

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2014071209

CLAIMANT,

vs.

EASTERN LOS ANGELES
REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on February 2, 2015, in Alhambra, California.¹ Claimant was represented by her mother and father, with the assistance of a Vietnamese language interpreter.² Eastern Los Angeles Regional Center (Service Agency or ELARC) was represented by its Fair Hearing Coordinator, Judy Perez.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on February 2, 2015.

ISSUE

Should ELARC be required to reimburse Claimant's parents for monies paid for four hours per day, Monday through Friday, for in-home respite in the Summer of 2014 (from May 30 - Aug. 13) due to ELARC's denial of an increase in Claimant's in-home respite hours for the summer of 2014?

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¹ Claimant's appeal was consolidated for hearing with her siblings' appeals in Case Numbers 2014071208 and 2014071210, and evidence was jointly received for all three cases.

² Claimant's and her siblings' and parents' names are omitted throughout this Decision to protect their privacy.

EVIDENCE

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

Testimonial: Christina Han; Claimant's mother; and Claimant's father.

FACTUAL FINDINGS

1. Claimant is an 11-year-old female. She lives at home with her parents and three siblings, one of whom is her twin brother, the other two who are eight-year-old twins (brother and sister). Claimant, her twin brother, and her eight-year-old brother are Service Agency consumers based on diagnoses of autism spectrum disorders. Neither of Claimant's parents works outside the family home, but spend their time devoted to the care and supervision of their children.

2. In addition to autism spectrum disorder, Claimant has been diagnosed with nocturnal enuresis (nighttime bed wetting). Claimant is ambulatory, and her vision and hearing are within normal limits. She is toilet trained, but needs help with wiping. She also needs assistance with personal hygiene, bathing, dressing and tying her shoes. Claimant has no safety awareness and requires constant supervision to avoid injury. The Service Agency funds social skills training for Claimant.

3. Claimant's eight-year-old brother provides round-the-clock challenges for his parents. He runs around frequently, which requires a caregiver to follow him since he is unsafe to be left unattended. He has several food allergies which require his mother to prepare special meals for him. He also has a history of feeding difficulties, including vomiting, spitting out solid foods and frequent bouts of diarrhea. Claimant's brother still wears diapers and requires regular diaper changes, even at night, particularly when he is suffering from excessive diarrhea. Claimant's brother will sometimes wake up screaming in the middle of the night which awakens his siblings. This requires a great deal of time and effort to soothe the children and get them to return to bed.

4. Claimant receives 30 hours per month of in-home respite (20 hours shared with siblings, and 10 hours individually), funded by the Service Agency. Claimant's uncle is the respite provider. Claimant's mother and father use the respite time to run errands or to relax.

5(a). Prior to 2011, the Service Agency had allowed parents to use in-home respite hours in lieu of out-of-home respite.

5(b). During the summers of 2010 and 2011, the Service Agency funded in-home respite services in lieu of out-of-home respite when Claimant's mother traveled

to Vietnam, leaving Claimant's father and uncle/respice worker to care for the children in their home.

5(c). However, following passage of Welfare and Institutions Code section 4686.5, subdivision (a) (which limited funding of in-home respice to 90 hours per quarter and funding of out-of-home respice to 21 days per year), ELARC revised its purchase of service policy for out-of-home respice, effective May of 2011. The revised guidelines regarding the use of out-of-home respice care provide that "[i]n home respice in lieu of out of home respice may be used only when there is no out of home respice arrangement available."

5(d). Thereafter, Claimant's parents made several unsuccessful attempts, via fair hearings in 2012, 2013 and 2014, to obtain Service Agency funding of in-home respice in lieu of out-of-home respice during summer breaks or times when Claimant's mother planned to travel out of the country. In several of those cases, the Service Agency had proposed Claimant's out-of-home placement in several potential residential facilities. However, Claimant's parents were dissatisfied with the proposed arrangements and chose to have their children remain in the home under the care of their parents and respice worker. In the prior cases, Claimant's parents failed to establish that the out-of-home facilities recommended by the Service Agency were insufficient to meet Claimant's needs.

6. On July 11, 2014, Claimant's parents requested an increase of in-home respice hours for the summer of 2014.

7(a). On July 16, 2014, the Service Agency sent Claimant's parents a Notice of Proposed Action (NOPA), stating that their "request to increase hours for in-home respice hours during the summer have been denied." (Service Agency Exhibit 4.)

7(b). The stated reason for the proposed action was:

A request for increase of In-home respice hours during summer months was denied due to parental responsibility and ability to utilize generic resources. [Claimant's parents] were aware that summer was approaching, thus, there was ample amount of time to explore low cost and/or free camps and other resources to assist with children during summer months. Parents have been informed and asked to be prepared year after year.

(Service Agency Exhibit 4.)

7(c). The Service Agency cited Welfare and Institutions Code, sections 4686.5, subdivision (a), 4646, subdivision (a), and 4646.4, subdivision (a), as the legal authority for its proposed action.

8. Claimant's father submitted a Fair Hearing Request on Claimant's behalf.

9. Claimant's current Individual Program Plan (IPP) from September 2013, documented that out-of-home respite was discussed with Claimant's parents. According to the IPP:

[P]arents understand that in home respite in lieu of out of home respite may be used only when there is no out of home respite arrangement available. The out of home respite is not more than 21 days per fiscal year.

(Service Agency Exhibit 2.)

10(a). At the fair hearing, Claimant's mother and father testified credibly on her behalf.

10(b). Claimant's mother explained that during the summer she is extremely busy caring for the children 24 hours per day and she needs time to relax. It takes over an hour to feed Claimant's eight-year-old brother at each meal, and his diaper needs frequent changing. Claimant's mother testified that the children are very active and she "has to yell at them all the time" to keep them under control and to ensure that they don't cause any accidents.

10(c). When Claimant's mother needs respite time, Claimant's father watches the children, and Claimant's uncle/respite worker frequently helps. Claimant's parents document less respite hours than Claimant's uncle actually provides. Claimant's father explained that, often Claimant's uncle does not want to accept the money offered for his help as a family member and that he "only receives a token." Claimant's parents did not explain why Claimant's parents, with her uncle's offered assistance, could not collectively provide each other respite time in the summer.

10(d). Claimant's parents are seeking reimbursement for additional respite hours in the summer of 2014 which the Service Agency had denied. Although Claimant's parents initially stated they were seeking reimbursement for four hours per day, Monday through Friday, for in-home respite in the Summer of 2014 (from July 1 – Aug. 13 for Claimant's eight-year-old brother, and from May 30- Aug.13 for Claimant and her twin brother), they did not present evidence that they had paid for that many respite hours. Claimant's parents presented evidence that they had paid \$980 in cash to Claimant's uncle for helping to care for the children from May 31, 2014, through August 13, 2014. However, the evidence did not establish how many hours Claimant's uncle actually provided, how the \$980 amount was calculated and whether this amount included, or was in addition to, the 30 hours each per month of respite to which the children were already entitled. Regardless, Claimant's parents

acknowledged that the \$980 was well below the amount for providing four hours per day, five days per week, of in-home respite for the children during the summer.

11. Claimant's mother noted that, during recent years the Service Agency had offered group home placement for out-of-home respite and that they had engaged in fair hearings on this issue. However, Claimant's parents do not feel comfortable leaving their children in the group placements offered by the Service Agency. Claimant's mother does not believe that they are age appropriate or able to make meal arrangements compatible with Claimant's eight-year-old brother's needs. Claimant's parents did not identify the out-of-home placement offerings which were insufficient and specifically how each was unable to meet Claimant's needs.

12. Claimant's mother also noted that she has had a tumor in her head since 2004, and will need to eventually undergo surgery. However, she has no plans to schedule surgery. She does not feel ready to have the surgery yet because her children "are in desperate need" of her daily care. Additionally, the Service Agency was previously told about the tumor and need for surgery and informed Claimant's mother that it could provide services to assist her once she provides a physician's note indicating when surgery is to occur and the length of the recovery period. Claimant's father also noted that he fell and injured himself a few months ago. However, neither Claimant's mother's tumor and eventual need for surgery nor Claimant's father's injury were among Claimant's asserted reasons for the requested increase of in-home respite hours for the summer of 2014, nor do either of these situations (at this time) constitute an "extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer." (See Legal Conclusions 5 and 6.)

13. At the fair hearing, in addition to citing the restrictions on in-home respite in lieu of out-of-home respite as specified in the purchase of service guidelines, the Service Agency noted that additional in-home respite hours were denied because: Claimant's parents have parental responsibility, as do parents of typically-developing peers, to care for their minor children and utilize the generic resources available to them in providing care and activities for their children during the summer months. The Service Agency provided Claimant's parents with a list of generic resources for summer activities. Additionally, the Service Agency noted that Claimant's uncle and other family members could provide natural support to help with Claimant's parents' needed respite. The Service Agency pointed out that 30 hours per month of in-home respite is the maximum allowed by law, and that summer is not an "extraordinary event" which would meet the statutory exception. (See Legal Conclusions 5 and 6.)

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LEGAL CONCLUSIONS

1. Cause exists to deny Claimant's appeal of the Service Agency's denial of funding additional in-home respite hours for the summer of 2014 and to deny Claimant's request for reimbursement of monies paid for additional respite hours during that time frame. (Factual Findings 1 through 13.)

2. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Developmental Disabilities Services Act (Lanterman Act) to appeal a contrary regional center decision. (Welf. & Inst. Code, §§ 4700-4716.) Claimant timely requested a hearing on receipt of the Service Agency's denial of funding additional in-home respite hours for the summer of 2014, and therefore, jurisdiction for this appeal was established.

3. 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.)

4. 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].) Specifically, in a case where a party is seeking funding not previously provided or approved by a regional center, that party bears the burden of proof. In this case, Claimant made a new request for the Service Agency to fund additional in-home respite hours for the summer of 2014. Claimant therefore bears the burden of proof. She has failed to meet her burden.

5. Welfare and Institutions Code section 4686.5 provides:

(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 hours 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.

(3) (A) A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) 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.

[¶] . . . [¶]

(4) A regional center shall not purchase day care services to replace or supplant respite services. For purposes of this section, "day care" is defined as regularly provide care, protection, and supervision of a consumer living in the home of his or her parents, for periods of less than 24 hours per day, while the parents are engaged in employment outside of the home or educational activities leading to employment, or both.

(5) A regional center shall only consider in-home supportive services a generic resource when the approved in-home supportive services meets the respite need as identified in the consumer's individual program plan (IPP) or individualized family service plan (IFSP).

(b) For consumer receiving respite services on July 1, 2009, as part of their IPP or IFSP, subdivision (a) shall apply on August 1, 2009.

6(a). Pursuant to Welfare and Institutions Code section 4686.5, Claimant's respite may not exceed 90 hours per quarter of in-home respite.

6(b). Claimant is seeking additional in-home respite hours, which may be allowed if an exemption to the statutory limitation is granted. However, Claimant's parents have not established that an exemption must be granted. The evidence did not establish that "the intensity of the consumer's care and supervision needs [is] such that additional respite is necessary to maintain the consumer in the family home," or that "there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer."

7. Additionally, although funding of 21 days per year of out-of-home respite is allowed, section 4686.5 and the Service Agency's policies no longer allow the conversion of the 21 days of out-of-home respite to in-home respite unless "there is no out of home respite arrangement available." In this case, the Service Agency offered out of home respite arrangements, which Claimant's parents declined.

8. Given the foregoing, ELARC appropriately denied funding Claimant's additional in-home respite hours for the summer of 2014, and no reimbursement is required.

ORDERS

1. Eastern Los Angeles Regional Center's denial of funding Claimant's additional in-home respite hours for the summer of 2014 is upheld, and Claimant's appeal is denied.

2. Eastern Los Angeles Regional Center shall not be required to reimburse Claimant for any monies paid in excess of the amount for respite hours to which Claimant is already entitled.

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.

DATED: February 10, 2015

/s/
JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearings