

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DANIEL T.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH Case No. 2012010096

DECISION

Michael A. Scarlett, Administrative Law Judge (ALJ) Office of Administrative Hearings, State of California, heard this matter at the Eastern Los Angeles Regional Center, in Whittier, California, on January 19, 2012.

Margarita Duran, Supervisor, represented Eastern Los Angeles Regional Center (ELARC or the Service Agency.) Maria T., Claimant's mother (Mother), represented Daniel T. (Claimant).¹ Pamela Carreon, Certified Court Interpreter, translated the proceeding from English into Spanish on behalf of Mother.

Oral and documentary evidence was received, the record was closed, and the case was submitted for decision on January 19, 2012.

ISSUE

The parties agreed that the following issue is to be decided by the ALJ:

May the Service Agency reduce Claimant's in-home respite hours from 30 hours per month to 18 hours per month?

¹ Claimant and his family are referred to by their initials or family titles to protect their confidentiality.

FACTUAL FINDINGS

1. Claimant is a 16 year-old boy who lives at home with his biological parents and two older brothers. He was found eligible for ELARC services based upon a diagnosis of profound mental retardation, cerebral palsy, and history of epilepsy. Claimant's father is fully employed and Mother is a full-time homemaker. He has one older brother that is also a consumer with ELARC. ELARC is currently funding in-home respite - family member vendor - at 30 hours per month. Claimant's in-home respite was reduced to 30 hours per month, the statutory maximum under Welfare and Institutions Code section 4686.5, in December 2009 without objection by Mother. Claimant's older sister, who lives outside of the home, had been his respite worker but recently, Claimant's his 19 year-old brother, Jesus, became the family's respite worker. ELARC also funds two hours per day, ten hours per week, of behavior intervention services from SEEK Education, with eight hours per month of behavior consultation. Claimant receives one hour of group therapy through Progressive Resources once per week, a service also funded by ELARC. Claimant receives In-Home Support Services (IHSS) in the amount of 272 hours per month (Mother is Claimant's IHSS worker) and is receiving \$210 per month of Social Security Income (SSI) benefits. He is a high school student enrolled in special day classes at Santa Fe High School in the Whittier Union High School District. The school district provides a 1:1 aide throughout the school day, with additional support services including speech services, transportation services, vocational; awareness and extended school year.

2. On November 1, 2011, Service Agency sent Claimant a Notice of Proposed Action (NOPA), notifying Claimant's Mother that it was reducing Claimant's in-home respite hours from 30 hours per month to 18 hours per month. The NOPA stated that the respite hours would be reduced effective November 28, 2011. Service Agency reduced the respite hours pursuant to the Regional Center's Purchase of Service (POS) Guidelines and Welfare and Institution Code, section 4686.5. On November 9, 2011, Claimant's mother filed a Fair Hearing Request (FHR) stating she did not agree with the reduction of in-home respite and requesting continued funding at the 30 hours per month level. All jurisdictional requirements have been met to proceed to hearing.

3. On October 28, 2011, Service Agency convened an Individual Program Plan (IPP) for Claimant. He was described as being in "good general health." Claimant, who has had a history of seizures, has reportedly stopped having seizures and his doctors felt that the medications he had been taking to control the seizures could be discontinued. Claimant continues to wear braces on both of his ankles and wears a brace for his back. His back brace requires adjusting every 20 hours. On occasion, Mother uses a wheel chair to transport Claimant when they are out in the community. Claimant's profound mental retardation and cerebral palsy significantly impacts his gross, fine, and cognitive abilities such that he is unable to adequately perform any self-help skills. Consequently, Mother indicated at the IPP that she was "overwhelmed with the amount of care" Claimant needs on a daily basis. Claimant is dependent on adults for all of his self-help needs. Although he attempts to feed himself, he is unable to safely perform feeding tasks because he does not properly chew his food and spillage is a major factor. Claimant requires assistance for all his toileting needs

and personal hygiene, even though Mother stated at hearing that she has tried to establish a toileting schedule for Claimant.

4. Claimant presents with several maladaptive behaviors and exhibits some sensory integration difficulties. He has a tendency to bite his hands, sometimes to the point of requiring first aide. Claimant continues to demonstrate tantrums and will bite himself and/or hit his forehead/face when experiencing tantrum episodes. Claimant also frequently sticks his whole hand into his mouth, attempting to put the hand down his throat. He also uses his fingers to play with his lips, causing irritation to the lips and around the mouth area. Claimant has no awareness of dangerous situations and requires constant supervision while at home and in the community. Although the service coordinator testified that Claimant did not need 24-hour, around the clock supervision, Mother stated that Claimant still is prone to awake during the night and must be monitored to prevent him from wandering or harming himself.

5. Service Agency essentially contends that Claimant's maladaptive behaviors and self care needs have sufficiently abated, such that 18 hours per month is adequate to meet Claimant's family respite needs. In determining that 18 hours per month was the appropriate level of in-home respite hours, Service Agency relied upon the "Reference Guide for Respite Levels of Services" in the POS Guidelines, approved by the Department of Developmental Services (DDS), effective January 31, 2011. The POS Reference Guide describes seven (7) levels for in-home respite services, Levels A through G, with corresponding monthly hours of respite authorization. The monthly hours for each level are as follows: Level A (four hours); Level B (eight hours); Level C (12 hours); Level D (18 hours); Level E (24 hours); Level F (30 hours); and Level G (more than 30 hours). Each service level has five categories that include factors upon which a determination is made as to the appropriate hours of monthly respite. The categories are: (1) Medical, (2) Behavioral, (3) Self-Care, (4) Care Giver Condition, and (5) Family Stress Factors. Claimant must satisfy at least one of the categories, and the factors therein, to be authorized for the respite hours specified for that in-home respite service level.

6. Service agency determined that the appropriate service level for in-home respite for Claimant was service Level D. Level D specifies the following five categories and factors, of which one or more must be present to authorize 18 hours of monthly respite:

D(1) Medical: (No criteria identified)

D(2) Behavioral: Consumer is exhibiting severe behavioral concerns and is injuring self and/or others, or Consumer requires continuous supervision due to disruptive and destructive behaviors (e.g., constant biting, smearing feces, periodic wandering – several times per week);

D(3) Self-Care: (No criteria identified);

D(4) Care Giver Condition: Consumer's care significantly interferes with sleep of care giver (e.g. requires treatment every two hours, feedings take over an hour);

D(5) Family Stress Factors: Severity and combination of Level C criteria may necessitate additional hours.

Service Agency determined that Claimant met the criteria for Levels A through C based upon satisfying the factors in the Medical, Behavioral, and Self-Care categories for those levels. Claimant met the criteria for Level D in-home respite hours based upon the Service Agency's determination that he satisfied the factors in the Behavioral category. However, Service Agency determined Claimant did not meet the criteria for Levels E and F (24 and 30 monthly hours respectively), because his behavioral and self care needs did not satisfy the criteria for those service levels.

7. Service Level D does not specify criteria for the Medical or Self-Care categories. Levels E and F also have no criteria or factors identified for the Self-Care category. Margarita Aquilar, Claimant's Service Coordinator, testified that where an in-home respite service level indicates "No criteria identified," the factors contained in the immediate preceding service level category for which factors were identified are to be applied to the level of service being considered. Thus, for Level D, where there is no factors indicated for the Self-Care category, the Self-Care factors for service Level C are deemed to be the pertinent factors for Level D. Hence, Claimant also satisfied the Self-Care category for service Level D by virtue of meeting the criteria for Level C.

8. Significantly, neither Levels E nor F, the next two service levels with greater respite hours, identified factors or criteria for the Self-Care category. Consequently, Level C's factors for Self-Care may be used in determining whether Claimant has met the criteria for Levels E and F service levels. The Level C Self-Care category provides that the consumer must have "chronic medical and physical needs requiring total care (e.g., personal hygiene, eating/feeding, bathing and dressing.)" Service Agency agreed that Claimant met this criteria and the evidence at hearing confirmed Claimant's self care needs met the Level C Self-Care category. Thus, because the Level C Self-Care category applies to Levels D, E, and F, Claimant necessarily has also met the criteria for Levels E and F, as he must only satisfy one category to meet the criteria for a funding level of service. Level F provides that Claimant is entitled to 30 hours per month of in-home respite services.

9. Claimant also has met the Behavioral category for Level F which provides that consumer must have "chronic intense maladaptive behaviors which require 24-hour supervision (e.g., wandering away every day, mental health crisis). The evidence showed that Claimant has chronic intense maladaptive behaviors and is profoundly mentally retarded. Claimant continues to display behaviors, which if unmonitored, could result in injury, and has resulted in injury to his person. Claimant's Mother is under constant fear that Claimant may harm himself by placing his whole hand down his throat and choking himself, or injure himself a result of his aggressive biting behavior. He must also be constantly supervised to

prevent wandering off when in the community, and per Mother's testimony, even during the night when he's supposedly sleeping. Claimant's profound mental retardation leaves him totally unaware of dangerous situations and requires that he be constantly supervised at home and in the community.

10. Based upon the totality of the evidence, Claimant meets the criteria contained in Service Agency's POS Guidelines for in-home respite level of services consistent with Level F (30 hours per month) of the Reference Guide for in-home respite service. Given Claimant's profound mental retardation, cerebral palsy, and history of epilepsy, Service Agency failed to establish that Claimant's in-home respite services should be reduced from 30 hours per month to 18 hours per month.

LEGAL CONCLUSIONS

1. Claimant's appeal of the Service Agency's decision to reduce in-home respite services was timely filed and thus proper jurisdiction to proceed with this hearing was established.

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) The Service Agency seeks to terminate a service it previously funded and therefore has the burden to demonstrate that its decision is correct. Service Agency has the burden to show that the reduction of in-home respite services for claimant was appropriate. Service Agency bears the burden of proving, by a preponderance of the evidence, that in-home respite services reduced are appropriate. (*See* Evid. Code, § 115.)

3. Claimant's appeal is governed by the Lanterman Developmental Disabilities Services Act (Lanterman Act.) (Welf. & Inst. Code, §§ 4500 et seq.)² Under the Lanterman Act, the Service Agency is required to secure services and supports that meet the needs of a person found eligible for services based upon a qualifying developmental disability. (Welf. & Inst. Code, § 4501.) Sufficient services and supports should be established to meet the needs and choices of the consumer, regardless of age or degree of disability, to support their integration into the community. (*Id.*) In providing these services, consumers and their families, when appropriate, should participate in decisions affecting their own lives, including the planning and implementation of services provided by the Service Agency. (*Id.*)

4. Section 4690.2, subdivision (a), provides in relevant part that:

“In-home respite services” means intermittent or regularly scheduled temporary nonmedical care and supervision provided in the client's own home, for a regional center client who resides with a family

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

member. These services are 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."

5. Section 4686.5, subdivision (a), provides in relevant part that:

(a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, all of the following shall apply:

- (1) A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.
- (2) A regional center shall not purchase more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter, for a consumer.

6. Service Agency contends it was justified in reducing Claimant's in-home respite services because under its POS Guidelines, Claimant is entitled to only 18 hours per month of in-home respite services based upon Claimant's October 28, 2011 IPP and the factors/criteria it must consider under its POS Guidelines for authorization of respite services. Service Agency may promulgate POS Guidelines to assist in providing the appropriate level of services and supports to the consumer. (Welf. & Inst. Code, § 4646.4, subd. (a).) To be effective, the POS Guidelines must be approved by the Department of Developmental Services (DDS). (Welf. & Inst. Code, §§ 4646.4, subd. (a)(1); 4434, subd. (d).) Here, effective January 31, 2011, Service Agency's POS Guidelines, including the Reference Guide For Respite Level Services therein, was approved by DDS on January 31, 2011. Accordingly, Service Agency may apply its POS Guidelines to determine an appropriate level of in-home respite.

7. Here, however, Service Agency has misapplied its POS Guidelines. Based upon the service coordinator's explanation of how the POS in-home respite Reference Guide is applied, Claimant has met the Level F criteria for in-home respite services, as set forth in Factual Findings 1 through 10. Claimant's developmental disabilities have rendered him

totally dependent upon adults for his self care needs. Service Agency admits that he satisfied the criteria under the Level C Self-Care category. Because Levels D, E, and F do not identify additional or new criteria for the Self-Care category, Claimant necessarily met the criteria for these levels of in-home respite services. The evidence also showed that Claimant's maladaptive behaviors have met the criteria for the Behavioral category for Level F as well, by reason of Factual Findings 1, 4, and 9. Claimant has profound mental retardation, continues to have tantrum episodes and exhibits self injurious behaviors, and is prone to wander off if not constantly supervised. He has no awareness of dangerous situations that may confront him.

8. Based upon the foregoing, Service Agency failed to establish that Claimant's in-home respite services may be reduced from 30 hours per month to 18 hours per month. To the contrary, the evidence suggests that Claimant is eligible to receive the statutory maximum of 30 hours per month of in-home respite services, (*see* Welf. & Inst. Code, § 4686.5, subd. (a)(2)), based upon Claimant's severe developmental disabilities.

ORDER

Claimant Daniel T.'s appeal of the Service Agency's decision to reduce in-home respite hours is granted. Eastern Los Angeles Regional Center may not reduce Claimant's in-home respite hours from 30 hours per month to 18 hours per month.

IT IS SO ORDERED.

DATED: January 31, 2012

MICHAEL A. SCARLETT
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.