

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

**In the Matter of the Fair Hearing Request of:**

**CLAIMANT,**

**vs.**

**SOUTH CENTRAL LOS ANGELES REGIONAL CENTER,**

**Service Agency.**

**OAH No. 2021020056**

**DECISION**

Deena R. Ghaly, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on March 25, 2021, via videoconference.

Aaron Abramowitz, Enright & Ochletree, LLP, represented South Central Los Angeles Regional Center (SCLARC or Regional Center). Maria Badillo, Public Counsel,

represented Claimant. Claimant and his mother (Mother)<sup>1</sup> were present at the hearing. Spanish interpretation services were provided by a certified interpreter.

The record was held open until April 1, 2021, for the parties to submit written closing arguments and until April 16, 2021, for the parties to submit responses to each other's closing arguments. Claimant's Closing Brief was timely received and marked for identification as Exhibit MM. Regional Center's Closing Brief was timely received and marked for identification as Exhibit 23. Claimant's Reply Closing Brief was timely received and marked for identification as Exhibit NN. Regional Center's Reply Closing Brief was timely received and marked for identification as Exhibit 24. Thereafter, the record was closed, and the matter was submitted for decision.

## **Preliminary Matters**

At hearing, the parties disagreed over the issue to be decided and which party bears the burden of proof. This ALJ directed the parties to address these matters in their post-hearing submissions. A summary of the parties' respective arguments and the rulings on these matters follow.

## **Issue of the Case**

### **PARTIES' ARGUMENTS**

SCLARC currently funds respite care for Claimant through licensed vocational nurses (LVN's). For many reasons, including language requirements, finding qualified

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<sup>1</sup> Titles are used for Claimant and his family to protect their privacy.

candidates for the respite position has been exceptionally challenging. Through his advocates, Claimant has argued for SCLARC to pay higher wages to attract and retain more and better candidates. In addition to offering higher wages to LVN's, Claimant has requested that SCLARC expand the field of eligible caregivers to include certified home health care aides (CHHA).

In its Notice of Proposed Action (NOPA), SCLARC denied Claimant's request to increase the pay offered for LVN respite care. Regarding alternative caretakers, although SCLARC had resisted this option in earlier discussions, the NOPA stated that SCLARC now agreed CHHA's could be retained to provide Claimant with respite care and that, in addition to its ongoing search for reliable and qualified LVN's, SCLARC would seek such providers during hours when Claimant did not need to have medication administered.

In its post-hearing submissions, SCLARC argued that whether the LVN respite care rate of pay could or should be increased are the sole issues in this matter and that questions of pay rates for services are beyond OAH's jurisdiction. Claimant agreed that whether SCLARC is required to authorize a higher pay rate is at issue. He disagreed that OAH does not have jurisdiction to decide this issue. Regarding whether CHHA's could be utilized for Claimant's respite care, he argued that the matter remains an active dispute and should be addressed here. As Claimant argued, SCLARC's initial resistance to utilizing CHHA's and its belated agreement to try to identify such candidates is part of a larger failure to approach its duty to secure services in a flexible and creative way to meet the unique requirements of the circumstances.

## **RULING REGARDING ISSUE OF THE CASE**

As discussed in greater detail at Legal Conclusions 2 and 3 below, service providers' wage rates are set by the Department of Developmental Services (DDS) and cannot be changed by regional centers. (See Cal. Code Regs, tit 17 (CCR) § 57300). To the extent that the dispute between the parties is about whether SCLARC can or should offer higher wages to LVN's assigned to provide respite care for Claimant, the issue is outside the regional center's powers and therefore, outside the ALJ's power to order SCLARC to do so.

The dispute between the parties is, however, more complex than setting LVN wage rates. At the heart of Claimant's complaint is that SCLARC has failed to live up to its obligations to be flexible and creative in securing agreed-upon services. Under the broad authority granted to OAH to decide controversies between regional centers and their consumers, (see Welf. & Inst. Code, §§ 4705, subd. (a)(1), 4706, subd. (b)<sup>2</sup>), this ALJ may properly decide that issue.

## **Burden of Proof**

### **PARTIES' ARGUMENTS**

Although the parties disagreed over which party bears the burden of proof at hearing, in their post-hearings, in their post-hearing submissions, both SCLARC (subject to its objection regarding OAH's jurisdiction) and Claimant stated Claimant bore the burden of proof. As set out in Legal Conclusion 4 below, this ALJ agrees that Claimant has the burden of proof in this proceeding.

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<sup>2</sup> Further statutory references are to the Welfare and Institutions Code.

## **ISSUES**

Has SCLARC meaningfully fulfilled its obligation to discharge its duties to secure agreed-upon respite care for Claimant by considering or implementing his recommendations to offer a higher rate of pay to prospective LVN's or offer the position to CHHA's, or some combination of both approaches?

## **FACTUAL FINDINGS**

### **Background**

1. Claimant is 19 years old and is a SCLARC consumer based on his qualifying diagnoses of epilepsy and intellectual disability. Multiple outside agencies provide services to Claimant.
2. After the parties' individual program plan (IPP) meeting in April 2017, SCLARC and Claimant's family determined respite care for Claimant was warranted. Based on Claimant's history of seizures and his other medical needs, SCLARC has always provided LVN's for his respite care.
3. Over the nearly four years since LVN-provided respite service became part of Claimant's IPP plan, SCLARC has experienced difficulties finding qualified LVN's for Claimant. Because Claimant communicates primarily in Spanish, Spanish-speaking LVN's are best suited to work with Claimant. According to SCLARC, there is a nationwide shortage of Spanish speaking LVN's, exacerbated significantly by the ongoing COVID-19 pandemic. In addition, finding LVN's able to accommodate

Mother's work schedule, which consists of 12-hour shifts, has been an added challenge.

4. SCLARC also argued that Claimant and his family have been especially difficult and demanding on the LVN's working with them. According to SCLARC personnel, LVN agencies have reported to SCLARC that the family home is unclean and bug-infested, Claimant is prone to physically attacking his assistants, public transportation to Claimant's home is spotty, making timely arrival for the start of shifts difficult, and family members have treated the LVN's rudely or asked them to perform tasks not associated with Claimant's care, such as cleaning or doing the laundry.

5. A. Mother denies that the family home is unclean or that respite workers are abused. She agrees that, due to his condition and limitations, Claimant can be difficult. She believes, however, that the main issue for why SCLARC has been unable to locate a suitable LVN is because the pay rate is too low. During the hearing, she stated that LVN's who have worked well with Claimant have told her that they would like to continue working with him, but the pay is unsustainable. At the first opportunity for better-paying work, sometimes in areas unrelated to nursing, the LVN's leave. The constant turnover is frustrating for Claimant who, when upset, becomes more difficult to care for.

B. Mother further stated that having assistance from Spanish-speaking

LVN's is essential for Claimant who can become greatly agitated and even violent when he cannot understand his caretakers.

## **IPP Meeting, Notice of Proposed Action and Fair Hearing Request**

6. At an IPP meeting held on December 7, 2020, Mother requested that SCLARC take steps to find a source of reliable, consistent respite care, including offering higher rates of pay to candidates for the position and considering hiring CHHA's during period when Claimant did not require medication.

7. In its December 29, 2020 NOPA, SCLARC denied Mother's request to offer higher pay: "SCLARC is not allowed to pay more than a certain rate for services and [Claimant's] needs do not require a higher level of care than these rates. Nursing care is and has been available to [Claimant] at the rate that the Regional Center is authorized to pay. Furthermore, the least costly service provider must be utilized." (Exh. 1, p. SCLARC 0002.<sup>3</sup>) The NOPA also addressed Claimant's request for respite care from providers who are not LVN's: "The family has previously requested non-licensed care, such as that provided by family member, and has provided a letter from [Claimant's] neurologist stating that he can be cared for by a Certified Home Health Aide (CHHA). SCLARC is currently working to find providers who have this service available. To our knowledge, [Claimant's] family members do not hold the CHHA qualification." (Exh. 1, p. 2.)

8. In response to the NOPA, Mother submitted a Fair Hearing Request (FHR). Under the heading in the FHR form stating, "Describe what is needed to resolve your complaint," Mother wrote "We request that SCLARC make meaningful efforts to attract Spanish-speaking LVNs or home health care aides, or a combination of both,

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<sup>3</sup> Further references to page numbers of SCLARC's exhibits will omit the initials and zero's preceding the numbers.

who can provide reliable and consistent care for [Claimant] while [Mother] is at work from 6 AM to 6 PM. This should include, not limited to, offering a rate for LVN's beyond the [maximum allowable pay rate]." (Ex. 2, p. 10.)

9. At the hearing, the parties agreed that SCLARC had made substantial efforts to find Spanish-speaking LVN's who were able to accommodate the other requirements of the position, namely reporting to the job punctually and consistently as well as competently handling Claimant's sometimes difficult behavior. Multiple agencies had declined the assignment altogether, sometimes after sending LVN's who refused to return to Claimant's home, citing the difficult work conditions. Other agencies could only provide English-speaking LVN's.

10. The lack of reliable respite care has taken its toll on Claimant's family as well as on him. Mother is a single parent who needs the respite services to maintain her own job. Without reliable caretakers, Claimant's older brother, 23 years old, quit his job to care for Claimant. The older brother, however, left home to pursue his life ambitions further straining the remaining family resources and leaving Mother to balance being the sole breadwinner and attending to Claimant's needs. Mother has begun to consider institutionalizing Respondent as a last resort.

## **LEGAL CONCLUSIONS**

### **Purpose and Implementation of the Lanterman Act**

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act), codified at section 4500 et seq., governs this matter. Under the Lanterman Act, the state accepts responsibility to care for persons with certain enumerated developmental disabilities, including providing "[a]n array of services and supports . . . sufficiently

complete to meet the needs and choices of each person with developmental disabilities.” (§ 4501.)

2. DDS administers the Lanterman Act. (§ 4416.) DDS delegates the day-to-day duties of establishing eligibility and determining appropriate supports and services to regional centers such as SCLARC but maintains responsibility for ensuring the services and supports are distributed in a cost-effective manner. To discharge these duties, DDS has promulgated regulations requiring that service providers be “vendorized” and be paid in accordance with wage rates DDS establishes known as Scheduled Maximum Allowances or SMA’s. (§ 4690.)

3. The requirements for vendorization are set forth in detail in CCR section 54302 et seq. Under CCR section 57300, subdivision (c)(2), regional centers may not pay for services “in an amount greater than the rate established pursuant to these regulations.” DDS has established an SMA for LVN’s. Nothing in the record indicates that SCLARC has failed to pay the maximum allowable wage under the applicable wage to LVN’s working with Claimant.

### **Regional Center Obligations**

4. Despite the specific strictures placing restrictions on regional centers’ ability to remunerate service providers, the Lanterman Act also anticipates that regional centers will be confronted with complex and unique circumstances in discharging their duties that may require creative solutions. Section 4630 provides that “the contract between the state and the contracting agency shall not . . . (b) Prevent a regional center from employing innovative programs, techniques, or staffing arrangements which may reasonably be expected to enhance program effectiveness.” Similarly, section 4648, subdivision (a)(2), provides that services and supports “shall be

flexible and individually tailored to the consumer and, if appropriate, the consumer's family."

## **Jurisdiction and Burden of Proof**

5. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing to contest SCLARC's failure to offer higher wages to prospective candidates to provide respite care as well as its alleged failure to show sufficient flexibility and diligence in securing agreed-up services. As the party seeking government services, Claimant bears the burden. (See, e.g., *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) The standard of proof in this case is the preponderance of the evidence because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

## **Disposition**

6. SCLARC has a duty to secure agreed-upon services. SCLARC has demonstrated good faith efforts to do so. Statutory and regulatory mandates prevent SCLARC from executing Claimant's first suggestion for securing appropriate service providers, i.e., offering higher wage rates to LVN respite care workers and has agreed, albeit belatedly, to try expanding the pool of eligible candidates to CHHA's. Claimant has not established other solutions exist. Under these circumstances, his appeal must be denied.

## **ORDER**

Claimant's appeal is denied. South Los Angeles Regional Center shall continue to explore alternatives to providing licensed vocational nurses to meet Claimant's respite care needs.

DATE:

DEENA R. GHALY

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.