

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

HANNAH G.,

Claimant,

OAH No. 2010060464

vs.

HARBOR REGIONAL CENTER,

Service Agency.

**DECISION**

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on November 20, 2013, and January 28 and 29, 2014, in Torrance.

Thomas E. Beltran, Attorney at Law, represented claimant. Claimant's mother (Mother) was present during the hearing.<sup>1</sup>

Robin James, Attorney at Law, represented Harbor Regional Center (Service Agency or HRC). Gigi Thompson, Manager of Rights Assurance, was present during the hearing.

Oral and documentary evidence was received on the hearing days. The record was held open for the parties to file written closing briefs by February 21, 2014, and response briefs, if any, by March 3, 2014. The parties timely filed their briefs. HRC's closing brief and response brief were respectively marked as Exhibits 28 and 29. Claimant's closing brief and response brief were respectively marked as Exhibits C15 and C16. In addition, on February 10, 2014, the ALJ issued an order that HRC's Exhibit 25 was admitted pursuant to Government Code section 11513, as evidence to explain and supplement the testimony of HRC's witness, Claudia DeMarco. The record was closed and the matter was submitted for decision on March 3, 2014.

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<sup>1</sup> Claimant and her family are referred to by initials or family titles to protect their privacy.

## ISSUE

Is claimant entitled to have caregiver Vivien Mendez's hourly rate of pay existing prior to February 1, 2010 reinstated prospectively (as of the effective date of this Decision).<sup>2</sup>

## EVIDENCE RELIED UPON

Documentary: HRC's exhibits 1-5, 7-11, 13-21, 23-29; and claimant's exhibits C1-C3, C6-C10, C12-C16.

Testimonial: Rhiannon Acree, president, Cambrian Home Care; Ed Swan, HRC service coordinator; Claudia DeMarco, HRC associate director; and claimant's mother.

## FACTUAL FINDINGS

### *Procedural History*

1. Claimant is a 17-year-old female with Canavan disease. She is eligible for regional center services on the basis of having a condition similar to mental retardation.

2. On or about August 7, 2009, the Service Agency decided to reduce the rate of reimbursement it paid to Cambrian Homecare (Cambrian) for the services of claimant's caregiver Vivian Mendez (Mendez). As a result, Mendez's net hourly pay received from her employer Cambrian would be \$12.50 per hour. Her previous pay rate was \$16.74 per hour, pursuant to OAH administrative decisions issued in 2005 and 2008. (Exhs. 19, 20.) The Service Agency notified Cambrian of its decision on August 13, 2009. The Service Agency notified Mother of its decision on September 1, 2009. Over the next few months, communications continued between the Service Agency and Mother regarding Mendez's compensation, as did internal discussions among the members of the Service Agency's administrative team. (Exh. C12.)

3. On December 3, 2009, Cambrian advised Mother that Mendez's hourly pay rate would be reduced due to the Service Agency's reduction in reimbursement, and Cambrian would pay Mendez \$12.50 per hour, the same rate paid to claimant's other caregivers, starting on February 1, 2010. On December 24, 2009, Mother filed

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<sup>2</sup> This was the issue identified for this hearing in the Order Denying Request to Amend Fair Hearing Request issued by Presiding Administrative Law Judge Susan Formaker on November 15, 2013.

a fair hearing request, on claimant's behalf, to appeal the Service Agency's decision to reduce its reimbursement rate to Cambrian for Mendez's services. In the fair hearing request, Mother requested that Mendez's hourly rate of pay should be unchanged. (Exh. 2.) At no time relevant herein did the Service Agency issue a notice of proposed action within the meaning of Welfare and Institutions Code section 4701. (Exh. 21.)

4. A hearing on claimant's fair hearing request was held on September 20, 2011, before ALJ Vincent Nafarrete. The record was held open to allow the parties to submit additional documents. The record was closed on December 23, 2011, and ALJ Nafarrete issued his final decision. Subsequently, on January 17, 2012, OAH received a Transcript Estimate Request from claimant's representative regarding the hearing before ALJ Nafarrete. In seeking to prepare an estimate of the cost of a transcript, OAH determined that, due to a failure with the recording equipment, there was no recording of the hearing available. Proceedings were filed in the Superior Court. On March 26, 2013, the Superior Court, County of Los Angeles, in case number BS13666, entered a Judgment of Remand to Office of Administrative Hearings, which ordered OAH to conduct a new hearing on claimant's fair hearing request. In accordance with that Judgment, OAH conducted a new hearing on November 20, 2013, and January 28 and 29, 2014. This Decision is the result of the new hearing.

#### *Claimant's Background and Needs*

5. Canavan disease is a rare degenerative disorder resulting from an inability to produce an enzyme that creates the buildup of myelin on the nervous system resulting in the degeneration of the neuromuscular system. Those diagnosed with the disease generally do not survive past adolescence, although some with the disease live into their early 20s. Causes of death are often immune system problems, osteopathic problems (e.g., scoliosis or hip displacement) or respiratory problems.

6. Claimant's needs are described in her individual/family service plans (IFSPs) dating from 2009, 2010, and 2011, and the Annual Review report for 2012. (Exhs. 3-5 and C9.)

7. Claimant has always lived at home with her family. She has two older brothers who are attending college and live outside the family home. Mother and claimant's father (Father) are separated and in the process of getting divorced. They each have their own separate residences. Mother moved to her own residence in September 2009. Father works as an attorney. Mother works as a dietician at a hospital. Pursuant to court order, claimant lives with Mother during weekdays, and she lives with Father on weekends (starting at 4:30 p.m. on Fridays until 8 a.m. on Sundays). Mother and Father use paid caregivers to assist with claimant's care.

8. Claimant attends school from approximately 9 a.m. to 12:20 p.m. Mendez accompanies claimant to school as her one-to-one aide. The school district provides claimant with speech and language, adaptive physical education, and physical therapy, and also funds Mendez's services as claimant's one-to-one aide at school.

9. Claimant requires total care, 24 hours per day, seven days per week. She is completely dependent on her family members and caretakers. For some activities, she requires assistance from more than one person. Claimant is not toilet trained and wears diapers. She is blind, and unable to move, walk, or sit up without assistance, and unable to feed or care for herself. She has difficulty with swallowing and chewing, so anyone who feeds her must first have received feeding training from an occupational therapist. Claimant likes to move as often as possible. She can become stuck in contorted positions and needs to be physically repositioned by her caregivers. Claimant does not sleep well or long. She needs a caregiver to sleep with her because she cannot turn herself when sleeping, but if she tries, she often ends up in a position where she cannot breathe and must be repositioned.

10. Claimant is nonverbal. She communicates her preferences and dislikes by facial expressions, vocal sounds, and body movements. She reacts to voices and tactile stimulation by smiling, vocalizing, and moving her body. She loves to play and interact with typical peers. She understands what is said to her and is aware of her surroundings. She needs to change activities often to keep her interest level up. Claimant cannot be left alone. She knows when she is alone. She becomes frightened and disoriented. She will scream, her whole body will twist to the right, and her tongue becomes positioned so she cannot swallow.

11. Claimant develops relationships with people, although it can take some time. She needs to develop bonds with her caregivers so they can effectively care for her. She communicates her dislike for a person through her body movements, facial expressions, and vocal sounds. When approached by someone with whom she has no bond, her body becomes stiff, she refuses to move or be handled, she refuses to eat, and she screams if she is not repositioned. As stated in her IFSPs, "[i]n order to maintain her quality of life, it is important for [claimant] to have trained care providers with whom she has a rapport."

12. Claimant is kept busy during the day performing activities that simulate active body movements of a typical child. When she is awake, her day is full. Her daily routines incorporate movements including range of motion, body massage, walking, a peanut ball, much weight bearing, and joint compression. Claimant uses adaptive equipment, such as a walker, wheelchair, Rifton stander, trampoline, therapy balls, and a wedge. Integral to her daily regimen are many exercises each day as well as prone positioning and placement in her stander. All caregivers assist claimant with her daily regimen.

13. Mother is well-studied in Canavan disease and its management. She has traveled to a rehabilitation center in Poland several times over the years with claimant, her caregivers, and other family members, to learn techniques for improving claimant's mobility and flexibility. Mother has devised an intensive care regimen for claimant. Claimant has thrived under the program developed by Mother. The program requires caregivers who have the willingness to be trained by Mother and be physically fit to carry out the program. Mother is demanding and selective of the persons she hires as her daughter's caregivers. As a result of these circumstances, it has been difficult over the years, to locate caregivers with the willingness and physical ability to work as claimant's caregivers at the typical pay rate for respite workers.

#### *Caregiver Services*

14. The Service Agency currently funds between 266 and 301 caregiver hours per month for claimant. In addition, claimant's family receives 272 hours per month of In-Home Support Services (IHSS) from a county program.

15. Under the Lanterman Act, a regional center may purchase services and supports for a consumer from an individual or agency who has been approved through the vendorization process. Here, the Service Agency purchases caregiver services for claimant from its authorized vendor, Cambrian. The caregivers are employees of Cambrian. They are paid an hourly wage by Cambrian. As temporary workers, the employees typically do not receive benefits such as vacation days, sick days, or holiday pay for holidays they do not work.

16. Pursuant to the Lanterman Act and DDS regulations, Cambrian pays its workers the pay rate negotiated between Cambrian and HRC, and approved by DDS, which is currently a net rate of \$12.50 per hour. Cambrian bills the Service Agency for services provided by Cambrian workers to HRC's consumer, and the Service Agency reimburses Cambrian an amount in accordance with the DDS regulations. In order for Cambrian to pay its workers a net rate of \$12.50 per hour, the Service Agency must reimburse Cambrian at the gross rate of \$18.65 per hour.

17. Claimant's caregivers are employed through Cambrian. Potential caregivers are located by Cambrian and sent to Mother for an interview and possible try-out period if Mother and the candidate are agreeable to do so. Or, if Mother locates a candidate she likes on her own, the candidate must complete Cambrian's process and become a Cambrian employee.

18. Claimant's family has had great difficulty finding and retaining long term caregivers at the rates Cambrian will pay. Because claimant's condition is so demanding, it is extremely hard to find qualified personnel who will undertake the job. Moreover, the long-term caregivers who work with claimant must have

longstanding knowledge of her daily program because she is fragile and assisting her during exercises and other activity can lead to great harm if the caregivers do not know what they are doing.

*Compensation for Vivian Mendez*

19. Vivian Mendez (Mendez) has been claimant's caregiver since 1997. She has been employed by Cambrian since 2000. Over the years, Mendez has developed a bond with claimant and has become claimant's primary caregiver.

20. Mendez, as claimant's caregiver, has received a higher rate of pay than claimant's other Cambrian caregivers as a result of decisions and orders made by OAH between 2000 and 2009. As noted above, Cambrian's employees, as temporary workers, do not receive benefits such as vacation or sick pay. However, as a result of OAH's decisions and orders, Mendez has received extra wages and paid vacation funded by HRC.

21. Prior to February 1, 2010, Mendez was paid by Cambrian a net hourly rate of \$16.74 for services provided to claimant. By comparison, claimant's other caregivers employed by Cambrian were paid its regular net hourly rate of \$12.50.

22. Mendez's higher pay level was established by a 2005 decision and order in OAH case number L2004010211 by ALJ Eric Sawyer, and a 2008 decision and order in OAH case number L2007090697/L2007100610 by ALJ Mark Harman. (Exhs. 19, 20.) The justification for Mendez receiving a higher pay level than claimant's other caregivers was due to claimant's needs being so great and her condition so demanding, the difficulty of finding and retaining long-term care givers at the regular rates Cambrian would pay, Mendez's experience working and bonding with claimant, and that losing Mendez would devastate the provision of claimant's long-term care under the circumstances.

23. As stated in ALJ Sawyer's decision: "It is clear from the evidence that [Mendez] is Claimant's primary caregiver. She helps with her daily exercises, goes to school with her, and performs the most vital aspects of Claimant's daily care. She has been with Claimant's family for many years and is intimately familiar with Claimant's needs and services. She has in a sense become part of Claimant's family. Claimant's mother relies on her to a great extent. Losing [Mendez] would devastate the provision of long term care to Claimant and it would take a long time to find a person(s) to replace her. (Exh. 19, p. 11.)

24. ALJ Harmon described the difficulty of finding caregivers for claimant as follows: "Over the years, dozens of potential caregivers were interviewed, tested, and trained. Many would turn down the opportunity during the interview or tryout period, in part because of the intensity of interaction that was required for the position. A smaller number were able or willing to provide the amount and quality of

care necessary to keep Claimant happy, but even fewer were willing to work as respite workers for \$12.50 per hour, the salary negotiated by the Service Agency to be paid by Cambrian. Even the majority of those who committed to this job never lasted for more than a few days, weeks or months. Only a handful lasted more than one year." (Exh. 20, p. 7-8.)

25. The Service Agency did not appeal the decisions by ALJs Sawyer and Harman. The Service Agency provided reimbursement to Cambrian for Mendez's services in accordance with those decisions. The Service Agency paid reimbursement to Cambrian of \$34.92 per hour, and Cambrian paid Mendez a net rate of \$16.74 per hour.

26. Mother testified regarding the continued difficulty in locating caregivers willing to provide care for claimant. The goal of developing a stable long term solution to the current ad hoc supply of caregivers who can work with claimant and implement her daily regimen continues to be included in claimant's recent IFSPs and Annual Review from 2009 through 2012. (Exh. C9.)

27. When Mendez notified Mother of her pregnancy in November 2008, Mother contacted claimant's service coordinator Ed Swan about locating a replacement caregiver for Mendez. At that time, Irma Gibson Murphy (Gaby) had been working as the "back-up" caregiver for Mendez since April 2008. Cambrian and other agencies (such as Maxim Healthcare) were contacted and requested by HRC to provide caregiver applicants. Mother testified that some of the applicants failed to show for their interview with her, while others were not qualified or willing to do the job. Ultimately, Mother trained Gaby during the months leading up to the start of Mendez's maternity leave in June 2009.

#### *Mendez's Maternity Leave*

28. Mendez was on maternity leave from June through August 2009. During that period, claimant's care during the day was provided by two other caregivers, Gaby and Yemny Barrilla (Yemny).<sup>3</sup> Gaby was employed through Cambrian and Yemny was employed through Maxim Healthcare. Mother took a leave of absence from her job during Mendez's maternity leave and was home to assist Gaby and Yemny with claimant's care. Mendez returned to work, part-time, on September 1, 2009, and she resumed her duties full-time on November 28, 2009. During the period of Mendez's absence, neither the Service Agency nor Cambrian received any complaints from Mother regarding the quality of care provided by Gaby or Yemny.

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<sup>3</sup> Mother had two other caregivers, Veronica and Lejia, who provided claimant's night-time care.

29. Gaby started working as claimant's caregiver in March/April of 2008. Mother began training Gaby to take over Mendez's duties after Mendez notified Mother of her pregnancy in approximately November 2008. Claimant's school also had Gaby "shadow" Mendez during school so that Gaby could be claimant's one-to-one aide during summer school. Gaby and Yemny covered Mendez's work hours and duties, and Mother assisted. Mother testified that it took her and Gaby to perform the duties that Mendez could do alone. Mother testified that the services provided by Gaby and Yemny were "acceptable" and "passable," but they were all merely "treading water" and waiting for Mendez to return to work.

30. Gaby became pregnant during Mendez's absence and went on maternity leave in mid-November 2009. Gaby did not return to work as claimant's caregiver during weekdays. However, Gaby provides care for claimant during the weekends she spends at Father's residence. Yemny started working as claimant's caregiver in April 2009, after training by Mother in March 2009. Yemny left after 10 months to become a registered nurse.

#### *Claimant's Current Caregivers*

31. Claimant's current caregivers at Mother's house are Mendez, Ena Zapura (Ena), and Samantha. Ena was found through IHSS and she started working in the spring of 2013. Ena is claimant's caregiver at night and sleeps with claimant. Mother testified that Ena needed three to four weeks of training before she could sleep through the night with claimant without needing Mother's assistance. Mother hired Ena because another worker, Maria, worked for six months and then left after giving a few days notice. Samantha started in December 2013 and works every other Sunday.

32. When claimant is with Father on the weekends, Gaby, Delfina, and Maureen are her caregivers. Claimant's father uses a caregiver for 9.5 hours every weekend. Father has expressed to HRC staff that he wants to be more involved in claimant's care and to assist with her exercise regimen. He knows claimant's exercises and has even taught the caregivers. He takes claimant in her wheelchair for walks to the park. Father has not made any complaints to the Service Agency or Cambrian regarding the quality of claimant's caregivers on the weekends.

#### *Hip Displacement*

33. Currently, claimant is not performing the exercise regimen as she used to, due to the displacement of her left hip. Service Coordinator Ed Swan was notified of the hip displacement by Mother in January 2011. The hip displacement affects claimant's ability to exercise, in that exercising her legs causes her to cry and tense up. Claimant does the exercise regimen only to the extent that she tolerates it. She is still doing some of the range of motion exercises. Claimant is no longer riding her exercise bicycle. The amount of time she spends in her stander has also decreased.

Mother has adjusted the exercise regimen so that the exercises stop before claimant experiences pain, that her shoulders and hips are kept in proper position, and that her muscles are not overworked. A progress note from claimant's physician dated August 9, 2013, noted that claimant's "[e]xercises that were ok for her previously (and even helpful) . . . may not be as helpful any longer and may cause some pain depending on her symptoms due to this left hip coming out." (Exh. C14.)

34. According to Mother, as a result of the hip displacement, claimant's hip can come out of the socket. When lifting her, claimant's hips need to be kept separated so that her legs do not cross. Her knees and feet need to be turned out. When standing, her feet must be properly spaced. When seated, her hips must be positioned squarely in the chair. The position of her body must be straight and rigid to keep the bones in place. Pillows are placed between claimant's legs to prevent them from crossing while she sleeps.

#### *Service Agency Decision*

35. Claudia DeMarco (DeMarco) is the associate director of HRC and made the decision, on behalf of HRC, to reduce the rate of reimbursement paid to Cambrian so that Mendez would receive the same net hourly pay rate of \$12.50 paid to claimant's other caregivers. Cambrian has been paying Mendez the \$12.50 per hour rate as of February 2010. Mother has also been paying Mendez \$1,200 per month from her own funds to supplement Mendez's lower pay rate. In making the decision, DeMarco consulted with HRC administrators and staff, including claimant's service coordinator Ed Swan and program manager Betty Tanius, Swan's supervisor. DeMarco also reviewed the prior OAH decisions ordering the higher pay for Mendez and the justification for the higher pay, and also changes in the applicable law.

36. The Service Agency considered whether claimant's care would suffer as a result of Mendez's absence due to maternity leave. Mendez received higher compensation to create stability for claimant. Mendez was found to have special skills that would be lost to claimant if Mendez quit. The maternity leave experience showed that Mendez's absence had no negative impact on claimant's services or care. Claimant's care went forward during the maternity leave without complaint, disruption, or negative impact. That historical experience, HRC contends, provided the foundation for establishing equal wages for all of claimant's caregivers, including Mendez, going forward. The lack of complaints led the planning team to conclude that claimant's care was satisfactory and appropriate.

37. The Service Agency also noted that specialized training or a professional license or certification (e.g., nursing, physical therapy) was not needed to perform claimant's exercise regimen. The caregivers received on-the-job training from Mother. On visits to claimant's home, service coordinator Ed Swan observed and participated in claimant's exercises with her caregivers.

38. In deciding to reduce Mendez's hourly rate, the Service Agency also considered changes in 2008 and 2009 made to the Lanterman Act as cost-saving measures, which, among other things, froze the rates that regional centers were permitted to pay their vendors, and restricted or limited the authority of regional centers to purchase certain types of services. For example, Welfare and Institutions Code section 4691.9 froze the rates that regional centers could pay their vendors. A three percent reduction in rates took effect in 2009 (at the time of HRC's decision regarding Mendez's pay), with another 1.25 percent reduction in 2011. All of the reductions were later restored in 2012 and 2013. Section 4648, subdivision (a)(6)(D), became effective in July 1, 2009, and required regional centers to review the cost of services and supports of comparable quality by different providers and the least costly of the comparable services that could accomplish all or part of the consumer's IPP goals was to be selected. In addition, DDS was conducting more frequent and intensive audits of regional centers' purchase of services and expenditures.

39. At this hearing, the Service Agency presented the testimony of Rhiannon Acree (Acree), who is president of Cambrian. Acree is familiar with claimant's case and the staffing of caregivers for claimant. Cambrian pays its workers who provide services to HRC clients the rate negotiated with HRC and approved by DDS. Acree believes that if Mendez were to quit, Cambrian would be able to provide a replacement caregiver for claimant. Cambrian's business is to provide staffing when caregiver changes occur, which according to Acree, occurs daily. Acree testified that some of the common tasks performed by Cambrian workers for clients are assisting with feeding, and lifting, moving, and repositioning the client. Although not a common task, Cambrian workers can also help with range of motion activities.

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## LEGAL CONCLUSIONS AND DISCUSSION

1. For the reasons set forth below, cause exists to grant claimant's appeal and to order the Service Agency to provide funding to Cambrian sufficient to prospectively reinstate (as of the effective date of this Decision) caregiver Mendez's pay rate to the level that existed prior to February 1, 2010, which was \$16.74 per hour.

### *Jurisdictional Issue*

2. The Lanterman Developmental Disabilities Services Act (Lanterman Act or Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)<sup>4</sup> A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. (§ 4710.5, subd. (a).) Mother filed a fair hearing request to appeal the Service Agency's decision to reduce the amount of its reimbursement payment to Cambrian for Mendez's services, resulting in Mendez receiving a pay rate of \$12.50 per hour for the care she provides to claimant as a Cambrian employee. The Service Agency contends that the issue of Mendez's pay rate is a vendor pay rate dispute that OAH lacks jurisdiction to decide. The Service Agency's argument is without legal support.

3. In *Harbor Regional Center v. Office of Administrative Hearings* (2012) 201 Cal.App.4th 293, the Court of Appeal, Second Appellate District, held that OAH had jurisdiction to determine whether HRC was obligated to fund a temporary pay raise for claimant's caregiver, Gaby, for the services she performed as Mendez's replacement during Mendez's three-month maternity leave. The court stated that the issue turned on whether Gaby's pay raise request was "a vendor pay rate dispute as to which OAH lacks jurisdiction, or a service provision dispute, which falls within OAH's statutory jurisdiction." (*Harbor, supra*, 210 Cal.App.4th at p. 314.) The court stated that "if a higher pay rate is needed to provide the care called for by an individualized plan, a regional center's refusal to approve that higher rate goes directly to whether adequate services are being provided. (*Id.*) The court found that the broad language of the Lanterman Act provisions prescribing a consumer's fair hearing rights encompassed Mother's request for Gaby's pay raise. HRC's denial of the request raised an issue concerning claimant's right to receive services (§ 4706, subd. (a)), reflected a decision that Mother believed was not in claimant's best interest (§ 4710.5, subd. (a)), and was based on Mother's belief that HRC was not offering adequate assistance to keep claimant at home (§ 4685, subd. (c)(4)). (*Id.*, at p. 312.) After finding OAH had jurisdiction, the appellate court concluded that the ALJ did not abuse his discretion in ordering HRC to fund the requested pay raise for Gaby. (*Id.*, at pp. 316-317)

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<sup>4</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

4. The Service Agency argues that this case is "materially distinguishable" from the *Harbor* case. The Service Agency's arguments are not persuasive. First, the Service Agency contends that Gaby threatened to quit, whereas there is no evidence of an imminent departure by Mendez. Mother, however, testified that Mendez stated she would quit if her pay was reduced. Although Mendez did not specify an actual departure date, Mother believed this threat to be serious and imminent enough that she has been paying Mendez \$1,200 per month out-of-pocket since Cambrian reduced her hourly pay to \$12.50 on February 1, 2010.

5. The Service Agency also argues that DDS has previously determined that the issue of a pay raise for Mendez was a wage dispute. The DDS letter to Mother (Exh. 11) was a letter in response to the complaint Mother submitted to DDS under the complaint resolution process established by section 4731.<sup>5</sup> That process is separate and distinct from the fair hearing process in which OAH is vested with jurisdiction. Mother's complaint was based on the present dispute regarding Mendez's pay rate. At most, the DDS letter established that Mother's complaint was a wage dispute that was not appropriate for the complaint resolution process under section 4731. The letter does not deprive OAH of jurisdiction in this case.

6. The Service Agency's third argument to distinguish the *Harbor* case is that it "now knows" that claimant can continue to receive her services even without Mendez, as she received her services from other caregivers and was able to live at home during Mendez's maternity leave. While the factual premise of the Service Agency's contention was established by the evidence -- that claimant received her services without Mendez during the maternity leave -- there are countervailing facts and evidence that must be considered. Mother was at home during Mendez's three-month maternity leave, having taken a leave of absence from her job. Mother was available to assist the caregivers Gaby and Yemny with claimant's care. This explains why Mother made no complaints about the caregivers during the maternity leave; she was home to address any problems with the caregivers. And, Gaby had one year of experience as claimant's caregiver by the time she took over Mendez's duties in June 2009. Moreover, Mendez's maternity leave was of a known, short, fixed duration (three months). Claimant's experience of receiving her services during that short time period is insufficient to establish that claimant's care without Mendez could be maintained for a longer period of time.

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<sup>5</sup> Section 4731 establishes the complaint process for consumers who believe that any "right" to which he or she is entitled has been abused, punitively withheld, or improperly or unreasonably denied by a regional center. The complaint is filed with and decided by DDS.

## *Mendez's Compensation*

7. Section 4501 requires the state, through the regional centers, to provide an array of services and supports which is sufficiently complete to meet the needs and choices of each person with developmental disabilities. These are services and supports that will allow such persons, “regardless of age or degree of disability, and at each stage of life” to integrate “into the mainstream life of the community” and to “approximate the pattern of everyday living available to people without disabilities of the same age.” Persons with developmental disabilities have the right to treatment and habilitation services and supports which foster the individual’s developmental potential and are “directed toward the achievement of the most independent, productive and normal lives possible.” The regional centers will work with consumers and their families to secure “those services and supports that maximize opportunities and choices for living, working, learning and recreating in the community.” (§ 4502.)

8. A regional center is required to secure the services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan (IPP). (§ 4646, subd. (a)(1).) The determination of which services and supports are necessary for each consumer shall be made through the IPP process. (§ 4512, subd. (b).) The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the IPP, and the cost-effectiveness of each option. (§ 4512, subd. (b).)

9. The Legislature requires services and supports to be decided through a collaborative process in creating a consumer's IPP. (§ 4646.) The IPP is arrived at by a conference of the consumer or her representatives, service agency representatives, and other appropriate participants. (§§ 4646, 4648.) A service agency is then required to secure the services and supports necessary to satisfy the consumer's needs determined in the IPP. (§ 4648.) If the parties cannot agree on the provision of a service after the IPP process, a hearing officer shall make the decision after a fair hearing. (§ 4646, subd. (g).)

10. Section 4648 requires regional centers to secure services to achieve the greatest self-sufficiency possible and to meet the needs identified in the consumer's IPP. The services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family. (§ 4648, subd. (a)(1), (2).) The Lanterman Act provides for regional centers to be flexible to meet unusual or unique circumstances. For example, regional centers are encouraged to employ innovative programs and techniques (§ 4630, subd. (b)); to find innovative and economical ways to achieve goals (§ 4651); to implement procedures that encourage innovative approaches to sharing resources with other agencies (§ 4669.2, subd. (a)(7)); and to utilize innovative service-delivery mechanisms (§§ 4685, subd. (c)(3)). Further,

"[t]he Legislature places a high priority on providing opportunities for children with developmental disabilities to live with their families, when living at home is the preferred objective in the child's individual program plan." (§ 4685, subd. (a).)

11. Section 4646, subdivision (a), states, in pertinent part: "It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual. . . . It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

12. Section 4648 of the Lanterman Act describes what the regional center must do in order to achieve the stated objectives of the IPP. In securing the needed services and supports for a consumer the regional center must find services that are flexible and individually tailored to the consumer. By vendorization or contract the service agency may purchase services from any individual or agency the regional center and consumer determines will best accomplish all or any part of the IPP. (§ 4648, subd. (a)(3).)

13. Services provided must be cost effective (§ 4512, subdivision (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.) 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 child's every possible need or desire, in part because it is obligated to meet the needs of many children and families. Although regional centers are mandated to provide a wide range of services to facilitate implementation of the IPP, they must do so in a cost-effective manner (§§ 4640.7, subd. (b), and 4646, subd. (a)). A regional center is not required to provide all of the services which a client may require, but is required to "find innovative and economical methods of achieving the objectives" of the IPP (§ 4651).

14. When selecting a provider of consumer services and supports, the regional center and the consumer are required to review "[t]he cost of providing services or supports of comparable quality by different providers, if available," and "the least costly available provider of comparable service . . . who is able to accomplish all or part of the consumer's [IPP], consistent with the particular needs of the consumer and family as identified in the [IPP], shall be selected." (§ 4648, subd. (c)(6)(D).) The regional center and consumer are also required to consider the "provider's ability to deliver quality services or supports which can accomplish all or part of the consumer's [IPP]" and the "provider's success in achieving the objectives set forth in the [IPP]." (§ 4648, subd. (c)(6)(A), (B).)

15. Where a change in the status quo is sought, the party seeking the change has the burden of proving, by a preponderance of the evidence, that a change is necessary. (Evid. Code, §§ 115 and 500.) In this case, the Service Agency is seeking to change the status quo by its decision to reduce its funding to Cambrian for Mendez's compensation, thereby reducing her hourly rate of pay from \$16.74 to \$12.50. As such, the Service Agency has the burden to prove by a preponderance of the evidence that this change is necessary

16. The Service Agency contends that its decision to reduce its funding to Cambrian for Mendez's services is warranted because: (1) the experience during Mendez's maternity leave shows that a higher pay rate for Mendez is not necessary in order for claimant to receive adequate services, (2) the prior OAH decisions that ordered a higher pay rate for Mendez were not based on an "actual" care situation while Mendez was "actually" gone, and (3) changes in the Lanterman Act in response to the State's budget crisis imposed new limits and restrictions on the authority of regional centers to purchase services for consumers, and resulted in increased DDS scrutiny and audits of regional center expenditures for services.

17. In this case, the Service Agency should be required to provide funding to Cambrian for Mendez's services so that Mendez receives net pay of \$16.74 per hour, in accordance with the 2005 and 2008 OAH decisions. Claimant's experience during Mendez's maternity leave was too short a time period upon which to conclude that her level of services without Mendez could be maintained for the long-term future. The maternity leave experience also occurred while Mother was at home on a leave of absence from her job and assisted the other caregivers. Because of her parents' marital separation, claimant lives with Father on weekends and with Mother on weekdays. Father has caregivers other than Mendez who assist him with caring for claimant on the weekends. However, claimant's routine on the weekends is less involved, and occurs over a shorter time period, than her weekday routine with Mother. Father is also at home from work on the weekends to assist the caregivers.

18. The justifications in prior OAH decisions supporting Mendez's higher pay rate included that she was willing and able to perform the daily routine and rigorous exercise regimen Mother developed for claimant. In 2010, claimant suffered a hip displacement and no longer exercises as rigorously and no longer uses her exercise bicycle. Nonetheless, she continues to complete her exercises to the extent she can tolerate them, and she continues to perform range of motion exercises and stretching. Moreover, the hip displacement has created a need for even more care to be taken when moving and repositioning claimant, so that her body and limbs are properly positioned to prevent displacement of her hip and causing any pain. Claimant's need for 24-hour, around the clock care, as identified in her IFSPs, has not diminished. Mendez has unique experience and qualifications that no other caregiver possesses, by virtue of her tenure as claimant's caregiver and the bond and relationship claimant has with her. Claimant's bond and rapport with her caregivers is identified in her IFSPs as an important aspect of her care.

19. As the Service Agency correctly notes, there have been changes to the Lanterman Act that have restricted, and in some cases eliminated, the authority of regional centers to purchase certain types of services. DDS has also increased its oversight of regional centers' expenditures and payments to providers, asked more questions and demanded more documentation. However, the cost-saving measures of the Lanterman Act do not trump the Service Agency's obligation to be flexible and innovative in providing services and supports to its consumers, or the Lanterman Act's high priority of having children with developmental disabilities living at home with their families.

20. As found by the appellate court in the *Harbor* case, the rate-setting provisions of the Lanterman Act are "designed to let DDS set rates for the general population of persons receiving services under the Act," but claimant "does not fall into that vast middle. Instead, by dint of both her disabilities and the unique program [Mother] was able to devise to meet her needs and keep her at home, [claimant] is more of an outlier." (*Harbor, supra*, 210 Cal.App.4th at p. 313.) The court found that a wage above Cambrian's approved pay rate for respite workers was warranted in order to attract and retain caregivers who are capable of learning and implementing the program and bonding with claimant, and ordering such increased pay "is the only way that [claimant] can receive the services she needs and to which she is legally entitled." (*Id.*)

21. Cambrian's workers commonly perform services for clients such as feeding, lifting, moving, and repositioning, and assisting with range of motion exercises if requested, and Cambrian's president believes her company can provide replacement caregivers for claimant because caregiver changes occur daily and Cambrian is capable of restaffing cases. While this may be the norm for Cambrian's general population of clients, including its other regional center clients, claimant's case is an "outlier" by dint of both her disabilities and the unique home program developed by Mother.

22. Under the totality of the circumstances presented, the Service Agency failed to prove by a preponderance of the evidence that a change in the status quo, evidenced by a reduction in Mendez's pay rate, is warranted at this time. Claimant's appeal shall be granted.

23. Claimant raises the argument that the prior OAH decisions should be given collateral estoppel effect to bar the Service Agency from relitigating the issue of a higher rate of pay for claimant's caregivers. This argument is without merit. Changes in facts or circumstances, or changes in the law, bar the application of collateral estoppel. (*Melendres v. City of Los Angeles* (1974) 40 Cal.App.3d 718, 730.) Here, there have been changes in the provisions of the Lanterman Act that govern this case. There have also been changes in claimant's physical condition which affect the services she requires to remain living at home. Construing the prior OAH decisions as claimant requests would be contrary to provisions of the Lanterman

Act providing for the review and modification of an IPP, through the IPP process, as necessary in response to a consumer's achievement or changing needs (§ 4646.5, subd. (b)), and requiring that the services provided by regional centers should be appropriate to meet the consumer's needs "at each stage of life." (§ 4501.)

### ORDER

Claimant's appeal is granted. Harbor Regional Center shall provide funding to Cambrian Homecare so that claimant's caregiver, Vivian Mendez, receives net pay of \$16.74 per hour as of the effective date of this Order.

DATED: March 25, 2014

  
\_\_\_\_\_  
ERLINDA G. SHRENGER  
Administrative Law Judge  
Office of Administrative Hearings

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.