

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

Claimant,

vs.

SAN GABRIEL/POMONA REGIONAL  
CENTER

Service Agency.

OAH No. 2017010885

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DECISION

Glynda B. Gomez, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on May 9, 2017 in Los Angeles, California.

Lucina R. Galarza, Associate Executive Director, represented San Gabriel Pomona Regional Center (SGPRC). Claimant was not present, but was represented by her mother (Mother).

Oral and documentary evidence was presented. The record was closed and the matter was submitted for decision on May 9, 2017.

ISSUE

Should Claimant be required to use License Vocational Nurse (LVN) respite instead of parent-choice respite.

For the reasons set forth below, Claimant's appeal is granted and the SGPRC shall continue funding parent-choice respite.

## FACTUAL FINDINGS

1. Claimant is a 17-year-old young woman eligible for regional center services based upon her diagnosis of Intellectual Disability and Cerebral Palsy.

2. Claimant was deprived of oxygen at birth and suffered catastrophic injuries as a result of the oxygen deprivation. She is wheelchair bound, non-ambulatory, non-verbal and completely incontinent requiring constant supervision and monitoring. Claimant receives nutrition and medication through a Gastrostomy (G-tube), a Jejunostomy (J-tube) and a drip/pump. Claimant has Gastroesophageal reflux disease (GERD) which results in stomach acids being regurgitated into her throat and esophagus. A suction machine is used to remove the secretions and is operated by a caregiver.

3. Claimant receives home school instruction because the school district was not able to accommodate the severity of her medical needs.

4. Claimant has a large extended family and two younger siblings. Claimant's grandmother, several aunts and uncles, and her siblings all have been instructed on the use of the suction machine and have all successfully used the machine to assist Claimant. Mother is the sole administrator of nutrition and medication. Mother and Claimant's uncle, Paul Jung, received instruction from Claimant's physician on the proper operation of the suction machine.

5. Mother is Claimant's primary care giver. Mother worked as an LVN for 11 years before Claimant's birth. Mother is diligent and careful with Claimant's care. Claimant's father, a full-time law enforcement professional, provides relief for Mother once a week. During that time, Mother handles family and personal errands. However, the bulk of responsibility for Claimant falls to Mother.

6. Mother has had negative experiences in hospitals and with home-based LVN care attending to Claimant. Mother credibly recounted instances in which nurses

gave Claimant medications through the wrong tube placing her health in jeopardy or were not facile with the operation of the suction machine causing Claimant discomfort. Mother also explained that Claimant is startled by strangers and becomes fearful when left with strangers.

7. Claimant's uncle, Paul Jung, is 47 years old, works for the Los Angeles Police Department providing support for domestic violence victims and has provided respite care for Claimant for approximately 10 years. He has been the parent-choice respite provider. He has attended medical appointments with Claimant and Mother, and has been trained by Claimant's physician and Mother to handle Claimant's needs. Claimant's physician, Annie T. Carr, MD, provided a written certification that Paul Jung is qualified to care for her and assist her with suction of secretions. (Exhibit B).

8. SGPRC asserts that it made a mistake in approving parent-choice respite care for Claimant in the past because of her extensive medical needs, her G-tube, J-tube and suctioning requirements. Melissa Ybanez, Manager of Client Services, made arrangements for a Registered Nurse (RN) to conduct an assessment of Claimant's respite needs. SGPRC relied upon the nursing assessment in making its decision. Joan Williams, RN, made a home visit to Claimant and assessed her respite level of care needs in November of 2016. Williams did not testify at hearing. William's opinions were memorialized in her nursing notes and in the SGPRC ID notes system.

9. According to her nursing notes and the ID notes, Williams recommended "[r]espice care level is licensed due to G-J tube feedings, as needed oral suctioning and nebulizer treatments." While Williams is credentialed as an RN, her opinion lacked a factual context or a thorough examination of Claimant's circumstances and supports. The preponderance of the evidence did not establish that an LVN was required to perform suctioning or to administer nebulizer treatments. Furthermore, the preponderance of the evidence established that no medications or nutrition are

administered by anyone other than Mother at any time. Claimant's physician, Dr. Carr, deemed Paul Jung to be an appropriately qualified care taker and approved of Paul Jung performing the needed suction. On balance, Mother's detailed testimony and expertise about Claimant's condition, regimen, and schedule of nutrition and medication, coupled with her professional experience, was more persuasive than Ms. William's brief notes after one visit to the home, especially when considered together with Dr. Carr's certification.

10. Claimant has very specific respite needs during the daytime and those needs do not involve the administration of medication or nutrition. Claimant's teenage children and other family members have been trained by Mother and regularly suction Claimant, if needed. Paul Jung has been approved by Claimant's physician and for ten years has regularly provided respite care for Claimant without incident. Mother credibly testified that Claimant would not utilize LVN respite under any circumstances because Mother had attempted to use the service in the past and was frustrated with the inadequacy of the service and the failure of the LVNs to meet Claimant's needs. Mother was also concerned with the potential for life-threatening mistakes by the LVNs because she had already experienced nursing issues at home and in the hospital which caused her concern for Claimant's safety.

11. SGPRC's Purchase of Service (POS) policy provides that "[r]espice care services are designed to provide family members with temporary relief from the continual care of a person with a developmental disability." It further provides that "[r]espice care shall be provided through the use of a vendored in-home respite or home health agency. Parents may choose the option of selecting their own respite worker as long as that individual is employed by a vendored respite agency.<sup>1</sup> The person

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<sup>1</sup> Vendorization was not raised as an issue for hearing.

must be employed prior to regional center funding. For those with medical needs, a registered or licensed vocational nurse from a home health agency may be appropriate to provide respite." Thus, the POS does not require that an LVN or even an RN provide respite services, it merely states that it may be appropriate. Under different facts, a fact finder could easily come to a different conclusion, but here, Claimant's support system is in place and all caregivers are appropriately trained to and have been meeting her needs without incident. Accordingly, there is no need to make a change to a more expensive option that is not preferred by Claimant's family and will not be utilized. Under this set of facts, it is best for Claimant that her primary caregiver be given respite and that the respite be provided by Paul Jung, a trained individual, approved by her physician and known to her rather than an LVN or RN agency.

## LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.) An administrative "fair hearing" to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal SGPRC decision to replace parent-choice respite with LVN respite services.

2. The burden of proof is on the party seeking to terminate the service or change the status quo. In this case, that burden is on SGPRC as the party seeking a service. The standard of proof in this matter is a preponderance of the evidence. (See Evid. Code, §§ 115 and 500.)

3. The purpose of the Lanterman Act is intended 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 productive and independent

lives in the community. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

4. In enacting the Lanterman Act, the Legislature accepted its responsibility to provide for the needs of developmentally-disabled individuals and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (Welf. & Inst. Code, § 4501.) The Lanterman Act gives regional centers, such as SGPRC, a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et. seq.) Welfare and Institutions Code section 4512, subdivision (b), defines the services and supports that may be funded, and sets forth the process through which such are identified, namely, the Individual Program Plan (IPP) process, a collaborative process involving consumers and service agency representatives.

5. Welfare and Institutions Code section 4512, subdivision (b), defines services and supports for persons with developmental disabilities as specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. Respite services are among the delineated services. Thus, regional centers are responsible for developing and implementing IPPs, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (Welf. & Inst. Code §§ 4646, 4646.4, 4646.5, 4647, and 4648.)

6. Welfare and Institutions Code section 4646, subdivision (a), provides that it is the intent of the Legislature to ensure that the IPP, and provision of services and supports by the regional center system, is centered on the individual and the family of the individual with disabilities and takes into account the needs and preferences of the

individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. The statute also provides that it is the further intent of the legislature that the provision of services to consumers and their families be effective in meeting consumer needs, and maintain a balance between reflecting consumer and family preference on the one hand, while being cost-effective on the other hand.

7. A regional center may purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities. An unlicensed in-home respite worker may perform incidental medical care provided that the worker is appropriately trained by a licensed health care worker and the consumer's physician opines that the consumer is sufficiently medical statement for such care. (Welf. & Inst. Code, §4686.)

8. In this case, Claimant's uncle has been providing parent-choice respite to Claimant for years. Recently, SGPRC determined that the provision was a mistake and that a nursing assessment should have been made before approval of a non-licensed respite worker to care for Claimant. Nevertheless, Claimant has been well-cared for by her uncle Paul Jung, who was trained by Mother, a licensed and experienced LVN, with a special expertise in handling Claimant's needs. Paul Jung does not provide nutrition or medicine to Claimant. Instead, he only provides incidental medical care consisting of suctioning secretions. The law and its POS, permit SGPRC to fund non-licensed respite care when only incidental medical care is needed and the respite worker has been appropriately trained and approved by the consumer's physician. All such requirements have been met here. The SGPRC nurse that performed an assessment of Claimant failed to consider that Claimant's nutrition and

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medicine schedule does not require the respite worker to administer nutrition or medicine or to operate any medical equipment other than the suction device.

## ORDER

Claimant's appeal is granted. SGPRC shall fund parent-choice respite care for Claimant provided by her uncle Paul Jung at a rate and frequency determined by the IPP team and consistent with the rate structure approved by the SGPRC for respite care.

DATED:

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Glynda B. Gomez  
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.**