

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of Fair Hearing Request of:

CLAIMANT

vs

EASTERN LOS ANGELES
REGIONAL CENTER,

Service Agency.

OAH No. 2018120863

DECISION

Jennifer M. Russell, Administrative Law Judge with the Office of Administrative Hearings, heard this matter in Los Angeles, California on February 4, 2019. Jacob Romero, Fair Hearing Coordinator, represented Eastern Los Regional Center (ELARC or service agency). Claimant's authorized representative, Mother, represented Claimant, who was not present at the hearing.¹

Testimonial and documentary evidence was received, the case was argued, and the matter was submitted for decision on February 4, 2019. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

¹ To preserve confidentiality, Claimant and Mother are not identified by name. Mother received Spanish language interpretation services at the hearing.

ISSUES

1. Whether the service agency may reduce Claimant's in-home respite care services hours from 24 hours per month to 10 hours per month?
2. Whether the service agency should grant Claimant's request to increase his in-home respite care service hours to 92 hours per month.

FACTUAL FINDINGS

1. Claimant is a 19-year-old male consumer of ELARC due to his qualifying diagnosis of Autism Spectrum Disorder. Claimant's most recent Individual Program Plan (IPP), which is dated November 26, 2018, documents Claimant's residence with Mother and support he receives from his father, his good general health notwithstanding a diagnosis for Blepharitis for which he has been prescribed an ointment, his independent self-care, his social interactions within his family and with close friends, and his attendance at college. (Exh. 6.) Claimant's IPP variously notes that there are "no major behavioral concerns," "no aggression either verbal or physical," no "tantrum like behaviors," and "no self-harm," but that Claimant "will be irritable occasionally and have disagreements with parents." (*Id.* at p. 4.)
2. The IPP provides that "ELARC will fund 24 hrs of respite for 11/2018-12/2018 and then fund 10 hours of respite per month effective 1/1/19 to 9/30/19. This will be reviewed on an annual basis, as per ELARC respite policy." (*Id.* at p. 7.)²

² The IPP additionally contains a list of the generic services Claimant receives. Those generic services include supplemental social security income (SSI) benefits in the amount of \$818 per month, 227 hours of in-home supportive services (IHSS) per month, and 10 hours of personal assistant services per month.

3. ELARC's *In Home Respite Services Purchase of Service Policy*, dated April 25, 2018, defines in-home respite services and articulates criteria for consideration of in-home respite services consistent with Welfare and Institutions Code sections 4686.5 and 4690.2³ as follows:

I. DEFINITION:

(1) IN-HOME RESPITE

In-home respite service means intermittent or regularly scheduled temporary non-medical care and supervision provided in the individual's home. The individual must reside with a family member to be eligible for respite services. . . .

"Family member" means an individual who:

- Has the person with developmental disabilities residing with him or her.
- Is responsible for the 24-care and supervision of the person.
- Is not a licensed or certified residential care facility or foster family home receiving funds from any public agency or regional center for the care and supervision provided. Notwithstanding this provision, a relative who receives foster care funds shall not be precluded from receiving respite.

The in-home respite services are intended to:

- Assist family members in maintaining the consumer at home[.]

³ Welfare and Institutions Code sections 4686.5 and 4690.2 are set forth in Legal Conclusions 3 and 4.

- Provide appropriate care and supervision to ensure the individual's safety in the absence of family members. (Absence is defined **not** by physical presence but by relief of direct care and supervision of the individual.)
- Relieve family members from the constantly demanding responsibility of caring for the individual.
- Attend to the individual's basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usually daily routines which would ordinarily be performed by family members.

[¶ . . . ¶]

II. CRITERIA:

In-home respite services are considered when:

An individual's needs are beyond the support of family, friends, natural supports and community resources and when the in-home respite service is identified as needed on a person's Individual Program Plan/Individual Family Service Plan[.] [¶ . . . ¶]

III. AMOUNT OF SERVICE:

The service coordinator shall use the Family Respite Needs Assessment Guideline to determine the appropriate amount of respite hours.

ELARC may grant an exception if it is demonstrated that 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 The request may require additional documentation, such as an updated Respite Needs Assessment, a behavioral assessment, a clinical review and/or medical assessment depending on situation in order to substantiate the need. In all case, the planning team shall approve the request. These hours must be reviewed and re-authorized on a quarterly to semi-annual basis.

The service coordinator will remind the family/consumer that the 90 hours of respite per quarter has been lifted and that they may request an exception for more hours of respite if they disagree with the hours offered by the regional center as a result of completing the respite assessment guideline. The family/consumer can request the exception directly from the service coordinator or provide a written request for exception. Should the regional center not grant the exception, family/consumer may file for fair hearing.

IV. ALTERNATIVE FUNDING RESOURCES:

Generic services and natural supports (extended family, friends and co-ops) must be explored and secured prior to

ELARC's purchase of in-home respite services. Generic or community resources include but are not limited to:

- Private insurance
- Medi-Cal benefits
- Schools (may be considered a form of respite for a non-working parent)
- ELARC will only consider IHSS a generic resource when the IHSS meets the respite needs and when agree to in the IPP/IFSP by the planning team. . . .
- Natural Supports

V. PROCESS FOR PURCHASE OF SERVICE APPROVAL

- When the family and/or individual requests in-home respite services, the service coordinator will discuss natural supports and inform them of generic and community resources. Services which are already being provided or are planned can count as a form of respite for the family member(s). A generic resource such as camp & extended school year or a vendored resources such as community integration services (CIT), Independent Living Services (ILS) or any other form of service that relieves the parent(s) of direct care responsibility can meet the need. Exploration of these resources must be pursued by the service coordinator and/or the family.
- In-home respite service must be identified on the ISFP/IPP[.]

(Exh. 3 at pp. 1-4; Bold in original.)

4. ELARC's *Family Respite Needs Assessment Guideline (Assessment Guideline)* reiterates that "Respite is not intended to provide for all supervised care needs of the family. It is a supplement to the family's responsibility for care." (*Id.* at p. 5.) The *Assessment Guideline* assigns certain numerical value to represent an individual consumer's skills or functioning level in several domains consisting of adaptive skills,

mobility, day program attendance, medical needs, behavioral needs, and family situation. (*Id.* at pp. 5-8.) For example, a numerical value 4 in the behavioral needs domain means the “[i]ndividual displays some behavioral excesses, may be hyperactive or irritable, but not aggressive or destructive of property, as appropriate for age.” (*Id.* at p. 7.) A numerical value of 4 in the family situation domain means the “[i]ndividual is a member of a one-parent family and they are the only person with a developmental disability in a home.” (*Id.* at p. 8.)

5. Concurrently with the preparation of Claimant’s most recent IPP, his service coordinator employed the *Assessment Guideline* to assigned the following numerical values to adaptive skills, mobility, day program attendance, medical needs, behavioral needs and family situation domains as they pertain to Claimant:

	Values from Guideline
Adaptive Skills	0
Mobility	0
Day Program	1
Medical Needs	1 ⁴
Behavioral Needs	4
Family Situation	4
SUM VALUE:	10

(Exh. 7 at p, 10.)

6. At the hearing, Claimant’s service coordinator explained the numerical values she assigned to the various domains. She assigned zero to adaptive skills domain

⁴ The instructions provide, “A value of 1-10 requires an explanation of need,” and the service coordinator’s note states, “Eye condition requires occasional medication and consults with MD as needed.” (Exh. 7 at p. 10.)

because "the family reported [Claimant] was independent." She assigned zero to the mobility domain because "the family did not report any limitations or need for adaptive equipment." She assigned one to the day program domain because "the family mentioned that [Claimant] was out 11 to 20 hours per week." She assigned one to the medical needs domain because "in general [Claimant] is in a healthy condition but he has an eye condition." She assigned four to the behavioral needs domain because "the family indicated that at times [Claimant] is irritable, but there are no self-injurious behaviors." And she assigned four to the family situation domain because Mother lives with Claimant and "other family members are at other locations."

7. Then, following the instructions accompanying the *Assessment Guideline*, the service coordinator deducted one point for the "number of IHSS Hours that meet Respite Need" and one point for "Personal Attendant Hours" or a total of two points from the sum value of 10 to derive a total value of eight. The *Assessment Guideline* provides that a total value between six and 10 warrants "up to 10 hours per month" of in-home respite services. (Exh. 7 at 11.) It is based on this assessment with its computations that Claimant's IPP provides for a reduction of Claimant's in-home respite care hours from 24 hours to 10 hours per month. No testimony or documentary evidence was offered to explain or establish the reason for the 24 hours of in-home respite care service provided for Claimant.

8. By Notice of Proposed Action letter dated November 30, 2018, ELARC formally notified Claimant that "respite services provided by Cordova Consulting will be reduced, effective 1/1/19. On December 12, 2018, on behalf of Claimant, Mother filed a Fair Hearing Request objecting to the reduction and requesting the service agency to provide the maximum hours of in-home respite services. Thereafter, these proceedings ensued.

9. Mother testified at the hearing that Claimant “has a record of needing help even though he denies it.” Mother noted Claimant’s difficulty acknowledging his autism disorder and his refusal to participate in therapies offered through his school district. She testified that Claimant has difficulties interacting with her and with others. She testified that Claimant has experienced language delays and that he has difficulties with speech and non-verbal behaviors. She asserted that Claimant has narrow academic interests, but that he does well academically due to his competitiveness. At the same time, she maintained Claimant is unable to remember complex requests and that Claimant is unable to focus on tasks,

10. Mother offered a December 13, 2017 decision in a child disability determination hearing before the Social Security Administration (SSA) Office of Disability Adjudication and Review. That SSA decision finds Claimant medically disabled as a 15-year old pursuant to section 1614(a)(3)(C) of the Social Security Act,⁵ and consequently eligible for supplemental security income. The eligibility criteria for SSI

⁵ Section 1614, subdivision (a)(3)(A) of the Social Security Act, 42 U.S.C. § 1382c, provides: “Except as provided in subparagraph (C), an individual shall be considered disabled for the purpose of this title if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” Subparagraph (C)(i) provides: An individual under the age of 18 shall be considered disabled for the purposes of this title if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

recipients such as Claimant require a finding of severe functional impairment in accordance with the Social Security Act's standard for disability. The administrative law judge in that SSA decision accorded "great weight" to a licensed board certified psychologist's opinion that manifestations of Claimant's autism include limitations attending to and completing tasks and interacting with and relating to others. The administrative law judge in the SSA decision noted that medical evidence established Claimant's difficulties with respect to his social behavior and that the psychologist opined that Claimant's difficulties are attributable to his narrow range of academic interests. (See Exh. 13.) Notably, the psychologist opined that there were no limitations with respect to Claimant's self-care and mobility.

11. At the hearing, Mother additionally reviewed the several domains requiring evaluation as set forth in the *Assessment Guideline*. In general, Mother maintains that the evaluation criteria accompanying each of the several domains "do not coincide with the needs of my son." With respect to the adaptive skills domain, Mother asserted that respondent needs directions and reminders to eat and to attend to his personal hygiene. Regarding the mobility domain, Mother asserted that "mobility for my son means using public transportation, driving safely without getting disoriented or less safely to movies or social events." In the day program domain, she testified that Claimant "goes to school seven hours and 40 minutes" and that he "needs transportation and support outside the classroom." Mother maintains that Claimant has medical needs consisting of "treatment three times daily" for his eyes and "being sexually responsible." In the behavior domain, Mother reports that Claimant "is at a highly functioning level," which according to her makes Claimant vulnerable to cybercrimes without realization that he might be in danger when he is using a computer. Discussing the family support domain, Mother maintains, "My situation requires support because I'm head of the household—the only parent caring for

[Claimant]. She explained that her other son, who has been diagnosed with a learning disability, depression, anxiety, and emotional disturbance, previously set fire to the family residence, was incarcerated for a period of time, and is now expected, upon his release, to resume living with her and Claimant. According to Mother, Claimant “can’t stand seeing his brother” and Claimant becomes upset—“his behavior rise”—when confronted with his brother’s return.

12. Mother offered a January 30, 2019 letter in which a neighbor recalls seeing Claimant awake as late as 1:30 in the morning, with the lights on his room and hearing him play the piano and music. Mother claimed that she has to constantly watch Claimant because he also wakes to ask for food at odd hours.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act (Lanterman Act), which mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream of life in the community.” (Welf. & Inst. Code, § 4501.) Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (*Id.* at § 4620 et seq.) Regional centers are responsible for taking into account individual consumer needs and preferences, and for ensuring service cost effectiveness. (*Id.* at §§ 4646, 4646.5, 4647, and 4648.)

2. The services and supports to be funded for a consumer are determined through the individualized program planning process, which involves collaboration with the consumer and service agency representatives. Services and supports for persons with developmental disabilities are defined as “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 rehabilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives.” (*Id.* at § 4512, subd. (b).) Services and supports include in-home respite services. (*Id.* at §§ 4686.5 and 4690.2.)

3. Section 4686.5 provides for the purchase of up to 90 hours of in-home respite services in a quarter (30 hours each month) when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities. Section 4690.2, subdivision (a) provides that “‘In-home respite services’ means intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client’s home, for a regional center client who resides with a family member.”

4. In-home respite care service is designed to achieve the following objectives set forth in section 4690.2, subdivision (a):

(1) Assist family members in maintaining the client at home.

(2) Provide appropriate care and supervision in maintaining the client at home.

(3) Relieve family members from the constantly demanding responsibility of caring for the clients.

(4) Attend to the client’s basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by family members.

5. When making determinations to acquire services and supports for its consumers the service agency must conform to its purchase of service guidelines. (*Id.* at § 4646.4, subd. (a)(1).) Pursuant to the Lanterman Act, the Department of Developmental Disability reviews the guidelines “to ensure compliance with statute and regulation” prior to promulgation of the guidelines. (*Id.* at § 4434, subd. (d).) The guidelines are deserving of deference because they reflect the service agency expertise and knowledge. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-15.) Importantly, guidelines the service agency promulgates must account for its consumers’ individual needs when making eligibility determinations for particular services and supports. (See *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

6. The service agency has the burden of establishing by a preponderance of evidence that a reduction of Claimant’s in-home respite service hours from 24 hours per month to 10 hours per month is warranted. (Evid. Code, §§ 115 (“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”) and 500 (“a party has the burden of proof as to each fact the existence of which is essential to the claim for relief or defense that he is asserting.”).)

7. Claimant has the burden of establishing by a preponderance of evidence that he has met the eligibility criteria for an increase of his in-home respite service hours from 24 hours per month to the maximum allowable hours per month. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits); *Greatoroex v. Board of Admin.* (1979) 91 Cal. App.3d 54, 57 [retirement benefits]).

8. a. It is not established by a preponderance of evidence that Claimant presents with limitations that interfere with his ability to function in domain-related activities such that members of Claimant’s family are providing him with constant and

demanding care and supervision exceeding the care and supervision of an individual of the same age without developmental disabilities.

b. The value number—zero—that the service agency assigned Claimant in the adaptive skills and mobility domains using the *Assessment Guidelines* is supported by Claimant's level of functioning. In the adaptive skills domain, Claimant may need reminders from Mother, but Claimant is capable of self-care, including toileting, grooming, dressing, and eating. Claimant may need assistance with transportation services as Mother asserts, but Claimant is mobile. Claimant is capable of independent movement and he does not require a walker, crutches, wheelchair, or other adaptive equipment to achieve mobility. These findings are consistent with the expert opinion in the SSA decision that Claimant does not present with limitations in self-care and mobility.

c. Mother's testimony that Claimant "goes to school seven hours and 40 minutes" conflicts with the service agency's understanding that Claimant "was out 11 to 20 hours per week." It is unclear whether Mother was testifying about Claimant's daily attendance or Claimant's weekly attendance at school; however, given the Lanterman Act's regard for the needs of the consumer, a generous interpretation of Mother's testimony is that Claimant attends school at least seven hours per week, and in which case the value number the service agency assigned to the day program attendance domain is increased from a value number of one to a value number of three. According to the *Assessment Guideline*, a value number of three is appropriate for an individual attending school or a day program less than 10 hours per week.

d. But for a diagnosis for Blepharitis, an eye condition characterized by chronic inflammation of the eyelid and scaly lashes, and for which he has a prescription for an ointment, Claimant is in good health. The value number—one—that the service agency assigned Claimant in the medical needs domain using the *Assessment Guideline*

is supported by Claimant's level of wellness set forth in his IPP. The fact that Claimant may have to apply his ointment several times daily, as Mother testified, does not warrant assigning another value number to the medical needs domain under the *Assessment Guideline*.

e. It is undisputed that on occasion Claimant displays irritability. The service agency determined that such behavior warranted a value number of four under the *Assessment Guideline*. Evidence offered at the hearing establishes that Claimant additionally displays night-time wakefulness which requires Mother to render care during typical sleeping hours. Under the *Assessment Guideline* Claimant's display of irritability and wakefulness fall in the category of moderate behavioral excesses and warrants a value number of eight when determining eligibility for in-home respite service hours. The value number the service agency assigned to the behavioral needs domain is increased from a value number of four to a value number of eight.

f. The service agency has recognized, consistent with Mother's testimony, that Claimant is a member of a one-parent family. And since Claimant is the only person with a developmental disability residing in the home (the evidence does not establish that Claimant's returning sibling presents with a qualifying disabling condition under the Lanterman Act), the service agency appropriately assigned a value number of four to the family situation domain in accordance with the *Assessment Guideline*. It is reasonable to assume that the service agency's recognition of the composition of the household in which Claimant resides accounts for those instances when Claimant's night-time wakefulness may require Mother's supervision. No evidence establishing that Mother, the one parent in the household in which Claimant resides, is permanently disabled and is unable to work or has a chronic major medical condition which directly interferes with her ability to meet Claimant's needs was presented at the hearing. Any such evidence would have warranted a higher value number under the *Assessment Guideline*.

g. To summarize, the value number the service agency assigned to the adaptive skills domain—zero; the mobility domain—zero; the medical needs domain—one; and the family situation domain—four when analyzing Claimant’s need for in-home respite service is unchanged. In the day program domain, the value number the service agency assigned is increased from one to three. In the behavioral needs domain, the number value the service agency assigned is increased from four to eight. Accordingly, the revised sum value is 16. After deducting two points for generic resources consideration—IHSS hours and personal attendant hours—the aggregate value number of 14 warrants granting Claimant up to 15 hours per month of in-home respite services in accordance with the service agency’s *Guideline*.

9. ELARC has established by a preponderance of evidence that cause exists to reduce Claimant’s 24 hours per month of in-home respite services by reason of Factual Findings 1 through 12 and Legal Conclusions 1 through 5 and 8.

10. Claimant has not established by a preponderance of evidence that cause exists to increase his 24 hours per month of in-home respite services by reason of Factual Findings 1 through 12 and Legal Conclusions 1 through 5 and 8.

ORDER

1. Claimant’s appeal is denied.
2. Eastern Los Angeles Regional Center may reduce Claimant’s in-home respite service hours to 15 hours per month.

Dated:

JENNIFER M. RUSSELL

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is a final administrative decision. This decision binds both parties. Either party may appeal this decision to a court of competent jurisdiction within 90 days.