

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

In the Matter of the Fair Hearing Requests of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL CENTER, Service Agency.

OAH No. 2020060397, OAH No. 2020060399,

and OAH No. 2020070039

DECISION

David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard these consolidated matters by videoconference on July 13 and 30, 2020.

Jacob Romero, Fair Hearing Coordinator, represented Eastern Los Angeles Regional Center (ELARC). Claimant was represented by his mother. Titles are used to protect confidentiality.

Oral and documentary evidence was received. The record was held open until August 14, 2020, for receipt of additional materials from both parties. ELARC submitted the following documents: a letter brief dated August 14, 2020, marked for

identification as exhibit RC27; a chronological list of the emails included in exhibits RC13 through RC16 and RC18 through RC25, as requested by the ALJ, received in evidence as exhibit RC28; and a translation of exhibit RC25, as requested by the ALJ, to be added to exhibit RC25. Claimant did not submit any additional documents. The record closed and the matter was submitted for decision on August 14, 2020.

ISSUES PRESENTED

1. Claimant wants an increase in hours of respite services.
2. Claimant wants an increase in hours of personal assistance services.
3. Claimant wants reimbursement of all costs mother paid for personal assistance services.

EVIDENCE RELIED UPON

ELARC's exhibits RC1 to RC28; Claimant's exhibits 1 to 20; testimony of Andrea Macias (service coordinator), Judy Perez (supervisor), Elizabeth Gomez (supporter for mother), and Claimant's mother.

NOTES ON EXHIBITS

Both parties used numbers for their exhibits. To avoid confusion, the ALJ directed that ELARC's exhibits would have the letters "RC" added before the exhibit numbers. ELARC and mother submitted documents before the first day of hearing.

ELARC submitted further documents (exhibits RC23 to RC26) before the second day of hearing. Unusual aspects of some of the exhibits are noted below.

ELARC exhibits: Exhibit RC16 is described in the Exhibit List submitted by ELARC as "Email, Unit Supervisor, Claimant Parent and Advocate—03/19/2020 – 04/02/2020." The actual exhibit RC16 is different; it has 11 numbered pages, comprised of six emails between Elizabeth Gomez, ELARC Executive Director Gloria Wong, and Judy Perez, from 5/6/20 to 5/18/20. Further, exhibit RC23 is comprised of pages to be added to exhibit RC16, numbered pages 12-18. The pages were not technically "added"; rather, they are a continuation of exhibit RC16, and were designated exhibit number RC23 by ELARC.

Claimant's exhibits: Claimant submitted several groups of documents, some that had pre-assigned exhibit numbers and some that did not. The first group of Claimant's documents begins with a cover page indicating the documents relate to "P.A.," meaning the issue relating to hours for personal assistance (PA). The next page is a Table of Contents, describing exhibits 1 through 16. Exhibit 9 is the first page of a letter from Elizabeth Gomez. The second page is exhibit 13. Exhibit 16 is titled "Emails," and includes three pages of emails. The first is to Andrea Macias and has no date. It was sent from Claimant's mother. The second and third emails are from mother to Andrea Macias, related to an IPP (Individual Program Plan), and are dated 3/27/20 and 3/31/20, respectively.

Claimant's second group of documents is 15 pages of emails from 4/1/20 to 5/20/20. Thirteen emails are between mother and Andrea Macias. The last two emails are between mother and Judy Perez. This group of documents is received in evidence as exhibit 17.

Claimant's third group of documents is six pages of emails: 5/20/20, 2:30 pm, Judy Perez to Andrea Macias; 5/20/20, 2:14 pm, mother to Andrea Macias; 6/4/20, 9:24 pm, mother to Judy Perez; 6/4/20, 2:15 pm, mother to Andrea Macias, Judy Perez; 6/4/20, 9:28 pm, mother to Andrea Macias, Judy Perez; 6/5/20, 1:46, mother to Judy Perez; 6/5/20, 1:03, Judy Perez to mother; 6/5/20, 11:39, mother to Judy Perez; and 6/13/20, 12:39 pm, mother to Andrea Macias, Judy Perez.¹ This group of documents is received in evidence as exhibit 18.

Claimant's fourth group of documents begins with a cover page indicating the documents relate to respite. It includes the fair hearing request and Notice of Proposed Action relating to the issue of respite. This group of documents is received in evidence as exhibit 19.

Claimant's fifth group of documents begins with a cover page indicating the documents relate to "P.A. reimbursement." It includes the fair hearing request and Notice of Proposed Action relating to this issue. This group of documents is received in evidence as exhibit 20.

At the beginning of the second day of hearing, the ALJ addressed new exhibits added by ELARC (exhibits RC23 to RC26). Mother objected that she was not aware documents could be added. ELARC exhibits RC23 to RC25 were more emails from the relevant time periods, as identified on an updated exhibit list. Exhibit RC26 was a letter from the Department of Developmental Services dated July 28, 2020. Mother requested the opportunity to add documents to the record and submit a closing

¹ Dates and times are included to further identify exhibits as needed, and to sometimes assist the ALJ in identifying duplicate exhibits.

argument. The ALJ ordered that the record would be held open to allow mother to submit additional documents and for closing arguments by both parties. The objections were overruled.

Translations: Most of the exhibits are in Spanish. Some were translated during the hearing and on the record. For others, translations were obtained by OAH, and will be added to each of the exhibits that have been translated. ELARC provided translation for exhibit RC25, which will be added to the exhibit.

SUMMARY

Claimant's requests in these three consolidated matters relate to the change in circumstances caused by the COVID-19 pandemic and the move of his education program from school to home, Claimant's related behaviors and needs, and mother's needs. Mother requested increased hours of PA services. ELARC provided more hours of PA, but less than the amount requested. Mother requested increased respite. ELARC did not agree to more respite hours, based on its agreement to provide additional PA hours. Due to delays in processing the additional hours of PA, mother paid out-of-pocket for some PA, at a pay rate above the rate approved by ELARC, and seeks reimbursement. ELARC does not agree to pay the hourly rate paid by mother. Rather than use a cumbersome process to reimburse mother directly, ELARC has approved additional hours of PA and paid the vendor, Accredited. ELARC then instructed mother to seek refunds from Accredited's workers. Mother claims there are still unreimbursed PA expenses for March and April 2020. The evidence was not sufficient to justify increased respite or PA, or additional reimbursement.

FACTUAL FINDINGS

Jurisdictional matters

1. Claimant is a 15-year-old male consumer of the Service Agency who lives in the family home with his mother. Claimant's father is not present and provides no financial or other support. An older brother no longer lives at home. There are no other family members who assist mother or Claimant. Claimant receives services under the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 et. seq., referred to as the Lanterman Act)², based on eligible conditions of autism, seizure disorder, and unspecified intellectual disability. He is also diagnosed with Lennox-Gestaut syndrome, a type of epilepsy often characterized by different types, severity, and frequency of seizures, behavior problems, and cognitive problems.

2. As noted in Claimant's IPP dated March 26 and April 7, 2020, he receives numerous services, including PA through vendor Accredited, 39 hours per month, and respite through Accredited, 41 hours per month, both approved from April 2020 to February 2021.

3. As discussed in more detail below, the COVID-19 pandemic closed Claimant's school and shifted Claimant to on-line learning, which increased his need for services. Mother requested to increase respite to 80 hours per month, and to increase PA to 170 hours per month.

² All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

4. On May 19, 2020, ELARC sent two Notices of Proposed Action (NOPA). ELARC denied any increase in respite hours, and agreed to increase PA hours to 152 per month, to cover the five hours per day that Claimant would have been at school.

5. On June 1, 2020, mother filed fair hearing requests seeking an increase of 39 respite hours per month (to a total of 80 hours), and seeking an increase in PA hours to eight per school day, or 170 hours per month.

6. Due to delays in obtaining and forwarding approval for increased PA hours to Accredited, and disagreement over the amount of PA hours for which ELARC would pay, mother paid the worker out of pocket starting March 16, 2020, at the rate of \$15 per hour. Mother seeks reimbursement for various hours for various days. ELARC did not agree to all of the requested hours, and would not pay more than \$12 per hour.

7. On June 23, 2020, mother filed a fair hearing request seeking further reimbursement for her payments to workers who provided PA.

IPP and IPP addendum

8. Claimant's IPP meeting was by telephone on March 26, 2020, and the IPP document is dated April 7, 2020 (exhibits RC11, RC12). It was not sent to mother for several weeks. Mother did not sign or return it due to changes she wanted and other disagreements. The IPP provides relevant information, augmented by testimony. Claimant is active and enjoys activities such as running, skimming through books, watching trains pass by the home, watching television, and listening to music. Mother is his caretaker, and encourages him, but does not believe he understands sometimes. Mother previously received 30 hours per month of respite. In 2018, mother made a request for increased hours. An review was performed, and ELARC agreed to provide

39 hours of respite per month and 41 hours per month of PA, as explained in a Decision after an administrative hearing in April 2018.³ Ms. Macias testified about ELARC's policy for determining hours of respite (exhibit RC8). The policy includes various factors to be considered to determine the proper level of respite hours, such as Claimant's age, adaptive skills, other abilities, and mobility, and the level of intensity of need. If an extraordinary level of respite is requested, various assessments should be performed, including behavioral, medical, and clinical review. Upon review, the clinical team determined to offer 39 hours per month of respite and 41 hours per month of PA. Mother requested more. As noted in the 2018 Decision, the ALJ determined that mother had not submitted sufficient information to justify any increase beyond these levels. An administrative hearing in 2014 determined that mother could utilize 21 days of in-home respite in lieu of out-of-home respite. Mother uses these days over the course of a year. Claimant communicates with two-to-three-word utterances and relies upon mother for all personal hygiene needs. Due to his seizures, he has a helmet. Claimant has seizures often, sometimes 15 strong seizures per day and 200 at night, as reported by mother. Medications help to some extent, but mother must monitor him, particularly at night. Due to the risk of seizures, transportation to medical and dental appointments, and to music therapy, was awarded after an administrative hearing in May 2015. The music therapy was awarded to Claimant after an administrative hearing in October 2011. He has Croup cough, a weak immune system, and gets sick often.

³ The 2018 Decision (exhibit RC9) refers to 38 respite hours in Factual Findings 11 and 12, and 39 hours in Legal Conclusion 9. The IPP references 39 hours per month of respite due to the 2018 Decision.

Numerous challenging behavioral issues are reported, and mother stated that, as Claimant gets bigger and stronger, she needs more assistance.

9. Respondent's behaviors, both from the IPP and mother's testimony, include that he runs around the house and the yard, wanders, is resistive, and displays tantrums, whining, frustration, and aggressive behaviors. He may pull other peoples' hair or poke them. Claimant can become destructive. When his clothes become wet, even from a drop of water, he may remove them. Mother is also dealing with new behaviors as Claimant reaches puberty. The IPP reflects that there is an active authorization for behavioral services, and that mother requested three different vendors since August 2019. The IPP includes that there were issues relating to behavioral services that appear largely due to mother's lack of cooperation. However, mother requested corrections in a May 26, 2020 email (exhibit RC15) to reflect that many of the problems were more related to vendors' failure to provide correct and timely services. Mother requested a new assessment at the 2020 IPP so that services can address Claimant's current behaviors.

10. Claimant is not able to be alone, as he has no awareness of potential dangers. Due to an unstable gait, he is prone to falling. Claimant has food allergies and specific feeding requirements, including types of food, and food must be chopped in small pieces so he won't overfill his mouth. Claimant must be supervised while being fed in the event of a seizure.

11. The IPP reflects a history of seizures, medical attention, and medication. Some medication has reduced the number of seizures, but the seizures appear to mother to be stronger. Mother reports up to six seizures per night previously, but for 2020 Claimant may have 200 seizures at night and up to 15 strong seizures a day. She

has an emergency medication if a seizure lasts more than three to five minutes. Mother's testimony was consistent with the IPP.

12. Mother submitted a letter dated July 10, 2020, from Claimant's physician, Dr. Jason Lerner (exhibit 11). Dr. Lerner notes that Claimant is diagnosed with Lennox-Gastaut Syndrome and intractable epilepsy, characterized by multiple types of seizures which are unable to be completely controlled. "[Claimant] currently experiences tonic seizures occurring two to three times during the day and night and lasting one to two minutes each. He also has a cluster of epileptic spasms every day in the morning, lasting 20-40 minutes." (*Ibid.*) Mother added to exhibit 11 a four-page after-visit summary of Claimant's visit with Dr. Lerner on November 14, 2019, which covers some changes in medications to address the epilepsy, and references a surgical procedure or electronic nerve or brain stimulation procedures if medication does not work. According to the summary, Dr. Lerner addressed a complaint of headaches by recommending Ibuprofen and keeping a log of headaches, seizures, and related changes in behavior or activity, and a follow up in three months.

13. In addition to the services noted above, ELARC provides translation for the IPP, and will obtain assessments for ABA and socialization services, and adaptive skills training. Mother receives 268 hours per month of In-Home Support Services (IHSS) from the county, to care for and provide services to Claimant in listed categories (for example, 7 hours for feeding, 3 hours 20 minutes for assistance in dressing, 168 hours for protective supervision).

14. Claimant also receives special education services from his school district. According to the IPP and an addendum dated April 6, 2020 (exhibits RC11, RC17, and 3), before school closed, Claimant had attended high school Monday through Friday, from 9 am to 2 pm, based on an agreement to drop him off an hour late and pick him

up an hour early. The IPP includes that PA hours will be adjusted from April 1 to June 12, 2020, due to Covid-19 and school closures; mother previously used two hours of PA per day Monday through Friday; mother requested five additional hours per day; and ELARC denied the five, but offered three additional hours per day, Monday through Friday, explaining that the current 39 hours per month was therefore being increased by 69 hours, to 108 hours per month. This is erroneous to the extent that the prior level of PA was 41 hours per month, not 39. Respite was at 39 hours per month.

15. The IPP addendum reflects, for the period March 19 to April 1, 2020, mother was to submit "documentation from DRC [Disability Rights Center; more likely, Disability Rights California⁴] confirming she was approved for a personal assistant at 8 or 6 hours per day," and then retroactive payment would be discussed. (Exhibits RC11, RC17.) The totality of the evidence is that mother was referring to a letter from the Department of Developmental Services (DDS) (exhibit RC7), discussed below, and that Ms. Macias mistakenly referenced DRC.

16. Mother requested changes and corrections to the first version of the IPP in her email dated May 26, 2020 (exhibit RC15). The IPP in evidence did not reflect mother's suggested changes. Mother did not sign the IPP. Mother signed the addendum April 20, 2020.

Other evidence

17. The evidence includes numerous emails; however, only some are noted below. Mother's first email in evidence was sent Thursday, March 19, 2020, at 4:56 pm.

⁴ Ms. Macias testified mother told her DRC was Disability Rights Center. However, mother presented documents from Disability Rights California, exhibit 7.

She requests ELARC provide PA as an emergency, due to school closure because of Covid-19. Her request did not include a specified number of hours. Ms. Macias responded March 23, 2020, requesting information including the IHSS award letter (which mother had not previously provided) for the number of hours granted, school district services provided in the home, and any generic resources that were exhausted, such as a request for additional hours to IHSS. On April 2, 2020, Ms. Macias requested further information about the manner in which mother was using IHSS hours as opposed to the manner in which they were awarded. Ms. Macias asked how many added hours of PA were being requested, and whether existing PA and respite hours could be used during weekdays to meet Claimant's and mother's needs. Ms. Macias noted when the information was received, she could submit the request to her supervisor. Mother replied the same day, and referenced the IPP meeting by telephone on March 26, 2020. Mother explained she requests eight hours of PA per day. She has paid someone to provide eight hours per day of PA since March 19, has been paying out-of-pocket, and will ask ELARC for reimbursement. Mother stated the 41 hours of respite are used on the weekends, eight days each month, five hours each day. Mother uses 39 hours of PA two hours per day for 20 weekdays each month. (Again, the number of respite hours and PA hours are switched.) She uses the IHSS hours at night due to Claimant's seizures, to provide medication and supervision when he does not sleep, and to clean up after him. Mother needs more hours for household activities, phone calls and conferences, and for sleep. Mother reminds Ms. Macias that this is an emergency, not a traditional process.

18. Ms. Macias testified that she was delayed in processing the requests because her supervisor was unavailable, due to a death in the family. Mother emailed again on April 9, with a reminder that the IPP included added PA for the month of

April 2020, but the school informed her it would be closed through the end of the school year in June. Therefore, emergency PA should also last that long.

19. Ms. Macias's email on April 10, 2020, noted the addendum to the IPP (in English) was sent and, if signed, would add 69 hours per month of PA. Mother replied that she did not understand English, but she understood the added PA hours were for April only, with no reference to later months or months after school ends. She references the other services and assessments in the IPP, and she will sign only because time is being lost and it is an emergency. Mother's signature is dated April 20, 2020, with the note it was only for the added 69 hours of PA.

20. Ms. Macias testified that she was waiting for the "DRC" documentation from mother indicating that eight hours per day of PA had been approved. She needed the documentation to address mother's request for PA hours from March 19 to April 1, 2020. Later in the hearing it became clear that mother was not referring to DRC or to any document specifically referring to a number of additional hours. Rather, she provided the letter from DDS that she believed allowed for flexibility and increased consumer control over how and by whom services can be provided due to the pandemic and Executive Orders issued by Governor Newsome. The DDS letter (exhibits RC7, 8) refers to increased consumer control of respite and PA services under "participant-directed" services. Mother, with support from Elizabeth Gomez, contends that this applies to Claimant. Mrs. Gomez testified that she was so informed by DDS personnel. This contention is not supported by the law, as discussed in more detail in the Legal Conclusions below.

21. On April 21, 2020, Ms. Macias and mother exchanged emails. Added PA services were approved for April, May, and June, other services were addressed, and mother asked for the authorization to be sent to the vendor so the PA worker could

get paid for the 69 added hours for April. Ms. Macias was candid in her testimony that other consumers' cases were also taking up her time, and she was reminded by mother's email on May 1, 2020, to send the approved PA authorization to the vendor.

22. Mother emailed Ms. Macias on May 4, 2020, that Accredited received added authorization for May, but not April. Emails were exchanged relating to subjects including finalizing the IPP, filling in required forms, and preparation of NOPA's relating to respite and PA services that mother had requested but ELARC had not approved.

23. Mother and Ms. Macias continued to exchange emails relating to numerous subjects, including reimbursement for PA services paid by mother. Mother informed Ms. Macias that she learned from Accredited that authorizations for approved PA were not all sent at the same time, and some authorizations did not cover the original number of hours and the added number of hours. Ms. Macias requested documentation from mother of the name, amounts paid, days and hours worked. This information was sent to ELARC's Community Services Department for review and approval, a different, and longer, process than for regularly authorized services. Ms. Macias first tried to get reimbursement sent directly to mother. However, she learned mother would have to be approved as a vendor. It would be faster to send to Accredited authorizations covering the approved PA hours for which mother paid out-of-pocket; Accredited would pay the worker, and the worker could reimburse mother. Mother sent some information but was told more was needed. Ms. Macias also told mother that ELARC pays \$12 per hour, not \$15 as paid by mother. Mother explained she paid the higher amount because she needed help immediately, and was afraid she would lose a trusted worker. Ms. Macias previously was unaware of that risk.

Mother agreed to reimbursement at the rate of \$12 (email June 4, 2020, in exhibit RC20.)

24. Ms. Perez and Ms. Gomez also exchanged information regarding mother's requests, the situation in general, and other subjects that are not directly relevant to the issues. These other issues are important and are not discussed here only because of the lack of direct relevance, and because the services at issue are time sensitive. In her May 18, 2020 email (exhibit RC16), mother described her customary day with Claimant, including many problems relating to his needs and the lack of services. Ms. Gomez wrote to Ms. Wong, the ELARC Executive Director. Ms. Perez replied, with 12 numbered paragraphs outlining agreements and disagreements. Ms. Gomez responded, including Claimant's quality of life was compromised due to combined effects of the pandemic and lack of services and support.

25. The NOPA for respite is dated May 19, 2020 (exhibits RC1, 1). It includes that ELARC funds 41 hours of respite per month and mother requested to add 39 hours.⁵ The reason for ELARC's denial is that, due to school closure, ELARC approved 152 hours per month of PA to cover the time that Claimant's had been in school, based on the school district's Individualized Education Plan (IEP) from October 19, 2019. Those PA hours will provide relief to mother from caretaking duties. Various Code sections were referenced as the authority for the action.

26. The NOPA for PA is dated May 19, 2020 (exhibits RC3, 20). It includes that ELARC funded 108 hours per month of PA, denied mother's request for an

⁵ Again, the 2018 Decision, and the 2020 IPP, establish that the actual number of respite hours provided by ELARC was 39 per month, not 41.

increase to 170 hours, and agreed to an increase to 152 hours (that is, adding 44 hours per month). The increase to 152 hours is based on adding five hours for each day that Claimant previously attended school.

27. In her Fair Hearing Requests (Exhibits RC2, RC4, 1, 19), mother notes using school hours is not relevant because she requested emergency help because Claimant is home 24 hours per day due the pandemic. Mother must take care of Claimant, who has lots of problems including epileptic seizures day and night. She requests 39 more hours of respite for the weekends.

28. The NOPA for reimbursement is dated June 11, 2020 (exhibits RC5, 20). It references mother's request of March 19, 2020; ELARC funded PA of 75 hours for March 2020 and 108 hours for April 2020, based on three hours per day; as of May 8, ELARC agreed to five hours per weekday. Mother paid out-of-pocket for six hours per day, to cover an eight-hour day, since school closed on March 16, 2020. The one receipt mother provided, exhibit RC18, indicates that the worker received \$720 for 48 hours in March, and \$945 for 63 hours in April, at the rate of \$15 per hour. ELARC agreed to five hours per day, equal to the hours Claimant usually was in school. The payment would be \$12 per hour. Any additional hours per day, or higher pay rate, was denied.

29. The Fair Hearing Request for reimbursement is not dated (Exhibits RC6, 20). Mother notes that she paid for six hours per day when the pandemic started and wants ELARC to reimburse her for everything she paid out-of-pocket, but ELARC only offered to pay part.

30. Many more emails were exchanged through May and June 2020. Ms. Perez had a lengthy phone conference with mother and Ms. Gomez on May 8, 2020.

Mother made her request for added respite. Mother spoke of her own medical problems. For the administrative hearing, mother submitted exhibit 10, medical documents dated June 30 and July 7, 2020, documenting that she suffers from diabetes, hypertension, hyperlipidemia, sleep apnea, major depressive disorder, and generalized anxiety disorder. She has a referral to a spine surgeon and a prescription for physical therapy for back and neck conditions. There was no evidence that this type of specific information had been previously provided to ELARC.

31. In the telephone call and emails, mother provided information on the number of daily PA hours for which she paid, and relevant time frames. On June 5, 2020, ELARC agreed to an increase to five additional PA hours per day, retroactive to March 16, 2020. The effect was to provide seven hours per day of PA paid by ELARC, increased from two hours per school day before the school closed. On June 17, 2020, Ms. Macias communicated with Accredited about reimbursement. Accredited confirmed that once there was access to the invoices, it could bill for the services, which were provided by the family's preferred worker.

32. The process of getting authorizations for PA services from ELARC to Accredited was not smooth. Among the issues is ELARC considers the PA hours as falling into different categories, one for the initial allotment of two hours per day, and another category for the added hours which, as noted above, changed over time. Because needed information was received at different times, authorizations for May and June were provided sooner than authorizations for April. Eventually authorizations were provided to reimburse for March and beyond. Ms. Macias also stated that, due to a clerical issue, some authorizations were approved for March and May before April hours were authorized. Ultimately, as Ms. Perez testified, there was no need to reimburse mother because ELARC was able to get authorizations to Accredited to pay

the PA worker. According to Ms. Perez, the issue remained of mother's request for one additional hour per day, from seven to eight, for each school day, which ELARC denied.

33. Mother's emails refer to problems with Claimant and, at ELARC's request for more information, she noted his seizures, the effort to take him to the bathroom, assist with clean up, his diet limits and feeding issues, and her stress, lack of natural supports, and medical issues. Ms. Perez suggested the possibility of nursing respite assistance and asked for doctor's notes regarding mother's condition. Mother did not provide feedback on these issues to Ms. Perez.

34. With respect to mother's request to increase respite from 41 (actually 39) to 80 hours per month, Ms. Perez considered several factors, many that are included in ELARC's purchase of service guideline (exhibit RC8). Ms. Perez considered that ELARC also provided mother with 21 days per year of in-home in lieu of out-of-home respite, which mother had used in years past. Also, mother was the care provider for 263 hours of IHSS. The IHSS award is for a maximum of eight hours per day. Ms. Perez noted it is difficult to provide respite when mother is obligated to work that much. If there was a different care provider for some of the IHSS hours, increased respite would be considered. Mother countered that IHSS is her work and her family relies upon that income. Ms. Perez also needed updated records and information concerning Claimant's and mother's medical conditions and needs. She noted that, over the years, mother has often made statements in emails but has not provided requested supporting documents. Ms. Perez intended to send updated information for the clinical team to consider. With the limited information she had, Ms. Perez could not approve any increase in PA or respite. Although mother provided some medical information for Claimant and herself for the administrative hearing, Ms. Perez noted

that the information therein was of limited help and more medical records were needed.

35. Ms. Gomez is an experienced advocate for families with children who have developmental disabilities, including her own family. She has a grant from, and works directly with, DDS, and is on the board of DRC. In her experience, distance learning does not work for students with developmental disabilities. Mother confirmed this is true for Claimant. Ms. Gomez contends that, based on discussions with DDS, the DDS letter (see Factual Finding 20) should allow mother authority to obtain increased PA and respite. Ms. Gomez also addressed an earlier directive from DDS to no longer apply a cap on respite hours. Ms. Gomez also stated that ELARC should not have considered IHSS in the manner that it did, and stated she would submit Decisions from administrative hearings addressing the issue. Ms. Gomez urged consideration of the reality of mother's day with Claimant and lack of all the support she needs.

36. Mother testified that, after the first day of hearing, Claimant spent three days in the hospital due to seizures. Her need for the added PA hour is based on Claimant's medical condition and needs, her own medical conditions, and the lack of services from school since it closed. She must monitor Claimant's sleep, and does not sleep well herself. Mother has had four surgeries, and has compromising medical conditions. She had a recent hysterectomy and was limited in her ability to care for Claimant when he experienced seizures. Claimant cannot focus on his Zoom school classes for more than a few minutes, and this creates more work for her. Due to the pandemic, she no longer takes Claimant out of the house, and many generic resources are closed. Mother was frustrated by the amount of time it took for ELARC to work on her emergency request, as well as the numerous delays in approving and forwarding authorizations for added PA hours. Mother stated that she paid for 48 PA hours in

March but there was reimbursement for 24 hours, leaving 24 hours unpaid. She paid for 63 PA hours in April but there was reimbursement for 41 hours, leaving 22 hours unpaid. Mother testified to 23 hours, but the correct math result is 22.

37. Written statements from Sandra Anguiano (exhibit 14), a PA for eight months, and Adriano Ramirez (exhibit 15), a family friend, confirm that Claimant requires constant supervision, particularly relating to his seizures, and that mother needs help to care for him, due to Claimant's condition and due to her own medical conditions and physical limitations.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, an administrative "fair hearing" is available to determine the rights and obligations of the parties. (Section 4710.5.) Claimant requested fair hearings to appeal the Service Agency's proposed denial of funding for a greater number of hours of respite services and PA services, and a greater amount of reimbursement for PA expenses. Jurisdiction in this case was thus established. (Factual Findings 1-7.)

2. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) A consumer seeking to obtain funding for a new or additional service has the burden to demonstrate that the funding should be provided, because the party asserting a claim or making changes generally has the burden of proof in administrative proceedings. (Evid. Code, § 550, subd.(a); see, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, Claimant bears

the burden of proof regarding his requests for added respite and PA, and for retroactive payment for PA services.

3. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act 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 life of the community.” (Section 4501.) These services and supports are provided by the state’s regional centers. (Section 4620, subd. (a).) As stated by the California Supreme Court in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, the purposes of the Lanterman Act include preventing or minimalizing institutionalization, or dislocation from family and community, of developmentally disabled persons, to enable them to approximate the pattern of living of nondisabled persons, and to lead more independent and productive lives in the community.

4. Services and supports listed in section 4512, subdivision (b), include in-home respite, out-of-home respite, and personal care. Regional centers have the responsibility to develop an IPP for implementing services that take into account a consumer’s needs and are cost effective. (Sections 4646, 4646.5, 4647, and 4648.) Services and supports should be flexible and individually tailored to the consumer and family. (Section 4648.)

5. For example, section 4646, subdivision (a), states:

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 the 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.

6. The plan to develop the IPP shall include gathering information from relevant sources, including the consumer's family. The IPP must also include 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 IPP goals. (Section 4646.5, subd. (a).) Services shall conform to regional center purchase of service policies, utilize generic resources where possible, and consider a family's responsibility for providing similar services and supports for a child without disabilities. The regional center shall take into account any need for extraordinary care and services, and the need for timely access to this care. (Section 4546.4, subd. (a).)

7. The regional center must consider services available from other sources, sometimes referred to as generic resources, and its funds shall not be used to provide services that another agency has the responsibility to provide and is publicly funded to do so. (Section 4648.8, subd. (a)(8).) Some generic resources are identified in section

4659, subdivision (a), including government medical insurance programs, school districts, and IHSS.

8. The Lanterman Act requires regional centers to control costs in its provision of services. (Sections 4640.7, subd. (b), 4651, subd. (a), and 4659.) Consequently, while a regional center is obligated to secure services and supports to meet the goals of each consumer's IPP, a regional center is not required to meet a consumer's every possible need or desire, but must provide a cost-effective use of public resources.

9. The Lanterman Act encourages a consumer and their family, and the regional center, to cooperate in designing and implementing services. Section 4646, subdivision (d), specifically provides that IPP's "shall be prepared jointly by the planning team." That subdivision further provides that "decisions concerning the consumer's goals, objectives, and services and supports that will be included in the consumer's IPP and purchased by the regional center . . . shall be made by agreement between the regional center representative and the consumer" or his representatives. (*Ibid.*) It is not the intention of the Legislature to have IPP programming, and implementation of that programming, decided unilaterally, either by a consumer or his representatives, or by the regional center. Because it is so important that all services provided are appropriately calculated to meet a consumer's needs as planned, it is imperative that there exists the highest degree of cooperation from all IPP participants.

10. Respite is one of the specific services available to consumers listed in section 4512, subdivision (b). In section 4690.2, subdivision (a), "In-home respite services" are defined as "intermittent or regularly scheduled temporary nonmedical

care and supervision provided in the client's own home, . . . designed to do all of 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 usual daily routines which would ordinarily be performed by the family members.

An almost identical definition of in-home respite services is found in California Code of Regulations, title 17 (Regulations), section 54302, subdivision (a)(38).

11. The statutory and regulatory definitions of in-home respite services clearly indicate that the primary goal of respite is to provide care to a consumer that is ordinarily provided by the consumer's family, thereby relieving the family from that duty so that the family may absent themselves and be free to do other things.

12. The Lanterman Act does not specifically authorize retroactive reimbursement of costs to families in the fair hearing context. The statutes detailing the IPP process suggest that reimbursement is generally not available, particularly where the development of the IPP is supposed to be a collaborative process between the parties, and the process necessarily requires prior consideration and approval of

any service or support provided to an individual client. Nevertheless, the absence of statutory authority is not necessarily dispositive of the issue of reimbursement because general principles of equity may require reimbursement in particular cases in order to fulfill the purposes and intent of the Lanterman Act. (See *Association for Retarded Citizens v. Department of Developmental Services*, *supra*, 38 Cal.3d 384.) Further, section 4706, subdivision (a), provides a broad grant of authority for a fair hearing to resolve all issues regarding services to a developmentally disabled person, and can encompass a claim for reimbursement.

13. Mother and Ms. Gomez contend that the March 30, 2020 DDS letter (exhibits RC7, 8) applies to Claimant to permit additional respite and PA due to the pandemic. This contention is not supported by the law. The letter relates to a category of services called participant-directed services. As explained in Regulations, section 58886, participant-directed services allow an adult consumer or family member to procure certain services, including respite. The DDS letter adds PA to the list of possible services. The effect of the regulation is that a family may choose to use a service provider other than an approved vendor, and the regulation requires the regional center to provide information and assistance for such a family to become an employer or use a fiscal monitoring service to oversee the financial responsibilities relating to the employee. Regulation 58886 also highlights family responsibilities regarding employee recruitment, verification of qualifications, duties, scheduling, supervision, evaluating performance, and use of time sheets. Additional requirements and procedures for participant-directed services are covered in Regulations, section 58887, such as processing payroll, tax withholding, and other paperwork. By contrast here, mother receives PA services from workers employed by vendor Accredited, both as authorized by ELARC for direct service and as paid by mother. The DDS letter does

not apply to Claimant's current services, both because he is not an adult and because he is not receiving participant-directed services.

14. ELARC did not have sufficient information from mother to present to the clinical team in support of the additional respite or PA requested by mother. Although neurological information for Claimant was requested, all that was provided was an after visit summary and Dr. Lerner's July 20, 2020 letter, which provided information on the number of Claimant's seizures that did not support the higher number of seizures reported by mother. The documentation relating to mother's medical conditions was very general and provided little specific information to support mother's testimony of the extent and effects of her medical condition on her ability to care for Claimant. And the medical documents for Claimant and mother were either created, or first submitted, after the NOPA's were issued, not when requested by ELARC for consideration earlier in the process.

15. Further, mother testified that Claimant is not able to take advantage of the virtual special education services once school closed. This is highly significant, as the primary basis for mother's requests relate to the additional burdens due to Claimant now being at home 24 hours a day, every day. When Claimant attended school, he was occupied for the five hours he was there and the time for round trip transportation. Yet there was no evidence that mother notified the school district of the issue of Claimant's limited attention span and the limited value, if any, of the virtual special education services the school provided after the school closed. These services are a generic resource, specifically referenced in the Lanterman Act as a resource to be accessed and exhausted before a regional center can consider "supplanting" the district's budget by providing services to fill a gap created by the district's failure to provide services required by law. A school program that is more

engaging for Claimant would address his educational needs as well as potentially reduce the need for mother's constant care and supervision of him.

16. The IPP reflects the services ELARC would provide to address Claimant's significant, challenging behaviors. For various reasons, those services have not gone forward. It is clear, however, that those services were designed to address many of the very behaviors that form the basis of mother's present requests. Those services, already authorized, should be provided or, as mother request, a new assessment should be performed. These issues are outside the scope of this fair hearing.

17. The request for an increase in respite care does not comport with ELARC's purchase of service policy for respite care. ELARC currently funds 39 (not 41) hours per month of respite. Authorized behavioral services could provide added support for Claimant and lessen the strain on mother. Additional generic/school services would do the same. Further, ELARC considered the medical information it had and suggested nursing respite as a possibility, but mother did not submit the documents that were requested. In light of other resources available to address Claimant's circumstances, granting additional respite services would not be a cost-effective use of public resources.

18. The Lanterman Act provides a framework within which the consumer, the consumer's family, and the regional center are to work together to gather and share relevant information, analyze strengths and needs, identify potential services, and reach conclusions in the IPP process to support and provide services to the consumer. The goal is reachable if everyone contributes. Here, the evidence is clear that this process has not been honored.

19. The fair hearing process was not designed as a substitute for the IPP process but, rather, to review that process to see if the decisions reached were appropriate under the circumstances. Claimant has not carried his burden of demonstrating that ELARC did not review available information or make appropriate decisions. Although the issue is not presented for the ALJ to determine, it is strongly recommended that the parties use the IPP process, which can take place at any time, to comprehensively gather and exchange information so that appropriate services and levels can be adjusted if needed. With access to all relevant information, there is increased potential to implement sufficient, meaningful services.

20. The evidence is similarly clear that ELARC did not respond to the urgency of the situation in a timely fashion. While some delays were for mother to provide information, others were due to the press of other consumers' needs, clerical error, and confusion regarding the nature, timing, and operation of the authorizations for added PA. And ELARC first approved two additional hours of weekday AP, then three, then five. This is both a delay, but also an indication that ELARC was being flexible to review and assess Claimant's needs based on the information made available to it. The ELARC agreement to provide reimbursement also took some time, as Ms. Macias, Ms. Perez and others worked through and tried to simplify the process. However, these facts do not support additional PA or respite. Mother did not provide sufficient evidence to support an award of additional PA.

21. Mother gave compelling testimony that she needs additional assistance. However, the evidence presented does not establish that an increase in respite hours or PA hours is justified. Mother did not provide detailed documentation to support her testimony of hours of PA that she paid but for which she has not been reimbursed.

22. ELARC's denial of an increase in respite hours above 39 hours per month for Claimant is affirmed.⁶ ELARC's denial of an increase in PA above 152 hours per month for Claimant is affirmed. ELARC's denial of further reimbursement for PA is affirmed.

ORDER

Claimant's appeals of the Eastern Los Angeles Regional Center's decisions to (1) deny more than 39 hours per month of respite, (2) deny more than 152 hours per month for personal assistance services, and (3) deny further reimbursement for out-of-pocket payments for PA services, are denied.

DATE:

DAVID B. ROSENMAN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

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.

⁶ As noted numerous times above, although the NOPA indicated that 41 hours per month of respite were provided, the correct amount is 39 hours.