

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request
of:

OAH No. 2017120688

CLAIMANT,

vs.

FRANK D. LANTERMAN REGIONAL CENTER,

Service Agency.

DECISION

Administrative Law Judge Cindy F. Forman of the Office of Administrative Hearings heard this matter on January 10, 2018, in Los Angeles, California.

Claimant's father represented claimant,¹ who was not present at the hearing.

Pat Huth, Attorney at Law, represented Frank D. Lanterman Regional Center (FDLRC or Service Agency). Renee Lewis appeared as representative of FDLRC.

Oral and documentary evidence was received. The record was closed, and the matter was submitted for decision at the close of the hearing.

ISSUE

Whether Service Agency is required to continue to fund a one-to-one (1:1) behavioral respite aide for claimant, even though claimant no longer attends extended-day child care at the A Plus Adventist Children's Center (Children's Center)?

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

FACTUAL FINDINGS

1. Claimant is a four-and-one-half year-old boy who is a client of FDLRC based on his qualifying diagnosis of autism spectrum disorder (ASD). His nine-and-one-half year-old sister is also an FDLRC client; she too has qualified based on an ASD diagnosis.²

2. Claimant's Individual Program Plan (IPP), developed at a September 9, 2016 meeting between claimant's parents and Cindy C. Lopez, FDLRC Service Coordinator, provides that claimant will participate in structured, supervised after-school activities at Children's Center during the week "to receive redirection and remain safe." (Exhibit 5³ at p. 4.) To enable claimant to attend Children's Center, the IPP further provides that FDLRC will fund a 1:1 aide with Behavioral Respite in Action (B.R.I.A.) for 28 hours per week from October 10, 2016, through September 30, 2017. (*Id.* at p. 5.) The IPP further provides that extended-day childcare support will no longer be necessary when claimant's challenging behavior or the need for support decreases in intensity. Claimant's father signed the IPP on October 10, 2016.

3. On June 2, 2017, by way of an amendment to the IPP (IPP Amendment), FDLRC modified the hours for claimant's 1:1 behavioral respite aide as follows: 128 hours in June 2017, 152.5 hours in July 2017, and 156 hours in August 2017. (Exhibit 4.) FDLRC agreed to continue to fund claimant's 1:1 behavioral respite aide for 28 hours per week,

² The parties agreed to consolidate the hearing in this matter and the hearing in OAH case number 201712689, regarding claimant's sister, because they involved similar issues and facts. Although Exhibits 1 through 16 were admitted at the hearing, Exhibits 1 through 9 pertain solely to claimant. Separate decisions will be issued for each matter.

³ Because of claimant's father's time constraints, there was insufficient time to provide full descriptions of the admitted exhibits during the hearing. Accordingly, a description of the admitted exhibits is marked as Exhibit 17 and made a part of the record.

from September 1, 2017, to September 30, 2017, after which FDLRC would assess claimant's continued need for the after-school aide services. According to the IPP Amendment, certain outcomes would be realized by providing claimant with the support of a 1:1 behavioral respite aide: claimant would be safe; he would be "provided with a structured setting where he will be appropriately supervised;" he would be "able to participate in all program activities;" and he would have an adult present "to assist with the management and reduction of behaviors." (*Ibid.*)

4. On October 24, 2017, FDLRC received a request from B.R.I.A. for re-authorization of claimant's 1:1 aide at Children's Center for the period from November 1, 2017, through October 31, 2018. Claimant's father had represented to FDLRC that claimant was enrolled in Children's Center from 1:00 p.m. to 6:00 p.m., five days a week, during which time B.R.I.A. was providing 1:1 assistance. After speaking with B.R.I.A. and the director of Children's Center, FDLRC learned that claimant was no longer attending Children's Center. Children's Center provided a letter to FDLRC confirming that claimant was no longer in attendance at the facility but was instead on the waitlist to enroll; claimant's father had previously supplied the same letter to FDLRC but had redacted the paragraph reflecting claimant's wait-list status. FDLRC also learned that B.R.I.A. had been providing the agreed-upon hours of behavioral respite care to claimant at his home. Neither claimant's father nor B.R.I.A. had informed FDLRC that claimant was no longer attending Children's Center; nor had they informed FDLRC that claimant was receiving 1:1 behavioral respite services at home.

5. In a letter dated October 31, 2017, FDLRC terminated its funding for claimant's 1:1 behavioral respite aide effective November 30, 2017, because claimant was no longer attending Children's Center and the 1:1 behavioral respite services were not being used in connection with another after-school program. (Exhibit 1.)⁴ Implicit in its

⁴ FDLRC later extended 1:1 behavioral respite services for claimant for an additional

denial was that claimant did not require behavioral respite services outside of the extended-day childcare setting.

6. On November 30, 2017, claimant's father timely filed a Fair Hearing Request in response to FDLRC's termination letter, stating in relevant part as follows: "Service is being terminated when no replacement services has been confirmed or ensured leaving child with potential period of no services, a serious health and safety danger." (Exhibit 2.) Claimant's father requested that Service Agency continue to provide the 1:1 behavioral respite aide until another extended day care facility could be located for claimant. (*Ibid.*) This hearing then ensued.

CLAIMANT'S BACKGROUND INFORMATION

7. Claimant lives at home with his mother, father, and sister. Claimant's father works full time (from 9:30 p.m. to 6 p.m.) for the Los Angeles City Department of Sanitation; claimant's mother works on a per diem basis as a night-shift registered nurse.

8. In the Service Agency's most recent annual review, dated September 28, 2017, claimant was reported to have limited verbal language skills. According to the review, claimant has aggressive, non-compliant behaviors and engages in crying often. He is not yet fully toilet trained. He is also very aggressive with his sister, hitting her or engaging in aggression towards her regularly. Claimant requires supervision at all times to ensure he remains safe because he is not fully aware of dangers. (Exhibit 3.)

9. Claimant is currently attending Cloud Pre-School through the Glendale Unified School District (School District), where he is enrolled in a special day class for the extended school year. There are six students and three teachers in his class. Claimant's class hours are from 8:30 a.m. to 12:30 p.m., five days a week. Claimant qualifies for two weeks, until December 14, 2017, because claimant's father had not timely received FDLRC's notice of termination.

occupational therapy and speech and language therapy through the School District.

10. Claimant is currently receiving Applied Behavior Analysis (ABA) services from Easterseals Southern California that is paid for by private insurance. The insurer has authorized 15 hours of ABA services for claimant each week; however, because of claimant's afternoon medical and occupational therapy appointments, claimant only receives approximately 10 hours of ABA therapy each week. At the hearing, claimant's father was unable to supply the times and days of claimant's ABA therapy.

11. Claimant's IPP does not identify the number of hours claimant requires of ABA therapy. Nor does the IPP address the fact that claimant's ABA therapy, even at 10 hours per week, cannot be accomplished without curtailing claimant's intended participation at Children's Center or at any other extended-day childcare program. Thus, under the current IPP and IPP Amendment, claimant was expected to participate for five hours a day in an extended-day childcare program in addition to receiving ABA services at home after school.

12. Claimant does not currently participate in any organized after-school activities during the week. Claimant attends religious school classes on Sunday.

13. Until December 12, 2017, claimant's sister also had the assistance of a 1:1 behavioral respite aide at claimant's home. Claimant's sister currently participates in weekly piano lessons and choir rehearsals; she is also scheduled to participate in a more comprehensive after-school program starting at the end of January 2018.

14. After FDLRC terminated claimant's 1:1 behavioral respite aide, FDLRC authorized claimant's parents to receive 30 hours per month of respite services for claimant and his sister. At the time of the hearing, the respite services had yet to commence.

15. Neither the IPP nor the IPP Amendment addresses the need for respite hours outside of an extended-day childcare setting.

CLAIMANT'S FATHER'S TESTIMONY

16. Claimant's father acknowledged that claimant was no longer attending Children's Center. Claimant had at one time done so, but Children's Center had placed claimant on the waiting list for the new school year to make room for a former returning student. Claimant's father ultimately was not able to secure a space for claimant at Children's Center or at any other extended day care facility. He misled Service Agency about claimant's enrollment because he was afraid claimant would lose the 1:1 behavioral respite services once FDLRC learned claimant was no longer enrolled at Children's Center.

17. Claimant's father testified that the 1:1 behavioral respite services provided to claimant in the afternoon are essential. The family requires help with claimant and his sister in the morning before school and in the afternoons and evenings after school. Currently, claimant's mother takes care of claimant and his sister after school until she goes to work; she receives no other help. Claimant's B.R.I.A. aide accompanies claimant to occupational therapy and observes claimant's ABA therapy. Because claimant's violent behaviors require special attention, claimant's father believes that a regular respite worker would not be appropriate, particularly when claimant's sister, who also has violent behaviors, is at home with her brother. Claimant's father also explained that the 30 hours per month of respite awarded is insufficient to provide time for claimant's parents to address their own needs and to attend to the needs of claimant's sister, who requires constant monitoring, particularly when she attends after-school activities.

18. Claimant's father wants claimant to safely participate in community activities. He also wants claimant to be exposed to after-school activities where he can interact with other children and improve his socialization skills. Claimant's father expressed his fear that claimant's behaviors will worsen without appropriate attention.

SERVICE AGENCY TESTIMONY

19. Cindy C. Lopez, claimant's Service Coordinator, and Ms. Srbui Ovsepyan, MA, FDLRC Regional Manager, testified on behalf of FDLRC. According to Ms. Lopez, Service Agency's usual allocation of behavioral respite hours is 15 hours a week, and claimant's 28 hour per week allocation was an exception to FDLRC policy. No documentation of FDLRC's purchase of service standards, however, was provided at the hearing.

20. Both Ms. Lopez and Ms. Ovsepyan stated that FDLRC terminated claimant's 1:1 behavioral respite services because claimant's father had misrepresented claimant's enrollment status at the Children's Center. Because claimant is no longer enrolled at the Children's Center, FDLRC determined that claimant no longer needed a behavioral respite aide outside of the extended-day childcare setting.

21. At the hearing, neither Ms. Lopez nor Ms. Ovsepyan disputed that claimant would benefit from an extended-day childcare program. FDLRC is not averse to providing 1:1 assistance to claimant to allow him to participate in such a program; however, no suitable placement has yet been found. Claimant is not eligible for certain facilities because of his age and because he is not fully toilet-trained.

22. Ms. Ovsepyan testified that claimant's father had not been forthcoming in providing FDLRC with the information necessary to assess claimant's needs; however, Ms. Lopez disagreed, and testified that claimant's father over the past several months had been cooperative and provided FDLRC with the information it needed.

23. Neither Ms. Lopez nor Ms. Ovsepyan addressed the difficulties currently facing claimant's parents regarding after-school care for claimant and his sister or the adequacy of FDLRC's allocation of 30 hours per month of respite care for claimant and his sister.

LEGAL CONCLUSIONS

STANDARD AND BURDEN OF PROOF

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code,⁵ § 4500 et seq.)

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Bd. of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) The standard of proof in this matter is a preponderance of the evidence because no other law or statute, including the Lanterman Act, requires otherwise. (Evid. Code, § 115.) A preponderance of the evidence requires the trier of fact to determine that the existence of a fact is more probable than its nonexistence. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

3. In this proceeding, each party is asserting a claim. FDLRC asserts that it is entitled to terminate 1:1 behavioral respite services to claimant because he is no longer enrolled in extended day care. Claimant asserts that FDLRC is required to fund 1:1 behavioral respite services at home until an appropriate after-school placement is located. Consequently, FDLRC has the burden of proving by a preponderance of evidence that its termination of funding an after-school behavioral respite aide for claimant was appropriate; claimant has the burden of proving by a preponderance of the evidence that he is entitled to a 1:1 behavioral respite aide at home until he is enrolled in an acceptable after-school childcare program. (Evid. Code, § 115.).

APPLICABLE LAW

4. Regional centers are charged with the responsibility of carrying out the

⁵ All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

state's responsibilities to the developmentally disabled under the Lanterman Act. (§ 4620, subd. (a).) The development and implementation of an IPP is a cornerstone of the regional center's responsibilities to the consumer. The Lanterman Act directs regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP states the consumer's goals and objectives and delineates the services and supports the consumer needs in order to achieve the goals set forth in the Lanterman Act. (§§ 4646, 4646.5, and 4648.) The Legislature's intent is that an IPP should address the needs and preferences of the consumer and the family, through a collaborative process, in order to provide the consumer with the opportunity to live an independent and productive life. (§§ 4646, 4646.5.)

5. The services and supports that may be funded through the IPP process are "flexible and individually tailored to the consumer and, where appropriate, his or her family." (§ 4648, subd. (a)(2).) In addition, the funded services should support the consumer's integration into the mainstream life of the community, "foster [the consumer's] developmental potential," and "maximize [the consumer's] opportunities and choices for living, working, learning and recreating in the community." (§§ 4501, 4502, subd. (b)(1), 4640.7, subd. (a), and 4646, subd. (a).) The Lanterman Act authorizes the funding of a wide variety of services including childcare, respite care, and advocacy. (§ 4512, subd. (b).) When providing these services, the regional center shall, among other things, assess the claimant's "need for extraordinary care, services, supports and supervision, and the need for timely access to this care." (§ 4640.4, subd. (a)(4).)

6. As set forth in Factual Findings 2 and 3, the IPP and IPP Amendment reflect the goal that claimant participate in an extended-day childcare program to facilitate redirection and remain safe. To assist claimant achieve that goal, FDLRC agreed to fund a 1:1 behavioral respite aide for 28 hours per week. As claimant is no longer attending an extended-day childcare program, Service Agency has established by a preponderance of

evidence that it is no longer required to provide claimant with a 1:1 behavioral respite aide for 28 hours per week to assist him at the extended-day childcare program. (Factual Findings 4 and 16.) Once claimant is enrolled in an appropriate extended-day childcare placement, FDLRC is obligated, per the IPP and IPP Amendment, to fund sufficient behavioral respite hours to allow claimant to participate safely and meaningfully in the program.

7. By misrepresenting the status of claimant's enrollment at Children's Center, claimant's father violated his duty to cooperate with FDLRC. A person who seeks benefits from a regional center must bear the burden of providing information, submitting to reasonable exams and assessments, and cooperating in the planning process. (See § 4646.5, subd. (a)(1) [needs assessment requires information from family]; Civ. Code § 3521 ["He who takes the benefit must bear the burden."].) A failure of cooperation may negate the authority to compel the regional center to fund services and supports.

8. Claimant's father's deception, however, while troubling, should not deprive claimant of the services and supports he requires. Claimant can be violent and aggressive and therefore warrants the attention of a behavioral respite aide. Claimant's need is even more pronounced when claimant's sister is at home as well, because the siblings frequently interact violently and claimant's sister has her own behavioral issues. Claimant's father therefore established that claimant requires behavioral respite at home and that the 30 hours of respite proposed by FDLRC for both claimant and his sister is insufficient to meet claimant's extraordinary needs in light of claimant's misbehaviors, parents' work schedules and claimant's sister's activities.

9. The IPP does not address the necessity or amount of 1:1 behavioral respite services claimant requires in light of any scheduled after-school childcare, claimant's ABA therapy commitments, parents' work commitments, and the after-school commitments of claimant's sister. Accordingly, until the parties conclude otherwise at an IPP meeting, the

same level of behavioral aide services previously agreed to be appropriate to meet claimant's needs in an after-school program, i.e., 28 hours per week, will be deemed to constitute the needed level of support.⁶

ORDER

1. Claimant's appeal of the Frank D. Lanterman Regional Center's decision to terminate his 1:1 behavioral respite aide is granted in part, as set forth in this Decision, namely, until a new extended-day childcare program is found.

2. Service Agency shall fund a 1:1 behavioral respite aide for claimant for 28 hours a week at home until the parties reach a different agreement at an IPP meeting or claimant's needs change.

3. Claimant's parents shall cooperate with Service Agency by notifying claimant's Service Provider of claimant's ABA therapy requirements. Claimant's parents shall also promptly inform Service Agency of any change in claimant's after-school activities.

DATED:

CINDY F. FORMAN
Administrative Law Judge
Office of Administrative Hearings

⁶ Effective January 1, 2018, section 4686.5, which placed limitations on a regional center's authority to pay for respite services, was repealed. Consequently, FDLRC is no longer constrained by statute to funding a certain number of in-home and out-of-home respite hours.

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.