

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

FAIRVIEW DEVELOPMENTAL
CENTER,

Service Agency.

OAH No. 2015070278

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on September 9, 2015, in Costa Mesa.

Bruce J. Beland, Staff Attorney, Department of Developmental Services ("DDS"), represented Fairview Developmental Center ("FDC" or "Service Agency").

Claimant's mother, his conservator and authorized representative, represented claimant, who was not present.¹

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on September 9, 2015.

ISSUE

Whether the Service Agency must increase the level of supervision provided as part of claimant's services and supports in order to comply with claimant's Individual

¹ Family titles are used to protect the privacy of claimant and his family.

Program Plan (IPP).

EVIDENCE RELIED UPON

Documents. Service Agency's exhibits 1-10; claimant's exhibits A-G.

Testimony. Carol Naylor-Pecson; Jeanette Burkhardt Pino, Ph.D.; Cheryl Scates; Julie Van Reusen; Thomas Watson; Sienna Go, M.D.; Steven Silverman, M.D.; claimant's mother.

FACTUAL FINDINGS

1. Claimant is a conserved 22-year-old man who has been a consumer of regional center services for many years based on his diagnoses of autism spectrum disorder and mild intellectual disability. Claimant has also been diagnosed with anxiety disorder and obsessive/compulsive disorder (Ex. 2), intermittent explosive disorder (Ex. 3), and scatolia (Ex. 7).

2. FDC is a state-operated residential institution for individuals with developmental disabilities. Claimant has lived at FDC since April 2008, when he was 15 years old, after a series of admissions to various hospitals for self-inflicted injuries. He resides in an all-male secured unit.

3. On July 15, 2015, claimant's mother filed a Fair Hearing Request, stating that FDC was not providing claimant with the level of supervision mandated under his IPP due primarily to staffing changes and staffing ratios. This hearing ensued.

4. According to claimant's most recent IPP, dated May 28, 2015, he bites his lips and tongue, bangs his head, pulls out his teeth and toenails, picks his skin, smears his feces, and grabs and rips others' clothing. His behaviors are managed through "restrictive interventions and psychotropic medications." (Ex. 2.) Wrist-to-waist restraints and helmet use were discontinued in 2010, as the treatment team deemed them no longer necessary; they have been replaced with the use of a five-point mobile chair

restraint and a physical escort. The IPP establishes parameters to provide claimant with supervision at a level that balances a decrease in claimant's personal freedom with the risk of injury. The parameters are to provide claimant with "consistent staff supervision" in the kitchen and dining rooms, bathtub room, storage rooms, fenced back yard, stairwells, and recreational rooms, and in the area outside his residence, on FDC grounds, and in the community. (Ex. 2, p. 9.) Although claimant's behaviors "may occur suddenly without any observed behavioral antecedents," "[t]he team agreed that [claimant] shows a lot of improvement due to staff's continue[d] support by following his behavior plans," and that "when staff reacts positively with [claimant], that [*sic*] get a productive respond [*sic*] from him." (Ex. 2.) The team agreed that there should be no decrease in his medications because, over the past year, when "dosages were decreased his behavior increased." (*Ibid.*) At the time of his IPP, claimant was taking Olanzapine (Zyprexa) and Clonazepam.

5. Various FDC witnesses testified that claimant will transfer from FDC to a group home in Venice in the near future, and that the group home, in concert with FDC and North Los Angeles County Regional Center, is currently developing a transition plan for claimant. According to claimant's IPP, the group home has a ratio of two staff to three clients on all shifts. In the event of a "behavior crisis," Westside Regional Center will send a crisis team to the group home. "Also, if [claimant] is not ready [f]or this placement, then the group home will not accept [claimant.]" (Ex. 2.)

6. Carol Naylor-Pecson, Program Director at FDC and former Acting Clinical Director, testified that FDC has complied with claimant's IPP. She testified that claimant's behaviors were more severe when he was admitted, and that, though he still smears his feces, he is progressing and will be placed at a community facility soon. Naylor-Pecson has talked to claimant's mother on the telephone about her concerns, including staffing issues, over the years. There have been some adjustments to claimant's IPP and to

staffing as a result of these concerns, when staff finds that there has been an increase in claimant's self-injurious behaviors. The changes in claimant's IPP have benefitted claimant, who is getting closer to achieving the goal of living in the least restrictive environment in the community. Claimant's mother has met the group home provider to which claimant will be transferred; the transfer is fairly close to happening.

7. Jeannette Burkhardt Pino, Ph.D., a licensed clinical psychologist, was on staff at FDC until six weeks prior to the hearing, and helped develop claimant's interventions and treatment program while spending a year on the facility's autism unit. The use of restraints for claimant, she testified, has decreased markedly over time. FDC last used restraints with claimant on two occasions in March 2015. In her Annual Psychological Evaluation and Functional Behavior Assessment, dated April 21, 2015, Dr. Burkhardt Pino enumerated FDC's formal behavioral plans "keyed to restrictive interventions including behavioral medications and restraint devices" (Ex. 6.) She wrote in her evaluation that "[d]ata reflect low counts in most behaviors, with the exception of SIB [self-injurious behaviors] and smearing feces." (*Ibid.*) In a Summary Progress Report dated July 9, 2015, Dr. Burkhardt Pino wrote that, "[s]ince [claimant] was admitted to Fairview, he has made considerable behavioral progress." (Ex. 3.) The report described the decrease in claimant's use of STAT medications, from 9, 10, and 12 uses per year in 2009, 2010, and 2012, to no use of STAT medications since 2013. Claimant was in restraints frequently for the first few years at FDC, but "[i]n 2014, [r]estraints were applied only 6 days of the year and so far in 2015, [claimant] has been in restraints for only 4 days." (*Ibid.*) Dr. Burkhardt wrote:

In summary, over the past 18 months, [claimant] has made progress regarding his maladaptive behaviors. Except for August 2014, his frequency of SIB remains low with no injury; he did have an episode in March with Severity of 3 (injury).

The last use of Highly Restrictive Intervention was March 2015. Use of HRI has dropped dramatically over the past 18 months. He does have occasional episodes of nail avulsion (2 times in the past 18 months) but the behaviors are not constant over time. However, the IPP ID team decided to keep these behavior plans open as even though this behavior is infrequent, it may lead to increases in frequency and severity. Smearing of feces remains [the] most frequent behavior. . . . A new plan for functionally equivalent behavior (escape), S-1-5 "Take a Break Card" was opened at the IPP and training with staff is ongoing." (Ex. 3.)

Dr. Burkhardt testified that FDC continues to work with claimant on self-managing frustrations and behaviors, and on his challenges with expressive language, and has tried to help claimant with adaptive living skills so he can live and work in the community.

8. Cheryl Scates, a licensed psychiatric technician, has been a program director at FDC for over three years. Scates testified that FDC has been following the plan set forth in the IPP, working on claimant's skill deficits, behaviors, and communications. There are special team meetings to address issues raised by claimant's mother, sometimes resulting in modifications to claimant's IPP. Claimant has improved, lessening the need for highly restrictive interventions. FDC did increase the size of client workshop groups, thereby somewhat decreasing the staff to client ratio, to which claimant's mother objected. The day after claimant's mother objected to the change, she reported finding feces in claimant's ear. Scates asked Dr. Steven Silverman to examine claimant's ear, but he found no evidence of feces or infection. Dr. Silverman is the staff physician at FDC who monitors claimant's medical condition and prescribes medication

for claimant as needed to control claimant's behaviors. Dr. Silverman testified that he has examined claimant's ears regularly for feces, due to claimant's mother's telephone calls, and has not observed feces in claimant's ears. Claimant's mother offered no photographic or other evidence to corroborate her claims that she has found feces in claimant's ears or that, when he pulls out his toenails, he does not receive medical treatment. Dr. Silverman's notes reflect that claimant is treated when he pulls out toenails, and that the treatment has prevented any infection.

9. Julie Van Reusen, a licensed psychiatric technician, is the Fairview unit supervisor of the unit in which claimant resides. She testified that FDC follows claimant's IPP in all respects to address his needs. The Service Agency has yearly IPP meetings, and monthly meetings to revise the IPP in order to address claimant's behaviors and his mother's concerns. Claimant's mother calls the facility more than once every day, asking to speak to numerous staff members. Van Reusen used to speak to claimant's mother at least weekly, but she testified that their interactions became unproductive. Now, claimant's mother's calls are directed to one person, to prevent conveying conflicting information about claimant and to facilitate unit operations. All daily calls with claimant's mother are now handled by the shift lead and the Acting Program Director, and the unit supervisor provides claimant's mother with weekly telephone updates.

10. Thomas Watson, a psychiatric technician assistant who has worked with claimant, testified that claimant has progressed a great deal, improving with respect to his maladaptive behaviors and in his willingness to participate in activities. He testified that claimant's mother's concerns have been incorporated into the program for claimant's care.

11. Sienna Go, M.D., is board-certified in family medicine and has served as the FDC Medical Director for the past two years, ensuring that medical care is provided consistent with clients' needs as determined by their medical treatment team. Based on

her review of claimant's psychological assessments and discussions with Dr. Silverman and claimant's multidisciplinary treatment team, Dr. Go concluded that claimant has shown significant progress; his behaviors have decreased, as has the need to use restraints and behavior-modifying medications. Dr. Go's testimony about claimant's medications was corroborated in part by Dr. Burkhardt Pino's report of the decrease in the use of stat medication, although claimant's need for regular doses of behavior modifying medications has not decreased.

12. Claimant's mother testified that she speaks with claimant once per day, and visits him almost every weekend. On four occasions, she found feces in claimant's ears and observed that claimant was missing some toenails. She complained after the fourth occasion, and in June 2015 FDC staff prepared an action plan to body-check claimant two-to-three times every morning, noon, and night, and to provide enhanced supervision by checking on claimant every 30 minutes during the night shift. FDC suggested to claimant's mother that she call a supervisor or witness when she notices feces in claimant's ears or a missing toenail, so the matter can be documented. On a subsequent visit, claimant's mother testified, she again found that toenails were missing. She testified that FDC does have frequent special meetings to revise action plans for claimant but that, after a few months, staff stops complying with the revisions. She testified that FDC used to place claimant in one of three workshop groups, and that since FDC combined the three groups into two, somewhat larger groups of clients with mild, moderate, and severe behaviors, claimant receives less personal attention and is likelier to hurt himself.

13. Until recently, claimant's mother regularly made at least three telephone calls each day to various FDC personnel to discuss claimant's status, behaviors, and class attendance, as well as staffing issues. She complained at hearing that FDC has designated one person to be her daily telephone contact when she calls for an update

on claimant's status, and that she has been told her phone calls disturb the staff. She also complained that the evening shift group leader has stopped calling her, so she has to call the group leader. Sometimes she receives a call from a staff member who knows nothing about claimant, she testified. Claimant's mother is primarily concerned that, although staff members seem to be adequately monitoring claimant currently, they will relax their vigilance and claimant will injure himself.

14. The evidence on this record as to whether and when claimant will transition to a group home is neither clear nor conclusive. But the evidence does support the conclusion that claimant's self-injurious and other behaviors, and the need for restraints and stat medications, have decreased over time. The evidence also supports the conclusion that FDC is implementing claimant's IPP, which is frequently updated to account for any changes in claimant's behaviors and his needs for services and supports. While group workshop staffing ratios have recently decreased, there was insufficient evidence to demonstrate any adverse effect on claimant's safety or medical condition.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)²

2. Under the Lanterman Act, issues concerning the rights of persons with developmental disabilities to receive services must be decided under the appeal and fair hearing procedures set forth in section 4700 et seq. (§ 4706, subd. (a).) As the party seeking services, claimant bears the burden of proving that the supervision services provided are not in accordance with claimant's IPP and that he should receive additional

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

supervision. (See § 4712, subd. (j); *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) Claimant must prove he is entitled to the funding by a preponderance of the evidence. (Evid. Code, § 115.)

3. Cause does not exist to grant claimant's appeal, as set forth in Factual Findings 1 through 14, and Legal Conclusions 4 through 9.

4. The Legislature's intent in enacting the Lanterman Act was to ensure the rights of persons with developmental disabilities, including "[a] right to treatment and habilitation services and supports in the least restrictive environment. Treatment and habilitation services and supports should foster the developmental potential of the person and be directed toward the achievement of the most independent, productive, and normal lives possible." (§§ 4502, subd. (a), 4640.7.)

5. The Legislature also explicitly intended "to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments" and "to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources." (§ 4646, subd. (a).)

6. Each consumer must have an IPP. The IPP must include "[a] statement of goals, based on the needs, preferences, and life choices of the individual with developmental disabilities. . . ." (§ 4646.5, subd. (a).)

7. Welfare and Institutions Code section 4648 states in pertinent part:

In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct

activities including, but not limited to, all of the following: [¶]

(a) Securing needed services and supports. . . .

8. “[T]he determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option.” (§ 4512, subd. (b).)

9. Here, the Service Agency must implement claimant’s IPP by continuing to provide, until such time as claimant leaves FDC to reside elsewhere, the full panoply of services and supports set forth in the IPP. The evidence presented at hearing demonstrates that the Service Agency has implemented claimant’s IPP, including providing security and safety measures to allow claimant to make use of the identified services and supports. Claimant’s mother’s concern that inadequate staffing may create a dangerous environment for claimant was not sufficiently substantiated on this record.

ORDER

Claimant’s appeal is denied.

DATE: September 18, 2015

_____/s/

HOWARD W. COHEN

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.