

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2014110352

DECISION

Administrative Law Judge Thomas Heller, State of California, Office of
Administrative Hearings, heard this matter at Whittier, California on May 13, 2015.

Claimant's mother and father represented claimant.

Judy Perez, Fair Hearing Coordinator, represented Eastern Los Angeles Regional
Center (ELARC or Service Agency).

The matter was submitted on May 13, 2015.

ISSUE

Shall ELARC continue to fund an additional 100 hours per month of respite
services for claimant, such that he receives funding for a total of 200 hours per month, in
order for his parents to employ two respite workers at once for 100 hours per month?

EVIDENCE RELIED UPON

Documents: ELARC's exhibits 1-8; claimant's exhibits A through HH (excluding
exhibit FF).

Testimony: ELARC Unit Supervisor Gerard Torres; ELARC Service Coordinator Cynthia Juarez; claimant's mother, claimant's father.

FACTUAL FINDINGS

1. Claimant is a 13-year-old boy with cerebral palsy – choreoathetosis, cerebral dysgenesis (abnormal formation of the brain), pervasive developmental disorder – not otherwise specified, and enlarged posterior ventricle of the brain, among other things. Based on his diagnoses, he is eligible for and receives services from ELARC under the Lanterman Developmental Disabilities Services Act (Lanterman Act). (Welf. & Inst. Code, § 4500 et seq.)¹ Since at least July 2008, those services have included, among other things, funding for 100 hours per month of in-home respite care. Presently, he also receives funding for an additional 21 days per fiscal year of in-home respite in lieu of out-of-home respite. He lives at home with his father, mother, and two younger brothers.

2. In August 2014, claimant requested an increase in funding for in-home respite to 200 hours per month, to allow 2:1 respite staffing for 100 hours per month. Claimant requested the additional respite funding due to a "crisis" that arose from a decrease in claimant's support services (Ex. 3 at p. 37), and his father's increased time away from home due to his new job. Progressive Resources, claimant's Adaptive Skills Training provider, unilaterally discontinued services to claimant in June 2014, and claimant's anxiety, aggression, and de-regulation had increased since that time.²

¹ All future statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

² ELARC is still attempting to identify an Adaptive Skills Training provider to take the place of Progressive Resources.

Claimant's father's new job also increased the care duties of claimant's mother, who is with claimant almost continuously, including during his individualized home education program school, and as his In-Home Supportive Services (IHSS) provider for protective supervision and other tasks.

3. ELARC agreed to increase claimant's respite funding as requested for three months, from August 1 until October 31, 2014. ELARC and claimant memorialized the increase in an Individual Program Plan (IPP) Addendum, dated September 17, 2014. The IPP Addendum states that "[r]espice services [are] to resume at 100 hours per month on 11/01/14 per agreement made by ELARC and parent on 08/08/14." (Ex. 3 at p. 44.)

4. In mid-October 2014, claimant objected to the 200 respite hours per month being reduced after October 31, 2014. ELARC issued a Notice of Proposed Action on October 21, 2014, which stated that ELARC's agreement to fund the additional 100 hours per month was temporary, and notified claimant that the 100 extra hours per month would terminate on November 21, 2014. (Ex. 1.) Claimant submitted a Fair Hearing Request on October 29, 2014, and later waived the time prescribed by law for holding the hearing on the request. (Continuance Order, dated Mar. 20, 2015; see § 4712, subd. (a).) Claimant has continued to receive 200 hours per month of respite funding while his Fair Hearing Request has been pending.

5. Claimant is currently about 64 inches tall and weighs about 117 pounds. He requires continuous protective supervision and frequently exhibits aggression to his parents and respite workers, often brought on by anxiety, sensory stimulation, or physical pain from his medical conditions. His maladaptive behaviors with others include biting, hitting, hair-pulling, grabbing, and similar behaviors. He also risks self-injury in many ways, such as falling, choking, or engaging in dangerous behavior (e.g., ingestion of medication, head-banging, attempting to use kitchen appliances, and eloping from home). He displays much difficulty with transitions, such as exposure to new people, and

with changes in routine. He uses a wheelchair, but also has mobility without it, albeit with poor balance. He is not toilet-trained, and requires support when being changed, bathed, or dressed. He has a special diet and requires support during feeding. His size and strength have increased since the recent onset of puberty.

6. Claimant's parents began applying his 100 hours per month of respite services at a 2:1 staffing level in about September 2013, after an incident involving a family member/respite worker. During that incident, the family member called claimant's parents shortly after they had left the house, and reported that claimant had grabbed the family member's hair and would not let go. Claimant's parents returned home and resolved the situation, but the family member stated that she could no longer work as a respite caregiver. Claimant's mother described this incident as a "game-changer."

7. Claimant currently has about six respite caregivers who work for Cordova Consulting, and provide services in shifts at a 2:1 staffing ratio. Claimant's parents identify acceptable respite workers to Cordova Consulting, and then Cordova Consulting hires them. There is a high turnover rate for claimant's respite workers.

8. ELARC learned that claimant had started using 2:1 respite staffing in an IPP conference in late 2013 or early 2014. Claimant's operative IPP contains the statement that "[s]ince September 2013, family has had to use 2 respite caregivers for all respite care. Thus the 100 hours per month is actually 50 hours per month. [Claimant] requires 2:1 attention and this allows the respite staff breaks." (Ex.3 at p. 9.) ELARC Service Coordinator Cynthia Juarez testified that this statement was a recitation of what claimant's mother told her. She and ELARC Unit Supervisor Gerard Torres also testified that they have been given limited opportunities to observe claimant during the last several years. Based on a May 2015 in-home observation and other information, Mr. Torres testified that some of claimant's behaviors are "tantrum" behaviors, and warrant behavior intervention services. ELARC has offered claimant such services in the past, but

claimant's parents have declined them. Claimant did receive some behavioral intervention services from ELARC in about 2009, but his parents terminated those services due to a disagreement about the proper approach.

9. From 2009-2010, claimant and ELARC had another dispute about respite services. In 2009, ELARC sought to reduce claimant's respite hours from 100 hours per month to 30 hours per month. Claimant submitted a Fair Hearing Request, and an Administrative Law Judge ruled that "[c]laimant shall maintain 100 hours per month of respite services," because claimant established that his "intense care and supervision needs" justified this "undeniably . . . significant number of respite hours." (Decision, OAH No. 2010090126, Nov. 30, 2010, at pp. 8-9 [Ex. R].) At the time of that decision, 2:1 respite staffing was not at issue.

10. In support of the present Fair Hearing Request, claimant's mother and father testified as to claimant's maladaptive behaviors and substantial needs. They also presented extensive evidence of claimant's current diagnoses and behaviors, and recent incidents regarding aggressive behaviors. The evidence included a letter completed on behalf of claimant's current physician, stating that claimant "would not benefit from one Respit [sic] Caregiver. Due to his aggressive behavior, he would need two caregivers at all times in order to provider [sic] safe and adequate care." (Ex. K.) This letter has little probative weight because it is conclusory and does not describe the foundation for the physician's opinion.

LEGAL CONCLUSIONS

1. Disputes about the rights of disabled persons to receive services under the Lanterman Act must be decided under the fair hearing and appeal procedures in the Act. (§ 4706, subd. (a).) Here, the dispute is whether claimant should continue to receive funding for respite services that ELARC agreed to provide for three months, after that three-month period has passed. Under these circumstances, claimant has the burden of

proving that he should receive funding for the disputed services (see *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]), and must do so by a preponderance of the evidence. (Evid. Code, § 115 [preponderance of evidence standard applies unless law or statute provides otherwise].)³

2. “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.” (§ 4690.2, subd. (a).) Respite services are designed to assist family members in maintaining a disabled person at home, provide appropriate care and supervision to ensure safety in family members’ absence, relieve family members from the constant demands of caring for the person, and attend to the person’s basic self-help needs and other activities of daily living. (§ 4690.2, subd. (a)(1) - (4).) Under the Lanterman Act, ELARC “may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities,” and may not purchase over 90 hours of in-home respite services in a calendar quarter unless “the intensity of the consumer’s care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member’s ability to meet the care and supervision needs of the consumer.” (§ 4686.5, subd. (a)(1)-(3).)

3. Claimant has not met his burden of proving ELARC should fund 100 hours

³ In 2010, ELARC sought to reduce funding for claimant’s respite services below an amount that had been ongoing for several years. Under those circumstances, ELARC bore the burden of proof. (Decision, OAH No. 2010090126, Nov. 30, 2010, at p. 7.) Here, in contrast, claimant requests continuation of short-term funding for services beyond the end date for that funding, and thus bears the burden of proof.

per month of respite care, in addition to the undisputed 100 hours per month of respite care. ELARC's agreement to double its respite funding to 200 hours per month from August to October 2014 was temporary, and the time period in which ELARC agreed to that increased funding has expired. The temporary funding for 100 extra hours per month of respite was intended to allow claimant and his family time to adjust to Progressive Resources' termination of claimant's Adaptive Skills Training, his father's new work schedule, and the resulting increase in his mother's role in his care. Considerable time has passed since those events, and the additional respite funding was not intended to become the permanent amount of respite funding that claimant would receive.

4. Claimant asserts that 200 hours per month of respite funding is required to provide 100 hours per month of actual respite, because 2:1 staffing is necessary to protect the health and safety of claimant and the respite workers. But there was insufficient evidence that claimant's behaviors, while challenging, can only be addressed with 2:1 respite staffing. There was evidence of many recent incidents of biting, hitting, hair-pulling, and similar behaviors, but these incidents did not involve extreme violence or imminent danger. The September 2013 incident with a family member/respite worker that prompted claimant's parents to begin 2:1 staffing was similar to these more recent incidents. While claimant is now bigger and stronger than he was in 2013, it was not shown that his size, strength, and behaviors are such that no respite worker could ever be alone with him safely. Claimant's letter from his doctor about 2:1 respite staffing is conclusory, and ELARC Supervisor Gerard Torres testified persuasively that some of claimant's more challenging behaviors warrant behavioral intervention services, which ELARC has offered but claimant's parents have refused. Claimant last received behavioral intervention services in about 2009, but his parents terminated those services due to a disagreement about the proper approach. The lack of more recent behavioral

intervention services undermines claimant's assertion that 2:1 respite staffing and such a high amount of respite funding are warranted, and suggests that such funding would not "reflect the cost-effective use of public resources." (§ 4646, subd. (a).)

5. Claimant asserts in his Fair Hearing Request that his IPP requires 2:1 respite staffing, and that denial of his request for more respite funding would deny him access to 100 hours per month of actual respite. But ELARC's funding of 200 hours per month of respite services on a temporary basis is evidence that ELARC did not agree to fund 2:1 staffing for the original, undisputed 100 hours per month of respite. While there is a statement in the IPP that "[claimant] requires 2:1 attention" during respite services (Ex. 3 at p. 9), ELARC Service Coordinator Cynthia Juarez persuasively testified that the statement is a recitation of what claimant's mother told her. (Factual Finding 8.) It is not an agreement of ELARC to fund 2:1 respite staffing during the undisputed 100 hours per month of respite care. That undisputed number of respite hours is itself significantly more than the usual maximum of 90 hours per calendar quarter. (§ 4686.5, subd. (a)(1)-(3).)

6. While claimant has not established that he is presently entitled to funding for an additional 100 hours per month of respite, changed circumstances may warrant revisiting this issue in the future. Nothing in this order bars claimant from making another request for additional respite funding due to changed circumstances.

ORDER

Claimant's request that ELARC continue to fund an additional 100 hours per month of respite services is denied.

DATE: May 27, 2015

/s/

THOMAS HELLER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. Either party may seek judicial review of this decision in a court of competent jurisdiction within 90 days.