

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

D.H.,

Claimant,

v.

EASTERN LOS ANGELES  
REGIONAL CENTER,

Service Agency.

OAH Case No. 2010090532

**DECISION**

Daniel Juárez, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), heard this matter on October 3, 2012, in Alhambra, California.

Matthew M. Pope, Esq., represented D.H. (Claimant).<sup>1</sup> Claimant was not present. Claimant's father and mother were present.<sup>2</sup>

Enright and Ocheltree, and Julie Ocheltree, Esq., represented the Eastern Los Angeles Regional Center (Service Agency).

This matter was consolidated for hearing with the case of Claimant D.H.'s sister, J.H. (*In the Matter of J.H. v. Eastern Los Angeles Regional Center*, OAH case number

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<sup>1</sup> Initials identify Claimant and initials or familial titles are used to refer to Claimant's family members to preserve Claimant's privacy.

<sup>2</sup> Claimant's father originally requested a court interpreter to interpret from English to Vietnamese and from Vietnamese to English. At the commencement of the hearing, however, Claimant, through his attorney, declined the interpreter services, preferring to participate in the hearing in English. The ALJ found Claimant to understand the proceedings and further found that his direct and cross-examination were not impeded without the interpreter.

2010090530). Pursuant to Welfare and Institutions Code section 4712.2, subdivision (b), a separate decision is issued for each matter.

On October 9, 2012, six calendar days after the hearing ended and the record was closed, the Service Agency moved for an order to re-open the record and admit 10 new exhibits and two declarations. The Service Agency offered the new evidence to impeach Claimant's father. The Service Agency's proposed exhibits and declarations involve interactions between Claimant's father and the Service Agency in 2011. The instant hearing solely involves a period in August 2010. The ALJ denied Service Agency's motion on October 10, 2012, because, 1) the Service Agency failed to establish that it could not have sought the admission of the proposed evidence at the hearing, and 2) even if the alleged actions set forth by the proposed exhibits showed Claimant's father to have acted dishonestly and/or fraudulently in 2011, such evidence would not necessarily establish that he acted in a similar manner in the instant matter, or that his character was so predisposed in 2010.

The parties submitted the matter for decision on October 3, 2012.

### PROCEDURAL HISTORY

These two consolidated matters were originally heard before OAH on March 1, 2011, before another ALJ. The decisions resultant of those hearings were issued on March 22, 2011. The decisions were favorable to the Service Agency. Claimants appealed the decisions by writ of administrative mandamus to the Los Angeles County Superior Court (case numbers BS 132582, consolidated with BS 132583). The court granted a peremptory writ of mandate in part. The court ordered OAH to, among other things, set aside the decisions in each matter, hear the cases anew, and issue decisions "on the proper calculation of respite hours."

### STATEMENT OF THE CASE

Claimant contends the Service Agency should fund 336 hours of in-home respite care for his care during the time his mother was away from the family home, from August 10 to August 30, 2010, and while he was in the care of his father. He further contends his circumstances are extraordinary in that he is one of three minor siblings who have developmental disabilities and are cared for by his parents in the family home.

The Service Agency agrees Claimant requires respite care but agrees to fund only 30 hours per month of in-home respite (a quantity that the parties do not dispute) and 257 hours of in-home respite in lieu of out-of-home respite during his mother's absence from the home.

The question at issue is what was the appropriate number of in-home respite in lieu of out-of-home respite care hours that Claimant was entitled to, to be cared for in the family

home between August 10 to August 30, 2010? The facts at issue in this matter solely pertain to this period in August 2010.

## FACTUAL FINDINGS

1. In August 2010, Claimant was a six-year-old boy with attention deficit/hyperactivity disorder (ADHD) and pervasive developmental disorder, not otherwise specified (PDD-NOS). He was and is a client of the Service Agency. From August 10 to August 30, 2010 (referred to herein as, “the time at issue”),<sup>3</sup> Claimant lived in the family home. The home consisted of his mother, father, and three siblings. Claimant and his sister, J.H. (the claimant in the other consolidated matter) are twins. J.H. has a developmental disability and is a client of the Service Agency. Claimant’s two other siblings, who are younger, are twins. One of the younger twins, K.H., also has a developmental disability and is also a client of the Service Agency. Claimant’s mother and father are unemployed. They care for their four children daily.

2. In August 2010, Claimant’s mother prepared for and took a vacation to Vietnam. Claimant’s mother was in Vietnam during the time at issue. During the time at issue, Claimant’s father cared for the children.

3. During the time at issue, the Service Agency agreed to fund 30 hours per month of in-home respite care in the family home.

4. Generally, the Legislature defines in-home respite care as “nonmedical care and supervision” provided in the home. (Welf. & Inst. Code, § 4690.2, set forth in Legal Conclusion 3, *post.*)

5. Thirty hours per month of in-home respite care is the maximum quantity of in-home respite hours per fiscal year allowed by the Legislature, unless one meets the statutory exemption criteria. (Welf. & Inst. Code, § 4686.5, set forth in Legal Conclusion 4, *post.*)

6. Claimant’s father was and is the respite vendor. This means that the Service Agency pays Claimant’s father an amount equal to the hourly rate to provide the in-home respite care, and Claimant’s father must find and pay an individual to provide that respite care. That is, the respite provider cares for Claimant while Claimant’s father takes a break from the constant and consistent care he would otherwise provide to Claimant. Claimant’s father paid his brother (Claimant’s uncle) to provide Claimant’s respite care during the time at issue.

7. Distinct from the statutory exemption criteria in Welfare and Institutions Code section 4686.5, subdivision (a)(3)(A), the Service Agency allows for the provision of

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<sup>3</sup> Unless otherwise indicated, all of the factual findings herein relate to the time at issue: August 10 to August 30, 2010.

additional in-home respite hours in cases like this one, where it is cost-effective and appropriate to the needs of the person with developmental disabilities to have additional in-home respite hours that equate to the 21 days of out-of-home respite hours available pursuant to Welfare and Institutions Code section 4686.5, subdivision (a)(2).

8. The parties proceeded at hearing calculating 21 days of out-of-home respite to equal 16 hours per day or 336 total hours of care. This calculation was undisputed.

9. The Service Agency calls this additional in-home respite, “in-home respite in lieu of out-of-home respite.” Hereafter, since it is these additional respite hours (in-home respite in lieu of out-of-home respite) that are solely at issue, these in-home respite in lieu of out-of-home respite hours are referred to simply as, “respite hours.”

10. For the time in question, Claimant requested the maximum number of respite hours: 336. On August 6, 2010, the parties agreed that the Service Agency would fund only 257 of those respite hours, but thereafter, Claimant’s father changed his mind and requested the maximum 336 hours.

11. The Service Agency issued a Notice of Proposed Action, dated August 13, 2010, denying 336 hours and agreeing to fund 257 hours. The Service Agency cited Welfare and Institutions Code section 4686.5 to support its denial.

12. The controlling individual program plan (IPP) is dated September 29, 2009, although the September 2010 IPP was also in the record. The 2009 IPP inaccurately states that he had autism (his diagnosis was clarified to be as set forth in Factual Finding 1). The IPPs and additional evidence at hearing provided a picture of Claimant during the time at issue. He was fully ambulatory. He did not require any special aides or equipment. By his mother’s report, he was not well coordinated; he tended to fall and trip easily. Claimant could use utensils to eat with little spillage. He was and is in good health; he did not and does not take medication and has had no major illnesses or hospitalizations. He required assistance with bathing and attending to his personal hygiene tasks. He could put on some clothes but could not close fasteners or tie shoe laces. He could go to the toilet alone, but would need help cleaning himself. He could not brush his teeth independently. Occasionally, he displayed possessiveness, aggression, impulsivity, hyperactivity, frustration, tantrums, and autistic-like characteristics. His tantrums occurred about twice per month and lasted between 10 and 15 minutes per episode. Claimant could not sit still; he would jump on furniture, run in circles and laugh out loud for no apparent reason. He was sensitive to loud noises. He tended to wander when in the community. There was limited evidence quantifying the time Claimant would engage in these behaviors or describing the severity of these actions.

13. At school, Claimant would disturb students and was inconsistent in following his teacher’s directions. He was receiving speech and language therapy from his school district. The evidence did not establish that Claimant received special education services. There was no evidence of any special education individualized education plan, nor any other

evidence establishing that he received special education services. Claimant was placed in a regular education classroom setting.

14. Claimant's father testified and described Claimant's behaviors. He described that, during the time at issue, Claimant would laugh for no reason. Claimant would grab him while he would drive an automobile. Notably, Claimant's father initially disputed the Service Agency's assertion that Claimant was non-compliant almost exclusively with his mother; but in describing Claimant's non-compliance, he described Claimant as largely listening to his father, and ignoring of his mother. Claimant's father did not describe Claimant as a child with significant or excessive behaviors or a child that was otherwise difficult to control or care for. Claimant's father's testimony did not establish that Claimant had significant care needs at the time at issue. Claimant's father also did not establish through his testimony that he suffered from stress or was otherwise unable to care for, or had notable difficulty caring for, his children during the time at issue.

15. Larry E. Gaines, Ph.D., a licensed psychologist, evaluated Claimant on April 16, 2010, "to determine current levels of cognitive and adaptive functioning." Gaines clarified that his evaluation was "limited to the assessment of developmental disabilities, including Mental Retardation and/or Autism." Gaines noted that Claimant received no educational therapeutic interventions. As a result of his testing and interviews, Gaines found that Claimant was able to talk in sentences, although he noted that Claimant's father did not believe Claimant could engage in full conversation. He was able to feed himself, but could not use a knife. He could use a toilet, but needed assistance cleaning himself. He needed prompting for his personal hygiene needs and to clean his room. He could take a dish to the sink but could not wash it. He could identify the day but not the date. He was able to tell time. He was not trusted to cross the street independently. Gaines opined that Claimant's motor skills were in the mild range of deficiency and that his visual, motor, and perceptual skills were in the average range. Claimant's intelligence was within the "average to above-average range" (Claimant scored a verbal comprehension intelligence quotient (IQ) of 110 and a perceptual reasoning IQ of 104 on the Wechsler Intelligence Scale for Children-IV). Gaines found Claimant's adaptive skills in the "borderline range" (Claimant scored an adaptive behavior composite of 69 on the Vineland Adaptive Behavior Scales, Second Edition). Gaines opined that Claimant's social functioning fell within the borderline range. Gaines diagnosed Claimant with ADHD combined type (rule out) and PDD-NOS. Gaines's findings regarding Claimant's behaviors and daily living skills (other than his toileting) were commensurate with those of many six-year-old boys. Claimant did not contest Gaines's findings.

16. The Service Agency funded behavior services from an entity called SEEK Education, Inc. (SEEK). In SEEK's behavior intervention service progress report, dated October 13, 2010 (referencing an authorization period of August 1, 2010, through November 30, 2010), SEEK noted that Claimant engaged in non-compliant behavior primarily with his mother. He would nonetheless walk away, ignore, or laugh when his mother or father would give him instructions.

17. Claimant offered copies of his weekly schedule during the time at issue. During the time at issue, he was not attending school. The weekly schedule did not show any significant or extraordinary time outside of the home.

18. The Los Angeles County Department of Public Social Services denied Claimant the provision of in-home supportive services (IHSS) hours in January 2010. Generally, IHSS is a service system intended for persons with disabilities who cannot care for themselves, wherein the County funds hours of personal and in-home care to allow the person with a disability to live in his or her own home. The County's denial letter stated, "You have no assessed need for services and you can remain safely in your own home without services . . . ."

19. For the time at issue, the Service Agency has funded 30 hours of in-home respite and 257 hours of in-home respite in lieu of out-of-home respite care for Claimant.

20. Claimant's current service coordinator, Mark Jia, testified. Jia has been Claimant's service coordinator since September 3, 2009. Jia opined that Claimant does not exhibit any severe behaviors and is generally a compliant child. Jia explained that the Service Agency considered four factors in determining the respite hours at issue: 1) Claimant's need, 2) Claimant's parent's parental responsibility, 3) available generic resources, and 4) all other services funded by the Service Agency. Jia and the Service Agency agree that having three children with developmental disabilities in the same home is a significant care issue and they agree Claimant's father needed support. However, Jia and the Service Agency calculated that funding 12 hours per day, for the time at issue, was adequate to meet the difficult care needs that presented. The Service Agency calculated that 12 hours per day by 21 days, or 252 hours was the appropriate level of additional support that the Service Agency would fund. The Service Agency also conceded that Claimant's parents had to be present and participate in some of the therapies Claimant receives. The Service Agency calculated that the parents were required to attend and participate in five hours of therapy for Claimant during the time at issue. For this reason, the Service Agency added five hours of additional respite care to allow Claimant's father to participate in those therapies, for a total of 257 hours of respite care. Claimant did not contest the calculation of the additional five respite hours. The Service Agency concluded that the remainder of the hours in each day were to be covered by Claimant's father as the portion of Claimant's care that would fall to a parent of a child without a disability. That is, the remaining, uncovered hours in each day constituted Claimant's father's parental responsibility to care for Claimant, as any parent of a six-year-old would if the other parent went away on vacation. Further, the Service Agency concluded that 257 additional respite hours was appropriate to provide Claimant's father rest from the care he provided Claimant during the time at issue.

21. There was no evidence as to the difficulties or tasks required to care for Claimant's younger sibling, K.H. K.H. was present for part of the instant hearing, in the care of his mother. At times, he was audibly disruptive and Claimant's mother was required to leave the hearing room several times, when K.H. was disruptive; however, for much of the

time that he was present, he was compliant and quiet. No factual findings regarding the care needs of K.H. could be derived from the ALJ's observations.

22. In a letter from Claimant's father to the Service Agency, dated February 22, 2011, Claimant's father asserted that an earlier service coordinator threatened him to obtain his agreement to the provision of 257 hours. He asserted that the earlier service coordinator told him that if he failed to agree to the 257 hours, "there is a chance that the [respite] payment won't be coming at all . . ." The evidence did not establish that the earlier service coordinator or anyone at the Service Agency threatened Claimant's father to accept the 257 respite hours. Also in his letter, Claimant's father argued that he needed the 336 hours to "allow [the family] to function effectively, and would let [them] have a balanced schedule to meet both educational and social/emotional needs of [their] 4 children." He additionally wrote, "In truth, the caring and educating for [*sic*] our children require round the clock adult supervision, without which the safety of my children would be compromised."

23. Claimant's father argued that caring for three children with disabilities on his own was very difficult and he required the help of his brother (Claimant's uncle). He further described the circumstances of having three children with developmental disabilities as extraordinary, and that therefore, the Service Agency should fund 336 hours of respite care.

24. Claimant's uncle, the respite care provider, did not testify.

## LEGAL CONCLUSIONS

1. Cause exists to deny Claimant's appeal, as set forth in Factual Findings 1-24, and Legal Conclusions 2-9.

2. As Claimant seeks an additional, new service, he bears the burden of proof by a preponderance of the evidence. (Evid. Code, §§ 500, 115.)

3. Welfare and Institutions Code section 4690.2 provides in part:

"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 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.

4. Welfare and Institutions Code section 4686.5 states in pertinent part:

(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.

(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.

5. Claimant and Claimant's father needed respite care during the time at issue. The parties did not dispute this conclusion. Having three children with developmental disabilities within two sets of twins creates a significant and unique circumstance and there is undoubtedly some difficulty in simultaneously caring for all of them, especially if one parent is absent. However, the Service Agency's calculation of respite hours took these factors into consideration in a reasonable fashion and derived a reasonable number of respite hours to offer Claimant's father. The Service Agency tailored the quantity of respite hours to Claimant's care needs, taking into consideration Claimant's skills, deficits, and behaviors.

6. It is noted that separate and apart from the 257 hours funded and utilized by Claimant and Claimant's father, the Service Agency funded an additional 30 hours of in-home respite that Claimant's father was to use in the month of August 2010. The evidence did not establish how Claimant's father utilized those 30 hours during the time at issue.

7. Setting aside the 30 hours of in-home respite for August 2010, the Service Agency's provision of 12 hours of respite care per day left Claimant's father to care for Claimant and his other children on his own during the time at issue for 12 hours each day. There was no evidence that Claimant or any of the other children had sleep problems or regularly woke in the middle of the night. With no evidence that the children did not sleep normally, it is reasonable to conclude that each child slept a normal night schedule, approximately eight hours each night. This would leave Claimant's father with having to

actively care for Claimant and the other children on his own, without respite assistance, during approximately four waking hours each day. While providing such care was undoubtedly challenging, there was no evidence to establish that Claimant's father was unable to provide that approximate quantity of care. To be sure, the evidence was insufficient to establish that Claimant's father was unable to provide even eight hours of care on his own, without respite assistance. The evidence did not establish that Claimant had such significant care needs as to make the Service Agency's calculation of 12 hours of respite care per day insufficient. There was no evidence that, due to Claimant's disability, the 257 hours of respite care left Claimant's health, safety, or welfare endangered, that it rendered him incapable of remaining in the family home, or that his personal care, self-help, and daily living activities were left unattended. The Service Agency also appropriately accounted for parental participation in Claimant's therapy sessions during the time at issue. Furthermore, there was no evidence that, with the 12 hours of respite care per day, Claimant's father was overwhelmed to such a degree that he needed greater assistance.

8. The Service Agency's consideration of Claimant's father's parental responsibility was appropriate, in accordance with Welfare and Institutions Code section 4646.4, subdivision (a)(4). (The statute states that when purchasing services and supports, regional centers' internal processes shall ensure, "[c]onsideration 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 argued that he met the exemption criteria in Welfare and Institutions Code section 4686.5, subdivision (a)(3)(A). He did not. The evidence did not establish that the intensity of his care and supervision needs required additional respite to allow him to remain in the family home. The fact that Claimant is one of three siblings who have developmental disabilities makes the circumstances of their care significant, but there was no evidence to establish that it was an "extraordinary event" as contemplated by the Legislature. Furthermore, in light of the 257 hours of respite care provided and Claimant's established skills, deficits, and needs, the evidence did not establish that the care required by Claimant and his siblings was a circumstance or event that impacted Claimant's father's ability to meet Claimant's care and supervision needs such that additional respite was warranted. Therefore, Claimant does not meet the exemption requirements of Welfare and Institutions Code section 4686.5, subdivision (a)(3)(A).

ORDER

Claimant's appeal in OAH case number 2010090532 is denied. The Service Agency's provision of 257 hours of in-home respite in lieu of out-of-home respite is upheld.

Dated: October 15, 2012

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DANIEL JUAREZ  
Administrative Law Judge  
Office of Administrative Hearings

NOTICE

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