BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CLAIMANT vs. NORTH LOS ANGELES COUNTY REGIONAL CENTER, Service Agency.	OAH No. 2019020738

DECISION

Thomas Y. Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on April 15, 2019, in Lancaster, California.

Claimant was represented by her parents. Family members' names are omitted to protect privacy. Claimant's older sister was also present and gave testimony.

North Los Angeles County Regional Center (service agency or NLACRC), was represented by Stella Dorian, Risk Assessment Supervisor, and Monica Mungia, Educational Advocate.

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on April 15, 2019.

ISSUE

Whether parent conversion respite services may be at a non-licensed level of care, or whether a registered nurse (RN) or licensed vocational nurse (LVN) must render such care.

FACTUAL FINDINGS

1. Claimant is 19 years old. She lives with her parents, who are her

conservators, older sister, and three younger siblings. She cannot care for herself. Her disability requires care from others at all times. She qualifies for services based on a diagnosis of profound intellectual disability (ID).

2. On February 8, 2019, the service agency sent claimant's mother a notice of proposed action (NOPA) to deny her request for parent conversion respite services at the non-licensed level of care. Claimant timely appealed the NOPA and requested a fair hearing. (Exhibit 1.)

3. Besides profound ID, claimant has been diagnosed with epilepsy, cerebral palsy, microcephaly, quadriplegia, scoliosis, spasticity, and asthma. She is unable to speak. She must be fed through a gastrostomy tube (G-tube). All medications normally taken orally must be administered by G-tube.

4. Physicians have prescribed claimant medications PRN (*pro re nata*, to be taken as needed). Claimant's PRN prescriptions are diazepam, for muscle spasms, and Albuterol, for asthma. Breathing treatments for asthma are provided through a nebulizer.

5. Claimant takes certain prescribed medications daily. She takes two types of medication daily against seizures. As a result, seizures are well controlled and infrequent. Claimant last experienced a seizure in May 2011.

6. Claimant no longer attends school. She is at home full-time. Claimant must be changed regularly. Her position must be moved regularly to prevent injury, such as from prolonged pressure on one part of her body. For the past several months, mother has been claimant's primary caregiver, including in the administration of claimant's medications, whether taken daily or PRN. Supporting mother and at times taking her place in claimant's care at home is her older sister.

7. An Individualized Program Plan (IPP) team met on September 18, 2018 and reported on claimant's progress. They assessed the family's need for respite

support. Based on the assessment, the team agreed with the family that respite should continue, but at an increased rate, from 30 to 45 hours per month. (Exh. 5, p. 5.) They duly prepared an IPP Addendum noting the increase. (Exh. 6.)

8. With the number of respite hours decided, the service agency reviewed the appropriate level of care for respite services, particularly whether claimant's care required such scientific knowledge and technical skills as an RN or LVN would possess. As indicated in the service agency's interdisciplinary (I.D.) notes, the service agency took advice from Joyce Macconnell, RN, the service agency's nurse consultant.

A. Nurse Macconnell telephoned the family's home and spoke with claimant's sister, obtaining a comprehensive understanding of claimant's current medications and how and in what quantities they were being administered. Nurse Macconnell December 11, 2018 I.D. note states in part:

> [Claimant] receives G-tube feeds of Ensure with fiber, 8 oz and 8 oz H2O QID [*quater in die*, four times per day], other medications are Tranxene TID [*ter in die*, three times per day], botox injections for spasticity, Valium TID, Lactulose QD [*quaque die*, one per day], Keppra BID [*bis in die*, two times per day], Albuterol nebulizer Q 4 H PRN [*quaque quarta hora*, every four hours], Benadryl PRN for allergies. [Claimant] has not had seizures for the last 2-3 yrs, her nebulizer is only generally used when she is sick or her allergies flare up. . . .
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> EPSDT [Early and Periodic Screening, Diagnostic, and Treatment, for which Medicaid benefits are available] should be applied for as she requires care at LVN level and it is the generic resource that should be used before NLACRC services. Respite services and EPSDT should be LVN level due

to G-tube feeds and PRN medications. (Exh. 7, p. 1.)

B. So far as she could discover, Nurse Macconnell's consultation was the first time that any nurse consultation or review had been requested. (Exh. 7, p. 2.)

C. In a January 14, 2019 I.D. note, Nurse Macconnell wrote: "Reviewed previous notes from CSC [Consumer Service Coordinator] last week. Recommendation remains LVN level for EPSDT and respite unless IHSS [In-Home Support Services] hours are utilized, in that case care may be provided at non licensed level. . . . Due to skilled nursing needs of consumer G-tube feeds and PRN medications level of care for services provided by NLACRC is LVN level." (Exh. 7, p. 3.)

D. In a January 22, 2019 I.D. note, Nurse Macconnell wrote that she had again reviewed records and claimant's plan of care. Nurse Macconnell listed claimant's needs and medications and wrote: "As many . . . are skilled nursing procedures and needs – nursing/physician statement also states consumer needs skilled nursing services. Services provided by NLACRC must be at LVN level." (Exh. 7, p. 4.)

E. In her February 25, 2019 I.D. note, Nurse Macconnell wrote that, accompanied by the CSC, she had visited the family that day to perform her nursing assessment. As in her previous I.D. note, Nurse Macconnell reviewed records. Her conclusion was the same: "Level of care at this time for services provided by NLACRC is LVN." (Exh. 7, p. 5.)

9. Nurse Macconnell testified at the hearing to the same effect as her I.D. notes. After reviewing medical records, assessing claimant's condition in person, and consulting with mother and sister, Nurse Macconnell opined that under applicable law claimant's care must be from a professional, an LVN, to the extent that the caregiver must provide claimant PRN medications and G-tube feeding.

10. Mother, father, and claimant's older sister testified that they are against

any change proposed by the service agency.

A. Family members testified that the service agency has not adequately explained the need for change to LVN-assisted care. Rather the service agency has been largely unresponsive to inquiries and requests and often will not return mother's voicemail messages.

B. Further, claimant has been doing well for years. According to the family's testimony, claimant has benefitted because mother is entirely devoted to her care and her older sister has provided unfailing assistance and support for both mother and claimant. Mother is not medically trained, but her years of experience in caring for claimant and her knowledge of every aspect of claimant's needs, as mother and father testified, makes mother ideally suited to provide any and all of claimant's care, including respite care. The family maintain the same regarding claimant's older sister, though she would, in the absence of LVN-level care, provide assistance to mother, rather than be primarily responsible for claimant's care at home.

C. The family testified that an LVN, though possessing scientific and technical skills, would have none of the experience that is more important: how to care for claimant. In consequence the family believes that if an LVN were put in charge of claimant's respite care, mother would be taxed with training the LVN, creating more work for mother and effectively taking resources away from claimant, to claimant's and the family's detriment.

D. Mother, father, and claimant's older sister all believe that there is no significant benefit to be gained, for them or claimant, from LVN-level care. Claimant is administered PRN medications very infrequently. From having lived with and cared for claimant over her entire lifetime, they believe they have learned thoroughly when best and how best to administer such PRN medications. There is even less need for LVN-level care regarding claimant's G-tube, according to the family, since they have been feeding

claimant several times per day, every day, year after year, using the G-tube, and have become thoroughly familiar with the G-tube, including how and when it should be changed or adjusted.

E. The most important consideration here should be, in the family's view, keeping in place practices that have been manifestly to claimant's benefit.

11. Some of the family's testimony is supported by letters from three of claimant's physicians from Kaiser Permanente.

A. On February 27, 2019, Agnes A. Vasco, M.D., wrote: "[Claimant] does not need a regional center LVN. [M]other . . . stays with [claimant] 24/7. [Claimant] also has an adult sister and a home health aid[e] that already help [mother]. An LVN would be redundant and unnecessary." (Exhs. D & 9.)

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B. On March 20, 2019, Gurcharn Singh, M.D., F.A.C.P., F.A.C.G., A.G.A.F., Diplomate, American Board of Internal Medicine, Gastroenterology, wrote: "[Claimant] is under my care for gastrostomy tube. Her mother has been changing the button PEG [percutaneous endoscopic gastrostomy] every two months. . . . [Mother and sister] together have taken care of the patient and been changing the gastrostomy tube over long time. [Sister] is capable of button PEG change and certified to change the PEG whenever is needed [*sic*]. Patient's mother and her sister have been able to take care of the needs of patient over long time. They have expressed that they do not need any additional home health like LVN. I agree with their request." (Exhs. E & 9.)

C. On March 27, 2019, Meriam Makary-Botros, M.D., Neurology with Special Qualification in Pediatric Neurology, wrote: "Mother has been [claimant's] caregiver since birth and continues to care for [claimant] as she needs full assistance with activities of daily living. Mother also administers all of [claimant's] medications." (Exhs. F & 9.)

12. Dr. Makary-Botros certified Exhibit 8, a Home Health Certification and Plan

of Care (certification) for claimant for the certification period February 2, 2019 through April 2, 2019. A certification is a required form which a physician must complete to allow an eligible patient, such as claimant, to receive EPSDT benefits under the Medi-Cal program. The certification in this case reviewed claimant's condition and treatment in detail, identifying among other things medications she is administered and dosages and care to be provided daily in the home. The certification concludes with Dr. Makary-Botros's Physician Certification Statement: "I certify that this patient needs skilled services, management and evaluations of the care plan . . . . The patient is under my care, and I have authorized services on this plan of care and will periodically review the plan." (Exh. 8, p. 3.) Dr. Makary-Botros signed another certification for the certification period April 3, 2019 through June 1, 2019, again certifying that claimant "needs skilled services." (Exh. B, p. 4.)

13. Father works outside the home and so must leave most of claimant's care to mother and sister. Mother and sister are not licensed professionals. They provide claimant constant care, informed by their years of experience with claimant and enhanced by family ties. They are not supervised by licensed professionals, however, such as a physician or nurse. They are not employed by a provider of health care services or by an agency vendored by a regional center to provide in-home respite services. On the other hand, as indicated in Exhibit G, sister has completed several types of training courses appropriate to caring for a patient in claimant's condition.

A. On October 29, 2017, the Palmdale Aide Training Program certified that sister "successfully completed the state required 120hr certified Home Health Aide Course . . . ."

B. ASAP Home Health, to which the Department of Public Health issued license number 9810001089, awarded sister certificates of completion for each of these two-hour courses: on April 1, 2018, for "Effects of Hypertension"; on May 1, 2018, for

"Fundamentals Regarding Allergies"; on June 1, 2018, for "Hand Hygiene: GuideLines for Health Care"; on July 1, 2018, for "Information On Mental Disorder"; on August 1, 2018, for "VP Shunts Updated"; on September 1, 2018, for "Discussing Body Systems"; on October 1, 2018, for "Guidelines for CPR"; on November 1, 2018, for "Caring for the Ventilated Patient Update"; on December 1, 2018, for "Obesity and Management Update"; on January 1, 2019, for Learning About Body Systems"; on April 1, 2019, for "An Update on Epilepsy."

14. The service agency and claimant, represented by her parents, accompanied by claimant's older sister, met to discuss concerns in an informal meeting on February 27, 2019. The meeting was described at some length in an April 14, 2019 letter by Ms. Mungia, Exhibit 18. As the letter states, claimant's IHSS provider is her mother. Mother advised Ms. Mungia that as of November 2018, when the service agency re-assessed respite services, there were "no changes to [claimant's] health, condition nor diagnoses for about 7 years." (Exh. 18, p. 3.) Mother advised further that claimant's older sister "became the caregiver through parent conversion for respite services two years ago with the agency Accredited and you were under the assumption that NLACRC was in agreement with the level of care since there was no changes during that time." (*Ibid.*)

LEGAL CONCLUSIONS

1. The party asserting a claim or seeking a change from the status quo generally has the burden of proof in administrative proceedings. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, the service agency bears the burden of proving, by a preponderance of the evidence, that the in-home level of care should change, so that a nurse, LVN or RN, is responsible for claimant's care. (Evid. Code, §§ 115, 500.) The service agency carried its burden of proof in this case.

2. The practice and licensure of a registered nurse is set out in the Nursing

Practice Act, Business and Professions Code section 2725 through 2742 (Act). Pertinent portions of the Act are:

A. Section 2725, subdivision (a), which: (i) recognizes "overlapping functions between physicians and registered nurses"; (ii) permits "sharing of functions within organized health care systems that provide for collaboration between physicians and registered nurses"; and (iii) states that such systems include "clinics, home health agencies, physicians' offices, and public or community health services."

B. Section 2725, subdivision (b), describing the duties of a registered nurse: "functions, including basic health care, that help people cope with difficulties in daily living that are associated with their actual or potential health or illness problems or the treatment thereof, and that require a substantial amount of scientific knowledge or technical skill . . . . "

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C. Section 2725.3, subdivision (a), which states that a licensed health facility "shall not assign unlicensed personnel to perform nursing functions in lieu of a registered nurse and may not allow unlicensed personnel to perform functions under the direct clinical supervision of a registered nurse that require a substantial amount of scientific knowledge or technical skills, including: ¶ "(1) Administration of medication. [¶] . . . [¶] (3) Parenteral or tube feedings. [¶] . . . [¶] (5) Assessment of patient condition."

D. Section 2727, which states that the Act does not prohibit: ¶ (a) Gratuitous nursing of the sick by friends or members of the family. [¶] . . . [¶] (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."

3. In Business and Professions Code section 2840.5, the Legislature declared "the practice of licensed vocational nursing to be a profession."

4. Business and Professions Code section 2859 provides that an LVN performs "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."

5. Section 4646, subdivision (a), of the Lanterman Developmental Disability Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act), provides that the service agency must cooperate with a claimant in preparing an IPP "to ensure that the provision of services to consumers and their families be effective in meeting the goals" of the IPP. Section 4646.5, subdivision (a)(1), of the Lanterman Act provides that planning for the IPP must include "[g]athering information and conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities."

6. Under section 4686 of the Lanterman Act, an in-home respite worker "who is trained by a licensed health care professional may perform incidental medical services for consumers of regional centers with stable conditions, after successful completion of training" as described in section 4686. The incidental medical services the in-home respite worker may perform are limited, but include "[g]astrosomy: feeding, hydration, cleaning stoma, and adding medication per physician's or nurse practitioner's orders for the routine medication of patients with stable conditions." Subdivision (k) of section 4686 provides further that, "[f]or purposes of this section, 'in-home respite worker' means an individual employed by an agency which is vendored by a regional center to provide in-home respite services."

7. Section 12300 of the Welfare and Institutions Code describes supportive services, including in-home supportive services. Section 12300.1 provides that supportive services "include those necessary paramedical services that are ordered by a

licensed health care professional who is lawfully authorized to do so . . . . 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. These necessary services shall be rendered by a provider under the direction of a licensed health care professional . . . ." The Department of Social Services describes paramedical services identically in the California DSS Manual SS, section 30-757.191, subdivision (c). (Exh. 17, p. 72 (the exhibit's last page).)

8. A professional license is needed to provide a substantial part of the care claimant receives. For instance, all of claimant's nutrition is through a G-tube. Approximately every two months a fresh G-tube must be substituted for the one in place. As Nurse Macconnell testified and observed in I.D. notes after evaluating claimant's condition, these procedures require "a substantial amount of scientific knowledge or technical skills" within the meaning of section 2725.3, subdivision (a)(1), of the Act. An LVN or RN have these skills, claimant's family do not.

9. Assessing claimant's condition and needs likewise requires professional services, under section 2725.3, subdivision (a)(5) of the Act.

10. Under sections 12300 and 12300.1 of the Welfare and Institutions Code, the family is providing claimant paramedical services, such as the administration of medications, and exercising judgment, which the service agency may allow based only on training given by a licensed health care professional. Mother does not have such training. Sister has some training of this kind, but is not caring for claimant as an employee of an agency vendored by a regional center to provide in-home respite services. In consequence, under section 4686 of the Lanterman Act, the service agency must ensure that the paramedical services are rendered by a licensed professional, an LVN or RN.

11. The family's position is that they have adequately, and more than adequately, provided professional care to claimant without the benefit of on-site assistance from a professional, an LVN or RN, and without being licensed as professionals themselves. Their position is not incorrect as a factual matter. Mother and sister have cared well for claimant, no harm has resulted to claimant, in fact claimant has benefitted from the family's care, as each family member at the hearing testified credibly. But these facts do not change legal requirements.

12. The legal requirements set out above are in place to prevent potential harm from care that is not sufficiently informed by scientific knowledge or accompanied by technical skills. So far such knowledge and skills have not proved necessary. But they may yet prove crucial. Because they may, the service agency must follow the law that requires professional care from a licensed nurse, an LVN or RN. Likewise, under section 2725.3, subdivision (a), of the Act, the service agency may not agree to a licensed health facility's assigning unlicensed personnel to perform nursing duties.

13. Some of claimant's conditions are stable, but not all. Claimant's allergies are not stable. At times her allergies change or act up and medication is administered PRN or as needed. There are two types of medication in this category, Albuterol and Benadryl. (Finding 8A.) Because claimant's condition with respect to allergies is not stable, the service agency may not, under section 4686 of the Lanterman Act, rely upon her family members to administer claimant's allergy medications.

14. The family is not prohibited from continuing to provide care to claimant. Under section 2727, subdivision (a), of the Act, the family may provide claimant gratuitous nursing, so long as they are not performing work that would require a professional license.

ORDER

Claimant's appeal is denied.

DATED:

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THOMAS Y. LUCERO

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 90 days.