BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: CLAIMANT, vs. SOUTH CENTRAL LOS ANGELES COUNTY REGIONAL CENTER, Service Agency.	OAH No. 2018090596

DECISION

The hearing in the above-captioned matter took place on January 16, 2019, at Los Angeles, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings.

The Service Agency, South Central Los Angeles County Regional Center (SCLARC or Service Agency) was represented by Karmell Walker, Fair Hearing Manager.

Claimant was represented by her father, who was her authorized representative, and he was assisted by Claimant's older sister.[1]

[1] Titles or initials are used in the place of names in the interests of privacy. Claimant is a twin, and her twin sister is the claimant in the other matter, heard with this case. Her twin sister will, when referenced, be identified as "sister 1," and her older sister, who also provides her respite care, will be referenced as "sister 2."

This case was consolidated for hearing with case number 2018090844. However, separate decisions will issue pursuant to Welfare and Institutions Code section 4712.2, subdivision (b).

The issues in the two cases were the same, and there was overlapping testimony provided in each matter. The ALJ hereby makes his factual findings, legal conclusions, and order, as follows.

ISSUE PRESENTED

Should Claimant's respite care be changed, so that it is provided by a licensed vocational nurse (LVN), rather than by family members such as sister 2?

FACTUAL FINDINGS

THE PARTIES AND JURISDICTION

1. Claimant is a 27-year-old woman who is a consumer of services from the service agency pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.[2] She is eligible for services due to intellectual disability, although she is also shown as suffering from epilepsy. (Ex. 6.) She lives with her parents within the Service Agency's catchment area.

2. On or about August 13, 2018, the Service Agency sent a Notice of Proposed Action (NOPA) to Claimant. It states that the Service Agency was denying her request to continue utilizing non-LVN respite services. The denial was based, in part, on section 4648, subdivision (g)(1), and a statement of policies. (Ex. 2.)

[2] All further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

3. Claimant submitted a Fair Hearing Request (FHR) to the Service Agency, dated September 7, 2018, and this proceeding ensued. The matter was twice continued, once to establish that Claimant's father was her authorized representative, and once because an interpreter was unavailable at a hearing set for December 2018.[3] All jurisdictional requirements have been met.

CLAIMANT'S BACKGROUND AND PRIOR SERVICES

4. Claimant underwent a psychological assessment in 1995, when she was four years old. At that time her IQ was estimated at 23. Her adaptive functioning was assessed using the Vineland Adaptive Behavior Scales. Her scores in all domains placed her in the .1 percentile, and that was where her composite score—37—placed her as well. (Ex. 4, pp. 2-3.)

5. Claimant is not just disabled in her cognitive ability or adaptive function. She also suffers from a seizure disorder. It is suspected that she has had vision loss. According to her Individual Program Plan (IPP), she does not use either hand, does not use words to communicate, and she requires constant supervision during waking hours to prevent injury or harm, in all settings. (Ex. 6, p. 1.) The record indicates that Claimant is ambulatory, but not for any significant amount of time, nor can she walk very far without assistance. She is incontinent, and Claimant needs assistance with all of her activities of daily living, including all aspects of personal hygiene. She cannot dress herself.

[3] This information is from the OAH file, of which the ALJ takes official notice. He also takes official notice of the FHR, in the OAH files, which was not offered at the hearing.

6. Claimant lives with sister 1—the other claimant—and her parents. They provide all care and supervision. One of her older sisters, sister 2, who no longer lives in the home, provides respite care to Claimant and sister 1.

7. Claimant, as noted above, does not use words, but can perform some communication by eye contact, sounds, and touch. Her family has learned to interpret much of Claimant's behavior. (Ex. 6, p. 7.)

8. When Claimant was of school age, she participated in special education through her local school district. She has now "aged out" of school. At this time, there is no day program in place for her, so the majority of her time is spent at home and with her family.

9. The 2015 IPP set a number of goals. One of them was that she would continue to live with her family. (Ex. 6, p. 12.) Another was that she would continue to receive respite care. (*Id.*, p. 9.) As noted above, Claimant's respite care has been provided by sister 2, who is paid through a vendor of the Service Agency.

CLAIMANT'S SEIZURE DISORDER

10. Claimant suffers from a seizure disorder. The nature and extent of the malady was the subject of some dispute during the Fair Hearing. She suffers from short seizures, perhaps two to three minutes, and longer "breakthrough" disorders, meaning a seizure lasting five minutes or more. When a seizure reaches five minutes, a family member, usually her mother, gives her Diastat, a rectal suppository that contains diazepam. That drug has been prescribed to her to respond to longer seizures.

11. Claimant and sister 1 are both treated by Susan Shaw, M.D., FAES. Dr. Shaw is Medical Director of the Epilepsy Center at Rancho Los Amigos National Rehabilitation Center (Rancho) and she the chair of the Department of Neurology at Rancho. She is board-certified in neurology, and board-certified in two subspecialties, clinical neurophysiology and epilepsy. (Ex. C, p. 1.)

12. In her letter, Dr. Shaw stated that in the four and one-half years Claimant has been under her care, Claimant's seizures (of any type) have decreased from approximately 10 per month to two per month, and the duration of the seizures has decreased as well. An increase to three per month, noted in January 2018 medical records, was brought back down to two per month through adjustment of Claimant's anti-seizure medications. (Ex. C, p. 1.)

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THE NURSING ASSESSMENT

13. On June 9, 2018, Nasreen Asaria, R.N., performed a nursing assessment of Claimant and her sister. Ms. Asaria's report was received as exhibit 7. She noted that a nursing assessment had not been performed since 2010. (P. 1.)

14. The report states that the nursing assessment was triggered by Claimant's request to increase the number of hours of respite care that was then funded by the Service Agency. Ms. Asaria reviewed records, she examined Claimant, and she spoke with Claimant's parents. (P. 1.) There was likely some miscommunication because Claimant's parents' primary language is Spanish.

15. Ms. Asaria understood from the interview that Claimant had had a seizure that required her mother to administer Diastat approximately one week before the nursing assessment, approximately June 2, 2018. (P. 4.)

16. Ms. Asaria noted two "nursing problems." One was that Claimant had had a breakthrough seizure the week before and that she was at risk for injuries. The other was that Claimant is dependent for all activities of daily living. Ms. Asaria recommended LVN respite because she believed that Claimant's medical condition met criteria for LVN respite. (p. 5.)

17. Dr. Shaw has treated Claimant since July 31, 2014. She agrees, generally, with the Service Agency's nursing evaluation, but she is of the opinion that while there

"technically" is a risk of injury from a seizure, such an injury is unlikely, based on the history for both Claimants, because there have been no injuries from seizures. And, while there could be "breakthrough" seizures, lasting more than five minutes and requiring administration of the Diastat suppository, they are infrequent. (Ex. C, p. 1.)

18. Dr. Shaw is of the opinion that, from a medical practitioner's point of view, an LVN is not needed to provide the respite care, both because the seizures are stable, and because the administration of Diastat is not a skilled nursing intervention. She points out that Diastat and similar emergency anti-seizure drugs were developed so that they could be administered by people without medical training. Dr. Shaw cited the manufacturer's publication of FDA-approved directions for patients, family members, and care-takers to respond to a seizure. She noted that in the "community epilepsy practice" the drug is typically prescribed for a family member to administer. Finally, Dr. Shaw cited Senate Bill 161, effective January 2012, allowing non-medical personnel to administer epilepsy drugs to students in schools. She would equate a trained respite worker to such school personnel. (Ex. C, p. 1.)

19. Dr. Shaw was of the firm opinion that a trained family member could safely administer Diastat to Claimant, noting that they have done so for years. She does not believe an LVN will add any additional benefit in the cases of uncontrolled or breakthrough seizures, which the family knows how to manage. Dr. Shaw pointed out that if a severe seizure did not stop with the administration of Diastat, or led to respiratory or cardiac complications, the typical responses to that situation, such as intubation or IV medications, could not be provided by an LVN. (Ex. C, p. 2.)

20. Dr. Shaw pointed out that Claimant is receiving an investigational form of diazepam—the drug found in the Diastat suppositories—which is administered orally, placing the medication between cheek and gum for absorption. Claimant is formally

participating in a trial of the new drug, and neither the investigational protocol or the FDA require LVN administration of the newer medication. (Ex. C, p. 2.)

21. In her letter, Dr. Shaw concluded by opining that the family has never been inadequate in their seizure responses, and that bringing an LVN into the picture might have a negative effect, as that person might not be able to communicate well with Claimant sister 1. She opined that LVN-respite care was "wholly unnecessary" for administration of Diastat or any other emergency-anti seizure medication, or for managing breakthrough seizures. (Ex. C, p. 2.)

22. Claimant's medical records bear out Dr. Shaw's opinion that Claimant's family has managed breakthrough seizures properly. In March 2017, Claimant was admitted to a local hospital due to a seizure that lasted some ten minutes, and after Diastat was administered by the family when the seizure exceeded five minutes. (See generally, ex. B.) At that time, family gave a history noting approximately two seizures per month, typically lasting two to three minutes. (Ex. B, p. 5 [hand-marked].)

OTHER MATTERS

23. The standard agreement between the respite vendor and the client or client's family provides, in part: "[y]our respite worker (caregiver) may not perform invasive medical procedures that fall within the scope of practice of skill nursing (e.g. gastrointestinal tube feedings, suctioning, wound care, injections, IV therapy, etc.) nor shall they diagnose or treat medical conditions." (Ex. 10.)

24. Gala Fair, a nurse consultant for the Service Agency, also testified in this case. She believes, based on information taken from the website of the Department of Developmental Services, that an LVN must provide Claimant's respite care. She also testified to a conversation she had with Dr. Shaw, where Ms. Fair informed the physician about issues pertaining to regional center services and fair hearings. According to her,

Dr. Fair stepped back from some of her opinions regarding provision of respite care to Claimant.

25. During Ms. Asaria's testimony, the ALJ attempted to determine if her opinion was based on an understanding of how the laws that regulate the nursing profession applied in this case. She was not able to say, clearly, that to allow Claimant's parent or sister to care for her amounted to practicing as an LVN without a license.

26. The family's preference is clearly to continue the current regime of providing respite through Claimant's older sister. Much of this is based on their belief that family members, who know Claimant's particular behaviors and needs, are best suited to communicate with her. They believe that bringing a stranger into the situation will be counter-productive.

27. During the hearing, the Service Agency acknowledged that the LVN respite will be more expensive, per hour, than the existing respite care services.

LEGAL CONCLUSIONS

JURISDICTION AND THE BURDEN OF PROOF

1. Jurisdiction to proceed in this matter pursuant to section 4710 et. seq. was established, based on Factual Findings 1 through 3.

2. The burden of proof is placed on the Service Agency in this matter. Although it couched the NOPA in terms of denying a request to continue non-LVN respite care, it is the Service Agency that was changing the status quo, as non-LVN respite had been in place for a period of years. The party seeking a change to the IPP must bear the burden of proof. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) The Service Agency must prove its case by a preponderance of the evidence. (Evid. Code, § 115.)

RULES OF GENERAL APPLICATION IN CASES INVOLVING SERVICE DISPUTES

3. Services provided under the Lanterman Act are to be provided in conformity with the IPP, per section 4646, subdivision (d). Consumer choice is to play a part in the construction of the IPP. Where the parties cannot agree on the terms and conditions of the IPP, a Fair Hearing decision may, in essence, establish such terms. (See § 4710.5, subd. (a).)

4. Regional centers must develop and implement IPP's, which shall identify services and supports "on the basis of the needs and preferences of the consumer, or where appropriate, the consumer's family, and shall include consideration of … the cost-effectiveness of each option . …" (§ 4512, subd. (b); see also §§ 4646, 4646.5, 4647, and 4648.) The Lanterman Act assigns a priority to services that will maximize the consumer's participation in the community. (§§ 4646.5, subd. (a)(2); 4648, subd. (a)(1), (2).)

5. In order to determine how an individual consumer is to be served, regional centers are directed to conduct a planning process that results in an IPP designed to promote as normal a life as possible. (§ 4646; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384 at 389 [*ARC v. DDS*].) Among other things, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services (which must be provided based upon the client's developmental needs), contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences. (§§ 4646; 4646.5, subd. (a)(1), (2) and (4); 4512, subd. (b); and 4648, subd. (a)(6)(E).)

6. Section 4512, subdivision (b), of the Lanterman Act states in part:

> "Services and supports for person with developmental disabilities" means specialized services and supports or special adaptations of generic services and support 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. … The determination of which services and supports are necessary 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's family, and shall include consideration of … the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, … physical, occupational, and speech therapy, … education, … behavior training and behavior modification programs, … *respite*, … social skills training, … transportation services necessary to ensure delivery of services to persons with developmental disabilities.

(Emphasis added.)

7. Services provided must be cost effective (§ 4512, subd. (b)), and the Lanterman Act requires the regional centers to control costs so far as possible, and to otherwise conserve resources that must be shared by many consumers. (See, e.g., §§ 4640.7; subd. (b), 4651, subd. (a); 4659, and 4697.) To be sure, the obligations to other consumers are not controlling in the decision-making process, but a fair reading of the law is that a regional center is not required to meet a disabled person's every possible

need or desire, in part because it is obligated to meet the needs of many children and families.

8. The IPP is to be prepared jointly by the planning team, and any services purchased or otherwise obtained by agreement between the regional center representative and the consumer or his or her parents or guardian. (§ 4646, subd. (d).) The planning team, which is to determine the content of the IPP and the services to be utilized, is made up of the disabled individual or their parents, guardian or representative, one or more regional center representatives, including the designated service coordinator, and any person, including service providers, invited by the consumer. (§ 4512, subd. (j).)

9. Pursuant to section 4646, subdivision (a), the planning process is to take into account the needs and preferences of the consumer and his or her family, "where appropriate." Further, services and supports are to assist disabled consumers in "achieving the greatest amount of self-sufficiency possible . … " In the planning process, the planning team is to give the highest preference to services and supports that will enable a minor to live with his or her family, and an adult person with developmental disabilities to live as independently in the community as possible. Planning is to have a general goal of allowing all consumers to interact with persons without disabilities in positive and meaningful ways. (§ 4648, subd. (a)(1).)

10. The planning process includes the gathering of information about the consumer and "conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. … Assessments shall be conducted by qualified individuals . … 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." (§ 4646.5, subd. (a)(1).) Given that services must be cost effective and

designed to meet the consumer's needs, it is plain that assessments must be made so that services can be properly provided in a cost-efficient manner.

11. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client in question, and within the bounds of the law each consumer's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d); 4501; 4502; 4502.1; 4512, subd. (b); 4640.7, subd. (a); 4646, subd. (a) & (b); 4648, subd. (a)(1) & (a)(2).) The Lanterman Act assigns a priority to services that will maximize the consumer's participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).) Under section 4640.7, each regional center is to assist consumers and families with services and supports that "maximize opportunities and choices for living, working, learning, and recreating in the community."

12. Reliance on a fixed policy "is inconsistent with the Act's stated purpose of providing services 'sufficiently complete to meet the needs of each person with developmental disabilities.' (§ 4501.)" (*Williams v. Macomber* (1990) 226 Cal.App.3d 225, 232-233.) The services to be provided to each consumer will be selected on an individual basis. (*ARC v. DDS*, *supra*, 38 Cal.3d at 388.)

13. One important mandate included within the statutory scheme is the flexibility necessary to meet unusual or unique circumstances, which is expressed in many different ways in the Lanterman Act. Regional centers are encouraged to employ innovative programs and techniques (§ 4630, subd. (b)); to find innovative and economical ways to achieve the goals in an IPP (§ 4651); and to utilize innovative service-delivery mechanisms (§§ 4685, subd. (c)(3), and 4791).

14. (A) Under section 4502, persons with developmental disabilities have certain rights, including the right to treatment services and supports in the least restrictive environment. Those services and supports should foster "the developmental potential of the person and be directed toward the achievement of the most

independent, productive and normal lives possible." (Subd. (b)(1).) There is also a right to dignity, privacy and humane care. (Subd. (b)(2).) The person also has the right to make choices, including where and with whom they live, and the pursuit of their personal future. (Subd. (b)(10).)

(B) The Act favors supporting minor children in their family home. When it comes to adults, the Legislature has placed "a high priority on providing opportunities for adults with developmental disabilities, regardless of the degree of disability, to live in homes that they own or lease with support available as often and for as long as it is needed, when that is the preferred objective in the individual program plan." (§ 4689.)

15. Section 4648, subdivision (a)(3), provides that a regional center may purchase services pursuant to vendorization *or* contract. Subdivision (a)(3)(A) provides that vendorization or contracting is the process of identifying, selecting, or utilizing vendors or contractors, based on qualifications and other factors. The Department of Developmental Services has enacted regulations governing the establishment of persons or firms as vendors. (See California Code of Regulations (CCR), title 17, §54300, et. seq.)[4] Other regulations control the purchase of services by contract. (CCR §§ 50607 through 50611.) All of these provisions plainly exist to not only control costs, but to assure the quality of services.

THE LAWS GOVERNING NURSING DO NOT BAR CLAIMANT'S SISTER OR MOTHER FROM ADMINISTERING DIASTAT TO CLAIMANT

16. (A) The current respite worker, sister 2, is not acting as an LVN in her care of Claimant, even if she has administered rectal suppositories. Likewise, Claimant's mother is not acting as an LVN if she administers Diastat at need. A review of statutes regulating nursing—both registered nursing and vocational nursing—indicate that a

[4] Further citations to the CCR shall be to title 17 unless otherwise noted.

person not licensed can provide care often associated with nursing, in certain circumstances.

(B) Licensed Vocational Nursing is not readily defined, even in the statutes governing the regulation of that profession. Business and Professions Code, section 2859, provides:

> The practice of vocational nursing within the meaning of this chapter is the performance of services requiring those technical, manual skills acquired by means of a course in an approved school of vocational nursing, or its equivalent, practiced under the direction of a licensed physician, or registered professional nurse, as defined in Section 2725.
>
> A vocational nurse, within the meaning of this chapter, is a person who has met all the legal requirements for a license as a vocational nurse in this state and who for compensation or personal profit engages in vocational nursing as the same is hereinabove defined.

Thus, it appears that a vocational nurse is someone who has received certain training and passed certain tests, but that training and testing is not described in the statutes.

(C) A regulation enacted by the Board of Licensed Vocational Nurses and Psychiatric Technicians defines the scope of practice as follows:

> The licensed vocational nurse performs services requiring technical and manual skills which include the following:

(a) Uses and practices basic assessment (data collection), participates in planning, executes interventions in accordance with the care plan or treatment plan, and contributes to evaluation of individualized interventions related to the care plan or treatment plan.

(b) Provides direct patient/client care by which the licensee:

(1) Performs basic nursing services as defined in subdivision (a);

(2) Administers medications;

(3) Applies communication skills for the purpose of patient/client care and education; and

(4) Contributes to the development and implementation of a teaching plan related to self-care for the patient/client.

(CCR, tit. 16, § 2518.5)

By this regulation, it is apparent that administration of medications is within the scope of an LVN's practice. This does not end the analysis; otherwise every parent who gives his or her child properly prescribed medicines (such as antibiotics) or even over-the-counter medication is acting as an LVN.

(D) Business and Professions Code section 2861 provides:

This chapter does not prohibit the performance of nursing services by any person not licensed under this chapter; provided, that such person shall not in any way assume to practice as a licensed vocational nurse.

(E) The statutes pertaining to registered nursing have a similar provision. The statutory definition of registered nursing, found in Business and Professions Code section 2725 is broader and more detailed than the definition set out in section 2859, relating to an LVN. However, a set of exceptions is found in another statute, Business and Professions Code section 2727.3, which states:

> This chapter does not prohibit:
>
> (a) Gratuitous nursing of the sick by friends or members of the family.
>
> (b) Incidental care of the sick by domestic servants or by persons primarily employed as housekeepers as long as they do not practice nursing within the meaning of this chapter.
>
> (c) Domestic administration of family remedies by any person.
>
> (d) Nursing services in case of an emergency. "Emergency," as used in this subdivision includes an epidemic or public disaster.
>
> (e) The performance by any person of such duties as required in the physical care of a patient and/or carrying out medical orders prescribed by a licensed physician; provided, such person shall not in any way assume to practice as a professional, registered, graduate or trained nurse.

(F) Business and Professions Code sections 2861 and 2727.3 allow persons who are not licensed to perform nursing acts, so long as they do not hold themselves

out as LVNs or RNs. Section 2727.3, subdivisions (a) and (e) would apply to the current respite worker, and section 2861 would apply as well. In *American Nurses Association v. Torlakson* (*ANA*) (2013) 57 Cal.4th 570, the Supreme Court held that a person who was not a registered nurse could give school children injections of insulin, at a physician's orders and with the parent's permission, and that such was not the practice of registered nursing in light of Business and Professions Code section 2727.3, subdivision (e), quoted above. The court held that one who did not otherwise hold him or herself out as a nurse could perform acts that would otherwise fall within the definition of nursing, if they were following a doctor's orders. (*ANA, supra*, 57 Cal.4th at 585-586.)

(G) The analysis in the *ANA* case is similar to the one offered by Dr. Shaw regarding the 2012 enactment she references regarding epileptic persons. Here it appears that neither the respite worker, N., or her mother will be practicing nursing by caring for Claimant, because neither is holding herself out to the world as a nurse (RN or LVN).

(H) Further, Dr. Shaw's opinion, that the care of Claimant or the administration of Diastat does not require the use of an LVN, and that it is not skilled medical care, is given great weight.

SECTION 4648, SUBDIVISION (G)(1) DOES NOT BAR THE CURRENT RESPITE PROGRAM

17. Section 4648, subdivision (g)(1), states:

> Prior to the purchase of incidental medical services through a trained respite worker, the regional center shall do all of the following: (1) Ensure that a nursing assessment of the consumer, performed by a registered nurse, is conducted to determine whether an in-home respite worker, licensed

vocational nurse, or registered nurse may perform the services.

While this requires a nursing assessment, it does not bar the services in question.

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THE APPEAL SHOULD BE GRANTED

18. The statutes regulating nursing do not bar Claimant's mother or sister 2 from providing Diastat if it is needed, or otherwise caring for Claimant. One or both have provided care, and where needed, Diastat, to Claimant for years. Her family, who cares the most about her, wish to continue in their current role. As the Lanterman Act provides, family choice, while not controlling, should be given weight. Continued provision of the services by sister 2 is cost-effective, as it is cheaper than LVN respite. The family's position, and the conclusion that inserting a suppository is not a skilled nursing task, is supported by Dr. Shaw's opinion, set out in her letter. That she was told that the Lanterman Act might affect the analysis does not make the provision of Diastat a skilled nursing task. Finally, the agreement utilized by the vendor, while barring provision of some medical care, does not bar the administration of a suppository.

ORDER

Claimant's appeal is granted, and respite care shall continue to be provided by her sister.

DATE:

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Joseph D. Montoya

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter, and both parties are bound by it. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days of this decision.