BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, vs. ALTA CALIFORNIA REGIONAL CENTER, Service Agency.	OAH No. 2017081072

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Sacramento, California, on October 19, 2017.

The Service Agency, Alta California Regional Center (ACRC), was represented by Robin Black, ACRC Legal Services Manager.

Claimant was represented by his mother.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on October 19, 2017.

ISSUE

Is ACRC required to fund Employer of Record (EOR)[1] in-home respite services for claimant?

[1] EOR is also referred to as Employee of Record throughout.

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FACTUAL FINDINGS

1. Claimant is a nineteen-year-old young man who was found eligible for regional center services in 2000 based on a diagnosis of epilepsy, secondary to Lennox-Gastaut syndrome. In June 2016, his diagnosis was updated to include Profound Intellectual Disability, secondary to bilateral perisylvian polymicrogyria, and spastic cerebral palsy (CP). Claimant is non-verbal, non-ambulatory, bowel and bladder incontinent, and is dependent on others for mobility, transfers, and all activities of daily living. His vision is impaired and it is unclear how much he can hear. Other diagnoses include severe scoliosis, asthma, and chronic pancreatitis. He has significant medical needs requiring medical care including g-tube feeding, suctioning and medication administration. His epilepsy is uncontrolled and he is reported to have daily seizures. Claimant resides with his mother in the family home and receives services and supports pursuant to the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code Section 4500 et seq.) [2]

2. Nancy Carlson-Zapata is claimant's ACRC Service Coordinator. She testified that claimant's case was transferred in 2016 from ACRC's Children's Unit to an Adult Services Unit. She became his new Service Coordinator at that time. Ms. Carlson-Zapata learned that claimant's ACRC services included in-home respite services provided through an EOR[3] arrangement with ACRC vendor Pacific Homecare. Claimant's

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[2] Unless otherwise indicated all statutory references are to the California Welfare and Institutions Code.

[3] EOR respite is a type of in-home respite where an agency is vendored to act as an employer of record for the respite provider. Per the ACRC In-Home Respite Services Procedure, "They are responsible to complete a background check, and fund training for the provider to complete CPR and First Aid. The EOR agency is responsible for hiring the

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grandmother, a Licensed Vocational Nurse (LVN), was the respite care provider.

Ms. Carlson-Zapata testified that she became concerned with the appropriate level of care necessary for claimant's in-home respite due to his medical needs. She explained that in-home respite is not a medical service. On May 5, 2016, she submitted a request for a nurse assessment with ACRC nurse Holly Smith, RN, PHN.

3. Ms. Smith completed her assessment on July 20, 2016. The Nursing Consultation – Home Visit Report concluded with the following:

> **Recommendations/Plan** Since mom is not interested in home nursing through EPSDT,[4] suggested applying for the NF-AH Waiver[5], as that allows use of just IHSS [In Home Supportive Services] and WPCS [Waiver Personal Care Services] hours instead of nursing. She was agreeable to me submitting an application for that. I informed her that there's

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respite provider as an employee assuming employer taxes and liabilities, which relieves the family of these responsibilities."

[4] EPSDT (Early and Periodic Screening, Diagnosis and Treatment) is a Medi-Cal benefit available to individuals under age 21. An EPSDT skilled nursing service is an available benefit based on medical necessity.

[5] NF/AH waiver is a Medi-Cal program available to a limited group of individuals with disabilities to assist them in being able to continue living at home rather than in a nursing facility or Medi-Cal funded institution. The FF/AH waiver is now the Home and Community Based Alternatives Waiver (HCB) and is administered by the California Department of Health Services (DHCS).

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a 2-year waiting list, but if client has an extended hospital stay in the future, or his care needs increase significantly (for example, if he goes on a ventilator or needs CPAP/BiPAP overnight) the NF-AH should be informed as that might bump up his priority.

Ms. Smith submitted an NF-AH Waiver on July 22, 2016.

4. Ms. Carlson-Zapata testified that alternative services are available to meet claimant's needs. However, his mother has not been interested in having a healthcare provider outside the family provide the services due to her concerns with claimant's health. The Service Coordinator requested a Family Supports Services Committee (FSSC) Best Practices staffing to request to reinstate EOR respite services. The "committee determined that due to [claimant's] medical needs ACRC is only able to fund skilled nursing level of respite care and EOR respite does not meet that requirement."

5. Ms. Carlson-Zapata also testified to extensive efforts to obtain an agency vendor capable of hiring claimant's grandmother as his respite care provider. She pursued Pacific Homecare asking if it would be possible for them to provide EOR respite if parent signed a waiver of liability for medical care. Pacific Homecare responded that it could not, that it is against their policies as providers may only provide non-medical care. The same response was received by other contacted agencies. She ran into additional roadblocks including agencies being unable to hire family members to assist other family members or not currently taking referrals for in-home respite.

ACRC vendor 24/7 Medstaff informed claimant's Service Coordinator that it would be possible to hire claimant's grandmother. The family determined that claimant's grandmother would apply for a job with 24/7 Medstaff to continue as claimant's respite care provider.

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6. Claimant's ACRC Individualized Program Plan (IPP) dated July 20, 2016, notes the following:

> ACRC RN, Holly Smith completed a nursing consult with the family to assess and make recommendations for the waiver program along with current services. [Claimant's mother] is not interested in using in home nursing through EPSDT; therefor, Holly suggested applying for the NF-AH waiver, as that allows use of just IHSS and WPCS hours instead of nursing. RN Holly Smith submitted the application on the client's behalf on 7/22/16. At the present time there is a two year waitlist; however, if the client's care needs increase significantly or if he has an extended hospital stay in the future the NF-AH should be informed as that might bump up his priority.

7. Tricia Cummings is an ACRC Client Services Manager in the Adult Services Unit. Her responsibilities include supervising ACRC Service Coordinators, including Ms. Carlson-Zapata. She testified to the requirements for providing in-home respite services to ACRC clients, explaining that it is a non-medical service. She testified that the only exception is for incidental medical services (IMS), which is limited to three specific services. Claimant requires additional services. IMS providers cannot be licensed health care professionals.

Ms. Cummings testified that an LVN cannot provide care absent the required supervision. Such care would be defined as Private Duty Nursing pursuant to California Code of Regulations, Title 16, section 2518.7 as follows:

> Private duty patient care may be performed in any setting,

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> including, but not limited to acute care, long term care or the patient's home. For purposes of licensure equivalency eligibility, the Board will accept only private duty patient care that has occurred in acute or long term care facilities. Private duty services are contracted directly between the nurse and the patient or entity acting on the patient's behalf. A licensed vocational nurse (LVN) must provide private duty nursing services under the direction of a registered nurse who directs nursing care and/or the patient's physician who directs medical care. The supervisor must be responsible for direction to the private duty LVN regarding the respective nursing and medical procedure. The direction provided by the registered nurse or physician to the LVN must be available at least by telephone.

8. Ms. Cummings reiterated claimant's mother's concerns with outside individuals coming into contact with claimant and exposing him to illness. She explained that a supervising RN could use universal precautions, including wearing a mask and gown, to prevent this. She also testified that ACRC has no objection to claimant's grandmother providing services. The agency is attempting to meet claimant's needs as allowed by law. ACRC has no dispute with the quality of care provided by claimant's grandmother in the past, and does not dispute that she would continue to provide him good care. The concern is specifically with the legally required oversight required of an LVN.

9. On August 1, 2016, ACRC issued a Notice of Proposed Action (NOPA) to claimant, advising "Alta California Regional Center is denying your request to fund EOR (Employee of Record) in home-respite services for [claimant]."

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The NOPA advised claimant that the reason for this action was as follows:

> Due to his medical needs, [claimant] is assessed to require nursing-level respite which must be provided by a California Licensed Vocational Nurse (LVN) under the supervision of a Registered Nurse (RN), or which must be provided by an RN. EOR in-home respite services are intended to provide non-medical care and supervision to clients, only, and thus are not appropriate to meet [claimant's] needs. You have advised that you would like [claimant's] maternal grandmother, who is an LVN, to be [claimant's] EOR respite worker. However, [claimant's] grandmother may not legally provide respite care without RN supervision.
>
> [Claimant's] grandmother [may] provide respite care if hired by one of ACRC's vendored Home Health agencies, which would provide the RN-level nursing oversight and supervision, funded by ACRC. However, you have declined this option, stating your concern that [claimant] might contract an infection from contacts with a supervising RN. ACRC notes that a risk of infection already exists from [claimant's] contacts with his own family members who spend time in the community. And crucially, any risk of infection to [claimant] would be properly mitigated by the RN's (and potentially family members') use of proper infection control procedures such as wearing a mask and gloves, and/or wearing a disposable gown over his/her clothing, when providing care.

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10. Claimant filed a Fair Hearing Request received by ACRC on August 18, 2017, appealing that decision. The reason for the request stated:

> My child's needs are not being met or individualized.
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> The request sought for "[claimant] to be put back into the respite care program."

11. Claimant's mother testified that she is requesting claimant continue to receive respite care services through Pacific Home Care. She stated that nursing respite does not support the family's needs, as did the EOR in-home respite. ACRC funded the EOR in-home respite for approximately sixteen years, and claimant's only respite care worker has been his grandmother, who has been an LVN for over thirty-five years. Claimant's mother was very concerned that after funding the service for such a long time period, ACRC now states it was a mistake and a service they are unable to provide. There was no evidence presented to explain how this situation occurred, only that it was discovered when claimant moved to the Adult Services Unit.

Claimant's mother stressed that claimant's health is extremely compromised and she attributes the fact that he is nineteen years old to the vigilance in his care. She testified that she is claimant's full-time caregiver with a goal of keeping him well and safe. She explained her concern with individuals having contact with claimant in his home and possibly putting his health at risk. She opined that universal precautions such as gowning up and masking are not sufficient. Claimant has been successful in respite care for sixteen years with the same respite worker, his grandmother.

12. Claimant's physician, Thomas A. Bullen M.D., by letter dated August 14, 2017, supported claimant's appeal and the concern with limiting his contact with individuals outside the home. Having cared for claimant since infancy, he opined, "Frequent spot checks would increase [claimant's] exposure risks, and be detrimental to his health."

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13. Claimant's grandmother was hired by ACRC vendor 24/7 Medstaff to provide respite services. However, his mother did not feel comfortable utilizing this vendor when she discovered that supervising RNs would be making home visits. She is extremely concerned about limiting his contact with individuals that may compromise his health. She was specifically concerned that the supervising RNs would be visiting other families and claimant would face an increased risk of exposure.

In addition, she testified that the agency requires a schedule in advance of service. She stated that claimant can only be cared for when he is in good health, and due to this unpredictability she did not believe she could adhere to a set schedule in advance.

14. Claimant's mother is his IHSS worker. ACRC suggested she consider hiring an additional caregiver to provide some of those services as requirements for IHSS workers providing medical services may be different than those for in-home respite providers. She testified that giving up IHSS hours to access respite was not something she is willing to do at this time.

15. At hearing, claimant's mother questioned whether it would make a difference if she were present in the home during respite. She stated that she could be called on at any time to perform any necessary medical services, thus relieving a respite worker from that responsibility, while still allowing her a break from constant care.

Each vendored agency has its own specific oversight requirements. The parties will continue to explore additional options. In the event that an agency is found that has requirements acceptable to the family, ACRC will provide funding.

LEGAL CONCLUSIONS

1. The Lanterman Act sets forth the regional center's responsibility for providing services to persons with development disabilities. An "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . to support their integration into the mainstream life of the

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community . . . and to prevent dislocation of persons with developmental disabilities from their home communities." (§ 4501.) The Lanterman Act requires regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP includes the consumer's goals and objectives as well as required services and supports. (§§4646.5 & 4648.)

Section 4646, subdivision (a) provides:

> It is the intent of the legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental 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. It is further the intent of the legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

Section 4512, subdivision (b), provides, in pertinent part:

> "Services and Supports for persons with developmental disabilities" means 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

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rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, where appropriate, the consumer's family, and shall include consideration of a range of services options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option

Section 4646.4, subdivision (a)(1) specifies:

(a) Effective September 1, 2008, regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

(1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.

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Section 4646.5, subdivisions (a)(1) and (2) clarifies:

> (a) The planning process for the individual program plan described in Section 4646 shall include all of the following:
>
> (1) Gathering information and conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. For children with disabilities, this process should include review of the strengths, preferences and needs of the child and the family unit as a whole. Assessments shall be conducted by qualified individuals and performed in natural environments whenever possible. Information shall be taken from the consumer, his or her parents and other family members, his or her friends, advocates, providers of services and supports, and other agencies. The assessment process shall reflect awareness of, and sensitivity to, the lifestyle and cultural background of the consumer and family.
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> (2) A statement of goals, based on the needs preferences, and life choices of the individual with developmental disabilities, and a statement of specific, time-limited objectives for implementing the person's goals and addressing his or her needs. These objectives shall be stated in terms that allow measurement of progress or monitoring service delivery. These goals and objectives should maximize opportunities for the consumer to develop relationships, be part of community life

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in the areas of community participation, housing, work, school, and leisure, increased control over his or her life, acquire increasingly positive roles in community life, and develop competencies to help accomplish these goals.

2. Regional centers are governed by the provisions of the Lanterman Act. Section 4690.2, subdivision (a), specifies:

> (a) The Director of Developmental Services shall develop program standards and establish, maintain, and revise, as necessary, an equitable process for setting rates of state payment, based upon those standards, for in-home respite services purchased by regional centers from agencies vendored to provide those services. The Director of Developmental Services may promulgate regulations establishing these standards and the process to be used for setting rates. "In-home respite services" means intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client's own home, for a regional center client who resides with a family member. These services are designed to do the following:
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> (1) Assist family members in maintaining the client at home.
>
> (2) Provide appropriate care and supervision to ensure the client's safety in the absence of family members.
>
> (3) Relieve family members from the constantly demanding responsibility of caring for the client.

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(4) Attend to the client's basic self-help needs and other activities of daily living including interaction, socialization, and continuation of the usual daily routines which would ordinarily be performed by the family members.

Section 4686, subdivision (a), provides as follows:

(a) Notwithstanding any other provision of law or regulation to the contrary, an in-home respite worker who is not a licensed health care professional but who is trained by a licensed health care professional may perform incidental medical services[6] for consumers of regional centers with stable conditions, after successful completion of training as provided in this section. Incidental medical services provided by trained in-home respite workers shall be limited to the following:

(1) Colostomy and ileostomy: changing bags and cleaning stoma.

(2) Urinary catheter: emptying and changing bags and care of catheter site.

(3) Gastrostomy: feeding, hydration, cleaning stoma, and adding medication per physician's or nurse practitioner's orders for the routine medication of patients with stable conditions.

[6] This provision is referred to as IMS (incidental medical services).

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3. The incidental medical services permitted in section 4686 are optional, not mandatory, services that may be provided by in-home respite workers. The statute sets forth training requirements and additional funding for providing these incidental services.

4. California Code of Regulations, Title 22, section 12300.1 describes the "supportive services" IHSS workers may provide to a consumer, including:

> . . . those necessary paramedical services that are ordered by a licensed health care professional who is lawfully authorized to do so, which persons could provide for themselves but for their functional limitations. Paramedical services include the administration of medications, puncturing the skin or inserting a medical device into a body orifice, activities requiring sterile procedures, or other activities requiring judgment based on training given by a licensed health care professional . . .

5. The evidence was clear that claimant is extremely well cared for by his mother and that in-home respite services provide needed support. Further, the evidence demonstrated that respite care provided in the past by his grandmother was successful and there was no indication that she could not continue to provide excellent future care. All parties agree that respite is a necessary service for claimant.

The difficulty has been finding a vendored respite agency whose oversight requirements are agreeable to claimant. It is understandable that claimant's mother would desire to continue using her mother as claimant's respite services provider, however ACRC cannot fund a service that does not meet legal requirements. Options are available for respite care and the parties may continue to explore other possibilities that may better suit claimant's need, while being legally compliant.

The evidence supports a finding that ACRC may not fund Employer of Record (EOR)

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in-home respite services for claimant due to his assessed medical needs.

ORDER

The appeal of claimant is denied. ACRC may not fund Employer of Record (EOR) in-home respite services for claimant at this time.

DATED: October 30, 2017

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SUSAN H. HOLLINGSHEAD

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of this decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)

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