

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

In the Matter of:

CLAIMANT,

vs.

EASTERN LOS ANGELES REGIONAL CENTER,

Service Agency.

OAH No. 2020070570

Laurie R. Pearlman, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 18, 2020, by telephone and video conference.

Claimant was not present, but was represented by his grandmother (Grandmother), who was designated to serve as his authorized representative for purposes of the hearing.¹

¹ Claimant and his family members are identified by titles to protect their privacy.

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

Spanish-language interpreter Bernadette Buckley provided interpretation services at the hearing.

Oral and documentary evidence was received. The record was left open until August 25, 2020, to obtain an English-language translation of Claimant's exhibits, which were in Spanish. The translation was timely received, marked for identification as Exhibit I, and admitted into evidence. The record was closed and the matter was submitted for decision on August 25, 2020.

ISSUE

Must ELARC provide an additional five hours of in-home respite services ² (respite) per week from Monday to Friday for Claimant, retroactive to March 16, 2020?

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-13; Claimant's exhibits A-I.

² In-home respite services consist of non-medical care and supervision provided in the individual's home to assist in maintaining the individual at home. Respite services are intended to attend to the person's basic self-help needs and other activities of daily living. They may include interaction, socialization, and continuation of daily routines ordinarily performed by family members.

Testimonial: Jacob Romero, ELARC Fair Hearing Coordinator; Alejandro Orozco, ELARC Service Coordinator; Elizabeth Ornelas, ELARC Supervisor; Claimant's Grandmother.

FACTUAL FINDINGS

Background Facts

1. Claimant is a regional center client whose eligibility for services is based upon a diagnosis of Autism Spectrum Disorder (ASD). He is about to turn nine years old and resides with his parents and two sisters, ages one and three. Mother is in the process of applying for regional center services for the three-year-old and Father is also a regional center client. Claimant has a large extended family, which includes Claimant's Grandmother.

2. Claimant received early intervention services through the Early Start program at ELARC prior to age 3. He has difficulty communicating and socializing, displays many issues with behavior and adaptive skills, and requires close supervision at all times to ensure his safety. Claimant is dependent on others for the majority of activities of daily living. He wears diapers and does not communicate when a diaper change is needed. Claimant suffers from insomnia, is hyperactive, and runs away from caregivers when given the opportunity. He has no sense of danger and puts himself at risk by touching a hot stove and jumping from furniture. Claimant has severe skin allergies and demands frequent bathing to alleviate his discomfort.

3. Claimant attends special education classes and has an Individualized Education Program (IEP). Claimant receives \$830 of Supplemental Security Income (SSI) from the Federal government and is eligible for Medi-Cal benefits. ELARC has

recommended that Claimant seek Applied Behavioral Analysis (ABA) services from a generic resource, but the family has not done so.

4. Claimant's first Individual Program Plan (IPP) was prepared in October 2014. At that time, Claimant was approved for 16 hours per month of respite, but the family had been unable to identify a respite worker, so they did not utilize the respite hours allocated. At the September 2019 IPP meeting, the family informed the regional center that they had now identified respite workers and ELARC again authorized funding for 16 respite hours per month. ELARC also approved funding for nine hours per month of social skills services.

5. After the September 2019 IPP meeting, ELARC reassessed Claimant's respite needs. ELARC approved funding for 25 hours per month of respite services for Claimant, effective August 1, 2020. Following the onset of the COVID-19 pandemic, ELARC began funding three additional hours of respite services per week, Monday through Friday, which equates to an additional 69 respite hours per month. In total, ELARC has agreed to fund 94 hours per month of respite services for Claimant.

Claimant's Request for Increased Respite Care Funding

6. On April 20, 2020, Claimant's Mother requested that ELARC fund an additional 10 respite hours per day, seven days per week, effective March 16, 2020. The request was made due to the extra demands on the family resulting from the COVID-19 pandemic. On May 11, 2020, Mother reduced the amount of hours requested to an additional eight respite hours per day, Monday to Friday, effective March 16, 2020.

Notices of Proposed Action and Fair Hearing Request

7. On May 18, 2020, ELARC issued a Notice of Proposed Action denying Mother's request for eight additional respite hours, Monday to Friday, retroactive to March 16, 2020. As the basis for its denial of the five additional hours sought, ELARC cited Welfare and Institutions Code (Code) sections 4646, subdivision (a), and 4646.4, subdivision (a), and ELARC's Family Respite Needs Assessment Guideline (Guideline). However, ELARC approved funding for a maximum of three additional hours each day, from April 20, 2020, until June 30, 2020, with the exception of weekends and holidays. The additional three hours have now been approved for July and August 2020, as well.

8. ELARC's determination was based on Claimant's needs; school closure due to COVID-19; and the availability of generic resources, including but not limited to: natural aid, In-Home Supportive Services (IHSS), and the parents' employment needs. In addition, Mother failed to provide ELARC with certain requested information regarding the services Claimant receives in support of Claimant's request for increased respite hours.

9. On May 20, 2020, Mother accepted the three additional hours of respite offered by ELARC, but has brought this appeal seeking the five hours per week of respite funding denied by ELARC.

10. Mother filed a timely fair hearing request on Claimant's behalf to appeal ELARC's denial of the additional five respite hours sought per day and this hearing followed.

ELARC's Respite Funding Determination

11. Funding for respite hours is provided pursuant to a needs assessment which takes into account the self-care, behavioral, and medical needs of the client, as well as the support needs of the family. This assessment is part of ELARC's Guideline. The Guideline provides that if the needs assessment yields a score of 20 to 25 points, ELARC will fund up to 25 hours of respite per month.

12. ELARC assessed Claimant's needs for in-home respite services employing the Respite Needs Assessment Tool (Assessment Tool). The Assessment Tool assigns numerical values to the consumer's needs based on the consumer's level of functioning in the areas of Adaptive Skills (0-8); Mobility (0-5); Day Program Attendance (0-5); Medical Needs (0-10); Behavioral Needs (0-16); and Family Situation (2-10.) A lower numerical value denotes a lower need in that particular area. One point is subtracted for each generic resource, including IHSS.

13. ELARC assessed Claimant's needs as follows: Adaptive Skills (4); Mobility (0); Day Program Attendance (0); Medical Needs (1); Behavioral Needs (12); and Family Situation (6.) This resulted in a total of 23 points. One point was subtracted for the SSI Claimant receives. For a score of 20 to 24 points, the Assessment Tool provides up to 25 hours per month of respite hours.

14. Accordingly, based on the Assessment Tool, ELARC made a determination to fund 25 hours of respite services per month to Claimant, effective April 20, 2020.

15. Funding for eight hours per day of respite hours is granted only in exceptional circumstances. Factors which would necessitate that level of respite hours include daily aggression and tantrums resulting in injuries requiring medical treatment

care beyond first aid; an increased requirement for self-care assistance, such as being non-ambulatory; a severe or chronic medical condition or being deemed medically fragile; lack of services provided by the school district; and not receiving therapy services from the Service Agency or a generic resource.

16. Grandmother asserted that social skills training has not been provided to Claimant since March 16, 2020 due to the COVID-19 pandemic. She believes Claimant's parents sought ABA services in the past from the school district or Medi-Cal, but were not able to obtain them. ELARC suggested that ABA services might address some of the behavioral and adaptive skills issues and could reduce the need for respite hours. Under the Guideline, ELARC can assess more points for a consumer who engages in ABA, but still has serious behavioral issues. This could enable ELARC to provide increased respite hours.

17. Numerous individuals familiar with Claimant and his family submitted letters supporting Grandmother's testimony that Claimant has serious behavioral and adaptive skills issues. The writers, and Grandmother, opined that additional respite hours are needed for Claimant.

LEGAL CONCLUSIONS

1. Claimant's appeal of the Service Agency's denial of an increase in respite hours is denied. (Factual Findings 1 through 17; Legal Conclusions 2 through 14.)

2. An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a contrary regional center decision. (Welf. & Inst. Code, §§ 4700-4716.) Claimant timely requested a hearing

following the Service Agency's denial of an increase in respite hours, and therefore, jurisdiction for this appeal was established.

3. When a party seeks government benefits or services, he bears the burden of proof. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) In a case where a party is seeking funding for services or items not previously approved by a regional center, that party bears the burden of proof. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (See, Evid. Code, § 115.) In seeking funding for an increase in respite hours, Claimant bears the burden of proving by a preponderance of the evidence that the funding is necessary to meet his needs. Claimant has failed to meet his burden.

4. A service agency is required to secure services and supports that meet the individual needs and preferences of consumers. (See, e.g., Welf. & Inst. Code, §§ 4501 and 4646, subd. (a).)

5. Code section 4648, subdivision (a)(1), provides:

In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities including, but not limited to, all of the following:

(a) Securing needed services and supports.

(1) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. The regional center shall secure

services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan, and within the context of the individual program plan, the planning team shall give highest preference to those services and supports which would allow minors with developmental disabilities to live with their families, adult persons with developmental disabilities to live as independently as possible in the community, and that allow all consumers to interact with persons without disabilities in positive, meaningful ways.

6(a). Welfare and Institutions Code section 4646, subdivision (a), provides, in pertinent part:

[I]t 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(b). The Lanterman Act requires regional centers to control costs in its provision of services. (See, *e.g.*, Welf. & Inst. Code, §§ 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.

7. Code section 4512, subdivision (b), provides, in part:

[T]he 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, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option.

8. Code section 4646.4 provides:

(a) Effective September 1, 2008, 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 . . . , 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.

(2) Utilization of generic services and supports when appropriate.

(3) Utilization of other services and sources of funding as contained in Section 4659.

(4) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting. In this determination, regional centers shall take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care. . . .

9. Claimant has not presented sufficient evidence at this time to establish that requiring ELARC to fund additional respite hours would be a cost-effective use of public resources. ELARC has agreed to fund 94 hours per month of respite services for Claimant. The evidence presented does not establish that an increase in respite hours is warranted at this time. (Factual Findings 1-14.)

10. Given the foregoing, the Service Agency's denial of an additional increase in respite hours of five hours per week is appropriate.

11. When making determinations to acquire services and supports for its consumers the service agency must conform to its purchase of service guidelines. (Code § 4646.4, subd. (a)(1).) Pursuant to the Lanterman Act, the California Department of Developmental Services reviews the guidelines "to ensure compliance with statute and regulation" prior to promulgation of the guidelines. (Code § 4434, subd. (d).) The

guidelines are deserving of deference because they reflect the service agency's 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.)

12. During the IPP process and subsequent to the September 2019 IPP meeting, ELARC appropriately considered the specific characteristics of Claimant's developmental challenges in several domains, including Claimant's adaptive skills, mobility, day program attendance, medical needs, behavioral needs, and family situation, and properly determined the number of hours of in-home respite services per month needed to alleviate the constant demands and responsibility of caring for Claimant. In making that determination, ELARC complied with the standards and requirements set forth in its In-Home Respite Care Services Policy and Respite Needs Assessment Tool.

13. Claimant has not established by a preponderance of evidence that cause exists to increase his in-home respite service hours beyond the hours currently allotted, as set forth in Factual Findings 1 through 17 and Legal Conclusions 1 through 12.

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ORDER

1. Claimant's appeal is denied.
2. Eastern Los Angeles Regional Center's denial of an increase in respite hours of five hours per weekday for Claimant is upheld.

DATE:

LAURIE R. PEARLMAN
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.