

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): DANIEL FAESSLER, SBN: 295691 East Bay Community Law Center 1950 University Ave, Suite 200 Berkeley, CA 94704 TELEPHONE NO.: 510-548-4040 FAX NO.: 510-849-1536 ATTORNEY FOR (Name): DYLAN LOPEZ ESPINOZA		FOR COURT USE ONLY <div style="text-align: center; color: blue; font-weight: bold;"> ENDORSED FILED ALAMEDA COUNTY DEC 12 2019 CLERK OF THE SUPERIOR COURT By <i>[Signature]</i> Deputy </div>
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA STREET ADDRESS: 1225 Fallon Street MAILING ADDRESS: CITY AND ZIP CODE: Oakland, CA 94612 BRANCH NAME: Rene C. Davidson Courthouse		CASE NUMBER: <div style="font-size: 1.5em; color: blue; font-weight: bold;">RG19046685</div>
CASE NAME: Espinoza v. Johnson et al		
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000)	<input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)	Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)
		JUDGE: DEPT.:

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) Non-PI/PD/WD (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input checked="" type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case ☐ is ☒ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
- | | |
|--|--|
| a. <input type="checkbox"/> Large number of separately represented parties
b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
c. <input type="checkbox"/> Substantial amount of documentary evidence | d. <input type="checkbox"/> Large number of witnesses
e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
f. <input type="checkbox"/> Substantial postjudgment judicial supervision |
|--|--|
3. Remedies sought (check all that apply): a. ☒ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☐ punitive
4. Number of causes of action (specify): 1
5. This case ☐ is ☒ is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: 12/11/2019

DANIEL FAESSLER

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

ATTORNEY (Name, State Bar number, and address): DANIEL FAESSLER SBN: 295691 East Bay Community Law Center 1950 University Ave, Suite 200 Berkeley, CA 94704 TELEPHONE NO.: 510-548-4040 FAX NO. (Optional): 510-849-1536 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): DYLAN LOPEZ ESPINOZA	FOR COURT USE ONLY ENDORSED FILED ALAMEDA COUNTY DEC 12 2019 CLERK OF THE SUPERIOR COURT By <u><i>[Signature]</i></u> Deputy
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Alameda STREET ADDRESS: 1225 Fallon Street MAILING ADDRESS: CITY AND ZIP CODE: Oakland, CA 94612 BRANCH NAME: Rene C. Davidson Courthouse	
PLAINTIFF/PETITIONER: DYLAN LOPEZ ESPINOZA DEFENDANT/RESPONDENT: KIMBERLEY JOHNSON CALIFORNIA DEPARTMENT OF SOCIAL SERVICES	
APPLICATION AND ORDER FOR APPOINTMENT OF GUARDIAN AD LITEM - CIVIL <input type="checkbox"/> EX PARTE	CASE NUMBER: RG19046685
<i>NOTE: This form is for use in civil proceedings in which a party is a minor, an incapacitated person, or a person for whom a conservator has been appointed. A party who seeks the appointment of a guardian ad litem in a family law or juvenile proceeding should use form FL-935. A party who seeks the appointment of a guardian ad litem in a probate proceeding should use form DE-350/GC-100. An individual cannot act as a guardian ad litem unless he or she is represented by an attorney or is an attorney.</i>	

1. Applicant (name): **LILIANA ESPINOZA** is
 - a. ☒ the parent of (name): **DYLAN LOPEZ ESPINOZA**
 - b. ☐ the guardian of (name):
 - c. ☐ the conservator of (name):
 - d. ☐ a party to the suit.
 - e. ☐ the minor to be represented (if the minor is 14 years of age or older).
 - f. ☐ another interested person (specify capacity):
2. This application seeks the appointment of the following person as guardian ad litem (state name, address, and telephone number):
LILIANA ESPINOZA
1510 67TH AVE, OAKLAND, CA 94621
(510) 332-2354
3. The guardian ad litem is to represent the interests of the following person (state name, address, and telephone number):
DYLAN LOPEZ ESPINOZA
1510 67TH AVE, OAKLAND, CA 94621
(510) 332-2354
4. The person to be represented is:
 - a. ☒ a minor (date of birth): **August 16, 2015**
 - b. ☐ an incompetent person.
 - c. ☐ a person for whom a conservator has been appointed.
5. The court should appoint a guardian ad litem because:
 - a. ☒ the person named in item 3 has a cause or causes of action on which suit should be brought (describe):
Writ of administrative mandamus under CCP § 1094.5

☐ Continued on Attachment 5a.

PLAINTIFF/PETITIONER: DYLAN LOPEZ ESPINOZA	CASE NUMBER:
DEFENDANT/RESPONDENT: KIMBERLEY JOHNSON	

5. b. ☐ more than 10 days have elapsed since the summons in the above-entitled matter was served on the person named in item 3, and no application for the appointment of a guardian ad litem has been made by the person identified in item 3 or any other person.
- c. ☐ the person named in item 3 has no guardian or conservator of his or her estate.
- d. ☒ the appointment of a guardian ad litem is necessary for the following reasons (*specify*):
To file the above lawsuit on behalf of her son who is under 18 years old.
- ☐ Continued on Attachment 5d.
6. The proposed guardian ad litem's relationship to the person he or she will be representing is:
a. ☒ related (*state relationship*): MOTHER
b. ☐ not related (*specify capacity*):
7. The proposed guardian ad litem is fully competent and qualified to understand and protect the rights of the person he or she will represent and has no interests adverse to the interests of that person. (*If there are any issues of competency or qualification or any possible adverse interests, describe and explain why the proposed guardian should nevertheless be appointed*):

☐ Continued on Attachment 7.

DANIEL FAESSLER
(TYPE OR PRINT NAME)


(SIGNATURE OF ATTORNEY)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 12/12/2019

LILIANA ESPINOZA ON BEHALF OF DYLAN LOPEZ ESPINOZA
(TYPE OR PRINT NAME)


(SIGNATURE OF APPLICANT)

CONSENT TO ACT AS GUARDIAN AD LITEM

I consent to the appointment as guardian ad litem under the above petition.

Date: 12/12/2019

LILIANA ESPINOZA
(TYPE OR PRINT NAME)


(SIGNATURE OF PROPOSED GUARDIAN AD LITEM)

ORDER ☐ EX PARTE

THE COURT FINDS that it is reasonable and necessary to appoint a guardian ad litem for the person named in item 3 of the application, as requested.

THE COURT ORDERS that (*name*):
is hereby appointed as the guardian ad litem for (*name*):
for the reasons set forth in item 5 of the application.

Date:

JUDICIAL OFFICER

☐ SIGNATURE FOLLOWS LAST ATTACHMENT

DANIEL FAESSLER, SBN: 295691
East Bay Community Law Center
1950 University Ave Suite 200
Berkeley, CA 94704
TELEPHONE: 510-548-4040 ext. 357
FAX: 510-849-1536

Attorney for Petitioner,
DYLAN LOPEZ
ESPINOZA, a minor by his
mother acting as his guardian
ad litem

ENDORSED
FILED
ALAMEDA COUNTY

DEC 12 2019

CLERK OF THE SUPERIOR COURT
By Saguana Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

DYLAN LOPEZ ESPINOZA, a minor, by his
mother Liliana Espinoza acting as his guardian *ad*
litem,

Petitioner,

vs.

KIMBERLEY JOHNSON, DIRECTOR OF
CALIFORNIA DEPARTMENT OF SOCIAL
SERVICES, and CALIFORNIA DEPARTMENT
OF SOCIAL SERVICES,

Respondents.

Case No.:

RG19046685

FILED:

PETITION FOR WRIT OF
ADMINISTRATIVE MANDAMUS
(C.C.P. §1094.5)

NO FILING FEE per Cal. Welf. & Insti.
Code § 10962

I. INTRODUCTION

1. This is a petition for a writ of mandate under Code of Civil Procedure § 1094.5 and Welfare and Institutions Code § 10962. Petitioner Dylan Lopez Espinoza, a minor child, requests a review of the final decision of the Respondents the California Department of Social Services (CDSS) and its Director, Kimberley Johnson, denying In-Home Supportive Services (IHSS) protective supervision.

2. Dylan requires protective supervision because, due to a rare genetic disorder called Kleefstra Syndrome, he engages in dangerous and self-injurious behavior, such as head banging, that can cause significant injury if his behavior is not constantly monitored. Alameda County

1 denied his request for IHSS protective supervision. This denial was upheld by an Administrative
2 Law Judge (ALJ) and adopted by Respondents. Dylan has exhausted his administrative remedies
3 and has no other remedy except through this action.

4 **II. PARTIES**

5 3. Dylan Lopez Espinoza, a resident of Alameda County, California, has significant
6 disabilities that qualify him for Supplemental Security Income (SSI), Medi-Cal, and IHSS.

7 4. Respondent Kimberley Johnson is the Director of the California Department of Social
8 Services (CDSS). She is sued here in her official capacity. As such, she is responsible for the
9 overall administration of the IHSS program according to all applicable laws and regulations and
10 has adopted the administrative decision at issue here.

11 5. Respondent CDSS is the agency responsible for the overall administration of the IHSS
12 program.

13 6. On December 12, 2018, Respondents released a final hearing decision, affirming
14 Alameda County's denial of IHSS protective supervision to Dylan, but granting other IHSS
15 hours. A true and correct copy of this decision is attached as Exhibit 1.

16 **III. STATUTORY SCHEME**

17 7. IHSS is a cooperative federal/state/county program intended to provide home-based
18 attendant care services to certain low-income individuals with disabilities. The IHSS program is
19 designed to provide supportive services to aged, blind, and disabled individuals who need those
20 services to safely remain in their own homes but who are unable to perform the services
21 themselves. Welf. & Inst. Code § 12300(a). By helping individuals stay in their homes, the
22 program prevents institutionalization.

23 8. The IHSS program must be administered with "due regard for the preservation of family
24 life" and so as to encourage, among other goals, "self-respect" and "self-reliance." Welf. & Inst.

1 Code § 10000. Its overall purpose is to provide protective services to “persons subject to social
2 or legal disability” and “subject to exploitation jeopardizing their present or future health,
3 opportunity for normal development, or capacity for independence.” Welf. Inst. Code § 10001.

4 9. Most IHSS services are provided through California’s Medicaid program (“Medi-Cal”).
5 Medicaid is a joint federal and state medical assistance program for certain groups of low-
6 income people, including children. *See* 42 U.S.C. §§ 1396-1396v. The counties, including
7 Alameda County, administer the IHSS program at the local level. CDSS, as the overseer of the
8 IHSS program, must ensure that the counties comply with requirements of the governing statutes
9 and regulations. Welf. & Inst. Code §§ 12302; 14132.95(f); 14132.951(b),(e). IHSS services
10 must be provided to every eligible recipient on the basis of individual need. Welf. & Inst. Code §
11 12301(a).

12 10. IHSS includes a range of services such as personal care services, domestic services,
13 paramedical services, and protective supervision. Welf. & Inst. Code § 12300(b). Protective
14 supervision consists of monitoring the behavior of an individual in order to safeguard “against
15 injury, hazard, or accident.” Manual of Policies and Procedures (MPP) § 30-757.17. It is
16 available to “non self-directing, confused, mentally impaired, or mentally ill persons.” MPP §
17 30-757.171. Protective supervision is available to qualifying IHSS recipients including children,
18 regardless of their age, but is only available due to the functional limitations of the individual.
19 CDSS has issued specific guidelines for assessing children for protective supervision. These
20 guidelines include the following instructions to county social workers:

21 ...2. evaluate a mentally ill/mentally impaired minor in the functions of memory,
22 orientation, and judgment, on an individualized basis;

23 3. evaluate a mentally ill/mentally impaired minor even if there are no previous
24 injuries;

25 4. evaluate a mentally ill/mentally impaired minor regardless of age;

5. assess whether the minor needs more supervision because of his/her mental impairment than a minor of the same age without such an impairment;
- ...7. review any relevant information provided by the parent;
8. advise parents or guardians of the availability of, and the conditions for receiving Protective Supervision; and
9. not presume that services, which are otherwise compensable, will be provided voluntarily by a parent or guardian or anyone else....

All County Letter ("ACL") No. 15-25 (2015), Protective Supervision Clarifications, available at <https://www.cdss.ca.gov/lettersnotices/EntRes/getinfo/acl/2015/15-25.pdf>, p. 6, and attached as Exhibit 2.

11. An IHSS beneficiary, as a recipient of public social services, may challenge a county's denial of protective supervision at a state administrative hearing. Welf. & Inst. Code § 10950(a). An ALJ, acting on behalf of the Director of CDSS, conducts the administrative hearing and issues a written decision. Welf. & Inst. Code §§ 10953, 10958.

IV. FACTUAL BACKGROUND

12. Dylan has Kleefstra Syndrome, autism, chronic infections, and limited hearing in his left ear. He is currently 4 years old. He was nearly 2 years old when the County conducted an assessment concluding that he was ineligible for IHSS protective supervision. He lives with his mother, Liliana, a 18-year-old brother, a 16-year-old sister, a 9-month-old sister, and his grandmother. His mother is his IHSS provider.

13. Due to his syndrome, Dylan engages in potentially dangerous repetitive behaviors, does not understand dangers, and is high energy. He does not understand his own developmental delays, causing him to hurt himself. He is unable to communicate when he is hurt due to not

1 having intelligible language abilities. His typically-developing siblings did not engage in these
2 behaviors and did not require as high a level of supervision.

3 14. Dylan requires frequent redirection and twenty-four-hour supervision due to his limited
4 cognitive skills and repetitive self-harming behaviors. He has no sense of danger, often putting
5 himself in harm's way.

6 15. In addition, he has engaged in the following behavior:

- 7 a. Ran into the street without regard for vehicles;
- 8 b. Grabbed hot pans on the stove;

9 16. He regularly engages in the following behaviors:

- 10 a. Throwing himself on the ground;
- 11 b. Punching himself repeatedly;
- 12 c. Banging his head against the wall repeatedly.

13 17. Dylan is watched constantly to ensure his safety at home. He requires round-the-clock
14 supervision that is significantly greater than would be required by a child of the same age
15 without his impairments. Without this supervision, Dylan would not be able to reside at home, as
16 he engages in activities that could result in serious harm to him.

17 18. An IHSS application was filed on Dylan's behalf on August 9, 2017. In a Notice of
18 Action dated October 16, 2017, the County denied IHSS protective supervision but allocated
19 hours for other IHSS care. Exhibit 3, pp. 1-2.

20 19. Dylan appealed the denial of protective supervision and a hearing was held on October
21 10, 2018. At the hearing, the County social worker asserted that Dylan's need for constant
22 supervision did not differ from that of a typical 2-year-old, and therefore he was ineligible for
23 protective services. Exhibit 1, pp. 10. Dylan's mother and primary care physician testified at the
24 hearing about numerous dangerous activities he engages in throughout the day and night, and

1 how Dylan's mom constantly watches and safeguards him. Exhibit 1, pp. 11-12.

2 20. In a decision released on December 12, 2018, CDSS's ALJ upheld the County's denial
3 of IHSS protective supervision for Dylan. The ALJ found both that "the [Petitioner] is not able to
4 assess danger or the risk of harm to himself and is therefore non-self-directing" and that
5 Petitioner "has the ability to engage in potentially dangerous activities that may cause self-
6 harm." Exhibit 1, pg. 28. Despite these findings, the ALJ erroneously concluded that Dylan's
7 "need for constant supervision is no greater or less than the constant supervision that is need by
8 all 2-year-old children, with or without mental impairment." Exhibit 1, pg. 29.

9 21. Respondents adopted the ALJ's decision as the final administrative decision. Having
10 completed the administrative appeal process, Petitioner now seeks judicial review in this action
11 in a writ of administrative mandate under the Code of Civil Procedure § 1094.5.

12 ADMINISTRATIVE MANDAMUS CLAIMS

13 C.C.P. § 1094.5

14 22. Petitioner incorporates by reference all the foregoing paragraphs.

15 23. Petitioner's claim involves a fundamental vested right and is therefore reviewed under
16 the independent judgment standard.

17 24. Respondents, in rendering the administrative decision at issue here, failed to proceed in
18 the manner required by law to the prejudice of Petitioner. Respondents misapplied IHSS
19 eligibility criteria in finding that Petitioner did not qualify for protective supervision because
20 "most 2-year old children need constant supervision, 24 hours a day, 7 days per week, to remain
21 safe" and "the amount of time or intensity of the supervision required is the [sic] generally the
22 same, regardless of whether the child is or is not mentally impaired." Exhibit 1, pg. 29. This is
23 contrary to the requirement that "a minor must not be denied PS based solely on age." ACL No.
24 98-87 (1998), available at <https://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl98/98-87.pdf>.

1 p. 3, and attached as Exhibit 4.

2 25. Respondent also abused their discretion to the prejudice of Petitioner, in that their
3 findings are against the weight of evidence. For example, contrary to a finding that Petitioner did
4 not require supervision of a greater intensity than the general 2-year-old, Dylan's secondary
5 treating physician, Dr. Gonzalez, explained that Dylan could not remain safely in a typical
6 daycare center for toddlers and required constant supervision. Exhibit 1, pg. 6. In addition, Dr.
7 Postma, Petitioner's treating pediatrician since birth, testified that Petitioner cannot be left alone
8 to play with toys or with any other type of distractions unattended while his mom quickly goes to
9 the restroom. Exhibit 1, pg. 11. Additionally, as Dr. Postma testified, unlike typical 2-year olds
10 that sleep several hours or until the morning, Petitioner sleeps only 1 to 3 hours every night and
11 wakes up agitated and aggressive, at which time his mom must wake up with him to ensure he
12 does not engage in dangerous activity. Exhibit 1, pg. 12.

13 PRAYER FOR RELIEF

14 Wherefore, Petitioner respectfully asks this Court:

15 1) To issue a Writ of Mandamus commanding Respondents to:

- 16 a. set aside the final administrative decision (Hearing No. 2018256103); and
17 b. issue a new decision ordering Alameda County to provide IHSS protective
18 supervision services to Petitioner and to pay Petitioners provider retroactive IHSS
19 wages with prejudgment interest for protective supervision provided since the
20 application for services.

21 2) To grant Petitioner's court costs and reasonable attorney's fees, pursuant to Welfare and
22 Institutions Code section 10962.

23 3) To grant such other relief as the court deems reasonable and necessary.
24

1
2 Dated:

12/11/2019




3 DANIEL FAESSLER
4 East Bay Community Law Center
5 Attorney for Petitioner, Dylan Lopez
6 Espinoza, a minor by his mother, Liliana
7 Espinoza acting as guardian *ad litem*

VERIFICATION

I, LILIANA ESPINOZA, Mother of Dylan Lopez Espinoza, Petitioner. I certify that the facts contained in the above Petition for Administrative Mandamus are true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 11 day of December, 2019 in Berkeley, California.



LILIANA ESPINOZA on behalf of Dylan Lopez Espinoza

Exhibit 1

**DEPARTMENT OF HEALTH CARE SERVICES
CALIFORNIA DEPARTMENT OF SOCIAL SERVICES**

Hearing No. **2018256103**

In the Matter of Claimant(s):

Liliana Espinoza
1510 67th Avenue
Oakland, CA 94621

**PROPOSED
DECISION**

Adopted by the Director
December 10, 2018
Department of Health Care Services
California Department of Social Services

I submit the attached proposed decision
for review and recommend its adoption.

Cert Date: December 6, 2018

Khadijah Hargett
Administrative Law Judge

State Hearing Record

<i>Hearing Date:</i> October 10, 2018	<i>Release Date:</i> December 12, 2018
<i>Aid Pending:</i> Not Applicable	<i>Issue Codes:</i> [560-3] [620-3] [626-2]
<i>Agency:</i> Alameda County	<i>Agency Representative:</i> Laura Hardt
<i>Agency:</i>	<i>Agency Representative:</i>
<i>Authorized Rep. Organization:</i>	<i>Authorized Rep:</i> Daniel Faessler
<i>SSN:</i>	<i>SSN:</i>
<i>AKA:</i>	<i>AKA:</i>
<i>Case Name:</i> Dylan Lopez Espinoza	<i>Language:</i> SPANISH
<i>LA District/Case:</i>	<i>Companion Case:</i>

Appeal Rights

You may ask for a rehearing of this decision by mailing a written request to the Rehearing Unit, 744 P Street, MS 9-17-37, Sacramento, CA 95814 within 30 days after you receive this decision. This time limit may be extended up to 180 days only upon a showing of good cause. In your rehearing request, state the date you received this decision and why a rehearing should be granted. If you want to present additional evidence, describe the additional evidence and explain why it was not introduced before and how it would change the decision. You may contact Legal Services for assistance.

You may ask for judicial review of this decision by filing a petition in Superior Court under Code of Civil Procedure, section 1094.5 within one year after you receive this decision. You may file this petition without asking for a rehearing. No filing fees are required. You may be entitled to reasonable attorney's fees and costs if the Court renders a final decision in your favor. You may contact Legal Services for assistance.

This decision is protected by the confidentiality provisions of Welfare and Institutions Code section 10850, subdivision (a).

SUMMARY

Alameda County (County) erred in determining that the Claimant's son (Beneficiary) is eligible to In-Home Supportive Services Plus Option (IHSS PO) benefits in the amount of 32 hours and 29 minutes (32:29) per month effective September 14, 2017 because the County erred in its calculations of time needed regarding Medical Accompaniment, including public transportation travel time and wait time for each medical visit. The Beneficiary requires IHSS PO benefits in the amount of 36 hours and 10 minutes (36:10), effective August 9, 2017. The County shall issue a new Notice of Action (NOA) to the Claimant, setting forth the Beneficiary's total weekly IHSS PO hours. The Claimant's right to file a timely request for hearing to dispute this determination is expressly reserved. [620-3] [560-3]

Alameda County correctly determined that the Claimant's son is not eligible for In-Home Supportive Services (IHSS) Protective Supervision benefits. [626-2]

FACTS AND FINDINGS

"IHSS" refers to in-home supportive services available under the Personal Care Services Program (PCSP), the IHSS-Plus Option (IHSS-IPO) program, the Community First Choice Option (CFCO) program and the In Home Supportive Services Residual (IHSS-R) program.

On August 9, 2017, the Claimant applied for In-Home Supportive Services/Plus Option (IHSS PO) benefits on behalf of her son who was one-week shy of turning 2 years old. The Claimant reported the Beneficiary has a genetic disorder characterized by intellectual disability, hypotonia, global developmental delay (including cognitive abilities), plagiocephaly, severe gross motor delay, chronic uvula infections, astigmatism and deafness in the left ear.

On August 18, 2017, the Beneficiary's primary pediatrician signed an In-Home Supportive Services Program Health Care Certification Form (SOC 873) on behalf of the Beneficiary. The primary pediatrician identified the Beneficiary's medical condition as a rare genetic disorder characterized by intellectual disability and noted that his condition was expected to last permanently. The primary pediatrician opined that the Beneficiary is unable to independently perform one or more activities of daily living and that one or more IHSS tasks are recommended to prevent the need for out-of-home care. The primary pediatrician stated she had provided medical services to the Beneficiary since his birth.

On September 14, 2017, a County IHSS Social Worker (SW) conducted an initial home visit assessment to determine the Beneficiary's IHSS needs. The Claimant, the Beneficiary and the SW were present at the home visit. The Beneficiary was 2 years and 1 month old.

On October 16, 2017, County sent the Claimant a NOA informing her that her August 9, 2017 application for IHSS PO benefits on behalf of the Beneficiary had been approved in the monthly amount of 32 hours 29 minutes (32:29) effective August 9, 2017. These hours were allotted as follows: 3 hours 30 minutes (3:30) weekly for respiration, 3 hours 30 minutes (3:30) weekly for rubbing skin/repositioning and 30 minutes (:30) weekly for accompaniment to medical appointments. The County advised the Claimant that the Beneficiary was not eligible for Protective Supervision.

On January 10, 2018, Claimant's requested a state hearing to contest the County's action and designated an Authorized Representative (AR) from the East Bay Community Law Center.

On March 28, 2018, a state hearing was held in which the Claimant participated with the assistance of a Spanish Interpreter. The Claimant was represented by her AR, and an Appeals Officer and the SW who conducted the September 14, 2017 in-home assessment participated for the County.

At the hearing, the Claimant stated that she was only contesting the County's determinations regarding the IHSS PO needs in the areas of protective supervision and medical accompaniment as of August 9, 2017. The Claimant stated that she was not contesting the County's determinations as to IHSS PO service needs in the areas of respiration and rubbing skin/repositioning.

At the hearing, the County and the Claimant reached a stipulation on the matters of the need for protective supervision and the need for medical accompaniment such that as of August 9, 2017 the claimant's son would be reassessed by the County based upon an exchange of additional information (specified medical information from Claimant and specified mileage calculation data from County); and that upon completion of its reevaluation, the County would notify the Claimant of the County's determination and of her right to request a hearing if she disagreed with the County's decision.

The Administrative Law Judge (ALJ) remanded the claim in part by stipulation in that Alameda County must abide by its stipulation (as noted above). As to those matters that were uncontested by the Claimant at the hearing, namely the County's determinations as to the IHSS PO needs in the areas of respiration and assistance with rubbing skin/repositioning as of August 9, 2017 (noted above), the ALJ sustained those County's actions. In all other respects, the claim was denied.

On June 6, 2018, the County notified the Claimant's AR of the County's completion of its reassessment as per the stipulation at the March 28, 2018 hearing via a lengthy email stating that, "[a]fter a review of all information, documentation, regulations, and consulting with IHSS upper management, the County's stance has not changed regarding protective supervision and accompaniment to medical appointments."

The County did not provide the Claimant or the AR with a Notice of Action (NOA) after its determination and did not provide the Claimant or AR with information regarding the right to request a state hearing if the Claimant disagreed with the County's determination.

On August 31, 2018, the Claimant's AR requested a state hearing to dispute the County's action regarding the reassessment.

On October 10, 2018, a state hearing was held. The Claimant, the Beneficiary, AR, the Beneficiary's primary pediatrician, a County appeals representative, the (SW) that conducted the home visit assessment and the SW most recently assigned to the Claimant's case appeared at the hearing. Based on the remand of the prior hearing, the only IHSS PO categories that were in dispute for the hearing were: (1) accompaniment to medical appointments and 2) protective supervision, effective August 9, 2017. Also, in dispute was whether the County wrongfully denied Claimant's request for reassessment of IHSS PO benefits based on a change of circumstances effective May 18, 2018. This last issue has been bifurcated from the issues addressed in this decision and have been addressed separately under state hearing case number 104534188.

All the documentary and testimonial evidence proffered by both parties was carefully considered in resolving the disputed issues.

Jurisdiction

At the state hearing on October 10, 2018, the County raised the issue of jurisdiction in regards to the following: 1) whether jurisdiction exists in regards to the County's denial of protective supervision effective August 9, 2017; 2) whether the Claimant's son is eligible for protective supervision effective August 9, 2017; 3) whether jurisdiction exists in the County's assessed hours for accompaniment to medical appointments effective August 9, 2017; 4) whether the County appropriately assessed the Claimant's son's hours for accompaniment to medical appointments; and 5) whether jurisdiction exists in regards to the Claimant's assertion that on May 18, 2018, the Claimant requested an assessment of IHSS hours. Issue number 5 had been addressed in a separate state hearing decision, case number 104534188.

Based on the facts stated above, it is found by a preponderance of evidence, that the Claimant/AR filed each hearing request within 90 days of a NOA or of being notified that the County had taken an action or failed to act. The hearing request contesting the October 16, 2017 NOA was filed within 90 days of that notice, on January 10, 2018. The hearing request contesting the June 6, 2018 notification of the County's reassessment determinations was filed within 90 days of that notification, on August 31, 2018. This finding is supported by the testimony of the parties and the documents in the case record.

Documents

The County submitted its Statement of Position (SOP) with its attachments into evidence. The attachments included the following documents: (1) IHSS Application dated August 9, 2017 (described above); (2) an Assessment of Need for Protective Supervision for In-Home Supportive Services Program form SOC 873 dated August 18, 2017 (described above); (3) Assessment Narrative for the Beneficiary dated September 14, 2017 (described below as necessary); (4) Initial Development Report for the Beneficiary dated July 14, 2017 (described below as necessary); (5) Functional Ranks and Service Type Details (described below as necessary); (6) Notice of Action dated October 16, 2017 (described above); Decision of Administrative Law Hearing dated March 28, 2018 (described above); Email of County's Determination after Stipulated Reassessment dated June 6, 2018 (described above).

- Assessment Narrative for the Beneficiary dated September 14, 2017. It states the IHSS PO application and referral date was September 9, 2017 and the intake home visit was conducted on September 14, 2017. The persons listed as being present at the visit were the Beneficiary, the Claimant and the SW. The Beneficiary was noted to be a 2-year-old boy who lives with his mother, grandmother and two older siblings. It was noted that due to the Beneficiary's diagnosis of a genetic disorder characterized by intellectual disability, Claimant was unable to work because there is no suitable caregiver available other than her. Beneficiary's diagnosis also is indicative of extraordinary need in respiration and rubbing of skin. Since it is not appropriate for a 2-year-old to complete any personal care tasks independently, no other areas of extraordinary need were found. Due to Beneficiary's various health conditions, he requires treatment from several medical specialists monthly inclusive of an Audiologist, Pulmonologist and a Vision specialist. Claimant reported that the Beneficiary is very active and has high energy, so she needs to strap him into a high chair to prevent him from falling or hurting himself. She also reported that the Beneficiary hits and kicks her throughout the day without warning or reason. The SW observed that the Claimant had a swollen lip and was missing a bottom tooth which she stated were from the Beneficiary's kicks to her face. Claimant reported that the Beneficiary would soon begin ABA therapy via the Regional Center of the East

Bay (RCEB) in attempts to mitigate such behavior. The SW found the Beneficiary to be warm and he engaged in "high fives" and giggling with her.

- Initial Development Report dated 7/20/2017. It states that Beneficiary was referred to the LEAP program to address global development delays. Genetic testing conducted revealed that Beneficiary has a genetic disorder characterized by intellectual disability, hearing loss in his left ear, astigmatism (requiring him to wear corrective lenses), hypotonia which impacts his motor movements and coordination. The results of the evaluation showed that the Beneficiary was functioning at the level of a 13-month old for Gross Motor Skills, and at the level of a 4-5-month-old for the other categories which include Fine Motor Skills, Relationship to Inanimate Objects, Language/Communication, Relationship to Persons, Emotions and Feelings States, and Coping Behavior. The specialist recommended that the Beneficiary continue with his Regional Center services as outlines in his IFSP.
- Functional Ranks and Service Type Details is an undated document. It shows the functional index ranks assigned to the Beneficiary as "Rank 5" in respiration and as "Rank 1" in all other categories. As for the documents labeled "View Service Type", the three service types listed include 1) respiration with an assessed total need of 03:30 daily, 2) rubbing skin/repositioning with an assessed total need of 03:30 daily and accompaniment to medical appointments with an assessed total need of 00:30 weekly

The Claimant submitted documents into evidence. The documents included: (1) 5 page Progress Notes from Stanford Children's Health Medical Genetics Clinic dated 8/9/16 (described below as necessary); (2) SOC 821 dated 5/4/2017 (described below); (3) 4 page Initial Development Report dated 7/14/2017 (described above); (4) 1 page Occupational Therapy Progress Report dated 8/2/2018 (described below as necessary); (5) Alameda County SOP with 28 page attachment for hearing date 4/25/2017; (6) Alameda County SOP with 18 page attachment for hearing date 2/27/2018; (7) Request for Hearing dated 1/10/2018 (described above); (8) State Hearing Decision for hearing dated March 28, 2018 (described above); (9) SOC 821 dated 4/9/2018 (described below as necessary); (10) Letter from Dr. EG, the beneficiary's secondary pediatrician dated 4/18/2018 (described below as necessary); (11) All County Letter 15-25 (described below as necessary); (12) American Academy of Pediatrics, Recommendations for Preventative Pediatric Health Care; (13) Emails between County Social Worker and Authorized Representative following March 28, 2018 state hearing (described above); (14) Letter from Ms. GC, Infant Development Specialist dated August 14, 2018 (described below as necessary); (15) IHSS, Assessing Minors: Age Appropriate Guidelines; (16) IHSS, Using the APG Tool for Assessment of Minor Children; (17) IHSS, FI Ranking/HTG Quick Reference Tool; (18) ACIN I-82-17, Attachment B, Annotated Assessment Criteria; (19) Letter from Ms. MN, Nurse Practitioner dated August 1, 2018 (described below as necessary); (20) Record of Beneficiary's clinic visits since 2015 (described below as necessary); and (21) Request for Hearing dated 8/31/2018 (described above).

- Progress Notes from a Medical Genetics Clinic. A consultation was requested and conducted at the age of 11 months old, for Beneficiary regarding the diagnosis, management and genetic counseling for findings of hypotonia, global developmental delay, right-sided plagiocephaly, asymmetric kidneys and a history of failed newborn hearing screens. The report describes Beneficiary as a child with a variant of unknown significance on 9q34.3 which is an Intragenic duplication in the EHMT1 gene, which can possibly be the cause of the symptoms of a genetic disorder characterized by intellectual disability.

Recommendations were provided the Claimant to obtain further parental testing, obtain an echocardiogram to screen for cardiac abnormalities, to continue supportive therapies and to return to the clinic in one year.

- On May 4, 2017, Beneficiary's primary doctor signed a SOC 821 on behalf of him. The doctor stated she had treated him since birth. She diagnosed his mental condition as "a genetic disorder characterized by intellectual disability, global delay" that is permanent. She stated he had "moderate or intermittent deficit" memory ("has global development delay including cognitive abilities"), "moderate disorientation/confusion" ("global delay, also has ptosis and hyperopic astigmatism require patches & glasses, not able to understand. Left-sided hearing loss"), and "impaired" judgment ("for 20 months old, unable to control body, if left alone will throw himself against ground, severe gross motor delay, hypotonia"). She stated she was aware of any injury or accident he had suffered due to deficits in memory, orientation or judgment, which were "see above, can inflict self-harm if not monitored." She stated he does retain the mobility or physical capacity to place himself in a situation which would result in injury, hazard or accident. She stated "lifelong condition as has genetic syndrome" in the additional information section.
- Occupational Therapy Progress Report from Baby Builders Pediatric Therapy Services dated August 2, 2018. The report outlines the progress the Beneficiary had made within the year of therapy and set new goals and benchmarks for the Beneficiary to strive to achieve.
- On April 9, 2018, Beneficiary's doctor EG signed an Assessment of Need for Protective Supervision for IHSS Program (SOC 821) on behalf of him. The doctor stated that she had treated him since birth. She diagnosed his medical condition as "A genetic disorder characterized by intellectual disability, developmental delay, behavior problems" that is permanent. She stated he had "severe memory deficit" ("very delayed, unable to communicate, no words at all"), "severe disorientation" ("only 2.5 years old but unable to understand what is dangerous or not"), and "severely impaired" judgment ("only 2.5 years old but very aggressive toward self and others, difficult to control"). She stated she was not aware of any injury or accident he had suffered due to deficits in memory, orientation or judgment, "Mom always with him to prevent this." She stated he does retain the mobility or physical capacity to place himself in a situation which would result in injury, hazard or accident, [he is] "walking". She stated "this is a" in the additional information section.
- Letter from Dr. EG, the beneficiary's secondary pediatrician. Dr. EG, the beneficiary's secondary pediatrician states that Beneficiary has been a patient at their facility since birth. She has been his primary physician while his regular doctor is on maternity leave, has worked with him for four months and is familiar with his medical limitations. She states that the purpose of her letter is to expand on the notes in Beneficiary's medical chart that, due to their busy practice, may not fully explain the implications of his A genetic disorder characterized by intellectual disability. She states that she has reviewed Beneficiary's records, including formal evaluations, as well as note by multiple specialists at Children's hospital. She states that it is her opinion that **Beneficiary faces significant cognitive impairment and functional limitations that poses a significant risk to his safety, he is unable to self-direct which leads to self-injurious behavior such as head banging and hitting himself and he requires constant supervision.** She states that A genetic disorder characterized by intellectual disability causes poor judgment, confusion and dangerous behavior.

While other children Beneficiary's age learns their physical limitations, Beneficiary's cognitive disability prevents him from learning these tools and puts himself in harm's way. Beneficiary does not understand his own developmental motor delays, which causes him to fall and hurt himself. Beneficiary does not have a sense of danger and will run into the street, grab hot pans on the stove and is unaware of changes in the ground or floor beneath his feet. If he is left alone, he will throw himself to the ground, punch himself, and otherwise inflict self-harm. She states that Beneficiary's mother understands his subtle clues and can help regulate him in a way that others are unable to do. According to Dr. EG, the beneficiary's secondary pediatrician, Beneficiary requires constant attention and vigilance from his mother throughout the entire day to ensure his safety. Therefore, Beneficiary cannot safely be in a typical daycare center for toddlers. **In order to prevent Beneficiary from hurting himself, she believes it is essential that Beneficiary receives constant supervision.** [Emph. added.]

- American Academy of Pediatrics, Recommendations for Preventative Pediatric Health Care is a chart that shows the type of medical visits and screenings parents and caregivers should anticipate for their children at specific age intervals, from prenatal to 21 years of age.
- Emails exchanged between the AR and the County appeals representative between April 18, 2018 and October 5, 2018 in compliance with their previous stipulation). The emails show the AR providing various information to the appeals representative by way of email attachments. The emails also show the authorized representative posing questions to the appeals representative regarding the County's method of mileage calculations and the type of appointments being considered for accompaniment to medical appointments. The emails also show that the County appeals representative had suggested that a reassessment be conducted due to: 1) the amount of time that had passed since the initial assessment; and 2) the new evidence that was currently being provided by the authorized representative, but the response to that suggestion is not shown in the emails.
- Letter from Ms. GC, Infant Development Specialist lists multiple specialty clinics that Beneficiary has visited at UCFS Benioff Children's Hospital since August 18, 2016. The list includes dates Beneficiary visited at the following hospital clinics:
 - Audiology: 2/3/17, 3/29/18, 5/16/18
 - Cardiology: 10/12/16
 - Neurology: 9/30/16
 - Anesthesiology & Pediatric Surgery: 9/19/16, 5/16/18
 - Psychiatry: 1/8/18, 1/12/18, 1/24/18, 3/12/18, 7/23/18, 8/1/18
 - Ophthalmology: 2/3/17, 7/25/17
 - Otolaryngology: 9/19/16, 2/7/17, 3/26/18, 4/3/18, 5/16/18, 8/10/18
 - Pediatric Rehabilitation for Occupational Therapy: 9/13/16, 10/20/16, 7/6/17, 11/03/16, 12/11/17
 - Emergency Room Visits: 12/7/17, 2/21/17, 5/17/17 (resulted in an overnight stay)
- Letter from Ms. MN, who is a pediatric primary care mental health specialist is recommending that the maximum hours possible are granted to Beneficiary for in

home health support at the request of the Claimant. She states that Beneficiary is seen in the hospital's department of Psychiatry and Early Intervention Services for chronic sleep problems and behavioral problems since he was one-year-old. She states that Beneficiary has been diagnosed with genetic disorder, a genetic disorder characterized by intellectual disability associated with deletion at chromosome 9q34.4. She also states that Beneficiary was just seen by the Regional Center of the East Bay and was diagnosed with autism syndrome as well. It is her medical opinion that Beneficiary's sleep and behavioral difficulties are most likely related to his genetic syndrome, A genetic disorder characterized by intellectual disability and autism, which require him to be monitored 24 hours, 7 days a week for his safety. She states that Beneficiary only sleeps about four hours a night and hits his mother while falling asleep. Also, she says that all of Beneficiary's food must be blended because he is unable to chew. Beneficiary is not toilet trained, he is not able to feed or dress himself.

- Summary of Beneficiary's Clinic Visits to La Clinica de la Raza since August 18, 2016:
 - 7 visits in 2016 (2 well child appts)
 - 16 visits in 2017 (2 well child appts)
 - 2 visits in 2018 (1 well child appt)
 - Total visits: 25 Non-Routine: 18

All the documentary evidence presented at the hearing was submitted as evidence. The hearing record was reopened after the hearing for a brief period for both the County and the AR to provide documents that were discussed at the hearing but missing from the attachments provided with their respective Statements of Position.

The Beneficiary was a 2-year old child at the time of the home visit assessment on September 14, 2017. The medical evidence supports that Beneficiary has been diagnosed with a genetic disorder characterized by intellectual disability, hypotonia, global developmental delay, right-sided plagiocephaly, exotropia, ptosis, asymmetric kidneys, hearing loss in left ear, chronic uvula infections and more recently autism. With respect to the specific categories of IHSS services in dispute, the following applies.

Accompaniment to Medical Appointments

The County provided testimony and evidence regarding the reassessed needs of the Beneficiary in the category of accompaniment to medical appointments. The County stated that per County policy, the County does not give time for children to be taken to routine primary care appointments as this is considered parental responsibility. However, the County does give time for children's visits to specialty appointments and this time was calculated and included in the time allotted to the Beneficiary. The calculation included those medical providers made known to the County by the Claimant during the in-home visit and calculated as follows:

Transportation Time Calculation Table (Hours and Minutes Version)

	# Weekly visits	# Monthly Visits (see chart for less than 1x per month)	Round Trip Time per visit (minutes)	Wait Time (Minutes)	Weekly Time (Minutes)
Clinical Lab Test	12	1	24	15	0:09
Ophthalmologist	12	1	22	15	0:09
Pulmonologist	12	1	36	15	0:12
Total Minutes					
				Hours	Minutes
Total Weekly Hours and Minutes				0	30

The County SW stated that the time for accompaniment to medical appointments is calculated using miles only; starting at the client's home and ending at the appointment site. Also, per County policy, the County SW testified that the County does not give extra time for utilization of public transportation or for travel for utilizing different routes. Based on the County's mileage calculations, the Claimant's son was allotted 30 minutes (00:30) weekly for accompaniment to medical appointments.

The AR testified that the County incorrectly assessed the Beneficiary's need for accompaniment to medical appointments in two ways. The AR stated that the County failed to consider that due to his medical condition, the Beneficiary has medical appointments that exceed the number of routine medical appointments of a 2-year old child who does not have significant medical needs. The AR testified that according to the American Academy of Pediatrics, the recommended number of annual routine medical appointments for a 2-year old is two.

The AR testified that since the Claimant does not drive and relies on public transportation to travel to and from medical appointments, public transportation should be used in the County's travel calculations, not driving mileage. The AR stated that the Claimant takes two to three forms of public transportation to and from medical appointments. The AR stated that at the time of the Claimant's IHSS application, it took the Claimant nearly 2 hours roundtrip to visit the audiologist and vision specialist; and 3 hours round trip to visit the pulmonologist. The AR contends that nowhere in the regulations is there a requirement that the County uses mileage to calculate need for medical accompaniment.

The AR provided charts showing the Beneficiary's medical appointments and roundtrip travel time from August 2017 to August 2018. The average calculation of time roundtrip per visit was 2 hours and 30 minutes (2:30) for the 23 medical appointments the Claimant accompanied the Beneficiary to from August 2017 to August 2018. Based on the AR's calculations utilizing public transportation as the mode of transportation, he states that the Beneficiary's need for accompaniment to medical appointments should be 1:04-1:15 weekly from August 2017 to August 2018. He provided additional evidence showing the projected medical appointment and roundtrip time estimates for the Beneficiary's appointments from August 2018 going forward. This evidence was viewed as estimated calculations that can be used to assist in the determination of the Beneficiary's actual medical accompaniment needs for the effective date of August 9, 2017.

It is found that the Beneficiary had a total of 23 medical appointments from August 2017 to August 2018, 18 of those appointments were with medical specialists. This finding is based on

the credible testimony of the Beneficiary's primary pediatrician, the letter listing specialty appointments from UCSF Benioff Children's Hospital dated August 14, 2018, the summary of visits to La Clinica de la Raza since August 18, 2016, the testimony of the County SW and the credible testimony of the Claimant.

It is found that due to the Beneficiary's disability of Chronic Uvula Infections, he suffers from labored breathing and requires the Claimant to administer his inhaler six times daily, including periods of time when he is traveling roundtrip to medical appointments substantiating the need for wait time. This finding is based on the credible testimony of the Beneficiary's primary pediatrician, the letter listing specialty appointments from UCSF Benioff Children's Hospital dated August 14, 2018, the summary of visits to La Clinica de la Raza since August 18, 2016, the testimony of the County SW and the credible testimony of the Claimant.

It is found that the Claimant utilizes public transportation on a roundtrip basis to take the Beneficiary to his medical appointments. The Claimant accompanied the Beneficiary to 21 medical appointments (two visits to the primary pediatrician have been deducted) from August 2017 to August 2018. It is found that the Beneficiary needs additional time for accompaniment to medical appointments, including public transportation travel time and wait time, to remain safely in his home, effective August 9, 2017.

Based upon the testimony provided regarding the Beneficiary's medical appointments, travel time using public transportation and reasonable wait time for each visit, the Beneficiary's needs for medical accompaniment are reflected in the chart below:

Transportation Time Calculation Table (Hours and Minutes Version)

	# Weekly visits	# Monthly Visits (see chart for less than 1x per month)	Round Trip & Wait Time per visit (minutes)	Monthly Time (Minutes)	Weekly Time (Minutes)
Dr. Postma		0.25	64	16.00	3.70
Ophthalmologist		0.167	146	24.38	5.63
Psychiatry		0.667	132	88.04	20.33
Anes & Ped Surgery		0.083	136	11.29	2.61
Otolaryngology		0.333	136	45.29	10.46
Ped Rehab		0.167	136	22.71	5.25
Audiology		0.083	136	11.29	2.61
Total Minutes				219.00	
				Hours	Minutes
Total Weekly Hours and Minutes				0	51
Total Monthly Hours and Minutes				3	39

Protective Supervision

The Assessment Narrative Form states that the SW, the Claimant, and the Beneficiary were present at the home visit assessment. The Claimant advised the SW that the Beneficiary has been diagnosed with a genetic disorder characterized by intellectual disability, low muscle tone, global development delays, hearing loss in left ear, exotropia, ptosis, astigmatism and chronic uvula

infections. The Claimant stated that she is unable to work due to Beneficiary's diagnosis because there is no suitable caregiver available other than her. She reported that due to his low muscle tone, he requires rubbing of skin for 15 minutes twice per day to prevent atrophy. Due to the Beneficiary's suffering from chronic uvula infections which cause labored breathing, he requires inhalers to be administered 6 times per day. She also reported that with his diagnosis, he is both hearing and visually impaired.

The SW reported that the Beneficiary appeared very accelerated throughout the home visit. He was kicking, pounding his fists and smiling all while strapped in a high chair. The Claimant reported that she often takes this preventative measure when he is so high energy to prevent the Beneficiary from falling or hurting himself. The Claimant reported that the Beneficiary hits and kicks her repeatedly throughout the day without reason or warning. The Social Worker observed that the Claimant had a swollen lip and a missing bottom tooth from recent kicks to her face. The Claimant stated that ABA therapy would begin soon at the Regional Center of the East Bay in attempts to mitigate the Beneficiary's behavior. The SW found the Beneficiary to exhibit warm behavior towards her stating that he engaged in giggling and high fives with her.

With respect to protective supervision specifically, the narrative form states:

"No reported or assessed need for protective supervision. [Beneficiary] does not exemplify suicidal ideation, self-endangering behavior, or thoughts of harm towards others."

The Needs Assessment Form also shows the County assessed the Beneficiary with a rank of 1 for memory, a 1 for orientation and a 1 for judgment. However, the form provides no analysis of why or what the factual basis was for the County giving each of these ranks.

At the hearing, the SW testified consistent with the Needs Assessment Form. She noted that at the time of the assessment the Beneficiary was 2 years old and her reason for denial of protection supervision was because all 2-year olds require constant supervision, so the Beneficiary's needs did not differ from those of a typical 2-year old. She stated that during her reassessment of the Beneficiary's needs for protective supervision, she had considered the pediatrician's letter dated April 18, 2018, stating that the Beneficiary requires "constant supervision" and that "his cognitive impairment poses a risk to his safety". She also considered the fact that the pediatrician included in the letter that the [Beneficiary] "does not have a sense of danger and will run into the street, grab hot pans on the stove, and is unaware of changes in the ground or floor beneath his feet." Again, the SW reiterated that "this is the case for any 2-year old; children this age must be safeguarded at all times."

The SW went on to state that based on All County Letter No. 15-25 and *Garrett v. Anderson* protective supervision is not permissible if a minor of a similar age whom is not impaired requires comparable supervision. According to the SW, this is the case for the Beneficiary, as he requires "constant supervision" which is comparable to the supervision required for any 2-year old. She continues to explain that under MPP 30-757.173, when more supervision is needed, there must exist a need for 24-hour supervision. Considering the Beneficiary's need for constant supervision, this need is natural because all 2-year olds are unable to fully decipher safe from unsafe situations and he, like any typical 2-year old must be safeguarded and taught. She concludes that this need for constant supervision constitutes routine childcare. However, she states that this [need] can likely change as the Beneficiary ages. There was no testimony provided by the County concerning why the County ranked the Beneficiary a 1 for memory, orientation, and judgment in its needs assessment.

The Beneficiary's primary pediatrician testified that the Beneficiary has a genetic disorder characterized by intellectual disability which has caused him severe developmental delays. As of August 2017, the Beneficiary was 2 years old. She testified that a typical 2-year old has approximately 50 words in their vocabulary, has begun to put words together and their words are approximately 50% understandable to strangers. In the Beneficiary's case, he had no intelligible words, he was unable to communicate any wants or needs at that time due to his speech delay. He also had global delay, so his motor skills were delayed and he had just begun to walk at 18-24 months. A typical child begins to walk at 9-14 months. He was cognitively delayed so he could not process or understand hunger, danger, sleep or the world around him because he was cognitively between the ages of 6-8 months at that time. He also had fine motor disability, so he could not perform small tasks such as pick up small foods to feed himself like a typical 2-year-old would be able to do.

The Beneficiary's primary pediatrician also stated that in August 2017 the Beneficiary was non-self-directing because he could not understand commands, is incapable of learning about dangers and has no mental capability to appreciate the concepts of harm or danger.

The Beneficiary's primary pediatrician testified that when he began to walk, he became more mobile and was able to throw himself to the floor when he experienced sudden change of emotions such as irritability and aggravation. She stated that he has the physical ability to engage in dangerous activities. He engages in a lot of head banging as a form of coping or communication, the doctor was not able to say which one for sure. He is also able to dart into the street and out into parking lots, putting himself in danger. She stated that he requires vigilant, constant supervision.

The Beneficiary's primary pediatrician testified that a typical 2-year old can understand commands such as Stop, No, Hot, Cold and have had the experience of hurting themselves and learning that they shouldn't do certain things. The Beneficiary does not have any ability to understand those type of verbal commands or to learn from past experiences what can cause him harm. If left unattended, he has the ability to harm himself and has done so on a few occasions, this is why he requires constant supervision. An example of the level of supervision that he requires that a typical 2-year old may not, is that he cannot be left alone to play with toys or with any other type of distractions unattended while his mom quickly goes to the restroom. He suffers severe behavioral outbursts where he has thrown himself against the wall or into doors resulting in head injuries. Because he has no understanding of danger and injures himself, the Claimant has tried to safeguard him by having him wear a helmet.

The Claimant testified that the Beneficiary has harmed himself by banging his head against the wall. She stated that she tried to have him wear a helmet, but he refused to keep the helmet on his head for more than 10 minutes. Once the helmet was removed, he began hitting himself with the helmet, so it too became a danger to him. She states that he continually tries to hurt himself, he hits himself with his hands constantly, with doors or with anything else within his reach. She also stated that due to his medical condition of having weak muscles, he falls to the floors and hurts himself constantly.

The Beneficiary's primary pediatrician testified that he also has very irregular sleep cycles due to his genetic disorder characterized by intellectual disability. She stated that most 2-years olds can be put to bed and will typically sleep for several hours or until they are awakened in the morning but the Beneficiary cannot. The Beneficiary suffers from severe sleep dysregulation and will spontaneously fall sleep in the daytime and then only sleep 1 to 2 to 3 hours at night. She stated that this is a constant condition, and when the Beneficiary wakes up, he is very aggressive and agitated. She testified that each time the Beneficiary wakes up, his mom must wake up with him to ensure that he does not engage in dangerous or harmful behaviors. Due to his severe anxiety, the Beneficiary must have his mom nearby at all times to calm him, so she must sleep with him nightly.

The primary pediatrician elaborated on the Beneficiary's needs for 24-hour supervision, stating that the need is slightly less intense in the daytime but is far more intense at night. She stated that the Beneficiary differs from a typical 2-year old because he very easily becomes irritated and agitated. She states that he is very difficult to calm down because he has no verbal understanding, so his mom has had to learn how to understand his non-verbal cues. She also stated that the Beneficiary has no way to verbally communicate his needs for sleep, tired, boredom, hunger and so he manifests his need through severe behavioral disturbances.

Based on a preponderance of the credible evidence, it is found the Beneficiary has a mental impairment caused primarily by a genetic disorder characterized by intellectual disability and global delays. This finding is based on the SOC 821 forms dated May 4, 2017 and April 9, 2018. This finding is also based on the Progress Notes from Stanford Children's Health Medical Genetics Clinic dated August 9, 2016 and Initial Development Report from UCSF Benioff Children's Hospital dated July 14, 2017. This finding is further based on the County's Needs Assessment Form, April 18, 2018 letter from Dr. EG, the beneficiary's secondary pediatrician and the Occupational Therapy Progress Report dated August 2, 2018. It is further based on the testimony of the Beneficiary's primary pediatrician, County IHSS SW and the Claimant.

The SOC 821 form dated May 4, 2017 identify the Beneficiary as moderate in memory and orientation and mildly impaired in judgment. Although the County ranked the Beneficiary's memory, orientation and judgment as a rank 1, it did not submit any evidence to substantiate the basis for these rankings.

The testimony of the Beneficiary's primary pediatrician acknowledges that the Beneficiary is not able to understand the concepts of danger or harm, but he engages in dangerous activities that have and will likely continue to cause self-harm requiring vigilant constant supervision.

The County stated that it is typical that 2-year old children like the Beneficiary require constant supervision, so it likely that his age is the cause of such behavior and not his mental impairment. It is difficult to determine what parts of the Beneficiary's behavior is attributable to his age, to body language communications and frustration due to his inability to communicate verbally or to his mental impairment.

LAW

All the regulations cited refer to the California Department of Social Services' Manual of Policies and Procedures (MPP), unless otherwise noted.

Jurisdiction

The County representative shall have authority at the state hearing to make binding agreements and stipulations on behalf of the County Welfare Department. (§22-073.37.)

A County action is one which requires adequate notice, as well as any other County action or inaction relating to the Claimant's application for or receipt of aid. (§22-001(c)(6).)

A state hearing shall be available to a Claimant who is dissatisfied with a County action and requests a state hearing. (§22-003.1.)

CalWORKs (formerly AFDC) regulations define "aid" as cash grants for maintenance needs and medical assistance under the Medi-Cal program, and Medi-Cal only. (§40-103.3)

A request for state hearing must be filed within 90 days of the action or inaction with which the claimant is dissatisfied. In the CalFresh Program, the appropriate time limits are set forth in §§63-802.4 and 63-804.5. Except for cases involving informal hearings concerning foster care overpayments (see §45-306.3) if the claimant received an adequate and language-compliant notice of the action, the date of the action is the date the notice was mailed or given to the claimant. If adequate notice was required but not provided or if the notice is not adequate and/or language-compliant, any hearing request (including an otherwise untimely hearing request) shall be deemed a timely hearing request. (§22-009.1 revised effective January 24, 2007)

The state hearing decision shall determine only those circumstances and issues existing at the time of the County action in dispute or otherwise agreed to by the parties. (§22-062.4.)

A "preponderance of the evidence" means "more likely than not." (Tellabs Inc. v. Makor Issues & Rights, Ltd. (2007) 127S.Ct 2499, 2513, 168 L.E.2d 179, 196)

A request for hearing or portion thereof shall be dismissed by written hearing decision when the person who requests the hearing does not have standing to request the hearing. Those persons who have standing to request the hearing are set forth in §22-001(c)(2). (§22-054.35.)

A recipient shall have the right to request a state hearing to review the current amount of aid. At the Claimant's request, such review shall extend back as many as 90 days from the date the request for hearing is filed and shall include review of any benefits issued during the entire first month in the 90-day period. (§22-009.2.)

The CDHS issues Medi-Cal regulations and these regulations are found in Title 22, California Code of Regulations (CCR). All further references, unless otherwise noted, are from the CCR. (§50005)

Hearings are to be conducted in accordance with regulations and procedures set forth by the California Department of Social Services (CDSS). Those regulations are set forth in Division 22 of the Manual of Policies and Procedures issued by the CDSS. (§50953)

For purposes of this decision, W&IC is the abbreviation for the Welfare & Institutions Code.

The CDHS issues Medi-Cal regulations and these regulations are found in Title 22, California Code of Regulations (CCR). All further references, unless otherwise noted, are from the CCR. (§50005)

Hearings are to be conducted in accordance with regulations and procedures set forth by the California Department of Social Services (CDSS). Those regulations are set forth in Division 22 of the Manual of Policies and Procedures issued by the CDSS. (§50953)

IHSS Programs and Categories

An individual shall be considered to be disabled for purposes of IHSS if he or she is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which has lasted or can be expected to last for a continuous period of not less than 12 months. The regulation makes reference to the disability criteria set forth in 20 Code of Federal Regulations §416, Subpart 1. (§§30-771.3 and .4)

A person is eligible for IHSS who is living in his/her own home and who meets all SSI/SSP eligibility criteria, except for income in excess of SSI/SSP eligibility standards. (§30-755.113)

IHSS shall be authorized only in cases where the recipient would not be able to remain safely in his/her home without authorized In-Home Supportive Services. (§30-700.1) This regulation is based on Welfare and Institutions Code (W&IC) §12300.

All Medi-Cal eligibility determinations are to be completed following Medi-Cal rules. This includes Medi-Cal eligibility determinations for IHSS and PCSP recipients.
(All County Welfare Director's Letter 04-27, August 30, 2004)

The term IHSS is often used to refer generally to four distinct state/county programs which provided in-home services to disabled populations. These programs are the following:

- PCSP (Personal Care Services Program) is a program funded through Medi-Cal and provides services to individuals who otherwise qualify for Medi-Cal and have a chronic disabling condition. Eligibility is fully based on Medi-Cal eligibility. PCSP is unavailable to individuals whose provider is their spouse or to minor individuals whose parent is the provider. It is also unavailable if the provider is receiving advance payment or the recipient is receiving a restaurant meal allowance. See, generally, Welfare and Institutions Code 14132.95
- IHSS Plus Option (IPO) is a program funded through Medi-Cal, which provides services for federally eligible Medi-Cal recipients who do not qualify for the PCSP Program. Such recipients often include individuals where the spouse is the provider or minors when the parent is the provider. Eligibility is fully based on Medi-Cal eligibility. See, generally, Welfare and Institutions Code 14132.97.
- Community First Choice Option (CFCO) is a program that provides services for federally eligible Medi-Cal recipients who meet IPO requirements and in addition require 195 hours over service or meet certain other levels of severity of need. See, generally, All County Letter 14-60, August 29, 2014.

IHSS Residual (IHSS-R) is a program limited to disabled individuals who do not qualify for federal Medi-Cal program participation, primarily legal aliens. Eligibility is based on linkage to the SSI/SSP program. See, generally, Welfare and Institutions Code 12300 et. seq.

For IHSS recipients who request a hearing pursuant to MPP section 22-009.2 to challenge their service authorization, the administrative law judge shall determine whether a change in circumstances has occurred since the recipient's last assessment or reassessment and whether that change was reported to the County welfare department. If the administrative law judge finds that a change in circumstances has occurred, relief shall be limited to ordering the County to perform a reassessment of the recipient's need for services unless the judge finds that the County welfare department was notified of the change in circumstances and failed to conduct a reassessment in accordance with MPP section 30-761.219. Any resulting adjustment of authorized service hours shall be effective as of the date of the change in circumstances. If it is determined that a change in circumstances has not occurred, the recipient's request for hearing shall be subject to the time limits set forth in 22-009.1. (§22-009.2.21)

Under state law, the purpose of the IHSS program is to provide those supportive services to eligible Aged, Blind and Disabled (ABD) persons who are unable to perform the services themselves and "who cannot safely remain in their homes or abodes of their own choosing unless these services are provided." IHSS is an alternative to out-of-home care.
(Welfare and Institutions Code (W&IC) §12300(a); §30-700.1.)

It is the intent of the Legislature that the State Department of Health Services seek approval of a Medicaid waiver under the federal Social Security Act in order that the services available under Article 7 (commencing with Section 12300) of Chapter 3, known as the In-Home Supportive Services program, may be provided as a Medi-Cal benefit under this chapter, to the extent federal financial participation is available. The waiver shall be known as the "IHSS Plus waiver." (Welfare and Institutions Code (W&IC) 14132.951(a))

The US Department of Health Care Services, Centers for Medicare and Medicaid Services (CMS) approved a Social Security Act § 1915(j) Self-Directed Personal Assistance Services State Plan Option program for California. This program is known as the IHSS Plus Option (IPO) and became effective October 1, 2009. Individuals eligible for the IHSS Plus Waiver (IPW) program were transitioned into the IPO program.

The IPW was limited to five years with a possibility of renewal; however, during that time, CMS initiated new options to allow recipients in the IPW to be served in a State Plan Option program. The new IPO program continues federal funding for the IPW population. The program criteria will continue to be the same as for the IPW.
(ACIN I-33-10, April 21, 2010)

To the extent feasible, the IHSS Plus waiver described in subdivision (a) shall incorporate the eligibility requirements, benefits, and operational requirements of the In-Home Supportive Services program as it exists on the effective date of this section. The director shall have discretion to modify eligibility requirements, benefits and operational requirements as needed to secure approval of the Medicaid waiver.
(Welfare and Institutions Code (W&IC) 14132.951(b))

The US Department of Health Care Services, Centers for Medicare and Medicaid Services (CMS) approved a Social Security Act § 1915(j) Self-Directed Personal Assistance Services State Plan Option program for California. This program is known as the IHSS Plus Option (IPO) and became effective October 1, 2009. Individuals eligible for the IHSS Plus Waiver (IPW) program were transitioned into the IPO program.

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(ACIN I-33-10, April 21, 2010)

A child means a person under the age of 21, except for those considered adults per §50014. (§50030(a)) An unborn is considered a child for Medi-Cal purposes (§50030(b))
To be eligible for PCSP or IHSS Plus Waiver (replaced by IPO), an individual must be eligible for full scope FFP Medi-Cal. The California Department of Health Care Services (DHCS) has sole responsibility for determining who is eligible for full scope FFP Medi-Cal.
(ACIN I-18-08, March 12, 2008)

In the IHSS Plus Waiver (replaced by IPO) process, presumptive disability is determined in accordance with Medi-Cal regulations located at Title 22, CCR, Division 3, Section 50167(a)(1)(C).

Additionally, for those not already determined eligible for full-scope federally funded Medi-Cal, a determination for Medi-Cal eligibility must be completed before final eligibility for the IHSS Plus Waiver can be established.
(§30-785(g)(2) and (3))