

**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. 2022060044

DECISION

Glynda B. Gomez, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on September 27, 2022 by videoconference.

South Central Los Angeles Regional Center (SCLARC or Service Agency) was represented by Aaron Abramowitz, attorney at law. Tami Summerville, Fair Hearing representative, was also present.

Claimant was represented by her mother. Claimant was not present.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision on September 27, 2022.

Issue

Is the Service Agency required to change Claimant's regular respite to licensed vocational nurse (LVN) respite?

EVIDENCE RELIED UPON

Testimony of Candie Cortez, Nasreen Asaria, RN and Mother; Exhibits 1-9 and 12.

FACTUAL FINDINGS

Jurisdictional Matters

1. The Service Agency issued a Notice of Proposed Action on May 9, 2022 wherein it sought to terminate Respondent's current respite services and substitute LVN respite. On May 31, 2022, Claimant filed a request for hearing. All jurisdictional requirements have been met.

2. Claimant is a 16-year-old consumer diagnosed with Epilepsy. Additionally, she has been diagnosed with unspecified Disorder of Psychological Development, Specific Learning Disability and Borderline Intellectual Function. She lives with her mother, grandmother and three younger siblings. Claimant was first diagnosed with Epilepsy at nine years old after fainting at school and experiencing right side weakness and an inability to speak. A medical examination revealed a ruptured arteriovenous malformation (AVM) in her brain which required a frontal parietal craniotomy. Claimant suffered partial hemiplegia on her right side as a result.

3. Historically, Claimant has suffered approximately two seizures per month. However, in March of 2022, she suffered seizures on seven separate days. Claimant's seizures have lasted less than five minutes and consist of experiencing auras, shaking and numbness. Claimant was prescribed daily medications for seizure control. Claimant's mother administers the daily medications. She was also prescribed Diastat, a rectal gel suppository, for emergency treatment of seizures lasting longer than five minutes, but has never had such seizures. Claimant's mother has trained all of the family including Claimant's uncle, who is also her respite provider, in the administration of the Diastat. At the hearing, Mother disclosed that in approximately, July of 2022, Claimant's daily seizure medication was changed by her physician. She has not suffered any seizures in the last two months. Claimant can walk short distances, dress herself with some assistance, request assistance, use the toilet and attend to most of her own personal needs with assistance. According to Claimant's initial Individual Program Plan (IPP) dated December 3, 2020, she had trouble making friends at school and had a few incidents of being aggressive with her siblings and yelling at her mother. Claimant's mother was able to manage the behavior issues which are now minimal.

4. Claimant is eligible for special education services due to a specific learning disability, has an Individualized Education Plan (IEP) with the school district and has attended a special day class in a local public school since fifth grade. The school nurse maintains Claimant's Diastat, but has never had to administer the medication.

5. Claimant has received 30 hours per month of respite care provided by her uncle for more than a year. He has been trained in Cardiopulmonary Resuscitations, First Aid and the administration of Claimant's emergency Diastat

medication. In January of 2022, Claimant's mother requested additional hours of respite for Claimant. At that time, the Service Agency advised her that a nursing assessment would be required to determine whether Claimant needed LVN respite care. Claimant's mother advised the service coordinator that Claimant did not want LVN respite care and wanted her uncle to continue providing respite care. Claimant does not receive In-Home Support Services (IHSS) or generic supports other than school district special education services.

6. In a July 28, 2022, letter, before Claimant's medication change, Claimant's physician Latanya Agurs, MD, wrote a letter in support of Claimant's request for respite. (Ex. 4.)

7. Pursuant to SCLARC's policies, a nursing assessment was performed on April 5, 2022 by Nasreen Asaria, a Registered Nurse Consultant. Ms. Asaria has 28 years of experience as a nurse and currently serves as the SCLARC nursing consultant. In her April 6, 2022 report of the assessment, Ms. Asaria summarized Claimant's medical needs and her medication. She noted the following as nursing problems: "1. Consumer suffers frequent seizures, at least once or twice a week secondary to her medical condition. 2. Consumer is at risk of injuries and needs supervision secondary to her diagnosis and 3. Mother is requesting respite hours for relief time." (Ex. 3.). Azaria concluded that Claimant's care needs met the requirements for LVN respite under the Service Agency's guidelines. (The guidelines are not in evidence.) At the hearing, she explained that under the guidelines Claimant's seizure risk and administration of emergency seizure medication required LVN respite care. Ms. Azaria testified that LVN respite care would not be required when Claimant is seizure free for two years. Ms. Azaria did not provide a basis for the two-year period of time and was not aware until testifying at the hearing that Claimant had new medication and was

seizure free for two months prior. Nevertheless, she insisted that LVN respite would be required because of the potential for administration of Diastat and injuries during a seizure episode.

LEGAL CONCLUSIONS

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

2. The burden of proof is placed on the Service Agency in this matter because it is the Service Agency that seeks to change the status quo, as non-LVN respite had been in place for more than a year. 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.)

3. Services provided under the Lanterman Act are to be provided in conformity with the IPP, per Welfare and Institutions Code (Code) 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 Code, § 4710.5, subd. (a).)

4. Regional centers must develop and implement IPPs, 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. (Code, § 4512, subd. (b); see also Code, §§ 4646, 4646.5, 4647, and 4648.) The Lanterman Act assigns a priority to services that will maximize the consumer's participation in the community. (Code, §4646.5, subd. (a)(2); 4648,

subd. (a)(1), (2).) "Services and supports for persons with disabilities" includes respite care. (Code, §4512, subdivision (b).)

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. (Code, § 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. (Code, §§ 4646; 4646.5, subd. (a)(1), (2) and (4); 4512, subd. (b); and 4648, subd. (a)(6)(E).)

6. The IPP is to be prepared jointly by the planning team and includes any services purchased or otherwise obtained by agreement between the regional center representative and the consumer or his or her parents or guardian. (Code, § 4646, subd. (d).) Pursuant to Code 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. (Code § 4648, subd. (a)(1).)

7. 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. (Code, § 4646.5, subd. (a)(1).)

8. 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 (Code, § 4630, subd. (b)); to find innovative and economical ways to achieve the goals in an IPP (Code, § 4651); and to utilize innovative service-delivery mechanisms (Code, §§ 4685, subd. (c)(3), and 4791).

9. Under Code 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. There is also a right to dignity, privacy and humane care. The person also has the right to make choices, including where and with whom they live, and the pursuit of their personal future.

10. Code section 4686, subdivision (a) provides:

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 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.

11. Code section 4686, subdivision (g) provides that the regional center shall "[e]nsure 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" and "[e]nsure that a nursing assessment of the home has been conducted to determine whether incidental medical services can appropriately be provided in that setting."

Disposition

12. SCLARC has failed to meet its burden to establish that Claimant requires LVN respite care. Claimant has been adequately served with regular respite services provided by her uncle for more than one year. During that time, she has not required administration of Diastat and she has never had seizures that would require

administration of Diastat. The medication is kept at home and at school as an emergency protocol. All of Claimant's family, including her uncle the respite worker, have been instructed by mother in the use of the medication. Claimant's daily medications are administered by her mother. A recent change in daily medication has stabilized Claimant's condition and eliminated her seizures for the last two months. The respite worker is not providing incidental or any nursing services. In the event of a true emergency, the respite worker would have to call for emergency paramedic services as would an LVN. On this record, the Service Agency has not established by a preponderance of the evidence that a change in the level of respite care provided is required. For the foregoing reasons, Claimant's appeal is granted, and the Service Agency shall continue funding 30 hours per month of regular respite services.

ORDER

Claimant's appeal is granted. Claimant's regular respite service shall continue, and a Licensed Vocational Nurse is not required.

DATE:

GLYNDA B. GOMEZ

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.