

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request
of:

OAH No. 2017120689

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 the Early Education and Extended Learning Program (Extended Learning Program) through Glendale

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

Unified School District (School District)?

FACTUAL FINDINGS

1. Claimant is a nine-and-one-half year-old girl who is a client of FDLRC based on her qualifying diagnosis of autism spectrum disorder (ASD). Her four- and-one- half year-old brother is also an FDLRC client; he too has qualified based on an ASD diagnosis.²

2. Claimant's Individual Program Plan (IPP), developed at an October 28, 2016 meeting between claimant's parents and Cindy C. Lopez, FDLRC Service Coordinator, provides that claimant will participate in structured, supervised after-school activities during the week "to receive redirection and remain safe." (Exhibit 14³ at p. 4.) According to the IPP, claimant's parents are to work with School District to develop sufficient structured programming. To enable claimant to participate in such programs, the IPP further provides that FDLRC will provide personal assistance support from an aide supplied by Behavioral Respite in Action (B.R.I.A.) for 105 hours per month from September 1, 2015, through February 28, 2017. (*Ibid.*) Claimant's father signed the IPP on March 9, 2017.

3. On March 21, 2017, by way of an amendment to the IPP (IPP Amendment), FDLRC confirmed that it had extended funding of claimant's behavioral aide for after-school activities through February 28, 2018, at the rate of 25 hours a week, 108 hours per

² The parties agreed to consolidate the hearing in this matter and the hearing in OAH case number 201712688, regarding claimant's brother, because they involved similar issues and facts. Although Exhibits 1 through 16 were admitted at the hearing, Exhibits 10 through 16 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.

month, after which FDLRC would assess claimant's continued need for the after-school aide services. (Exhibit 13 at p. 3.) According to the IPP Amendment, claimant's parents were responsible for funding claimant's after-school program. The IPP Amendment further provided that claimants' parents were to inform Service Agency if a "reduction of hours took place." The IPP Amendment recognized that certain outcomes would be realized by providing claimant with the support of a 1:1 behavioral aide: claimant would be safe; she would be "provided with a structured setting where she will be appropriately supervised;" she would be "able to participate in all program activities;" and she would have an adult present "to assist with the management and reduction of maladaptive behaviors." (*Ibid.*)

4. On June 2, 2017, the IPP and IPP Amendment were further modified to increase claimant's personal assistance support for the months of June, July, and August 2017. Claimant's 105 hours per month allocation resumed as of September 1, 2017.

5. In October and November 2017, FDLRC learned that claimant's brother, who also received 1:1 behavioral support services for after-school activities, no longer attended his after-school program, despite claimant's father's representations to the contrary, and that claimant's brother instead was receiving behavioral support services at home. Prompted by their findings, FDLRC sought confirmation that claimant was attending School District's after-school program. FDLRC received conflicting information about claimant's attendance. An unsigned letter, dated August 25, 2017, from the Program Supervisor of the Extended Learning Program indicated that claimant attended School District's after-school program (Exhibit 15); however, a telephone conversation with the lead teacher for the Extended Learning Program indicated that claimant had not been in attendance for over a year.⁴ FDLRC learned from B.R.I.A. that claimant had been receiving

⁴ FDLRC was unable to resolve the discrepancy because the author of the letter was on vacation.

the agreed-upon hours of behavioral respite care at her home and was no longer attending the after-school program. Neither claimant's father nor B.R.I.A. had informed FDLRC that claimant was no longer attending the Extended Learning Program; nor had they informed FDLRC that claimant was receiving 1:1 behavioral respite services at home.

6. 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 the Extended Learning Program and the 1:1 behavioral respite services were not being used in connection with another after-school program. (Exhibit 10.)⁵ Implicit in its denial was that claimant did not require behavioral respite services outside of an after-school structured program.

7. On November 30, 2017, claimant's father timely filed a Fair Hearing Request (Request) in response to FDLRC's termination letter. Claimant's father pointed out that claimant was enrolled in an after-school program and was also participating in choir and piano lessons. The Request also stated in relevant part as follows: "Service is being terminated when no replacement services has been confirmed or ensured leaving child with possible period of no services, a potential health hazard and emergency." (Exhibit 11.) Claimant's father requested that Service Agency continue to provide the 1:1 behavioral respite aide. (*Ibid.*) This hearing then ensued.

CLAIMANT'S BACKGROUND INFORMATION

8. Claimant lives at home with her mother, father, and brother. 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.

⁵ FDLRC later extended 1:1 behavioral respite services for claimant for an additional two weeks, until December 14, 2017, because claimant's father had not timely received FDLRC's notice of termination.

9. Claimant was recently diagnosed with seizures; otherwise she is healthy. She engages in maladaptive behaviors, including tantrums and physical and verbal aggression. Claimant has a difficult time self-regulating her inappropriate behavior. When at home with her brother, she and her brother do not get along; her brother frequently hits her and is aggressive towards her. In the Service Agency's most recent annual review, dated September 20, 2017, claimant's parents reported that claimant frequently lies and attempts to manipulate certain situations. She is unable to read social cues and has difficulties making new friends. Claimant requires supervision at all times since she is not aware of her surroundings and she tends to speak to strangers. (Exhibit 12.)

10. Claimant is currently in the fourth grade at Glenoaks Elementary School in the School District. She is enrolled in a mainstream classroom where she receives 1:1 behavioral support. Her class hours are from 8:00 a.m. to 2:30 p.m., five days a week. School District provides claimant with transportation services and speech therapy. Claimant does not qualify for an extended year program with School District because of her improving grades and behavior.

11. FDLRC funded Behavioral Management Parent Consultation services for claimant at her home until July 31, 2017. After that time, claimant's parents were to explore funding for these services from their own insurance or Medi-Cal. Claimant's parents have not continued with the behavioral management services, and it was not made known at the hearing whether they intend to resume them.

12. Claimant currently participates in weekly chorus and piano lessons. She is also enrolled in a more comprehensive after-school program starting at the end of January 2018 with the School District. Claimant's father has already paid for the program.

13. Until December 12, 2017, claimant's brother also had the assistance of a 1:1 behavioral respite aide at claimant's home. He also receives Applied Behavior Analysis (ABA) services at home in the afternoon after school.

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

15. Neither the IPP nor the IPP Amendment addresses claimant's need for respite hours outside of an after-school setting

CLAIMANT'S FATHER'S TESTIMONY

16. Claimant's father acknowledged that claimant was no longer attending the School District's after-school program. Claimant had at one time done so, but she was asked to leave because she was hitting and biting in the classroom. Claimant's father had failed to inform Service Agency about claimant's change in status because claimant was enrolled in the program but only sporadically attended. He was also afraid claimant would lose the 1:1 behavioral respite services once FDLRC learned of claimant's status.

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 the children in the morning before school and in the afternoons and evenings after school. Currently, claimant's mother takes care of claimant and her brother after school until she goes to work; she receives no other help. Claimant's B.R.I.A. aide accompanied claimant to choir and piano lessons. Because claimant's maladaptive behaviors require special attention, claimant's father believes that a regular respite worker would not be appropriate, particularly when claimant's brother, who also has violent behaviors, is at home. 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 brother, who requires constant monitoring.

18. Claimant's father wants claimant to be part of the community and be safe while participating in the community. He also wants claimant to be exposed to after-

school activities where she can interact with other children and improve her socialization skills. Claimant's father is fearful 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 25 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 no longer was enrolled in the School District's after-school program. FDLRC determined that claimant no longer needed a behavioral respite aide outside of the after-school setting.

21. Neither Ms. Lopez nor Ms. Ovsepyan disputed that claimant would benefit from an after-school structured program. FDLRC is not averse to providing 1:1 assistance to claimant to allow her to participate in such a program; however, no suitable placement has yet been found. Neither Ms. Lopez nor Ms. Ovsepyan opined as to the appropriateness of the after-school activities and program selected by claimant's parents.

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 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 her brother or the adequacy of FDLRC's allocation of 30 hours per month of respite care for claimant and her brother.

LEGAL CONCLUSIONS

STANDARD AND BURDEN OF PROOF

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code,⁶ § 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 she is no longer attending the Extended Learning Program. 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 she is entitled to a 1:1 behavioral respite aide at home until she is enrolled in an acceptable after-school program. (Evid. Code, § 115.).

APPLICABLE LAW

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

⁶ 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 through 4, the IPP and IPP Amendment reflect the goal that claimant participate in a structured after-school program to facilitate redirection and remain safe. To assist claimant achieve that goal, FDLRC agreed to fund a 1:1 behavioral respite aide for 105 hours per month. As claimant is no longer attending a structured after-school 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 105 hours per month (25 hours per week) to assist her at the after-school program. (Factual Findings 5 and 16.) Once claimant is enrolled in an appropriate after-school program, 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 failing to inform Service Agency of the status of claimant's attendance at the School District after-school program, 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 omission, however, while troubling, should not deprive claimant of the services and supports she 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 brother is at home as well, because the siblings frequently interact violently and claimant's brother has his 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 her brother is insufficient to meet claimant's extraordinary and timely needs in light of claimant's misbehaviors, her own activities, parents' work schedules and claimant's brother's requirements.

9. The IPP does not address the necessity or amount of 1:1 behavioral respite services claimant requires in light of her currently scheduled and future after-school

activities, any additional ABA therapy commitments, parents' work commitments, and her brother's after-school commitments. 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., 105 hours per month (25 hours per week), will be deemed to constitute the needed level of support.⁷

ORDER

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

2. Service Agency shall fund a 1:1 behavioral respite aide for claimant for 105 hours a month (25 hours per 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 if and when claimant resumes behavioral therapy and the per month hours of such therapy. Claimant's parents shall also promptly inform Service Agency of any change in claimant's after-school activities.

⁷ 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.

DATED:

CINDY F. FORMAN
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.