

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

In the Matter of the Appeal of:

CLAIMANT,

vs.

SOUTH CENTRAL LOS ANGELES REGIONAL CENTER,

Service Agency.

DDS Case No. CS0015477

OAH No. 2024040737

DECISION

Irina Tentser, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter in person on July 16, 2024 at South Central Los Angeles Regional Center (Service Agency or SCLARC) and by videoconference on July 26, 2024.

Claimant was represented by his mother. The names of Claimant and his family members are not used in this decision to protect their privacy.

Tami Summerville, Fair Hearing and Appeal Manager, represented SCLARC.

Johanna Perez provided Spanish interpreter services during the July 16, 2024 fair hearing. Garbriella Carmona and Alex Zajdman provided Spanish interpreter services during the July 26, 2024 fair hearing.

Testimonial and documentary evidence was received. The record was closed and the matter was submitted for decision on July 26, 2024.

ISSUE

Should SCLARC be required to fund respite care to be provided to Claimant by a family caregiver who is not a licensed vocational nurse (LVN)?

EVIDENCE RELIED UPON

Documents: SCLARC exhibits 1 through 8.

Testimony: Candie Cortez, SCLARC Service Coordinator; Nasreen Asaria, Nurse Consultant; Gala Fair, Nurse Consultant, SCLARC; and Claimant's mother.

FACTUAL FINDINGS

Procedural History and Background

1. Claimant is a four-year-old SCLARC consumer with a qualifying diagnosis of Autistic Disorder and other psychologic developmental disorders. He has additional diagnoses of maple syrup urine disease, developmental delay, Nasogastric tube (NG-tube) dependence for feedings, congenital cataracts, nystagmus, and myopia. Claimant is allergic to protein, and he has ongoing feeding difficulties due to oral aversion. As a

result of these conditions, Claimant received Anamix formula with neuro-pro duocal 120 milliliters (protein free formula) every three hours through a NG tube. As of the date of the fair hearing, Claimant receives his nutrition through a Gastronomy tube (G-tube) in his abdomen. Claimant's Mother primarily handles the administration of all medications to Claimant via his G-tube.

2. Claimant has a history of seizures. Claimant takes Keppra twice a day to control his seizures. Claimant also has been prescribed a Diastat (diazepam rectal gel) Rectal Gel Kit, to be administered as needed, for seizures lasting over three minutes in length. Mother has not administered the rectal gel kit medication in the past when Claimant has experienced seizures but has called paramedics. Claimant was hospitalized for three days because of a seizure in July 2023. In January 2024, Claimant was hospitalized for ten days after testing positive for Covid-19.

3. Claimant resides with his mother and father. Claimant's mother is his primary caregiver and his In-Home Supportive Services (IHSS) provider for 105 hours per month. Claimant's father is employed and helps provide for the family. The family was denied Supplemental Security Income (SSI) due to the household income. Claimant's health insurance coverage is through Medi-Cal via LA Care. Claimant depends on mother for all self-care. His circle of support also includes his father, maternal aunt, and cousin. Claimant had an older brother who passed away who also received services with regional center.

4. Claimant is homeschooled and sees his teacher every Tuesday and Thursday for one hour. Both the Los Angeles Unified School District (LAUSD) and Claimant's parents have agreed to provide homeschooling for him. Claimant does not participate in community outings because mother is afraid of Claimant being exposed to viruses. Claimant has low immunity, and mother tries to keep him healthy and safe.

If Claimant goes somewhere with mom, he sits in a stroller. (Claimant sat in a stroller for part of the first day of fair hearing in this matter). Claimant has not learned to walk in the community.

5. Claimant is scheduled to begin kindergarten in August 2024. Claimant had an Individualized Education Program (IEP) meeting on March 20, 2024. The IEP has not closed as Claimant's mother requested for Claimant to have speech therapy at the IEP. Claimant's mother also requested speech therapy to be funded by SCLARC.

6. Sometime in 2023, Claimant's mother first requested that SCLARC provide funding for In-Home Respite Care Services from someone other than an LVN. Claimant's mother's prefers Claimant's aunt, who is not an LVN, to be Claimant's respite provider because Claimant's aunt has provided care to Claimant as needed since Claimant was four months old.

7. Because of Claimant's medical needs, Claimant's mother's request for a non-LVN respite provider was referred for a nursing assessment. On May 18, 2023, Claimant's Service Coordinator referred the case to SCLARC's clinical department for a nursing assessment as Claimant met SCLARC's policy criteria for LVN respite care services. On July 10, 2023, the nursing assessment, fully described below, recommended LVN respite care due to Claimant's medical conditions, despite Claimant's mom's preference for regular respite without LVN support.

8. By a written Notice of Proposed Action (NOPA), dated February 20, 2024, SCLARC informed Claimant's mother she was not eligible for In-Home Respite Care Services by an individual who is not a licensed LVN because, according to SCLARC's policies and procedures, Claimant's medical needs require an LVN level of care. (Exhibit 2.)

9. On April 5, 2024, Claimant's appeal, filed by mother, was received by the Department of Developmental Services (DDS). The reason for the appeal was stated as:

I am requesting respite care from a family provider and the Regional Center is denying respite hours, offering a nurse that I do not need. Because my son has autism, my family member is the one who helps me with my son from 10 to 4 months old and he I [sic] like to be alone with her, she knows how to give him his medicine, his formula, and I trust her with my son and my son takes medicine only in the morning and at night.

(Exhibit 2, p. A12.)

SCLARC

POSITION STATEMENT AND HEARING EVIDENCE

10. SCLARC's Position Statement further explained the justification for Claimant requiring skilled nursing care at the LVN level. (Exhibit 1.) According to the Position Statement, a lower level of care is not appropriate and is a threat to Claimant's health and safety. An In-Home Respite worker who is not a licensed health care professional (i.e., for example, not an LVN), may perform incidental medical services for regional center consumers with stable conditions, such as Claimant. However, such a non-licensed health care professional must be trained by a licensed health care professional subject to the requirements of Welfare and Institutions Code section 4686. (Legal Conclusion 8.) SCLARC has no vendors currently who can provide the required training to an In-Home Respite worker who is not a licensed health care professional. Consequently, for SCLARC to satisfy the relevant rules and regulations, it

can only authorize a licensed LVN to perform In-Home Respite care to Claimant based on his medical needs. (Testimony of Gala Fair.)

SCLARC NURSING ASSESSMENT

11. Nasreen Asaria, a licensed nurse (RN) and SCLARC's RN Consultant, performed Claimant's nursing assessment on July 10, 2023, and credibly testified at fair hearing. (Exhibit 4.) The basis for SCLARC's referral for a nursing assessment of Claimant's case was to determine if Claimant met the criteria of receiving regular respite or LVN respite hours.

12. Ms. Asaria's nursing assessment included a review of SCLARC's records and video facetime with Claimant and his parents to conduct the assessment. Ms. Asaria analyzed the following information in making her nursing assessment:

- Claimant's diagnoses of maple syrup urine disease, Autism Spectrum Disorder with language impairment and provisional intellectual impairment, developmental delay, NG-tube dependence for feedings, congenital cataract, nystagmus, and myopia;
- Claimant's prenatal/birth history; immunization record; school history; medical history (including surgeries/injuries); physicians, consultants, dentists; allergies; medications (Carnitor 1gm/10 ml, 10 ml via NG tube twice a day; Diastatat rectal gel kit 10 mg, give 7.5 mg. via rectum one time only as needed for seizures lasting more than three minutes; Polyethelyne glycol 3350 powder for reconstitution, 8.5 g, NG tube once a day as needed; and Keppra 100 mg per ml, give 1.5 ml twice a day); October 20, 2021 abnormal electroencephalogram (EEG) (due to findings that are consistent with epileptogenic focus in the bilateral occipital regions);

- Claimant's diet (feeding difficulties due to oral aversion requiring formula and medication to be given to Claimant via NG tube with placement of NG tube checked by mother via testing PH of the residual and with stethoscope as well); equipment (NG tube, syringe, stethoscope, PH test strips and testers, and diapers);
- Physical assessment of Claimant (awake, alert, and no acute distress; busy watching children's shows on television; response of paying attention for a few seconds and going back to watching television; moving and active through assessment);
- Claimant's height, weight, hair, scalp, skin, eyes, ears, nose, mouth, throat, neck, chest, abdomen, and back; Claimant's voluntary use of his extremities; genitourinary (Claimant is not potty trained and wears diapers.);
- Claimant's Central Nervous System (CNS), which included a history of seizures with a seizure in July 2023 which lasted less than two minutes resulting in mother calling paramedics and Claimant being transported to Children's Hospital Los Angeles, where he was given bolus medication and admitted for three days. Claimant's prior seizure episode was in approximately 2012, which was short, lasting a few seconds. Based on mother's report, Claimant passed out during the seizure and had a combination of shaking and twitching. Claimant's mother had not administered Diastat in the past, but the medication was present at home;
- Claimant's mobility, toilet, and care requirements; dependent on parents for all physical needs; not potty trained and wears diapers, dependent on

parents for diaper changes and hygiene needs; unsteady on his feet; walks with his parents around for few steps indoors;

- Claimant's sleeping through the night based on mother's report;
- Claimant's communication, socialization, activity and behavior as being mostly non-verbal; making random sounds and feeling comfortable surrounded by his parents; mostly staying home, going out with parents in community, and no negative behavior based on parents' report.

(Exhibit 4, pp. A52-A55.)

13. Based on her review of Claimant's medical conditions and his day-to-day needs, Ms. Asaria concluded that Claimant's medical needs required professional nursing care for his safety and met the criteria of receiving LVN respite. Ms. Asaria recommended SCLARC grant Claimant LVN respite per its guidelines to assist mother with Claimant's care and supervision. Ms. Asaria also recommended that once LVN hours were initiated, a home health agency could then apply for Early Periodic Screening and Diagnostic Testing (EPSDT) for further assistance with LVN hours. (EPSDT is a generic service funded through Medi-Cal that allows for consumers who are under the age of 21, like Claimant, to receive additional service, such as nursing supports in the home.)

14. At fair hearing, Ms. Asaria was informed that since her July 2023 nursing assessment was completed, Claimant's feeding needs were now being met through a G-tube in his abdomen rather than an NG-tube. Ms. Asaria testified that despite this change, her nursing assessment remained the same based on Claimant's medical needs – he required professional nursing care at the LVN respite level for his safety. In addition, although Claimant's mother asserted at hearing that Claimant's medications

had been reduced, he continues to be prescribed rectal gel for seizures lasting three minutes, and Claimant's mother provided no new medical records showing Claimant's medications regime had been modified. Accordingly, Ms. Asaria's fair hearing testimony regarding her nursing assessment remained consistent with her July 2023 recommendation for LVN respite level care for Claimant.

SCLARC'S POLICY AND REGULATIONS

15. Gala Fair, SCLARC's Lead Nurse Consultant, testified at fair hearing regarding the basis of SCLARC's position that Claimant requires LVN level respite care. Ms. Fair assigned Ms. Asaria to perform a nursing assessment of Claimant after mother's request for respite because of Claimant's medical diagnoses, including the presence of an NG-tube for feeding and medication administration. SCLARC's policy, as guided by relevant regulations, require any consumer who has an NG-tube to have a minimum of LVN level respite care. According to Ms. Fair, the purpose of the requirement of LVN respite care in cases involving individuals, like Claimant, with a myriad of medical diagnoses and needs, is to provide the consumer with the care that only a skilled nurse can provide.

16. Claimant's change from an NG-tube to a G-tube as of May 2024 did not change SCLARC's position that under its policies and regulations Claimant still requires LVN level respite care. Ms. Fair explained there were risks to Claimant's health and safety associated with allowing a non-licensed individual to perform the type of tasks required for Claimant, including feeding and medication administration through a G-tube, such as respiratory and abdominal issues if the placement of the G-tube was incorrect. Ms. Fair explained that if SCLARC provides an exception in Claimant's case and allows his aunt, a non-licensed layperson, to provide him respite care, SCLARC would violate Health and Safety Code sections 1725, 1726, and 1727, Welfare and

Institutions Code section 4686, and nursing scope and practice guidelines. (See Legal Conclusions 8-10.)

17. Ms. Fair testified SCLARC also has no vendor who has an approved Department of Developmental Services (DDS) curriculum for Claimant's aunt to complete required training and thereby potentially meet the exception of having a non-licensed person perform Claimant's necessary incidental medical services. (Welf. & Inst. Code, § 4686.)

18. Ms. Fair stressed SCLARC has no concerns with the care Claimant's mother and circle of support have provided to Claimant. SCLARC's only concern is that it follows applicable regulations and policies to ensure Claimant's health and safety, and those regulations and policies require LVN-level respite care for Claimant. SCLARC is ready to fund respite care by an LVN if Claimant's mother is willing to accept respite care at the LVN level for Claimant.

19. Ms. Fair described one of the benefits to Claimant's mother accessing LVN-respite care for Claimant is that Claimant could potentially be eligible to receive EPSDT through Medi-Cal to provide Claimant with additional nursing supports in the home.

CLAIMANT'S POSITION

20. It is undisputed Claimant's aunt is not an LVN or other licensed health professional. Mother testified that, nonetheless, she believes Claimant's aunt is qualified to provide respite care to Claimant. Claimant's aunt is Claimant's mother's choice for a respite care provider because the aunt has provided competent care for Claimant since he was four months old. The specific tasks Claimant's aunt performed as his caregiver were not detailed by Mother at fair hearing. Mother testified she

needs a respite worker who can come to her home anytime, including at night, like Claimant's aunt has done. Mother questions whether an LVN respite worker funded by SCLARC would be willing to provide respite care during the evenings.

Ultimate Findings

21. The facts of this case establish Claimant's medical diagnoses and needs require an LVN-level respite for his care. Mother has not demonstrated that responsible laypeople can administer Claimant's medication, Diastat, rectally, in case Claimant suffers a seizure. Claimant's mother has not administered Diastat rectally when he has suffered a seizure in the past, calling paramedics, and Claimant was hospitalized in July 2023 when he suffered a seizure. Further, there is valid concern to Claimant's health and safety if a formally untrained layperson, like Claimant's aunt, administers Claimant's nutrition and medicine through Claimant's G-tube. Under the circumstances, while requiring the responsibility of respite care to be satisfied by an LVN is clearly contrary to the desires of Claimant's family, it has been shown to be necessary to ensure Claimant's health and safety.

22. SCLARC is bound to follow relevant legal guidelines in determining whether it can fund Claimant's requested respite services by his aunt. As more fully set forth below, under the Lanterman Disabilities Services Act (Lanterman Act), only certain incidental medical services can be performed by an in-home respite worker who is not a licensed health professional. Claimant's feeding and medication administration needs are not among those allowed services. The Lanterman Act provides an exception for non-health professional respite workers to provide non-incidental medical services if the workers are appropriately trained. However, currently, there is no SCLARC vendor who can train Claimant's aunt to satisfy the exception. As a result, SCLARC correctly determined it cannot fund Claimant's respite care provided by

his aunt and t any SCLARC-funded respite for Claimant must currently be provided by an LVN.

23. Notwithstanding the denial of Claimant's appeal in this matter, if, at a future date, SCLARC can identify a vendor who can provide the required training to Claimant's aunt under Welfare and Institutions Code section 4686, mother's request for Claimant's aunt to be Claimant's respite provider shall be reconsidered by SCLARC through the Individual Program Plan (IPP) process.

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. (Welf. & Inst. Code, §§ 4500 et seq.) (All further section references are to Welfare and Institutions Code unless otherwise noted.)

2. Claimant has the burden of proving he is entitled to respite services to be provided by his aunt and not, as SCLARC has authorized, by an LVN-respite provider. (Evid. Code, §§ 115, 500.) The standard of proof in this case requires proof by a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute requires otherwise. "Preponderance of the evidence" means evidence which is of greater weight or more convincing than evidence which is offered in opposition to it. (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324.)

3. An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant timely requested a hearing following SCLARC's denial of Claimant's request that his aunt, who is not a licensed health professional, specifically, an LVN, provide mother with SCLARC funded respite hours.

4. A regional center is required to secure services and supports that meet the individual needs and preferences of consumers through the collaborative IPP process. (§§ 4501 and 4646, subds. (a), (b), (d).)

LVN In-Home Respite Care Provider Requirement

5. SCLARC's policy provides that nursing respite services are provided to those caregivers of consumers who require a nursing level of respite due to their medical conditions. SCLARC will utilize nursing personnel through a nursing or home health agency service. A Registered Nurse, LVN or Certified Home Health Assistant (CHHA) will provide the requested respite care, depending on the requirements of the consumer's medical condition and state licensing regulations. According to SCLARC policy, as relevant to Claimant, conditions which require at least an LVN level of care for respite services include but are not limited to: gastrostomy [G-tube], nasogastric tube [NG-tube] feedings, prescribed medication required during respite hours, Diastat administration to control seizures, and medically fragile profile.

6. A regional center must "ensure that a nursing assessment of the consumer, performed by a registered nurse, is conducted to determine whether an in-home respite worker, [LVN], or registered nurse may perform the services. (§ 4686, subd. (g)(1).)

7. Based on SCLARC policy, the results of Ms. Asaria's nursing assessment conducted pursuant to section 4686, subdivision (g)(1), and the evidence presented at hearing, SCLARC properly denied funding respite services by an individual, in this case, Claimant's aunt, who is not an LVN. (Factual Findings 1-22; Legal Conclusions 1-6.)

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No Current Exception to Requirement of LVN In-Home Respite Care Provider

8. Section 4686 provides:

a) Notwithstanding any other provision of law or regulation to the contrary, 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.

(b) In order to be eligible to receive training for purposes of this section, an in-home respite worker shall submit to the trainer proof of successful completion of a first aid course

and successful completion of a cardiopulmonary resuscitation course within the preceding year.

(c) The training in incidental medical services required under this section shall be provided by physicians or registered nurses. Training in gastrostomy services shall be provided by a physician or registered nurse, or through a gastroenterology or surgical center in an acute care hospital, as defined in subdivision (a) of Section 1250 of the Health and Safety Code, which meets California Children Services' Program standards for centers for children with congenital gastrointestinal disorders, or comparable standards for adults, or by a physician or registered nurse who has been certified to provide training by the center.

(d) The in-home respite agency providing the training shall develop a training protocol which shall be submitted for approval to the State Department of Developmental Services. The department shall approve those protocols that specifically address both of the following:

(1) A description of the incidental medical services to be provided by trained in-home respite workers.

(2) A description of the protocols by which the training will be provided. Protocols shall include a demonstration of the following skills by the trainee:

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(A) Care of the gastrostomy, colostomy, ileostomy, or urinary catheter site.

(B) Performance of gastrostomy tube feeding, changing bags and cleaning stoma of colostomy or ileostomy sites, and emptying and changing urinary catheter bags.

(C) Identification of, and appropriate response to, problems and complications associated with gastrostomy care and feeding, colostomy and ileostomy care, and care of urinary catheter sites.

(D) Continuing education requirements.

(e) Training by the gastroenterology or surgical center, or the certified physician or registered nurse, shall be done in accordance with the approved training protocol. Training of in-home respite workers shall be specific to the individual needs of the regional center consumer receiving the incidental medical service and shall be in accordance with orders from the consumer's treating physician or surgeon.

(f) The treating physician or surgeon shall give assurances to the regional center that the patient's condition is stable prior to the regional center's purchasing incidental medical services for the consumer through an appropriately trained respite worker.

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(g) 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.

(2) Ensure that a nursing assessment of the home has been conducted to determine whether incidental medical services can appropriately be provided in that setting.

(h) The agency providing in-home respite services shall do all of the following:

(1) Ensure adequate training of the in-home respite worker.

(2) Ensure that telephone backup and emergency consultation by a registered nurse or physician is available.

(3) Develop a plan for care specific to the incidental medical services provided to be carried out by the respite worker.

(4) Ensure that the in-home respite worker and the incidental medical services provided by the respite worker are adequately supervised by a registered nurse.

(i) Notwithstanding any other provision of law or regulation to the contrary, the hourly rate for an in-home respite

agency shall be increased to provide a fifty cent (\$.50) per hour wage increase and an eight-cent (\$.08) per hour benefit increase for the hours the in-home respite agency is providing incidental medical services.

(j) To expand the availability of trained in-home respite agency staff, a regional center may reimburse the in-home respite agency up to two hundred dollars (\$200) semiannually, for the provision of training pursuant to subdivision (c).

(k) For 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. These agencies include, but are not limited to, in-home respite services agencies, home health agencies, or other agencies providing these services.

9. Health and Safety Code sections 1725, 1726, and 1727, establish DDS licensure requirements and guidelines for home health agencies when workers provide "skilled nursing services" to patients in the home. Section 1727 defines "skilled nursing services" as "services provided by a licensed nurse or licensed vocational nurse."

10. 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. However, for this exception to be applied in this matter, the non-licensed In-Home Respite worker must satisfy the requirements of section 4686. As explained by Ms. Fair

at hearing, there are currently no DDS approved SCLARC vendors, pursuant to the requirements of Health and Safety Code sections 1725, 1726, and 1727, who can provide the required training pursuant to section 4686 to Claimant's aunt so that she can provide the required skilled nursing services for Claimant as his In-Home Respite worker. Accordingly, Claimant's aunt cannot currently satisfy the requirement for the exception to be applicable. Claimant, therefore, requires a nursing level of care to be provided by an LVN In-Home Respite worker for his health and safety. (Factual Findings 1-23; Legal Conclusions 1-4, 8-9.)

ORDER

Claimant's appeal of SCLARC's determination that Claimant's In-Home Respite Care provider must be a licensed vocational nurse is denied.

DATE:

IRINA TENTSER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Each party is bound by this decision. Either party may request a reconsideration pursuant to subdivision (b) of the Welfare and Institutions Code section 4713 within 15 days of receiving the decision, or appeal

the decision to a court of competent jurisdiction within 180 days of receiving the final decision.