

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

SAN DIEGO REGIONAL CENTER,

Service Agency.

OAH Nos. 2014100467,
2014110273, and
2014100890

DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings (OAH), heard this matter in San Diego, California, on December 2, 2014.

Claimant's mother, who is also his guardian, represented claimant, who was not present at the fair hearing.

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

On November 7, 2014, OAH issued an order consolidating OAH Nos. 2014100467, 2014110273, and 2014100890. The parties agreed at the hearing that one decision would be written addressing all issues. The parties' request to submit written closing arguments and keep the record open until December 23, 2014, was granted. However, the parties submitted additional arguments after 5:00 p.m., on December 23, 2014, which were not received by OAH until December 24, 2014. Those submissions were received in evidence and considered in this decision. SDRC's objection to the new documents attached to claimant's closing argument was overruled and those documents were considered. SDRC's objection to communications occurring after the hearing was overruled as those documents demonstrate SDRC is working on placement, an issue in this proceeding. Claimant's objection to SDRC's rebuttal closing was also overruled and that argument was received.¹ On December 24, 2014, the record was closed and the matter was submitted.

¹ Claimant's closing argument was marked and received as Exhibit A, SDRC's closing argument was marked and received as Exhibit B. Claimant's rebuttal closing argument was marked and received as Exhibit C. SDRC's rebuttal closing argument was marked and received as Exhibit D. Claimant's objection to SDRC's rebuttal closing

ISSUES

1. Can an exemption be granted to SDRC's prior determination, upheld at a previous hearing, that SDRC does not fund nursing services for its consumers? And, as a sub-issue, does claimant possess new evidence occurring after September 2, 2014, the date of the prior hearing, demonstrating that he requires 24 hour care?
2. Can SDRC find a placement facility that will meet claimant's needs?
3. Did SDRC witnesses intentionally testify falsely at previous hearings regarding SDRC's ability to provide a placement facility that would meet claimant's needs and the costs of placing claimant in such a facility?

FACTUAL FINDINGS

Jurisdictional Matters and Procedural History

1. On September 3, 2009, following an administrative hearing, SDRC was ordered to fund 310 hours per month of nursing respite services. The total number of monthly hours was divided between 95 hours of licensed vocational nursing (LVN) respite services and 215 hours of certified nursing assistant (CNA) respite services. (OAH No. 2009040141, ALJ James Ahler.)
2. On November 2, 2010, SDRC and claimant participated in mediation. In the Final Mediation Agreement SDRC agreed to fund nursing respite services "up to the total amount of \$148,564 for 12 months." As written, the agreement expired on November 2, 2011. (OAH No. 2010060987, ALJ Valleria Johnson.)
3. On May 2, 2013, SDRC and claimant again participated in mediation. In that Final Mediation Agreement SDRC agreed to annually fund \$219,564 of LVN respite services. Claimant's mother agreed to terminate her vendorization as a parent vendor. The mediation agreement became effective on June 1, 2013. (OAH No. 2013031101, ALJ Roy Hewitt.)
4. On November 14, 2013, following two days of hearing, claimant's appeal that the mediation agreement reached in OAH No. 2013031101 was being violated, that the order issued in OAH No. 2009040141 was being violated, and that he requested 24 hour, 2:1 respite services, was denied. The evidence did establish that claimant required 2:1 nursing care, but this was not a service SDRC funded. (OAH Nos. 2013070454 and 2013080101, ALJ Mary Agnes Matyszewski.)

argument was marked and received as Exhibit E, and claimant's reply to SDRC's rebuttal closing argument was marked and received as Exhibit F.

5. On September 15, 2014, following an administrative hearing, claimant's appeal that SDRC fund 24 hours of 1:1 skilled LVN services for claimant, that SDRC fund eight hours of 2:1 skilled LVN services on Saturdays so claimant can go into the community and attend the library for recreation/leisure, and that SDRC have a registered nurse (RN) write a comprehensive plan of care, was denied. (OAH No. 2014070594, ALJ Mary Agnes Matyszewski.)

6. In this appeal, claimant now seeks an exemption to SDRC's refusal to fund nursing services. As a corollary, claimant asserts that there has been a change in his circumstances since the last hearing to warrant his receipt of 24 hours of 1:1 LVN care. Claimant also requests that SDRC identify a placement facility that will meet his needs. In addition, claimant alleges that SDRC's witnesses intentionally testified falsely at the prior hearing about the costs associated with placing claimant in a facility.

Claimant

7. Claimant is a 25-year-old male diagnosed with epilepsy, autism and severe mental retardation. He currently resides at home with his family. Claimant participates in the Home and Community-Based Waiver for Individuals with Developmental Disabilities Program (HCBS Waiver Program). In the summer of 2013, claimant was hospitalized for several weeks. As a result, claimant's family was able to procure 24 hour 1:1 LVN care for claimant by using the funds the family did not spend while claimant was hospitalized.

DVDs and Documents Introduced

8. Claimant introduced 4 DVDs containing several hours' of video depicting "day in the life" clips. The videos showed claimant at all hours of the day and night and demonstrated how spontaneous his seizure episodes can be and the great deal of effort it takes to work with him. The videos also showed his mother's utter exhaustion and understandable frustration with caring for her son around the clock, and the lack of sleep she routinely gets. In addition to the efforts involved in caring for claimant, the videos also showed the joy he brings his family as one clip showed him hugging his mother in a store. Disconcerting was the fact that the videos also confirmed his mother's fears regarding her son's caregivers as one clip showed a caregiver falling asleep and forcing claimant to remain in bed for several hours while the caregiver watched TV. Claimant became increasingly agitated as he was forced to remain in bed during the afternoon, a time he is routinely outdoors getting exercise. The videos supported claimant's position regarding his condition and his needs. At a minimum, claimant requires 1:1 24 hour care.

9. A November 5, 2014, letter from Cheryl Boyd, M.D., claimant's treating physician, stated that claimant "requires 1:1 round-the-clock continuous LVN care 24/7, 365 days per year due to complex medical needs..." Claimant also "requires additional 1:1 intensive daily behavioral support staff, trained in behavioral intervention." The behavioral support staff should be provided on an "around the clock ... daily basis." Dr. Boyd also noted that claimant has had Methicillin-resistant Staphylococcus aureus (MRSA), and his "injuries

tend to promote recurrence of infection.”

10. Antonio Ong, M.D., claimant’s treating psychiatrist, authored a letter dated October 8, 2014, in support of claimant’s request for 24 hour 1:1 LVN care. Dr. Ong also recommended 24 hour 1:1 behavioral support staff.

11. Gustavo Delgado, M.D., claimant’s treating neurologist, authored two letters recommending 1:1 nursing care 24 hours per day, seven days per week. He wrote that changing claimant’s seizure medications is difficult given claimant’s “fragile” medical condition and that his seizures have been much better controlled over the past year due to his current combination of medications. Given how intense the seizures appeared on the DVDs, it was hard to imagine how they must have been when not “better controlled.” Dr. Delgado noted that claimant’s seizures are unpredictable and can often occur several times in 24 hours which is why 24 hour LVN care was required.

12. Several e-mails between the parties demonstrated claimant’s family’s frustration with SDRC and with claimant’s nursing care. They also demonstrated the family’s desire to get a list of potential group homes to evaluate them for potential placement.

13. An applied behavioral analysis (ABA) document provided an overview of the services provided to claimant.

14. Several articles noted that it is stressful to care for children with developmental disabilities.

15. Nursing care notes written by claimant’s providers documented claimant’s condition, including his seizures, the medications administered, the care rendered, the two-person assistance needed to control claimant, and the times when the LVNs sought claimant’s mother’s assistance, often during the middle of the night. These documents corroborated the testimony offered by the caregivers and claimant’s parents.

16. Seizure records documented the frequency, duration and types of seizures claimant experiences. Claimant was often sleeping just before having a seizure. The records indicated that he has frequent seizures lasting up to a minute and that there seems to be no pattern for when the seizures occur; they appear to be unpredictable.

17. Harbor Regional Center records from 2009 documented the injury to claimant’s ear, which occurred at his previous group home. Claimant sustained a hematoma and required surgery due to his injury. As claimant’s parents testified, despite being told there would be 1:1 care provided to claimant at that group home, he was left alone all night in his room and engaged in self-injurious behavior striking his head and ears all night long. These records also noted that claimant required 24 hour 1:1 care.

18. A November 17, 2014, SDRC Nursing Note documented claimant’s current care needs and indicated that information in the note was obtained from an August 26, 2014,

Nursing Health Assessment, a three-hour observation conducted on September 2, 2014, and Dr. Ong's letter. The note documented that claimant attends a day program with a 1:1 LVN. The note listed claimant's extensive needs and medical condition. The recommendations for placement were a non-ambulatory community care licensed facility with "LVN or psychiatric technician availability" to be able "to provide assessments and interventions on an intermittent basis with additional staff to provide support and intervention for activities of daily living and behaviors." Further, there was to be a minimum of two awake staff at night, one of whom is licensed, and there should be "nurse, behavioral, OT/PT, and dietician consultation for staff education and training." This document lent further support to claimant's argument regarding his extensive care needs.

19. A November 22, 2014, note from Jenna Lavina, M.D., one of claimant's treating physicians, indicated that claimant has been hospitalized and required 1:1 and 2:1 nursing and staff care at times to "help stabilize his medical/behavioral condition." Thus, even when hospitalized, claimant requires intervention to control his condition.

Witness Testimony Introduced by Claimant

20. Three LVNs who work with claimant testified about the images on the DVDs and the services they provide. All three explained that claimant's seizures happen without warning and that it requires two people to catheterize him and often requires two people to control him, especially during transportation to his day program. The LVNs explained that often times claimant's mother is the back-up person rendering aid and that SDRC officials have never interviewed them regarding the care they render.

21. Claimant's parents and brother testified about the strain caring for claimant has placed on the family. Claimant's brother testified about the loss of free time and the difficulty growing up in his home. Claimant's parents testified about claimant's extraordinary needs and the round-the-clock care he requires. They have never met another person with their son's needs, even in the support groups they have attended or in the thousands of emergency calls to which claimant's father, a firefighter, has responded. Current changes in the household include the fact that claimant's father has now returned to work full-time as a firefighter following an injury. This leaves almost all of claimant's care on claimant's mother, and she is finding herself caring for him 24 hours a day with very little time to rest. Claimant's family testified about the serious injury claimant sustained in his prior group home, an injury SDRC acknowledged. As such, their concerns regarding placing claimant in another home were justified, and it is reasonable for them to want to ensure proper placement, especially when they were given assurances about the prior group home. They also testified that as claimant has gotten older and heavier he has become more difficult to handle. In recent months he is becoming more difficult to control, and claimant's mother is utterly exhausted. Claimant's parents' testimony was corroborated by the DVDs, which showed how strong claimant can be, the number of people it takes to care for him, the unpredictability of his seizures, and how much control and redirection he requires.

Exemption Issue

22. Although the doctrine of issue preclusion, as set forth in *Lucido v. Superior Court* (1990) 51 Cal.3d 335, at 342-344, precludes claimant from re-litigating the issue whether SDRC should provide 24 hour nursing care², claimant does not seek to relitigate that issue. Instead, claimant's argument is two-fold. Initially he seeks an exemption to SDRC's prohibition against purchasing nursing services. Alternatively, claimant seeks 24 hour 1:1 funding of LVN services based on new evidence obtained since the last hearing which he claimed showed a change in his circumstances warranting an increase in services.³

In support of his position regarding an exemption, claimant cites other cases where an exemption was granted. However, in those cases the administrative law judges and/or the regional centers relied on specific language found in the Welfare and Institutions Code allowing for such exemptions. For example, Welfare and Institutions Code Section 4648.5 permits regional centers to fund social recreation services when an exemption exists, and Section 4686.5 permits regional centers to fund more than 90 hours per quarter of respite services if an exemption exists. Thus, the Legislature specifically provided exemptions for consumers to assert when those services are denied by regional centers. No such exemption language is found in Welfare and Institutions Code Section 4512, the code section identifying the services a regional center can provide its consumers. Moreover, Welfare and Institutions Code Section 4646.4, subdivision (a), requires SDRC to adhere to its Purchase of Service Standards (POS) when determining what services it will fund. As was testified about at the prior hearing, and as upheld in the decision, SDRC's POS was approved by its board of directors and the Department of Developmental Services (DDS). The POS identifies what services SDRC will fund for its consumers. As SDRC's POS is currently written, SDRC is not authorized to fund nursing services for its consumers.

Based on the above, a preponderance of the evidence did not establish that SDRC can fund claimant's request for nursing services.

Request for Increased Services

23. In order for claimant to prevail on his request for an increase in his respite services, he must demonstrate a change in his circumstances since the previous determination. Additionally, because SDRC funds claimant's services as LVN respite, claimant must demonstrate either that the intensity of his care and supervision needs are such that additional respite is necessary to maintain him in the family home or that there is an extraordinary event that impacts his family member's ability to meet his care and supervision

² The decision in OAH No. 2014070594 determined that SDRC shall not be required to fund 24 hours of LVN services.

³ Claimant was allowed to introduce evidence as to matters that occurred after September 2, 2014, and evidence not available to him or of which he was not aware before that date.

needs. (Welfare and Institutions Code section 4686.5, subdivision (a)(3)(A)).

Kathy Karins, R.N., SDRC Nursing Supervisor, and Lori Sorenson, SDRC Regional Manager for North County, both testified that they watched the DVDs and did not see anything on them that would indicate that SDRC should increase the services currently being provided or that claimant should receive nursing services. However, that testimony was unpersuasive because the DVDs actually depicted claimant receiving the requested 24 hour 1:1 LVN care.

Since claimant was discharged from the hospital, his family has been able to provide 24 hour 1:1 care to claimant. The DVDs demonstrate that, at a minimum, that care is warranted. Moreover, claimant's medical providers all recommended 1:1 LVN care 24 hours per day. No such evidence from claimant's physicians was previously offered. Three of claimant's LVNs testified about claimant's current condition and the treatment rendered to him during the past few months. The LVNs' nursing notes corroborated their testimony. The DVDs documented the continuous 1:1 LVN care claimant receives. The evidence demonstrated that claimant's needs are intense and appear to be increasing. His Individual Program Plan documents his extensive needs and medical condition. Moreover, both claimant and his parents are getting older. Claimant is getting stronger, and his mother is becoming more exhausted caring for him. Her presentation on the DVDs and at this hearing demonstrated how overwhelmed she is both physically and emotionally. Not providing claimant with the increased care he seeks puts her at risk of suffering a breakdown. Nothing in the Lanterman Act requires claimant's natural supports to be stretched to the point of utter exhaustion before services can be increased. In fact, the Lanterman Act provides that a change in a family member's ability to care for a consumer is one of the factors to be considered when granting an exemption.

Claimant's increasing strength, unpredictable seizures, physician recommendations, and his aging parents are all changes in his circumstances that warrant an increase in his services. Additionally, his father's recent return to work has placed more of the responsibility for claimant's care on his mother and is another change in the family's circumstances. A preponderance of the evidence supported claimant's contention that his circumstances have changed warranting that he be provided with 24 hour 1:1 LVN care and that he qualified for a respite exemption.

While it is true that respite is intended to be a temporary break for caregivers, nothing in Welfare and Institutions Code section 4686.5 prohibits a regional center from funding respite for 24 hours when the evidence supports that determination. In fact, Ms. Karins testified that of the 20,000 clients SDRC services, she was aware of only four with conditions similar to claimant. Although she offered that testimony in support of her position that claimant was not an "extraordinary consumer," it actually demonstrated just the opposite. Moreover, it provided further support that claimant qualified for a respite exemption.

A preponderance of the evidence supported claimant's request for 24 hour 1:1 LVN respite care. However, the \$269,160.32 amount that was calculated at the prior hearing

needs to be reduced because it included the Saturday library outings, which were denied in that hearing. (OAH No. 2014070594.)

A preponderance of the evidence did not support claimant's request for 24 hour 1:1 behavioral care. His parents and caregivers have received behavior training and/or training on how to respond to claimant's outbursts. Claimant has received ABA services. Nothing on the DVDs or in the documents demonstrated that 24 hour behavior care is required and that request is denied.

SDRC's Ability to Locate a Placement Facility that Will Meet Claimant's Needs

24. Lori Blair, SDRC Resources Coordinator, is responsible for developing resources for those clients who are in developmental centers or at risk of entering a center. Ms. Blair is also a member of the Placement Review Team which reviews clients' needs for services, especially Level 4 services. Level 4 homes are group homes for individuals with significant behavioral challenges. The Team reviewed claimant's case in September 2014 and determined his needs exceed Level 4 criteria, qualifying him as "deflection status," making him eligible for additional services in a Level 4 home. This category also opens up additional options for placement but makes placement more difficult given the severity of the client's needs. Ms. Blair explained the placement process and testified that once a home is located, the family can inspect it, but not before SDRC identifies the potential home. Moreover, SDRC has no authority to force a vendor to accept a client for placement; that choice is solely up to the vendor. Ms. Blair is aware of two homes that may be able to accept claimant. On cross examination Ms. Blair explained that additional services increase the costs of placement, that the homes hire the LVNs, and that clients do not bring their own LVNs to the homes. Thus, claimant's LVNs would need to be hired by the group home in order to continue working with claimant.

Daniel Clark, SDRC Director of Community Services, testified about the different type of placement homes for consumers. He explained that in addition to the level of residential homes provided for in the regulations, regional centers can also negotiate with the providers to obtain additional services for consumers. Those kinds of homes are commonly referred to as "deflection homes" or "negotiated rate homes." A few years ago the DDS capped the rate SDRC can pay for deflection homes at \$8,987 per month. However, SDRC can pay more for supplemental services provided to a consumer in the home. Those services are typically beyond those which a Level 3 or Level 4 home provides. Moreover, he acknowledged that the \$8,987 does not include the costs of claimant's day program, transportation, LVN services, or any additional services he may require. However, Mr. Clark has "no reason" to believe SDRC cannot find a home in which to place claimant.

Lori Sorenson, SDRC Regional Manager for North County, testified that "deflection homes" are negotiated rate homes in which additional services are provided for clients to meet their particular needs. She testified that at the last hearing SDRC had not even begun the process of looking for a deflection home as claimant's family was not willing to explore that option. In the interim, SDRC has begun that process based on the family's request. Ms.

Sorenson acknowledged that, in 2013, SDRC and the family were exploring placement but testified that the family did not like the available home because it did not have a bathtub. Claimant's mother refuted that testimony. In any event, Ms. Sorenson testified that a home in South Bay is interested in caring for claimant and that SDRC is also working with a home in North County to see if it could accept claimant. (These were the two homes Ms. Blair testified about.) Ms. Sorenson explained the procedures for determining which homes can care for SDRC consumers and that families cannot contact the homes until the providers have expressed an interest in caring for the consumer.

Claimant's parents testified about their justifiable concerns regarding placement given their prior experience. However, their request for a list of homes is premature as it is early in the process, and they cannot inspect the homes until the vendors of those facilities agree to care for claimant.

After the hearing the parties exchanged e-mails documenting SDRC's continuing efforts to locate placement for claimant. While it is true that claimant's unique condition will require effort to locate an acceptable home for him, a preponderance of the evidence did not establish that SDRC cannot locate a home that can care for claimant.

Issue Regarding Whether SDRC Witnesses Lied at the Previous Hearing

25. Claimant asserted that SDRC witnesses lied when testifying at previous hearings regarding SDRC's ability to provide a placement facility that could meet claimant's needs and the costs of placing claimant in such a facility. Claimant alleged that Daniel Clark's and Darrin Trammel's testimony regarding their estimates of the cost-effectiveness of residential placement was inaccurate because they did not factor the costs of claimant's day program, transportation services, and additional staff members that would be required to meet claimant's needs at those residential facilities.

Claimant's arguments were unpersuasive. As noted in that decision (OAH No. 2014070594), "Mr. Clark testified that the cost of residential treatment for claimant would be approximately \$8,000 per month, making placement a much more cost-effective option for SDRC. Mr. Clark acknowledged that he was not familiar with the generic resources available to claimant but again explained that 24 hour nursing services were not a service SDRC is authorized to fund." Mr. Trammel, an SDRC Program Manager, who was claimant's Program Manager until just before that hearing, testified "that SDRC is providing sufficient funding, at \$219,564 of LVN respite services, to meet claimant's needs." Mr. Trammel further "testified about Deflection Homes, a provider that could meet claimant's needs and would be much more cost-effective for SDRC."

Nothing in that decision indicates that either witness was asked to factor in the costs of day programs, transportation, or additional staff members. Moreover, the cost of placement was not an issue in that proceeding; therefore, the nuances of the different costs were not fully addressed. Each witness gave only vague, general testimony about the costs of placement. Furthermore, nothing in that decision indicates that placement was an issue to

be decided at that hearing. Thus, SDRC employees' vague testimony about placement facilities was insufficient to support claimant's contention that they lied about the availability of such facilities to meet claimant's needs. Additionally, it was not established that any finding regarding that testimony was relied upon in reaching the decision.

A preponderance of the evidence did not demonstrate that SDRC witnesses lied when testifying at the previous hearing regarding SDRC's ability to provide a placement facility that would meet claimant's needs and the cost of placing claimant in such a facility.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court; except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.) In this matter, claimant had the burden of establishing that SDRC did not comply with the Order issued in OAH No. 2009040141 and that SDRC should fund 24 hours of 2:1 LVN respite services for claimant.

2. A preponderance of the evidence means that the evidence on one side outweighs the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed. In other words, the term refers to evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) Claimant's mother's statements on the DVDs indicate that she believes she must show "lots of evidence" in order to prevail, but that is simply not the case. Claimant is only required to provide evidence that is more persuasive for his position than the evidence against it in order to prevail.

The Lanterman Act and Regional Centers

3. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (the Lanterman Act), which is found at Welfare and Institutions Code section 4500 et seq.

4. The Lanterman Act provides a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. 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; 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. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

5. The DDS is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.) In order to comply with its statutory mandate, the DDS contracts with private non-profit community agencies, known as “regional centers,” to provide developmentally disabled consumers with “access to the services and supports best suited to them throughout their lifetime.” (Welf. & Inst. Code, § 4620.)

6. A regional center’s responsibilities to its consumers are set forth in Welfare and Institutions Code sections 4640-4659. Regional centers must meet consumer’s needs and be cost-effective.

ORDERS

Claimant’s appeal that he should be granted an exemption that would allow SDRC to fund claimant’s request for nursing services is denied.

Claimant’s appeal for 24 hour 1:1 LVN respite care is granted. However, the \$269,160.32 amount that was calculated at the prior hearing needs to be reduced because it included Saturday library outings which were denied in OAH No. 2014070594.

Claimant’s appeal that SDRC cannot locate a group home that can care for claimant is denied.

Claimant’s appeal that SDRC witnesses lied when testifying at the previous hearing regarding SDRC’s ability to provide a placement facility that would meet claimant’s needs and the cost of placing claimant in such a facility is denied.

DATED: January 9, 2015

_____/s/_____
MARY AGNES MATYSZEWSKI
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.