

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

TOM B.,

Claimant,

vs.

FAIRVIEW DEVELOPMENTAL CENTER,

Service Agency

OAH Case No. 2013020281

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on March 25, 2013, at the Fairview Developmental Center in Costa Mesa.

Lessie S. Nixon, Esq., represented Claimant, who was not present.¹ Bruce Beland, Senior Staff Attorney, Department of Developmental Services (DDS), represented the Fairview Developmental Center (Fairview or the Service Agency).

The parties requested the record remain open at the conclusion of the hearing to submit closing briefs. Those briefs were timely received and marked for identification as follows: Claimant's as exhibit 17; the Service Agency's as exhibit H. The record was closed and the matter submitted for decision upon receipt of the briefs on April 8, 2013.

ISSUES

1. How many videos may Claimant have access to during his father's weekly visits?

¹ Initials and family titles are used to protect the privacy of Claimant and his family.

2. How many hours may Claimant's father spend with him during his weekly visits?

EVIDENCE RELIED ON

In making this Decision, the ALJ relied upon exhibits A-G submitted by the Service Agency, exhibits 1-16 submitted by Claimant, and the testimony of Jeannette Pino, Ph.D.; Cheryl Scates; Julie Van Reusen; Kim Gibbons; Jennifer Becker; Claimant's mother; Dan McGinnis; Jeremy Cooper; Claimant's father (who also played a recorded voice-mail message while testifying); and Joaquin Perez. The closing briefs were read but are not evidence.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is a 17-year-old male who is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) based on his qualifying diagnosis of autistic disorder and mild mental retardation with behavioral disturbance. Claimant currently resides at Fairview, which is an intermediate care facility for the developmentally disabled licensed to and operated by the DDS.

2. On January 28, 2013, Claimant's father submitted to Fairview a Fair Hearing Request discussing the two Issues identified above, among others. At the outset of the hearing, Claimant narrowed the Issues presented in this case as the two identified above.

3. No evidence was presented indicating that Fairview sent any notice required by Welfare and Institutions Code section 4710² (a proposed action without

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

mutual consent of Claimant or his family or denial of a service request made by Claimant or his family) that would have precipitated the Fair Hearing Request. In any event, Fairview did not make any jurisdictional objection to the hearing proceeding.

4. The matter was initially scheduled to be heard on March 22, 2013. That hearing date was continued at the request of Claimant's father to accommodate his witnesses' availability.

5. In connection with the continuance request, Claimant's father executed a written waiver of the time limit prescribed by law for holding the hearing and for the ALJ to issue a decision.

BACKGROUND INFORMATION

6. Claimant's biological parents were divorced in or about 2003, after having separated years before. Claimant's parents were awarded joint legal custody, and joint physical custody, of their son. Claimant's mother has retained final authority to make decisions regarding his health, education and welfare, and Claimant was to live primarily with her. However, Claimant's father retained the right to participate in the decision-making process, to attend meetings and provide input.

7. In addition to his developmental disabilities, Claimant has also been diagnosed with Impulse Control Disorder Not Otherwise Specified and Post-Traumatic Stress Disorder.

He has extremely challenging maladaptive behaviors, including violence toward others, tantrums, resistiveness, severe hyperactivity, lack of safety awareness and extreme elopement.

8. Claimant's mother elected to place Claimant in a community group home in 2006. Claimant's father has never fully approved of that decision. The extreme behaviors persisted, especially the elopement. Claimant was placed in three different group homes but kept trying to escape from each. In June of 2008, Claimant eloped from a "crisis home" in which he had been placed, his third group home. He ran onto

Highway 101, was struck by a vehicle, and suffered serious injuries that required a seven-week hospitalization.

9. After the accident, a petition was filed with the Superior Court in Los Angeles County under section 6500 for a judicial commitment of Claimant to protect him and others from his dangerous behaviors. The petition was granted and Claimant was placed in Fairview at that time. His commitment has been extended on a yearly basis, including through March of 2014.

VISITS BY CLAIMANT'S FATHER

10. Claimant's father lives in Central California. He is in constant and frequent contact with his son. He writes daily letters to Claimant. He telephones Claimant several times per week and their conversations are usually lengthy. And he also visits Claimant at Fairview once per week. He visits on Saturdays. Claimant's mother visits on Sundays.

11. In or about July of 2011, a dispute arose between Claimant's father and Fairview regarding his Saturday visits. The dispute intensified by the Fall of 2011, when Fairview staff began limiting the number of videos and compact discs Claimant could access during the visits. Claimant's father filed a Fair Hearing Request (OAH case no. 2011090353). The matter was successfully mediated and did not proceed to hearing or a decision. According to the mediation agreement executed in October of 2011, the parties agreed to convene an Individual Program Plan (IPP) meeting within two weeks, at which time, the parties would discuss restrictions on off-site visits and the number of videos and compact discs Claimant's father could bring with him during a visit.

12. As a result of the mediation agreement, the parties convened a "Special Conference" on November 10, 2011. Many issues pertinent to the visits of Claimant's father were discussed and agreed upon. In December of 2011, the IPP team, including Claimant's parents, was involved in an IPP annual conference.

13. On September 26, 2012, a "Special Conference" was convened by the IPP team, including Claimant's parents. A few issues were discussed, including visits. It was

agreed that Claimant's father would continue to visit Claimant on Saturdays, from 8:00 a.m. to 3:00 p.m., for a total of seven hours.

14. Another annual IPP conference was conducted in December of 2012 and an IPP created at that time. That IPP document was subsequently revised, effective March 1, 2013. The only version of that IPP offered in evidence was that revised in March of 2013. The version created in December of 2012 was not presented, nor was evidence presented indicating the terms it contained.

15. The revised March 2013 IPP is currently the operative IPP for Claimant. It discusses Claimant's global services and needs, and also addresses family member weekend visits. The operative IPP reiterates that Claimant's father may visit Saturdays from 8:00 a.m. to 3:00 p.m.

16. The revised March 2013 IPP also specifies that Claimant can only have access to four videos (including CDs, VHS, DVD, Blu-ray, etc.) when his family members visit him, and that family members cannot bring more than four such items with them on visits. If Claimant selects four videos from his own collection to access during the visit, then family members cannot bring any others to Claimant. The IPP explains that the restriction is necessary because giving Claimant access to more than four such items causes his perseveration and anxiety to increase, resulting in negative behaviors and aggression.

17. The aforementioned documents were created after IPP team meetings, in which Claimant's father participated, as was his right. Although the IPP documents are not signed, it was established that they were created after an agreement by all members of the IPP team, including Claimant's father, and were subject to review by all who participated. Moreover, no evidence was presented suggesting that Claimant's father disagreed with the content of these IPPs, nor that he made a request for a service or right to be included in the IPP that had been denied.

THE DURATION OF THE SATURDAY VISITS

18. Fairview staff created a summary of Claimant's visitation plan, which summarizes salient provisions of his operative IPP. Inexplicably, the visitation plan states that visit times are from "0800-1400." The visitation plan summary is not an IPP team document, nor does it portend to be.

19. For reasons that were not explained, at some point in the last several months, Fairview staff advised Claimant's father that his Saturday visits were extended from 8:00 a.m. to 4:00 p.m. For reasons that were also not explained, Claimant's visits have recently been decreased from 8:00 a.m. to 2:00 p.m. None of these changes are reflected in Claimant's operative IPP, nor were they the product of discussion by Claimant's full IPP team. None of the Fairview staff members who testified explained why Claimant's father's visiting hours have been decreased.

20. Claimant's father would like his Saturday visits extended from 8:00 a.m. to 6:00 p.m. He would like more time with his son, mainly to allow him more time to spend on off-site excursions, and because he has to travel from so far to see his son. Claimant's father may have informally asked Fairview staff if he could have more time during his visits, but it was not established that he has made that request during an IPP team meeting or specifically requested that Claimant's IPP be amended for that purpose.

THE NUMBER OF VIDEOS CLAIMANT CAN ACCESS DURING VISITS

21. Claimant has had a restricted interest in videos for a number of years. He has a collection of hundreds of videos. Some are with him at Fairview, some are kept by his father. Claimant and his father have bonded over the years while watching the videos. Claimant's father believes the videos have also facilitated Claimant's improved communication skills.

22. Claimant attends school while at Fairview. Claimant is only allowed to have access to four videos while at school, a limitation which apparently has not been a

problem. Claimant's mother sometimes accesses videos with her son while she visits him on Sundays. Only recently has she had difficulty with the four video per visit limit.

23. An annual functional behavioral assessment (FBA) was conducted on Claimant in November of 2012, as part of his annual IPP conference. It was generally recommended that Claimant participate in a consistent, structured schedule. An FBA update was conducted in March of 2013, due to Claimant's reported increasing maladaptive behaviors, including those related to his father's Saturday visits. The updated FBA noted Claimant exhibited two spikes of increased negative behaviors. One spike occurred in or around July of 2012, when a number of changes in Claimant's schedule occurred due to staffing changes at his school and on his residence floor. The second spike was in or around November of 2012, and it continued through to March of 2013. Claimant's frustration and anxiety was noted concerning his access to videos offered to him during his father's weekend visits. The updated FBA noted that Claimant has problems when he is presented with too many choices, which causes increased frustration. His agitation reduces when the number of choices reduces. For that reason, it was recommended to limit the number of choices given to Claimant at first; and that over time the number of choices could be slowly increased. It was further recommended to limit his choices to "1 out of 4" or "1 out of 3."

24. For the same reasons outlined in the two FBAs described above, Fairview staff decided to limit Claimant's access to four videos per family visit. It was not established when this limitation was imposed, but the evidence indicates that this happened in or around July of 2011.

25. Enforcement of the four video limit has thereafter been sporadic. As discussed above, the limit is observed when Claimant is at school and when he visits with his mother. But the limit has not been strictly enforced during his father's visits. Sometimes Claimant's father has brought bags full of many videos. Sometimes Fairview staff allows Claimant's father to provide his son more than four videos; sometimes staff have enforced the four video limit. The spike in maladaptive behaviors beginning in

November of 2012 and continuing through the present is no doubt related to a period when the four video limit has not been consistently enforced.

26. Claimant's father wants his son to have access to any number of videos that he wants each visit. Since videos make his son happy, Claimant's father believes he should be allowed to bring as many as he wants. Claimant's father and a long-time family friend believe Claimant derives just as much enjoyment from looking at and organizing the videos as he does from watching them. Claimant's father testified that his son does not engage in negative behaviors during their visits when the four video limit is not enforced; the only problems happen when the limit is enforced. Claimant's father therefore requests that the four video limit be removed, and that he be allowed to bring his son any number of videos he wants, and to allow his son to access as many videos as he wants.

27. Claimant's father acknowledges that his son's IPP has contained the four video limit for some time period before the revised March 2013 IPP was created. He also acknowledges that he has essentially disregarded the four video limit while it has been in place. He applauds those staff members who have also done so. It is unknown why Claimant's father would agree to the four video limit in the IPP, only to later disregard it. Claimant's father testified that he has not formally requested an IPP team meeting or revision to Claimant's IPP to remove or change the four video limit because doing so "would be a waste of time."

28. Two Fairview staff members acknowledged in their testimony that they have disregarded the four video limit on occasion during the Saturday visits of Claimant's father. One, Jeremy Cooper, testified that sometimes Claimant can get too anxious when presented with more than four videos, and that sometimes he is fine when the limit is applied. He also testified that sometimes Claimant gets agitated when the four video limit is applied, but that he is easily redirected if so. The other staff member, Joaquin Perez, testified that Claimant does act out when the four video limit is enforced, and that he once allowed Claimant's father to exceed that limit. Mr. Perez

testified that he thereafter regretted not following the limit and apologized to his supervisor. Mr. Perez does not know why there is a four video limit in the first place.

DISCUSSION

JURISDICTION AND BURDEN OF PROOF

The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary service agency decision. (§§ 4700-4716.) Claimant's father requested a hearing. No objection was raised on any jurisdictional grounds. (Factual Findings 1-5.)

The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

When one seeks government benefits or services, the burden of proof is on him. (*See, e.g., Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) In this case, Claimant bears the burden of proof because he is requesting a service or right that the service agency, Fairview, does not agree to provide.

VISITATION RIGHTS

Section 4503, subdivision (c), provides that any consumer committed to a state hospital or community care facility shall have the right to see visitors each day. Pursuant to section 4504, such right may be denied or limited by the person in charge of the facility in question, or his/her designee, upon a showing of good cause and following the procedures specified therein, which are not pertinent in this case. Pursuant to section 4646, the services and supports intended to support a consumer to meet his goals shall be stated in the consumer's IPP. Visitation rights is such a service or support that is appropriately covered in a consumer's IPP.

CREATING AND CHANGING AN IPP

In order to determine how an individual consumer is to be served, service agencies are directed to conduct a planning process that results in an IPP designed to promote as normal a life as possible for the consumer under the circumstances. (§ 4646; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389.) The IPP is developed by an interdisciplinary team and must include participation by the consumer and his or her authorized representative. Among other things, the IPP must set forth goals and objectives for the consumer, contain provisions for the acquisition of services (which must be provided based upon the consumer's developmental needs) and reflect the consumer's particular desires and preferences. (§§ 4646 and 4646.5, subd. (a)(4).)

The development of an IPP is to be a collaborative and cooperative process. Section 4646 specifically provides that an IPP "shall be prepared jointly by the planning team." That section further provides that "decisions concerning the consumer's goals, objectives, and services and supports that will be included in the consumer's IPP . . . shall be made by agreement between the regional center representative and the consumer" or her representatives. It was not the intention of the Legislature to have IPP programming and implementation of that programming decided unilaterally, either by a consumer or her representatives or by a service agency.

An authorized service agency representative and the consumer or his authorized representative must sign the IPP prior to its implementation. (§ 4646, subd. (g).) If the consumer or his representative does not agree with all the components of the plan, the consumer or the representative may indicate that disagreement on the plan. (*Id.*) If a final agreement regarding the services and supports to be provided to the consumer cannot be reached at the IPP meeting, a subsequent IPP meeting shall be convened within 15 days, or later, at the request of the consumer or his authorized representative or when agreed to by the IPP planning team. (§ 4646, subd. (f).) Additional meetings may be held with the agreement of the IPP planning team. (*Id.*)

If, at the end of this process, the consumer or his authorized representative does not agree with the plan in whole or in part, he or she shall be sent written notice of his/her fair hearing rights, as required by section 4710. (§ 4646, subd. (g).)

If the service agency at the end of the IPP process proposes to reduce, change, modify or terminate a service or right, it shall also send such a notification pursuant to section 4710, subdivision (a). The issuance of such a notice triggers a consumer's right to request a fair hearing regarding the subject matter of that notice pursuant to section 4710.5. A service agency cannot unilaterally terminate or modify a service set forth in an IPP, without issuing the notice required by section 4710. The Fair Hearing process will then determine the outcome of any such disputes.

In this case, Claimant's operative IPP provides that Claimant's father may visit his son at Fairview on Saturdays, from 8:00 a.m. to 3:00 p.m. Fairview's unilateral decisions to increase, and then decrease, those hours were made outside of the IPP planning process and were invalid. Neither Fairview, nor Claimant's father, may unilaterally change this term of Claimant's IPP without engaging in the IPP planning process.

The same is true concerning the number of videos that Claimant may access during family member visits. The operative IPP dictates that there is a four video limit for such visits. It is unknown why Claimant's father would agree to that limitation initially, only to later disregard it when staff allowed him to do so. But the preponderance of the evidence established that the four video limit was agreed upon as part of crafting the operative IPP. It is unfortunate that some staff have chosen to disregard this provision of Claimant's IPP. The fact that they have does not alter the fact that the four video limit is part of Claimant's operative IPP and shall be enforced, unless and until it is modified appropriately.

Claimant's father cannot use the Fair Hearing process as a way of creating change in his son's IPP, unless and until he engages in the IPP process properly. The IPP process is intended to allow the parties to meet and confer regarding a consumer's services and supports, as well as those attendant to family members. It is during this process that the

parties can exchange information and vet ideas and concepts in an attempt to reach a consensus. It is only when this process has been engaged, and a service agency issues a notice of proposed action denying a specific request for a service or right to be included in an IPP, that a Fair Hearing is properly convened. In this case, Claimant's father has not engaged in this process. His view that doing so would be "a waste of time" is not a legal justification for ignoring the IPP process. For this reason alone, his requests to expand his visitation hours and to remove the video limitation shall be denied.

Additionally, Claimant's father has provided no factual basis to change these provisions of his son's IPP.

Though his reasons for extending his visitation hours are sympathetic, Claimant's father provided little factual detail specifying why the additional time is necessary.

More importantly, Claimant's father provided no factual justification for modifying or terminating the video limitation. The staff at Fairview are currently in charge of Claimant's care and treatment. After two FBAs and copious amounts of anecdotal evidence, staff have decided that Claimant should not be overwhelmed with unlimited choices, and therefore they have decided to impose a four video limit. The limit has worked otherwise, such as at Claimant's school and visits with his mother. Given that Claimant needs structure in his daily regimen, it is no wonder that the sporadic enforcement of this limit during his father's visits has proven to be a recipe for disaster. Claimant's father presented no science-based or expert evidence indicating that the video limitation is bad for his son or that Fairview staff are in error. Claimant's father simply relies on the argument that he knows what is best for his son. Whether or not that is the case, allowing Claimant and/or his father unfettered discretion in this area, where limits are imposed in other areas of Claimant's schedule, is unworkable and not in Claimant's best interests. The most recent FBA does indicate that the four video limit is susceptible to gradual increase over time as Claimant successfully accommodates the threshold limit. Revisiting that topic is exactly the type of issue that Claimant's IPP team can and should address.

LEGAL CONCLUSIONS

1. Pursuant to sections 4503, 4504, 4646, 4646.5, 4710 and 4710.5, cause was established to order the Service Agency to allow Claimant's father to visit Claimant on Saturdays from 8:00 a.m. to 3:00 p.m. (Factual Findings 1-20, Discussion.)

2. Pursuant to sections 4503, 4504, 4646, 4646.5, 4710 and 4710.5, cause was not established to change or modify the existing limit regarding how many videos Claimant may access during family member visits. (Factual Findings 1-28, Discussion.)

ORDER

Claimant's appeal is granted, in part, and denied, in part, as follows.

The Service Agency shall allow Claimant's father to visit Claimant on Saturdays from 8:00 a.m. to 3:00 p.m.

Claimant may only have access to four videos (including CDs, VHS, DVD, Blu-ray, etc.) when his family members visit him, and family members cannot bring more than four such items with them on visits. If Claimant selects four videos from his own collection to access during the visit, then family members cannot bring any others to Claimant.

DATED: April 19, 2013



ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.