

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

SOUTH CENTRAL LOS ANGELES REGIONAL  
CENTER,

Service Agency.

OAH No. 2018070126

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on October 16, 2018, in Los Angeles, California. Claimant was represented by his mother with the assistance of a Spanish language interpreter.<sup>1</sup> South Central Los Angeles Regional Center (Service Agency or SCLARC) was represented by its Fair Hearing Manager, Karmell Walker.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on October 16, 2018.

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<sup>1</sup> Names are omitted throughout this Decision to protect the parties' privacy.

## ISSUE

Should SCLARC be required to continue funding Claimant's non-LVN<sup>2</sup> respite?

## EVIDENCE

Documentary: Service Agency exhibits 1-6; Claimant's exhibits A - D.

Testimonial: Cecilia Pannell-Atkins, Nurse Consultant; Claimant's mother.

## FACTUAL FINDINGS

1. Claimant is a 17-year-old male client of SCLARC who lives with his mother, father, and sister. He qualifies for regional center services under diagnoses of mild intellectual disability, cerebral palsy, and seizure disorder.
2. Claimant is non-ambulatory and uses a wheelchair. He is unable to use the bathroom independently, and he requires assistance with personal hygiene. Claimant is non-verbal and communicates with gestures.
3. Claimant can eat without assistance. He has never choked or aspirated while eating.
4. Claimant has been prescribed an inhaler to assist him with breathing difficulty when he contracts a cold or flu. Claimant has never had an asthma attack. He has never required oxygen.
5. Claimant has good skin care, and he has no bedsores or ulcers.
- 6A. Claimant suffers from occasional seizures. He has been prescribed Diastat which is administered rectally to immediately halt seizures lasting more than five minutes. Claimant's mother and his sister have completed a class on

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<sup>2</sup> Licensed Vocational Nurse.

how to administer Diastat. Claimant has been administered Diastat only three times in his life, and the last time was approximately two years ago. Since that time, Claimant's neurologist prescribed a medication which better controls his seizures. His seizures now typically last less than one minute.

6B. Claimant's most recent seizure occurred while he was on the school bus. He had Diastat in his backpack and a nurse by his side. The nurse did not notice that Claimant was having a seizure and did not administer the Diastat.

7A. Claimant has been receiving 24 hours per month of in-home respite services, funded by SCLARC. His sister is his service provider.

7B. Claimant's most recent Individual Program Plan (IPP) is dated December 19, 2016. One of the stated goals of Claimant's 2016 IPP is: "Mother would like [Claimant] to continue to receive 24 hours of In-Home Respite Services in order for him to continue to receive an optimal level of care while his mother takes care of her personal matters, thus ensuring that [Claimant] continues to live an [*sic*] healthy life in the community." (Exhibit 4.)

8A. In early 2018, Claimant's mother requested that SCLARC increase Claimant's in-home respite hours from 24 hours per month to 36 hours per month.

8B. In response to that request, SCLARC informed Claimant's mother that a nursing assessment would need to be completed in order to determine the most appropriate level of respite care for Claimant.

8C. Claimant's mother did not request a higher level of respite care (i.e., respite care provided by a nurse).

9. On February 6, 2018, Nurse Consultant Cecilia Pannell-Atkins conducted the nursing assessment at SCLARC's request. She recommended 36

hours per month of respite provided by a licensed vocational nurse (LVN). The details of her assessment are set forth in Factual Finding 12, below.

10A. On May 22, 2018, SCLARC sent Claimant's mother a Notice of Proposed Action (NOPA) letter, stating that it was denying her request "to continue utilizing In-Home Respite by a Non-Licensed Vocational Nurse." (Exhibit 2.) The NOPA's stated factual reason for the denial was: "Licensed Vocational Nursing has been determined by [SCLARC's] nursing consultant to be the appropriate respite care for [Claimant] due to his current medical conditions." (Exhibit 2.)

10B. The stated legal basis for SCLARC's decision was as follows:

Welfare and Institutions Code section 4648(g)(1) states: "Regional Center must ensure that a nursing assessment of the client, performed by a registered nurse, is conducted to determine whether an in-home respite worker, LVN, or RN may perform the respite services." (Exhibit 2.)

10C. The citation to Welfare and Institutions Code section 4648, subdivision (g)(1), was incorrect. Welfare and Institutions Code section 4648, subdivision (g) contains no subsection (1). Instead, Welfare and Institutions Code section 4648, subdivision (g), provides: "When 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."

11A. Claimant's mother filed a Fair Hearing Request, in which she agreed to the increase of respite hours to 36 hours per month (as she had requested), but indicated that she did not want a nurse to provide those respite hours. (Exhibit 1.)

11B. At the fair hearing, the parties agreed that 36 hours per month of respite was appropriate. They disagreed on whether LVN-respite was required.

12A. In her nursing assessment report, Nurse Consultant Pannell-Atkins noted that: Claimant took Carbamazepine daily to control his seizures; he had a Pro Air inhaler to use as needed, last used in November of 2017; and he had been prescribed Diastat to be administered rectally.

12B. Nurse Pannell-Atkins noted that Claimant eats by mouth and that "he has no difficulty with swallowing but he gulps his food and eats quickly. He requires monitoring during mealtimes." (Exhibit 5, p. 4.) Nurse Pannell-Atkins further noted:

[Claimant] does have a diagnosis of seizures. His last seizure occurred last week while at school. The seizure lasted approximately 2 minutes. The seizure prior to this one was approximately 3 months ago which lasted less than one minute. The last time Disastat was used was 6-12 months ago for a seizure that lasted more than 5 minutes. His seizures usually occur anywhere from every 2 months or may occur 2-3 times per month [with] any frequency increase during warmer months. (Exhibit 4, p. 5.)

12C. Nurse Pannell-Atkins identified the following "nursing problems:"

At risk for breakthrough seizure

At risk for respiratory compromise

At risk for skin breakdown

At risk for impaired oxygen exchange

At risk for inadequate nutritional intake

At risk for choking and aspiration (Exhibit 4, p. 5.)

12D. To explain these "risks," Nurse Pannell-Atkins noted that Claimant: is "incontinent of bowel and bladder and require[s] thorough skin care with each diaper change to prevent skin breakdown;" "requires monitoring for seizure activity for administration of Diastat;" requires "monitoring of respiratory status for administration of as needed [inhaler];" "requires monitoring during mealtimes secondary to gulping his food and eating too quickly;" "needs assistance and supervision with medication administration, physician and dental appointments and safety;" and "needs supervision and assistance with [activities of daily living]." (Exhibit 5, p. 6.)

13A. Nurse Pannell-Atkins testified that in conducting her assessment she "tr[ies] to look at what issues could happen." In taking this approach, Nurse Pannell-Atkins's generalized "risk" assessment apparently included a large realm of possibility rather than Claimant's current status.

13B. Nurse Pannell-Atkins did not sufficiently explain the factors placing Claimant at risk for respiratory compromise and impaired oxygen exchange, given that he last used his as-needed inhaler in November 2017. Nurse Pannell-Atkins did not sufficiently explain the factors placing Claimant at risk for skin

breakdown, given that his skin care is thorough, and he did not have any sores or ulcers. Nurse Pannell-Atkins did not sufficiently explain the factors placing Claimant at risk for inadequate nutritional intake, since there was no evidence that he was unable to ingest sufficient nutrition. Nurse Pannell-Atkins did not sufficiently explain the factors placing Claimant at risk for choking and aspiration, given that he did not have a history of choking or aspiration, and there was no evidence that a habit of eating quickly automatically places him at risk for choking and aspiration.

13C. (1). Nurse Pannell-Atkins was correct that Claimant is currently at risk for occasional seizure activity. She opined that, if his seizure disorder was well-controlled, meaning that he had not suffered from seizures for more than two years, he would not require LVN intervention. However, Nurse Pannell-Atkins opined that Claimant's occasional seizures require him to have an LVN caregiver because, if Diastat is required, it must be administered by a licensed person who must thereafter monitor Claimant for respiratory compromise. She explained that, if Claimant was administered Diastat, he could have an asthma attack due to Diastat's sedating effect, and he would need to be given his inhaler.

(2). Before changing to his current medication, Claimant's seizures required the administration of Diastat on three occasions. Therefore, Claimant has required a caregiver trained in the administration of Diastat. However, Nurse Pannell-Atkins failed to acknowledge that Claimant has not required Diastat in almost two years. She also did not adequately explain, in the remote event that Diastat is needed, why Claimant's sister (trained in the administration of Diastat) could not administer the Diastat rather than an LVN. Nurse Pannell-Atkins failed to acknowledge that Claimant had been administered Diastat three times previously without suffering an asthma attack. Nurse Pannell-

Atkins also did not adequately explain why, in the unlikely event that Claimant suffered a Diastat-induced asthma attack, his sister could not also administer his inhaler which does not require LVN administration.

13D. Given the foregoing, Nurse Pannell-Atkins did not establish that an LVN, rather than Claimant's sister, is required to provide in-home respite.

14. Claimant's mother, father and sister have taken care of him all 17 years of his life. They were never offered or provided with a nurse to care for him, even when he returned home after surgeries and hospitalizations. Neither Claimant's neurologist nor his pediatrician recommends that he be provided an LVN for in-home respite.

15. Claimant's mother has been a very involved and dedicated caregiver for Claimant. She has used the in-home respite hours to run personal errands, to relax, or to go out with her husband. Claimant's mother is able to relax during the respite hours because she trusts Claimant's sister to care for Claimant properly and keep him safe. Although Claimant is non-verbal, Claimant's sister is familiar with how he communicates and is able to ascertain what he is asking for. Claimant's sister will bathe him and put him to bed on the evenings that Claimant's mother and father go out.

16. Claimant's mother testified credibly that she "definitely need[s] the respite [time]." However, she would not feel comfortable leaving Claimant with a stranger who does not understand him like his sister does. If she was forced to employ an LVN respite worker, Claimant's mother believes she would not be able to use the respite for its intended purpose: to relax. Consequently, Claimant's mother anticipates that she would not utilize the respite hours if Claimant's sister was not the respite worker.



17. SCLARC's response to Claimant's mother's request has left her with a sense that she is being penalized for requesting additional respite hours. She noted that she has offered to SCLARC to keep Claimant's respite at 24 hours per month if she could be allowed to continue using Claimant's sister as the respite provider.

## LEGAL CONCLUSIONS

1. Claimant's appeal of the Service Agency's discontinued funding of non-LVN respite is granted. (Factual Findings 1 through 17; Legal Conclusions 2 through 5.)

2. Where a change in services is sought, the party seeking the change has the burden of proving that a change in services is necessary. (See, Evid. Code, §§ 115 and 500.) In seeking to terminate funding for non-LVN respite and requiring the use of LVN-respite, the Service Agency bears the burden of proving by a preponderance of the evidence that the change is required. The Service Agency has not met its burden.

3A. Welfare and Institutions Code section 4512, subdivision (b), provides, in part:

[T]he 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, when appropriate, the consumer's family, and shall include consideration of a range of service 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. ...

3B. SCLARC cited Welfare and Institutions Code section 4512, subdivision (b), as one of the legal bases for its denial of further funding for non-LVN respite. SCLARC highlighted the language indicating that services will be determined based on the needs of the consumer. However, that section also notes that the selection of services will be based on the preferences of the consumer and his family, the effectiveness of the service options in meeting Claimant's IPP goals, and the cost-effectiveness of those options. This is also highlighted in Welfare and Institutions Code section 4646, which provides, in part:

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 the further 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. (Emphasis added.)

4. Welfare and Institutions Code section 4690.2, subdivision (a), defines in-home respite services as follows:

"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 all of the following:

(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.

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

5A. One of Claimant's IPP goals is continued respite services to allow his mother to attend to personal matters while Claimant remains under care.

Although Claimant's mother requested an increase in respite hours, her preference is to continue with non-LVN respite, and she did not request nursing respite. The forced change to LVN respite would preclude the use of her preferred respite provider, essentially resulting in no respite at all. Additionally, non-LVN respite is more cost-effective. The stated goal in Claimant's IPP, the preference of Claimant and his family, and the cost-effectiveness of the service options are all considerations which must be given weight by Welfare and Institutions Code section 4512, subdivision (b). Furthermore, Claimant's current nonmedical respite is meeting all four of the intended effects of in-home respite, as defined by Welfare and Institutions Code section 4690.2, subdivision (a).

5B. SCLARC argued that it was required to conduct the nursing assessment because "when a request is made, [SCLARC] must look at everything." However, SCLARC provided no authority to support this assertion. Moreover, the nursing assessment did not adequately establish that LVN respite is currently required

## ORDER

1. South Central Los Angeles Regional Center's denial of continued funding for non-LVN respite services is overturned. Claimant's appeal is granted.
2. South Central Los Angeles Regional Center shall continue to fund Claimant's in-home non-LVN respite services at 36 hours per month.

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## 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 90 days.

DATED:

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JULIE CABOS-OWEN

Administrative Law Judge

Office of Administrative Hearings