

IHSS STATE REHEARING REQUEST

Date of Postmark on Envelope: February 12, 2024

Date Decision was Received: February 15, 2024

Date of Rehearing Request: March 12, 2024

- Case Name: Kaleb Xiong
- Claimant: Yang Xiong (Kaleb's father)
- Witness: Mary Xiong (Kaleb's mother)
- IHSS Case #: 1951916
- State Hearing Case #: 104946193
- Hearing Date: 1/10/2024 @ 10:00 AM
- Administrative Law Judge: Julie Warren
- Sacramento County Hearing Specialist: Yolanda Lewis
- Sacramento County Social Worker: Norman Choy

SUMMARY - WHY A REHEARING SHOULD BE GRANT

1. The 1/10/2024 hearing was unfair; there was an abuse of discretion.
2. The adopted decision is not supported by the evidence in the record.
3. The adopted decision does not address all the claims and issues we raised and is not supported by the evidence.

REASON 1: The 1/10/2024 hearing was unfair; there was an abuse of discretion.

Per Section 22-049.2 of the State Hearing and Request Review (Manual Letter No. CF-95-02), "The hearing shall be conducted in an impartial manner." Julie Warren, the ALJ who presided over the hearing, violated this requirement. Throughout the hearing, the ALJ made unprofessional and unnecessary remarks about our testimonies, which made us uncomfortable and derailed us from what we had planned to present.

At 13 minutes and 2 seconds through 16 minutes and 26 seconds of the hearing, during my time to question the County, as I got closer to making my point about how the County Hearing Specialist did not consider the

overwhelming evidence that supported Kaleb's qualification for Protective Supervision, the County Hearing Specialist turned to the ALJ for support. Sure enough, the ALJ intervened and defended the County Hearing Specialist, which distracted me from being able to make my points entirely the way I had initially planned. On the other hand, later in the hearing, when the ALJ questioned about Kaleb's 1:1 support at school (Hearing Timestamp 40:06 -40:50), the ALJ said nothing to disapprove of the County Hearing Specialist when she made remarks that were out of turn but supported the ALJ's position.

At 22 minutes and 27 seconds into the hearing, the ALJ remarked, *"But what's the dangerous behavior, right? Like, if he has an anxiety attack, that's not going to kill him, right?"* This statement was uncalled for. It made us feel as if she wanted our child to get hurt before she would hear us out. Shortly after, the ALJ dismissed and belittled our concerns about Kaleb's unusual behavior of covering his ears so tightly that he broke out with sweats by saying, *"I do that too,"* and then quickly changed the subject.

At 34 minutes and 28 seconds into the hearing, I tried to convey to the ALJ that while the ALJ had a lot of questions, many of her questions would be answered if I was permitted to present. The ALJ quickly cut me off before I could fully complete my sentence and then stated, *"I need to make sure that I get my questions answered because, yeah, my decision is based on, like, I know what's relevant, and I know what I need to know. So I don't want to go off on a huge tangent of stuff that I don't need to know."* This statement was inappropriate and shows that the ALJ was not there to hear me out. She was not there to be impartial as the law dictated.

Consequently, we were derailed and felt that we were on the stand and that the judge was the lawyer for the County. She took it upon herself to do the County's job so much that she did so much more than what the County put forth in their argument to deny Protective Supervision for Kaleb. In short, the hearing atmosphere was one in which the ALJ was not there to listen to our side of the issue so a fair and impartial decision could be made. The ALJ had already decided against us from the start, and she was trying to corner us throughout the hearing. Sure enough, the adopted decision confirmed our suspicion.

REASON 2: The adopted decision is inconsistent with the law and not supported by the evidence in the record.

Per ACL 15-25, the Minor Recipient (Kaleb Xiong) "... does not have to suffer actual injury to be eligible for Protective Supervision, but only have a history of a propensity for placing him/herself in danger." The ALJ violated this regulation by focussing on whether Kaleb had sustained sufficient injuries from the dangerous behaviors instead of looking at whether Kaleb has "a history of a propensity for placing him/herself in danger."

The ALJ slyly reached her decision to uphold the County's denial of Protective Supervision for Kaleb by omitting critical information we had clarified about the Behavior Logs on Page 16 of my Claimant Statement of Position: "The two logs documented a total of 36 incidents, but these were only the incidents that had occurred. If we were to add all the times when we succeeded in preventing him from engaging in dangerous behaviors, the number of incidents would have been much higher."

Despite this candid disclaimer, the ALJ went out of her way to say that we had lied about how frequently Kaleb engaged in dangerous behaviors by claiming that what we documented on the Behavior Logs did not match what we said during the hearing. Clarifying this matter is crucial as it bears a significant weight on the decision. Below, we listed each behavior, the ALJ's position, and our response or the facts regarding the behavior.

MOUTHING OBJECTS**ALJ Position:**

"It is found that the Minor Recipient is not mouthing objects with the frequency which the Mother testified. This finding is supported by the fact that the Behavior Logs only record six incidents of mouthing during the period from August 29, 2023 to September 15, 2023 and October 1, 2023 to October 31, 2023. The IEP does not mention the mouthing behavior. Considering that the child is under the supervision of the school for a

sustained period, and the school is charged with the child's safety, it stands to reason that if the behavior were a danger, the IEP would indicate the behavior was occurring with such frequency that there is or would be a plan to prevent the behavior while in school. However, the IEP indicates nothing of the sort. The conclusion to draw then is that the behavior is not happening or is not happening frequently enough to pose a danger. Therefore, the Minor Recipient engages in the behavior of mouthing objects at the rate of six times in 49 days."

Response - The Fact:

The ALJ neglected to consider our explanation of the Behavior Logs on Page 16 of my Claimant Statement of Position: "The two logs documented a total of 36 incidents, but these were only the incidents that had occurred. If we were to add all the times when we succeeded in preventing him from engaging in dangerous behaviors, the number of incidents would have been much higher."

The ALJ cited that the school did not notice this mouthing objects behavior even though Kaleb had been under their supervision for a sustained period. This assertion is a false statement. Kaleb had not started Pre-K when the Elk Grove Unified School District developed his IEP on 5/9/2023. While we concede that mouthing objects was not stated in the IEP, the ALJ neglected to acknowledge that this behavior was documented in Kaleb's Teacher Questionnaire, completed on 11/28/2023. By this time, Kaleb's teacher and aides have worked with Kaleb for about four months, a reasonably sustained period under the school's supervision.

But even more telling about how the ALJ neglected or deliberately omitted crucial evidence are the images of Kaleb mouthing objects shown in the video that the ALJ viewed at the hearing. There were multiple images of Kaleb mouthing objects. For the ALJ to conclude that Kaleb mouths objects just six times in 49 days is a gross error of facts and an understatement of the degree to which the behavior occurred. We testified during the hearing that Kaleb engages in this behavior about five times per hour (Hearing Timestamp 24:53 - 25:03). In fact, this is the one behavior that Kaleb engages most often DAILY. Our testimony was omitted from consideration, which was an improper act by the ALJ.

TOUCHING THE STOVEALJ Position:

“It is found that the Minor Recipient is not attempting to touch the stove with the frequency with which the Mother testified. This finding is supported by the fact that the Behavior Logs only record two incidents of attempting to touch the stove during the period from August 29, 2023 to September 15, 2023 and October 1, 2023 to October 31, 2023. Therefore, the Minor Recipient engages in the behavior of attempting to touch the stove two times in 49 days.”

Response - The Fact:

The ALJ neglected to consider our explanation of the Behavior Logs on Page 16 of my Claimant Statement of Position: “The two logs documented a total of 36 incidents, but these were only the incidents that had occurred. If we were to add all the times when we succeeded in preventing him from engaging in dangerous behaviors, the number of incidents would have been much higher.”

For the ALJ to conclude that Kaleb attempted to touch the stove only two times in 49 days is a gross error of facts and an understatement of the degree to which the behavior occurred. We testified that Kaleb would attempt to touch the stove about four times per day (Timestamp 27:46 - 33:40). Our testimony was omitted from consideration, which was an improper act by the ALJ.

THROWING OBJECTSALJ Position:

“It is found that the Minor Recipient is not throwing objects with the frequency with which the Mother testified. This finding is supported by the fact that the Behavior Logs do not record any incidents of the Minor

Recipient throwing anything during the period from August 29, 2023 to September 15, 2023 and October 1, 2023 to October 31, 2023. Therefore, the Minor Recipient does not regularly throw objects.”

Response - The Fact:

To say that Kaleb is not throwing objects is a flat-out lie. The ALJ neglected to acknowledge the video she viewed during the hearing, in which Kaleb grabbed things from the rocking chair and threw them behind him.

JUMPING ON THE ROCKING CHAIR OR SOFA

ALJ Position:

“It is found that the Minor Recipient is not jumping on the rocking chair or sofa with the frequency with which the Mother testified. This finding is supported by the fact that the Behavior Logs only record two incidents of the Minor Recipient jumping on the rocking chair during the period from August 29, 2023 to September 15, 2023 and October 1, 2023 to October 31, 2023. There are an additional three incidents of the Minor Recipient jumping in bed but none of him jumping on the sofa. Therefore, the Minor Recipient engages in the behavior of jumping on the rocking chair or sofa two times in 49 days.”

Response - The Fact:

The ALJ neglected to consider our explanation of the Behavior Logs on Page 16 of my Claimant Statement of Position: “The two logs documented a total of 36 incidents, but these were only the incidents that had occurred. If we were to add all the times when we succeeded in preventing him from engaging in dangerous behaviors, the number of incidents would have been much higher.”

For the ALJ to conclude that Kaleb jumps on the rocking chair or sofa only two times in 49 days is a gross error of facts and an understatement of the degree to which the behavior occurred. We testified that Kaleb would jump on the rocking chair or sofa 5 - 6 times per day (Hearing Timestamp 44:45 -

46:56). Our testimony was omitted from consideration, which was an improper act by the ALJ.

HITTING HIS HEAD WHILE STIMMING

ALJ Position:

“It is found that the Minor Recipient is not hitting his head while stimming with the frequency with which the Mother testified. This finding is supported by the fact that the Behavior Logs only recorded three incidents of the Minor Recipient hitting his head while stimming during the period from August 29, 2023 to September 15, 2023 and October 1, 2023 to October 31, 2023. Therefore, the Minor Recipient engages in the behavior of hitting his head while stimming at the rate of three times in 49 days.”

Response - The Fact:

The ALJ neglected to consider our explanation of the Behavior Logs on Page 16 of my Claimant Statement of Position: “The two logs documented a total of 36 incidents, but these were only the incidents that had occurred. If we were to add all the times when we succeeded in preventing him from engaging in dangerous behaviors, the number of incidents would have been much higher.”

The ALJ's conclusion that Kaleb hit his head while stimming only three times in 49 days is a gross error of facts and an understatement of the degree to which the behavior occurred. We testified that Kaleb stimmed every day everywhere throughout the home and that he hit his head two to three times per day (Hearing Timestamp 49:52 - 50). The ALJ saw this behavior occurring multiple times throughout different days in the video she viewed on the day of the hearing. Yet, our testimony was omitted from consideration, which was an improper act by the ALJ.

PLAYING IN TOILET WATER

ALJ Position:

“It is found that the Minor Recipient is not playing in toilet water with the frequency with which the Mother testified. This finding is supported by the fact that the Behavior Logs only recorded two incidents of the Minor Recipient playing in toilet water during the period from August 29, 2023 to September 15, 2023 and October 1, 2023 to October 31, 2023. Therefore, the Minor Recipient engages in the behavior of playing in toilet water at the rate of two times in 49 days.”

Response - The Fact:

The ALJ neglected to consider our explanation of the Behavior Logs on Page 16 of my Claimant Statement of Position: “The two logs documented a total of 36 incidents, but these were only the incidents that had occurred. If we were to add all the times when we succeeded in preventing him from engaging in dangerous behaviors, the number of incidents would have been much higher.”

For the ALJ to conclude that Kaleb engaged in the behavior of attempting to touch the toilet water only two times in 49 days is a gross error of facts and an understatement of the degree to which the behavior occurred. We testified Kaleb tried to play with the toilet water 3-4 per day (Hearing Timestamp: starting at 53:40). Yet, our testimony was omitted from consideration, which was an improper act by the ALJ.

ELOPING

ALJ Position:

It is found that the Minor Recipient is not attempting to elope with the frequency with which the Claimant testified. This finding is supported by the fact that the Behavior Logs do not record any incidents of the Minor Recipient attempting to elope during the period from August 29, 2023 to September 15, 2023 and October 1, 2023 to October 31, 2023. Therefore, the Minor Recipient does not regularly attempt to elope.

Our Response - The Fact:

The ALJ neglected to consider this fact as stated on Page 16 of the Claimant Statement of Position regarding the frequency of the dangerous behaviors documented in the Behavior logs: "The two logs documented a total of 36 incidents, but these were only the incidents that had occurred. If we were to add all the times when we succeeded in preventing him from engaging in dangerous behaviors, the number of incidents would have been much higher."

The ALJ's conclusion that Kaleb does not regularly attempt to elope is a gross error of facts and an understatement of the degree to which the behavior occurred. We testified that Kaleb had tried to elope about five times (Timestamp: starting at 58:55). Yet, our testimony was omitted from consideration, which was an improper act by the ALJ.

In addition to the above, the ALJ had errors throughout the "FACTS" section of the written decision. A couple of examples are the following: Under the sub-section "Diagnosis and Functional Limitations" on Page 1, the ALJ failed to include that Dr. Aita had diagnosed Kaleb with Autism Spectrum Disorder, Learning Disorder, and Global Developmental Delay. Under the sub-section "Claimant's Evidence" on Page 3, the ALJ wrote that Kaleb's mother testified that Kaleb knows where to get food. That is false. Kaleb's mother never said that.

In summary, for all of the behaviors cited, the ALJ twisted the facts and drew ridiculous conclusions. Thus, as the ALJ insisted that Kaleb had not engaged enough in dangerous behaviors, she violated ACL 15-25, which states that Kaleb "... does not have to suffer actual injury to be eligible for Protective Supervision, but only have a history of a propensity for placing himself/herself in danger."

REASON 3: The adopted decision does not address all the claims and issues we raised and is not supported by the evidence.

I provided a thorough 19-page Claimant Statement of Position in which I addressed all of the criteria for Protective Supervision, showing how Kaleb had met each criterion while refuting all of the County's claims, not only by

our testimonies but also by the testimonies and findings of third-party professionals (school personnel and medical professionals). Yet, the ALJ disregarded and even misrepresented and downplayed the statements made by medical professionals, namely Kaleb's pediatrician, Dr. Yee-Guardino.

For example, on Page 34 of the ALJ's written decision, the ALJ wrote, "The Pediatrician explained that the Minor Recipient lacks appropriate judgment for his age "due to blindness." Again, the judgment deficit must be related to a mental impairment and not blindness. Therefore, the Second SOC 821 dated October 3, 2023 is not persuasive as to a severe judgment deficit."

A careful review of the statement that the ALJ referenced shows that the complete sentence says something entirely different from how the ALJ presented: "Due to his blindness & more so for his developmental delays, pt lacks appropriate judgement for age. As mentioned above, the inability to retarin age appropriate information and his disorientation clouds his judgment; if not watched all the time, he is risk for eloping and safety." This pattern of the ALJ leaving out critical information can be found throughout her written decision.

The ALJ went out of her way to cherry-pick statements supporting her position. A document that the ALJ used often to support her position was a very old Interdisciplinary Assessment Report, conducted from 4/17/2023 to 4/20/2023. There were a few statements found in that report that appear to say that Kaleb had no mental impairment. Still, if we look at the conclusions drawn in that same report, Kaleb is behind or delayed compared to other young children his age in most areas of development. The ALJ either neglected or purposely did not consider or mention these crucial findings. The findings were the following:

- Cognitive Functioning Skills: Delayed range compared to peers of the same age.
- Adaptive Functioning Skills: Delayed range when compared to peers of the same age.
- Speech and Language Development: Delayed in receptive language and expressive communication compared to what is expected for his age.

- Orientation & Mobility: While ambulatory with a cane, unaware of time, place, self, and other people in his environment.
- Social-emotional/Behavior Functioning: Delayed range, when compared to same age peers.

Furthermore, as recorded in a Teacher Questionnaire dated November 28, 2023, Kaleb's teacher, Mr. Jim Thao, stated that while Kaleb had some strengths, "He will often repeat a word or phrase that is being taught or just hearing from another person. A form of echolalia. As a result, some learning occurs, but Kaleb does not always understand what a word or phrase means for communication in a functional manner." Kaleb "Does not seek interaction with peers Communicates very little with his peers. May say a peer's names, but not in a way to gain their attention to communicate with." Kaleb "Closes ears for some musical sounds. Intense interest in some objects (pepperoni from board game). **Often hold and put objects in mouth** Kaleb often hold small items that have bumps in his hands for comfort and not to interact w/ other students...."

Similarly, Dr. Morgen Aita, Licensed Clinical Psychologist, on December 13, 2023, diagnosed Kaleb with Autism Spectrum Disorder in the moderate to severe range, Language Disorder, and Global Developmental Delay, and he made this very pertinent observation: "Kaleb displays a significant lack of safety and environmental awareness. He requires constant supervision as he engages in elopement, climbing onto furniture, or will attempt to touch dangerous items. Furthermore, Kaleb is unresponsive to his parents' warnings and verbal instructions to "stop" or "don't touch" items in his environment. Kaleb appears to not retain previously learned information. He will typically forget such information after approximately 1-2 days."

In a January 5, 2024 letter by Kaleb's pediatrician, Dr. Yee-Guardino stated that "If Kaleb were not blind, this family [the Xiong family] would still have a very challenging time caring for Kaleb, as he was categorized in the moderate to severe range of Autism. While the visual impairment adds a different dimension to Kaleb's care and safety, it is not the cause of Kaleb's global delays. Children with blindness still retain the ability to develop normal social communication skills as well as comprehension, and thus the ability to learn. Kaleb currently speaks in single- or 2-word phrases, which is the expected range for a 1-2 year old. It is the significant developmental

delays associated with Autism that place him at risk for safety concerns, resulting in his need for constant supervision.”

In addition to the above, one final example of how the ALJ either neglected or deliberately left out essential information about Kaleb’s level needs and services, which would have impacted the adopted decision, is Kaleb’s need for a 1:1 aide at school. We testified, and it was also written into Kaleb’s IEP about Kaleb having this service, yet the ALJ claimed that there was no such service in his IEP. This kind of bold and erroneous claims can be found throughout the ALJ’s decision. Facts and errors were twisted to support the position of the ALJ.

THEREFORE, a rehearing should be granted. A fair and thorough review of the records, evidence, and especially our Claimant Statement of Position will show that Kaleb has met every criterion for Protective Supervision. He needs constant prompting to be redirected from engaging in dangerous behaviors. Kaleb is not self-directed due to his mental impairment of Autism in the moderate to severe range. A rehearing must be granted.