

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

ALTA CALIFORNIA REGIONAL
CENTER,

Service Agency.

OAH No. 2016050867

DECISION

This matter was heard before Administrative Law Judge (ALJ) Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Sacramento, California, on July 13, 2016.

The Service Agency, Alta California Regional Center (ACRC), was represented by Robin Black, Legal Services Manager.

Claimant was represented by her mother who is also her conservator.

Oral and documentary evidence was received. The record remained open for the parties to submit closing briefs. Both claimant and respondent submitted closing briefs on August 19, 2016. The record was closed and the matter submitted for decision on August 19, 2016.

ISSUE

Is ACRC required to fund and/or authorize in-home respite workers capable of assisting claimant with seizure rescue medication in an emergency situation?

FACTUAL FINDINGS

1. Claimant is a 19-year-old conserved young woman who resides with her parents in the family home in rural El Dorado County. Her mother is her conservator. She is eligible for ACRC services based upon an intellectual disability and cerebral palsy. She also experiences generalized convulsive epilepsy. Claimant receives services and supports pursuant to the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 et seq.)¹

Claimant's current Individual Program Plan (IPP), dated March 2, 2016, provides for supports and services from ACRC, which include in-home respite.

2. While claimant does experience generalized convulsive epilepsy, she had been seizure free for most of her life. In November 2015, she experienced two grand mal seizures that did not resolve. Her family was able to administer emergency post-seizure medication within minutes following the seizures.

3. Subsequently, claimant's neurologist advised the family "any care provider for [claimant] should be able to provide emergency medication (a 1 ml dose of fluid medication administered orally using an oral syringe)." Claimant's mother informed ACRC of this requirement by email and was advised that, based on an earlier decision (OAH No. 2013070290), respite workers were denied the ability to provide medication. The respite provider, Elder Options, was informed of ACRC's position and was no longer able to provide in-home respite services.

In OAH Decision 2013070290, ALJ Marilyn A. Woollard granted claimant's request for in-home respite services through the vendor Elder Options as an alternative solution to out-of-home respite placement subject to conditions, which were to remain in effect through August 30, 2014. Conditions (b)(1 through 3) state:

- (1) Elder Options in-home respite providers shall not dispense oral medications to claimant or provide medication reminders;
- (2) Claimant's parents shall provide ACRC with their natural supports medication agreement which will provide for claimant's necessary oral medication; and,
- (3) Claimant's parents shall sign an authorization designating an individual, other than an employee of ACRC or Elder Options, who is authorized to consent or to withhold consent to medical treatment for claimant during their vacation(s).

These conditions for medication administration specifically addressed claimant's scheduled medications, not emergency seizure rescue medications.

¹ Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

4. Claimant's family requested ACRC fund nursing respite, as a licensed nurse is able to administer medication in the respite setting. ACRC reported that the planning team unsuccessfully searched for more than five months for a nursing or home health care agency with availability to provide respite to claimant.

The family reported that they sought to hire part-time IHSS² workers (for five hours per week), who would be able to administer medications, to provide "respite care to claimant." Their search was also unsuccessful. They found it difficult to hire either Employer of Record respite workers or IHSS workers due to the low number of hours offered and low wages provided.

5. As claimant's family was unable to access any of her authorized in-home respite, they requested that ACRC allow Elder Options staff to volunteer to provide claimant emergency post-seizure medication while providing her in-home respite. ACRC denied this request stating that in-home respite staff is not permitted to administer medication.

6. On April 19, 2016, ACRC issued a Notice of Proposed Action (NOPA) to claimant advising, "Alta California Regional Center (ACRC) is denying your request to allow staff from vendored in-home respite provider Elder Options to administer medications to [claimant] while providing her in-home respite services."

The NOPA advised claimant that the reason for this action was as follows:

An in-home respite worker who is not a licensed health care professional may not provide medical, paramedical, or incidental services to a client except as provided for in law. The Lanterman Act does allow in-home respite providers who are not licensed health care professionals to provide certain incidental medical services to clients, but those incidental medical services do not include administering medications. Only licensed health care workers who provide in-home respite, i.e., nursing respite providers, are legally authorized to administer medications to clients while providing in-home respite services. ACRC is unable to waive this legal requirement, the intent of which is to protect clients' health and safety.

7. Claimant filed a Fair Hearing Request, received by ACRC on May 11, 2016, appealing that decision. The request contained the following:

In November 2015, ACRC withdrew agency respite authorization after [claimant] suffered a prolonged seizure which required emergency medication. As no nursing respite agency is available and ACRC prohibits respite agency workers from volunteering to

² In Home Supportive Services.

assist in a medical emergency, [claimant's] in home respite benefits have been lost.

8. Regional centers are governed by the provisions of the Lanterman Act. Section 4690.2 specifies:

“In-home respite services” means intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client’s own home, for a regional center client who resides with a family member. These services are designed to do the following:

- (1) Assist family members in maintaining the client at home.
- (2) Provide appropriate care and supervision to ensure the client’s safety in the absence of family members.
- (3) Relieve family members from the constantly demanding responsibility of caring for the client.
- (4) Attend to the client’s basic self-help needs and other activities of daily living including interaction, socialization, and continuation of the usual daily routines which would ordinarily be performed by the family members

Section 4686 provides as follows:

- (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.

9. In response to these mandates, ACRC determined that in-home respite is non-medical care and in-home respite workers who are not licensed health care professionals are only authorized to provide medical care as set forth in the section 4686 exceptions. Section 4686 only expressly permits in-home respite workers to administer routine medications through the gastrostomy tube of patients with stable conditions. Therefore, ACRC takes the position that it cannot authorize claimant's in-home respite workers to administer her emergency anti-seizure medications as part of the in-home respite services they provide.

10. California Code of Regulations, title 22, section 70029 defines "drug administration" as follows:

The act in which a single dose of a prescribed drug or biological is given to a patient by an authorized person in accordance with all laws and regulations governing such acts. The complete act of administration entails removing an individual dose from a previously dispensed labeled container, including a unit dose container, verifying the dose with the prescriber's orders, giving the individual dose to the proper patient and promptly recording the time and dose given.

California Code of Regulations, title 22, section 76447, subdivision (i), provides that only licensed medical or nursing personnel may administer medications in the absence of an exception:

All medications shall be administered only by licensed medical or licensed nursing personnel with the following exceptions:

- (1) Students in the healing arts professions shall be allowed to administer medications and treatment only when the administration of medications and treatment is incidental to their course of study as approved by the professional board or organization legally authorized to give such approval.
- (2) Unlicensed persons may administer, under the direct supervision of licensed nursing or licensed medical personnel, during or after the completion of training and demonstrated evidence of competency, only the following medications and treatments:
 - (A) Medicinal shampoos and baths.
 - (B) Laxative suppositories and enemas.
 - (C) Nonlegend topical ointments, creams, lotions and solutions when applied to intact skin surfaces.

- (3) Unlicensed persons shall not administer any medication associated with the treatment of the eyes, ears, nose or genitourinary track

11. Exceptions to only licensed medical or licensed nursing personnel administering medications have been authorized in Intermediate Care Facilities for the Developmentally Disabled (Cal. Code Regs., tit. 22, § 76876), California Licensed Residential Care Facilities for the Elderly (Cal. Code Regs., tit. 22, § 87356), and in licensed day care, camps and recreational programs (Cal. Code Regs., tit. 22, § 101226).

In the educational setting, unlicensed staff may voluntarily agree to administer emergency anti-seizure medication to students in the absence of a school nurse or licensed vocational nurse, after appropriate training and parental consent. (Ed. Code, § 49414.7).

Section 12300.1 describes the “supportive services” IHSS workers may provide to a consumer, including:

...those necessary paramedical services that are ordered by a licensed health care professional who is lawfully authorized to do so, which persons could provide for themselves but for their functional limitations. Paramedical services include the administration of medications, puncturing the skin or inserting a medical device into a body orifice, activities requiring sterile procedures, or other activities requiring judgment based on training given by a licensed health care professional. . .

When medications are permitted to be administered by other than licensed medical or licensed nursing personnel, the exceptions set forth varying training, consent and oversight requirements. However, friends and family members are not prohibited from assisting individuals with medications and individuals may, of course, take their own prescribed medications. No legal mandates govern these situations.

12. The Department of Developmental Services (DDS)³ maintains a website which includes a section of “Frequently Asked Questions (FAQ)” pertaining to “In-Home Respite Incidental Medical Services Training Protocol.” This section explains that section 4686 “expands the incidental medical services that may be performed by an in-home respite worker, who is not a licensed health care professional and who is trained by a licensed health care professional to perform these services for consumers of regional centers with stable conditions. These incidental medical services are restricted to gastrostomy, colostomy/ileostomy, and urinary catheter care. . . . The treating physician or surgeon shall give assurance 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.”

³ DDS is the state agency through which the state of California provides services and supports to individuals with developmental disabilities.

The in-home respite agency providing the training develops a training protocol, which is submitted for approval to DDS. DDS uses criteria listed in section 4686, subdivision (d) and the “In-Home Incidental Medical Services Training Curriculum Review Protocol” checklist to evaluate all training curriculums for approval.

FAQ number 17 provides the following information:

The gastrostomy services training protocol includes the administration of medication through the gastrostomy tube. Does this mean that trained in-home respite workers are permitted to administer oral medications?

A. No. There is no provision in the statute that permits the administration of oral medications by trained in-home respite workers.

13. The incidental medical services permitted in section 4686 are optional, not mandatory, services that may be provided by in-home respite workers. The statute sets forth training requirements and additional funding⁴ for providing these incidental services.

14. Qualifications for in-home respite workers include having been trained in CPR and First Aid. Neither of these trainings address administration of medications or require any specific licensure.

15. Claimant’s mother testified that claimant’s emergency medication is contained in an oral syringe with fluid medication that is inserted between the cheek and gum and released. It is easy to administer but time sensitive; it should be administered within three minutes as a longer delay makes it more difficult to stop the seizure. A delay of 20 minutes or more may result in brain damage. Claimant responds quickly and returns to normal consciousness. Because the medication administration is so time sensitive, having a friend or neighbor available or utilizing 911 would not be an option. An individual must be available within those first minutes.

Claimant’s mother also agreed that scheduled medications are not an issue in this matter. Scheduled medications are provided to claimant by a neighbor as a natural support. The concern is only with the need to deliver emergency seizure medication if the need arises during in-home respite.

All known employer of record and nursing respite options for respite care providers were exhausted.

⁴ 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 the incidental medical services.

16. Complainant's mother argues that the law does not specifically prohibit administration of medication by in-home respite workers. She contends that the incidental services were set forth in the Lanterman Act and DDS published training protocols to support the supplemental fee authorized for provision of those specific services. It does not mean that respite workers may not perform other services. She asserts that medication administration by unlicensed providers is authorized elsewhere in California law. This includes family members, friends, caregivers in licensed facilities, schools (non-medical staff), and IHSS workers, with consent from client.

Unlicensed lay staff at school districts and day care centers are legally authorized to volunteer to provide emergency medical assistance to children. California Community Care Licensing (CCL) Evaluator Manual explains that staff at Family Child Care Homes, who are not licensed medical professionals, may administer anti-seizure medication according to specified procedures. This allows licensed family child care homes to serve children who might need emergency medication, knowing that they cannot and are not required to have licensed medical personnel on staff and that family members cannot be present at all times to administer such medication in the event of an emergency.

17. Claimant's mother also cites to the 2013 California Supreme Court decision in *American Nurses Association et. al. v. Tom Torlakson, et al. American Diabetes Association, Intervener and Appellant* (2013) 57 Cal 4th 570, as establishing support for nonmedical laypersons volunteering to provide medication in accordance with doctors' orders in the educational setting. The California Education Code subsequently codified requirements for willing employees to administer medications during the course of employment. An employee cannot be required, but may be permitted, to "volunteer."

She suggests that specific terms could be written into claimant's IPP similar to those allowed in the education context: An employee could be given an opportunity to volunteer, with three days to retract agreement, and then two weeks' notice after that time. The regional center disagreed stating that the IPP is a contract and the regional center does not have control over a vendor. ACRC does not do the hiring of the individual providers; its contract is with the vendor not the employee. ACRC may hold vendors to a standard through a finding of substantial inadequacy.

Claimant's mother believes that it is necessary for claimant's safety that the regional center stipulate in claimant's IPP the need for in-home respite workers who will volunteer to administer rescue medications in an emergency situation. She is understandably concerned that staff who might volunteer could also choose at any time to stop volunteering, thus putting her daughter at risk. Thus, an informal arrangement might not be sufficient.

18. Sharon Wiggins is an ACRC Client Services Manager whose responsibilities include the supervision of ACRC Service Coordinators. Ms. Wiggins supervises claimant's Service Coordinator. She testified that claimant is eligible for regional center services and supports as an individual with cerebral palsy and mild intellectual disability. She stated that the

regional center did not diagnose claimant with epilepsy and suggested that it was not a substantially disabling condition for the claimant.

19. Ms. Wiggins testified that there is no dispute that claimant requires administration of seizure rescue medication in those isolated instances where she has a seizure. She also noted that claimant's IPP team has agreed on her need for in-home respite services. Ms. Wiggins described the difficulty for the regional center in funding in-home respite care services that would allow for the administration of emergency medications. The regional center is governed by the Lanterman Act. Section 4690.2 defines in-home respite services as "nonmedical" and administering medications is considered medical care. Administering medications other than through a gastrostomy tube, was not mentioned in section 4686 which discusses "incidental medical services" which may be performed by an in-home respite worker who is not a licensed health care professional but is trained by one.

When claimant was unable to access her authorized in-home respite, her parents requested that ACRC allow Elder Options staff to volunteer to provide emergency post-seizure medication while providing claimant's in-home respite care. The request was denied based on ACRC's belief that in-home respite staff are not permitted to administer medication.

ACRC concludes that the purpose of in-home respite is not to provide medical services, and that in-home respite providers are not permitted pursuant to the Health and Safety Code nor the Lanterman Act to orally administer medications to consumers as part of their job duties.

20. ACRC also takes the position that even if claimant's in-home respite workers are not permitted to administer medications as part of their job duties, that does not prevent her from receiving emergency seizure medications while she is in in-home respite care. Claimant's in-home respite workers can provide her emergency seizure rescue medications on a volunteer basis, by agreement. Ms. Wiggins testified that the regional center has no objection to having Elder Options staff trained to volunteer with the provision of emergency rescue medications, however, the regional center cannot fund that training.

At least according to the California Education Code, Emergency Medical Assistance means "the administration of an emergency antiseizure medication to a pupil suffering from an epileptic seizure." (Ed. Code, §49414.7, subd. (p)(1)(2).) ACRC argues that, in the absence of other California law or regulations directly categorizing the nature of emergency administration of seizure rescue medication, it seems reasonable that this would constitute a form of emergency medical assistance.

21. California Health and Safety Code section 1799.103 provides as follows:

- (a) An employer shall not adopt or enforce a policy prohibiting an employee from voluntarily providing emergency medical services, including, but not limited to, cardiopulmonary resuscitation, in response to a medical emergency, except as provided in subdivisions (b) and (c).

- (b) Notwithstanding subdivision (a), an employer may adopt and enforce a policy authorizing employees trained in emergency services to provide those services. However, in the event of an emergency, any available employee may voluntarily provide emergency medical services if a trained and authorized employee is not immediately available or is otherwise unavailable or unwilling to provide emergency medical services.
- (c) Notwithstanding subdivision (a), an employer may adopt and enforce a policy prohibiting an employee from performing emergency medical services, including, but not limited to, cardiopulmonary resuscitation, on a person who has expressed the desire to forgo resuscitation or other medical interventions through any legally recognized means, including, but not limited to, a do-not-resuscitate order, a Physician Orders for Life Sustaining Treatment form, an advance health care directive, or a legally recognized health care decisionmaker.
- (d) This section does not impose any express or implied duty on an employer to train its employees regarding emergency medical services or cardiopulmonary resuscitation.

22. California Health and Safety Code section 1799.102 protects an individual voluntarily providing emergency medical services from liability as follows:

- (a) No person who in good faith, and not for compensation, renders emergency medical or nonmedical care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission. The scene of an emergency shall not include emergency departments and other places where medical care is usually offered. This subdivision applies only to the medical, law enforcement, and emergency personnel specified in this chapter.
- (b) (1) It is the intent of the legislature to encourage other individuals to volunteer, without compensation, to assist others in need during an emergency, while ensuring that those volunteers who provide care or assistance act responsibly.

(2) Except for those persons specified in subdivision (a), no person who in good faith, and not for compensation, renders emergency medical or nonmedical care or assistance at the scene of an emergency shall be liable for civil damages resulting from any act or omission other than an act or

omission constituting gross negligence or willful or wanton misconduct.

23. ACRC contends that, based on the forgoing, in-home respite providers may administer emergency rescue medications to claimant by agreement. It would be the responsibility of the family and Elder Options to reach their own agreement on how that would occur. The requirements set out in the Education Code could be used for guidance. The agreement would permit the voluntary administration of emergency rescue medication to claimant by Elder Options staff and protect employees from liability since the law prohibits Elder Options from prohibiting employees from volunteering to provide such services.

24. ACRC cannot agree in claimant's IPP that claimant's in-home respite worker must provide emergency rescue medications. The IPP legally obligates the regional center to provide included services and it cannot require a provider to "volunteer" nor can it compel Elder Options or its workers to act contrary to the law, such as administering medications by in-home respite workers, which it argues is not permitted by law or regulation.

Elder Options cannot prevent its employees from voluntarily providing emergency medical services. Administering emergency rescue seizure medication appears to be one such service. There is no requirement that Elder Options authorize or train such individuals and, in fact, assistance must be voluntary.

LEGAL CONCLUSIONS

1. The Lanterman Act sets forth the regional center's responsibility for providing services to persons with development disabilities. An "array of services and supports should be established ... to meet the needs and choices of each person with developmental disabilities ... to support their integration into the mainstream life of the community ... and to prevent dislocation of persons with developmental disabilities from their home communities." (§ 4501.) The Lanterman Act requires regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP includes the consumer's goals and objectives as well as required services and supports. (§§4646.5 & 4648.)

2. Section 4646, subdivision (a), provides:

(a) 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 with developmental disabilities and takes into account the needs and preferences of the individual and family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. 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 plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

3. Section 4512, subdivision (b), provides, in pertinent part:

“Services and Supports for persons with developmental disabilities” means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, where appropriate, the consumer’s family, and shall include consideration of a range of services options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option

4. Section 4646.4, subdivision (a), in pertinent part provides:

Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer’s individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

- (1) Conformance with the regional center’s purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.

5. Section 4646.5, subdivision (a)(4), states:

(a)The planning process for the individual program plan described in Section 4646 shall include all of the following:

- (4) A schedule of the type and amount of services and supports to be purchased by the regional center or obtained from generic

agencies or other resources in order to achieve the individual program plan goals and objectives, and identification of the provider and providers of service responsible for attaining each objective, including, but not limited to, vendors, contracted providers, generic service agencies, and natural supports. The plan shall specify the approximate scheduled start date for services and supports and shall contain timelines for actions necessary to begin services and supports, including generic services.

6. Section 4512, subdivision (e), defines “natural supports” to mean:

[P]ersonal associations and relationships typically developed in the community that enhance the quality and security of life for people, including, but not limited to, family relationships, friendships reflecting the diversity of the neighborhood and the community, associations with fellow students or employees in regular classrooms and workplaces, and associations developed through participation in clubs, organizations, and other civic activities.

7. The parties are in agreement that claimant is entitled to in-home respite authorized in her IPP and that, in order to receive that service she requires availability of an individual capable of administering emergency rescue medication within three minutes of the start of a seizure that does not resolve naturally.

An employer cannot prohibit an employee from volunteering to provide services in a medical emergency. ACRC has no authority to prohibit any employee of its vendors from volunteering to assist in a medical emergency. An agreement can be reached between claimant and Elder Options setting forth the specific requirements required to allow for volunteer medical administration designed to ensure claimant’s health and safety in the in-home respite situation. ACRC could then fund in-home respite services without mandating a level of care, which it does not believe to be authorized by the Lanterman Act. The regional center contract with the respite agency would not be affected as the emergency provision of medication is provided voluntarily and outside the course of employment. The in-home respite provider would still perform his or her respite duties as defined in section 4690.2. The IPP could include that ACRC would fund claimant’s in-home respite with the providers chosen by agreement of the family and Elder Options.

ORDER

The appeal of claimant is granted in part. ACRC shall fund in-home respite services for claimant, which allow for a respite worker to volunteer to provide emergency rescue medications as agreed to between Elder Options (or a subsequent respite services vendor) and

the family. It is the claimant's family's and/or vendor's obligation to inform ACRC, in writing, that a volunteer agreement has been reached to initiate funding. The respite agency and the family shall determine the terms of this agreement. Respite agency funding shall continue, without interruption, when claimant requires emergency rescue medication administration. The IPP shall continue to document claimant's need for in-home respite services.

DATED: September 1, 2016

SUSAN H. HOLLINGSHEAD
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of this decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)