center and the vendor shall not be subject to the review and approval of the Department.”

Substantiation of Rate Requested for Health and Safety Waiver

26. The parties appear to agree there are no statutes or regulations that specify what DDS may consider, or the process it must follow, to determine whether to give or deny “written authorization” for a health and safety waiver. The only document that purports to provide guidance to regional centers requesting written authorization is a 2007 letter from DDS to “Regional Center Executive Directors” entitled, “Instructions for Requesting Health and Safety Waiver Exemptions.” The letter requires regional centers to provide 1) a description of the risk to health and safety of the consumer and why current services are inadequate; 2) a description of how health and safety may be affected if the increase is not granted; 3) documentation of the cost basis for the rate increase with back-up documentation; 4) information about available, alternative resources; 5) verification that alternative services have been considered; and 6) documentation that the rate increase is the most cost-effective and consumer-centered strategy to mitigate the risk.

SDRC complied with each of these requirements. As relates to documentation of the cost basis for the rate increase, SDRC, over several months, provided substantial financial and other information concerning Care 4 U as, and when, requested by DDS. SDRC relayed DDS’s financial questions to Care 4 U and forwarded Care 4 U’s responses to DDS. It is noted that after SDRC responded to questions from DDS in early 2015, another DDS representative asked the same questions in August 2015.

As noted by both SDRC and DDS representatives, both agencies are expected to be protectors of the public funds entrusted to them. However, both agencies are also mandated to provide the supports and services to developmentally disabled clients that are found to be necessary to their health and well-being as documented in the clients’ IPPs. It is determined that SDRC carefully reviewed the available options and costs associated with providing specialized transportation services to claimant. In so doing, SDRC established that Care 4 U was the most cost effective provider of safe and reliable transportation services for claimant.²

SDRC sought a waiver amount of \$100 or \$130 per day depending upon where claimant was residing for the week. The evidence supported a finding that the specialized

² DDS contends that the calculations provided to support the waiver include miles and time spent figures that are based on round trip mileage rather than “route miles.” The evidence supports a finding that the mileage and time spent calculations are based on one-way transporting claimant to the day program and one-way returning him home.

transportation costs for claimant was \$97.55 per day to and from his mother's house and \$121.78 to and from his father's house. This amount is fair and reasonable, and it is the most cost-effective means to provide transportation services to claimant.

Mandating a Vendor to Provide Services

27. DDS contended that, pursuant to Welfare and Institutions Code section 58522, Care 4 U, a SDRC vendor, may not refuse to transport claimant if the health and safety waiver is denied. It argued that, based on this statute, SDRC may require Care 4 U to transport claimant at the rate of \$27.04 per day on penalty of violating its contract with SDRC. DDS is incorrect. Welfare and Institutions Code section 58522 does not require a vendor to transport a consumer at any costs. The provision only prohibits the vendor from refusing to transport a client based upon a particular type of disability or other discriminatory motive.

Payment of Increased Rate of Transportation

28. Under claimant's IPP, and pursuant to Welfare and Institutions Code section 4648, SDRC must provide specialized transportation to and from claimant's day program. There are no safe and reliable transportation providers who will transport claimant for the DDS rate of \$27.04 per day. In order to fund the transportation service it is required to provide, SDRC must demonstrate the service is necessary to protect claimant's health or safety and the department must grant proper written authorization. While section 4648.4 does not explicitly state that DDS may not unreasonably withhold authorization, the doctrine of "reasonable consent" must be read into the statute. See, *Rey v. Lafferty* (1st Cir. 1993) 990 F.2d 1379, 1393 (author may not unreasonably withhold approval of merchandise under a licensing contract.). Applying that principle, DDS may not unreasonably withhold authorization for SDRC to contract with a transportation provider at a rate higher than the DDS rate.

Under the facts in this case, DDS unreasonably withheld authorization for SDRC to contract with Care 4 U at a rate of \$97.55 per day to and from his mother's house and \$121.78 to and from his father's house. If DDS does not provide the written authorization for SDRC to fund transportation through Care 4 U, DDS may provide the supports and services directly. (Welf. & Inst. Code §4648, subd. (g).)

ORDER

1. Claimant's appeal from San Diego Regional Center's determination to terminate funding of Care 4 U transportation services is granted.

2. The Department of Developmental Services must issue a written authorization to San Diego Regional Center to fund Care 4 U transportation services for claimant at the

rate of \$97.55 for travel to and from his mother's home and \$121.78 for travel to and from his father's house. Alternatively, the Department of Developmental Services must provide claimant with safe and reliable specialized transportation services directly.

DATED: June 24, 2016

SUSAN J. BOYLE
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety days.