

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of the Fair Hearing Request of:

CLAIMANT

v.

FRANK D. LANTERMAN REGIONAL CENTER,

Service Agency.

OAH NO. 2022110564

DECISION

Administrative Law Judge Deena R. Ghaly, Office of Administrative Hearings (OAH), State of California, heard this matter on March 28, May 9 through 11, June 26 through 28, and August 14 through 16, 2023. All hearings were conducted by videoconference.

Claimant's father (Father), an attorney, represented Claimant, who did not appear. Father and Claimant's mother (Mother) (collectively, Parents) are Claimant's co-conservators and authorized representatives. Claimant's and Parents are referred to by title to protect their privacy.

Attorney Jessica Franey, Waterson, Huth & Associates, represented the Frank D. Lanterman Regional Center (FDLRC or Service Agency).

Post-Hearing Submissions

During the hearing, testimony and documentary evidence were received. The record was held open until August 18, 2023, for the parties to submit closing statements and until August 25, 2023, for the parties to submit any responses to each other's submissions. On August 18, 2023, both parties submitted closing statements. Claimant's closing statement has been marked Exhibit E-8 and FDLRC's closing statement has been marked Exhibit 91.

On August 21, 2023, Claimant submitted "Claimant's Notice of Errata Re Closing Brief" (Errata Brief) which purports to correct errors and cure omissions in Claimant's closing brief. The Errata Brief has been marked Exhibit E-9.

The Errata Brief lists 12 sections in Claimant's closing brief where citations to legal authority or referenced exhibits are left blank and provides the missing citations. It also corrects the wording of a heading found on page 9 of Claimant's closing brief, from "FUNDING AUTHORIZATION DID NOT EXPIRE BECAUSE NO SERVICES EXPIRATION DATE" to "FUNDING AUTHORIZATION DID NOT EXPIRE BECAUSE THERE WAS NO AGREEMENT TO IMPOSE EXPIRATION DATES FOR SERVICE."

For sections 4, 5, 6, and 7, Claimant added argument in addition to providing missing citations. For section 9, Claimant noted one of his exhibits, A-7, which was admitted into evidence at the hearing, was incomplete and introduced a corrected version, pre-marked A.7.1. For section 10, Claimant added an argument regarding whether any retroactive payments should be increased to reflect updated pay rates and offered an exhibit, pre-marked C-7, in support of this argument. For section 15,

Claimant offered two new exhibits, invoices for time two witnesses billed for appearing at the hearing, pre-marked D-7 and E-7 respectively. The Errata Brief cites "Civil Code section 473(a)" as the authority for permitting its submission.

On August 25, 2023, Claimant filed a reply to FDLRC's closing statement which has been marked Exhibit E-10, and FDLRC filed and served a writing entitled "Service Agency's Response to Claimant's Closing Brief and Objections to Notice of Errata." (FDLRC Response.) The FDLRC Response has been marked Exhibit 92. In its response, FDLRC objected to consideration of the Errata Brief and moved to strike it in its entirety on multiple grounds, summarized here as follows: (1) There is no such law as Civil Code section 473(a); there is a Code of Civil Procedure section 473, subdivision (a)(1), which provides in part, "[t]he court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect . . ." FDLRC argued the Errata Brief does not merely correct mistakes but adds new facts and arguments and seeks to introduce new evidence not introduced during the hearing; (2) Introducing evidence not admitted during a hearing violates the due process of the adverse party as it denies that party the opportunity to object to, or rebut it; and (3) Submission of additional exhibits at this late stage violates Welfare and Institutions Code section 4712, subdivision (d)(3)'s requirement that a represented claimant serve a regional center with a position statement and copies of all documentary evidence the claimant intends to use two business days before the hearing. FDLRC further noted that, throughout the hearing, Claimant intermittently uploaded dozens of documents into OAH's case management system in violation of the procedural requirement to serve the adverse party with evidence he intends to rely upon before the hearing yet, despite their late submission, many of these exhibits were admitted.

FDLRC's objections to the Errata Brief are upheld except to the extent that it provides citations for legal authority and referenced or quoted exhibits and modifies a heading in Claimant's closing brief as these are clarifying additions that do not prejudice FDLRC.

Procedural rules and standards for fair hearings under the Lanterman Act are less formal and do not conform to the strictures of the procedures used in civil actions or even the Administrative Procedure Act. Moreover, recent changes to the procedural provisions applicable to cases such as the instant one instruct the administrative law judge to provide some leniency and acknowledgement of the difficulties claimants and their representatives face in trying to effectively advocate for themselves through the fair hearing process. (Welf. & Inst. Code, §4712, subd. (i).) (Further statutory references are to the Welfare and Institutions Code unless otherwise designated.)

Even in the instant case where Claimant's representative is both his father and an experienced attorney, there are hurdles in trying to maintain professional standards in the face of the emotional toll advocating for one's own child naturally takes. Thus, allowing inclusion of some late citations and corrections to Claimant's closing brief is a reasonable allowance. On the other hand, permitting new argument, new factual assertions, and additional exhibits to be submitted after the hearing has concluded and when the record was left open only for the limited purpose of allowing written closing statements and responses, would unduly prejudice FDLRC because it would extend opportunities for advocacy to Claimant not available to FDLRC.

With respect to adding to Claimant's late submissions of evidence during the hearing, this was only permitted because, particularly given the extended period over which the hearing occurred, FDLRC had the opportunity to review and respond to this evidence. Allowing additional evidence after the record closed presents entirely

different circumstances and would prejudice FDLRC. The one exception is Exhibit D-7, the invoice for Dr. Palafox's services. This exhibit, though not made available during the hearing, was discussed and it was anticipated Dr. Palafox would submit the invoice after she prepared it. FDLRC did not object to it at the hearing or in its response and, as noted in the Issues section below, it is relevant to one of the issues under review in this case. Exhibit D-7 is admitted. Exhibits 91, 92, E-8 and E-10 have been lodged with the record and considered in deciding this matter. Exhibit E-9, the Errata Brief, has been considered to the extent consistent with the above ruling.

ISSUES

The central issue presented in this matter is whether FDLRC properly terminated Claimant's funding for services comprised of a combination of Independent Living Services (ILS) and Supportive Living Services (SLS), referred to by the parties as "ILS/SLS-like Services" and for Personal Assistance Services (PAS). In addition to contending FDLRC improperly terminated funding, Claimant listed five affirmative requests as part of the Fair Hearing Request:

1. FDLRC shall provide an IPP that properly expresses [Claimant's] goals and objectives and identifies FDLRC funding to effectively support them with the 595 monthly hours that [Claimant] continues to need as well as the services that [Claimant's] parents/full conservators previously requested and Dr. Palafox has deemed necessary.
2. FDLRC shall continue funding [Claimant's] necessary and authorized services and begin funding those services

previously requested by [Claimant's] parents/full conservators and recommended by Dr. Palafox.

3. FDLRC shall pay Claimant's parents/full conservators for any necessary and authorized unpaid services provided to [Claimant].

4. There shall be no gap in FDLRC's funding for [Claimant's] necessary and authorized services throughout the Fair Hearing Process.

5. Reimburse Claimant for the cost of paying Dr. Palafox for her time participating in the Fair Hearing.

(Exh. 2, p. A21.)

At the commencement of the hearing, the parties failed to agree on whether all Claimant's requests listed above can properly be decided in this matter. After considering the parties' arguments and in an effort to promote efficiency in settling the significant number of controversies between the parties, in addition to whether FDLRC properly terminated Claimant's services, this decision addresses Claimant's Request 1, whether, based on the applicable law and the established factual findings, Claimant's preferred IPP language should be incorporated into an IPP. The decision also addresses Requests 2, 3, and 4, to the extent these can all be boiled down to a single issue, namely, whether Claimant and Parents are entitled to monetary damages for the months of services provided to Claimant, many of which were supplied by Parents, between the time FDLRC ceased funding and the conclusion of the hearing process. Finally, the decision addresses whether expenses for Claimant's witness, Dr. Palafox, who essentially served as Claimant's expert, will be reimbursed by FDLRC.

Evidence and Argument Relied Upon

Documentary: Regional Center's Exhibits 1 through 92 and Claimant's Exhibits B1-B7, C1, C2, J, K, L, P, Q, R, S, T, U, V, W, X, Y, Z, BB, CC, DD, EE, FF, GG, HH, II, LL, MM, NN, OO, PP, QQ, RR, YY, ZZ, AAA, BBB, DDD, HHH, III, JJJ, LLL, NNN, PPP, QQQ, RRR, SSS, TTT, UUU, VVV, WWW, XXX, YYY, ZZZ (p. 1), AAAA, AAAA.1, DDDD, EEEE, GGGG, HHHH, JJJJ, MMMM, NNNN, OOOO, PPPP, QQQQ (pp. 1-2), B-5, I-5, J-5, K-5, H-5, L-5, M-5, P-5, T-5, U-5, V-5, W-5, Y-5, C-6, D-6, E-6, G-6, Q-6, S-6, U-6, W-6, Y-6, Z-6, A-7, B-7, E-7-E-10, and Z-11

Witnesses: For Regional Center: Associate Director of Client and Family Services Srbui Ovsepyan (Ms. Ovsepyan), Service Coordinator Mayra Dwyer (SC Dwyer), Assistant Director of Client and Family Services Megan Mendes (Ms. Mendes); For Claimant: Mother, Father, LCSW Paul Royer (LCSW Royer), Dr. Gwendolyn Palafax (Dr. Palafax).

FACTUAL FINDINGS

1. Claimant is a 38-year-old conserved male. He is eligible for regional center services based upon his diagnoses of intellectual disability, now known as intellectual developmental disorder, and autism spectrum disorder. Claimant has also been diagnosed with Expressive Language Disorder, Attention Deficit Hyperactivity Disorder, and Generalized Anxiety Disorder.

2. In 2008, Parents purchased a small home close to their family home in Pasadena for Claimant to live in. Claimant, however, cannot reside at the home alone because he requires 24-hour supervision and assistance with life skills such as

medication administration, meal preparation, time management, money management and budgeting, respecting others' boundaries, and reading social cues. Claimant also needs job coaching to help him understand what is expected of him at his work as a clerk at a local supermarket.

3. Throughout the years, various caretakers have stayed with Claimant, including family members and others. During most of the time, however, Parents, particularly Mother, have taken on most of the work involved in supervising and caring for him, as well as providing job coaching and many other forms of assistance.

Claimant's History with East Los Angeles Regional Center

4. Claimant first became a regional center client at three years old and was assigned to the East Los Angeles Regional Center (ELARC). The last Individual Program Plan (IPP) developed with ELARC was signed by Parents and Claimant's then-service coordinator in February 2015. The services listed in the 2015 IPP include PAS, SLS, and ILS. A chart attached to the 2015 IPP includes a column titled "Start Date for each of the services listed" followed by dates of either 2/4/15 – the date the document was signed by Parents and the service coordinator – or 3/1/15. Another column is titled "Duration of Service" and lists 7/15 for each of the services listed in the first column.

5. In August 2018, Parents and ELARC reached an agreement about ongoing services for Claimant. The agreement was documented as an IPP amendment (2018 IPP amendment). Key provisions of the 2018 IPP amendment are as follows:

The Regional Center agrees to fund \$21.00 per hour for third parties providing ILS/SLS like services and \$22.06 for ILS/SLS like services provided by [Parents] and \$14.50 for PAS (Overnight Support) services, as those services are

referenced on the attached spreadsheets and updated IPP document. These rates shall cover all services provided from January 2015 through July 2018 and to all services provided thereafter and prospectively until changed by mutual agreement of the parties. . . .

Prospective services are capped at 595 hours per month comprised of 352 ILS/SLS like services and 243 PAS (Overnight Support) services.

[¶] . . . [¶]

Parents have agreed to transfer [Claimant's] case to the Frank D. Lanterman Regional Center and have agreed to dismiss all pending complaints, including but not limited to to 4731 complaints and Whistleblower complaints

All vendorization requests shall be submitted to Frank D. Lanterman Regional Center.

(Exh. S-6, p. B555.)

Claimant's History with FDLRC

6. In April 2020, Claimant transferred to FDLRC. Srbur Ovsepyan, FDLRC's associate director for client and family services, testified at the hearing. Ms. Ovsepyan has worked at FDLRC for over 10 years and is familiar with Claimant's case. During her testimony, Ms. Ovsepyan explained the transition process when Claimant moved from ELARC to FDLRC: Initially, FDLRC authorized the same level and types of support services specified in the 2015 IPP and the 2018 amendment as required by the

Lanterman Act (see, § 4643.5, subd. (c)) and because regional centers, including FDLRC, had modified some of their normal procedures in response to the then-nascent emergency conditions brought on by the COVID pandemic.

7. FDLRC personnel, however, had reservations about the language and authorized services in the IPP documents and, by the next month, began scheduling meetings to develop a new IPP for Claimant. Between May 2020 and November 2021, the FDLRC IPP team and Parents met 10 times in an ultimately fruitless attempt to develop mutually acceptable IPP language. Throughout this period, FDLRC continued to honor the 2015 IPP and the 2018 IPP amendment.

8. During her testimony at the hearing, Ms. Ovsepyan stated that one of the reasons FDLRC concluded the ILS/SLS-like services were no longer appropriate to fund was because Parents themselves, who often provided these services, had stated they were having difficulty shouldering the burden of being Claimant's caretakers. Despite this, Ms. Ovsepyan stated that Parents refused to work with multiple vendors recommended by FDLRC and refused an alternative vendorization process known as "participant directed," which would have given Parents the authority to directly hire and pay for Claimant's assistants. She also maintained Parents did not respond to questions FDLRC personnel had about why they were not utilizing In-Home Supportive Services (IHSS), a generic resource to fund care workers.

9. Ms. Ovsepyan further maintained Parents refused to cooperate with FDLRC's legally mandated efforts to assess and gather information about Claimant's goals, capacities, strengths, and concerns as part of the IPP review process. Ms. Ovsepyan stated FDLRC agreed to various accommodations Parents requested in order to allow the assessment but ultimately, negotiations broke down and the assessment never occurred.

10. Megan Mendes is also an associate director at FDLRC and has worked on Claimant's case. At the time of the hearing, she had been employed at FDLRC for just over a year. Ms. Mendes testified at the hearing, stating FDLRC personnel concluded the PAS and ILS/SLS-like services violated regulations promulgated under the Lanterman Act requiring services bear vendor identification numbers and service codes and requiring services identified in an IPP have start and stop dates. As Ms. Mendes explained, there is no service code for ILS/SLS-like services, a hybrid category developed by ELARC. Further, Ms. Mendes determined Mother's title for vendorization purposes, "Money Manager" (see, Exh. 5), does not accurately describe her role as Claimant's caretaker and life skills and job coach. According to Ms. Mendes, providing services without complying with the service code and vendorization regulations could trigger an audit by the regional centers' contracting agency, the Department of Developmental Services (DDS) and create liability for FDLRC.

11. Ms. Mendes found additional deficiencies in both the 2015 IPP and the 2018 IPP amendment: the 2015 IPP did not include Claimant's objectives and goals and listed next to the services provided appeared to be expiration dates for those services just weeks or months after they were scheduled to begin; the 2018 IPP amendment was deficient because it did not provide any end dates for services and did not describe how the services supported Claimant's goals and objectives. Ms. Mendes also noted that, because services were sometimes provided by Parents, they would not be obliged to submit quarterly reports, a tool FDLRC used to monitor the progress and ongoing needs of its consumers. Ms. Mendes understood the monitoring process to be one of the responsibilities regional centers had under the Lanterman Act and a necessary step when disbursing government funds for services.

12. Ms. Mendes further stated the 2018 IPP amendment included PAS rates below the changing minimum wage rates in California and called for 56 hours per week without providing for overtime rates. FDLRC offered temporary IPP amendments to Parents to extend services while IPP discussions continued. (See, Exhs. 42 and 43.) With respect to the wage and hour issues in the 2018 IPP amendment, FDLRC's proposed amendment would have authorized regular time paid at \$19.58 per hour and an overtime rate of \$29.36 per hour. (Exh. 42, p. A351.) Parents did not agree to sign the proposed amendments.

13. In July 2021, a new path for obtaining services, the Self-Determination Program (SDP), became available for all regional center consumers. (See, § 4685.8, subd. (a).) SDP allows consumers or their conservators more control over choosing services they need and allows them to directly hire and supervise service providers.

14. In November 2021, Parents indicated an interest in transitioning to SDP, something FDLRC personnel strongly agreed with. Parents also agreed to work with an independent facilitator, Guidelight Group, to help them develop a person-centered plan (PCP), the first step to transition to SDP. Guidelight Group personnel represented they could begin working with Parents in January 2022. With that understanding, the parties agreed to discontinue their efforts to update Claimant's IPP under the traditional process.

15. In February 2022, FDLRC contacted Guidelight Group personnel to inquire about its progress completing Claimant's PCP. Guidelight Group informed FDLRC it had made no progress because it had been unable to reach mutually agreed upon language for Guidelight Group's contract with Parents. FDLRC personnel next attempted to contact Parents. Both Ms. Ovsepyan and Ms. Mendes testified that, at that point, FDLRC believed that the 2018 IPP amendment had expired because, as they

understood it, the Lanterman Act provided that IPP's expire "as a matter of law" after three years. Therefore, either another IPP had to be developed through traditional means or Claimant had to transition to SDP.

16. Regional centers use a digital journal known as "Client ID Notes" to document communications with, and actions taken on behalf of, consumers. FDLRC's Client ID Notes for Claimant reflect that FDLRC personnel sent communications to Parents in February, March, May, June, July, August, and September 2022 regarding the expiration of services and other matters. "Expiration" in these communications referred to both the expiration of the 2018 IPP amendment as well as an expiration date FDLRC set on each of its invoices. (See, Exhs. 61-70.) While Parents responded to some of these communications, they did not respond to any regarding the expiration issues and did not sign the 90-day extension documents. (See, Exh. 71, pp. A609-630).

17. Sometime after the last communication with Parents in September 2022, FDLRC personnel reviewed Claimant's entire record and determined no billings for PAS services had been submitted on his behalf for the period from July 1, 2021 to June 30, 2022 or for the ILS/SLS-like services for the period of September 1, 2021 to August 31, 2022. To FDLRC personnel, this raised a question about whether Claimant was utilizing, or even had a continuing need for, these services.

18. On October 6, 2022, FDLRC sent a letter and the NOPA informing Parents funding for PAS and ILS/SLS-like services would be terminated in 30 days for the following reasons: (i) Pursuant to FDLRC's internal funding schedule Claimant's funding authority had expired; (ii) Parents had not signed FDLRC's IPP amendment documents extending the funding for 90 days; and (iii) Claimant's 2015 IPP and 2018 IPP amendment had expired. (Exh. 1, pp. A2-A5.)

19. Section 4715, subdivision (a) allows for “aid paid pending,” i.e., continuation of funding of services proposed to be terminated by a regional center, if a consumer timely requests a hearing. In October 2022, the time limit was 10 days. The letter accompanying the NOPA addressed this requirement: “If you wish to appeal and have a service to continue during the appeal process, you must file your request for a fair hearing within ten (10) days of your receipt of this letter.” (Exh. 1, p. A5.) The parties do not dispute that Parents did not file their fair hearing request before the ten-day period expired.

20. In November 2022, the parties continued to negotiate terms of IPP amendments to temporarily extend funding for the PAS and ILS/SLS-like services pending completion of the SDP. The efforts to find mutually acceptable IPP amendments were not successful and FDLRC ceased funding services for Claimant on November 10, 2022, consistent with the NOPA.

Claimant’s Evidence

21. Both Mother and Father testified at the hearing. Although ELARC is no longer the servicing agency for Claimant and has not been for several years, a central point for Mother is that the family’s history with ELARC continues to inform and impact their experience as a regional center family. As she explained it, Parents were committed to helping Claimant achieve the maximum degree of independence and a productive, enjoyable life. They purchased the small house for Claimant with that objective in mind; however, it was clear almost from the outset that Claimant’s developmental disabilities, particularly in combination with his sometimes debilitating anxiety, prevented him from living there alone. Mother contended she attempted to find the assistance Claimant needed within the strictures of the law and the normal practices of regional centers while Claimant was an ELARC consumer, with disastrous

results. Service providers from vendorized agencies proved to be at best, negligent and lazy, and at worst, abusive and destructive. At different periods since Claimant moved into his home, he was screamed at, left alone in unfamiliar places, and threatened with abandonment if he did not "behave." In addition, SLS workers had a very high turnover rate. Mother estimates that Claimant has had approximately 100 different workers with him while he was an ELARC consumer, a situation that spiked his anxiety and caused him to regress.

22. Mother maintained she advocated for her son because she had no other choice, including bringing complaints against ELARC to prod it into finding more careful, professional, and compassionate care workers. She hoped the information would raise concerns in the management of ELARC and DDS and therefore not only help Claimant but others like him. She found, however, the response was only to make the ELARC personnel defensive and even put them on the attack, making comments to the effect that Parents were not fit conservators for Claimant.

23. In the face of this increasingly dysfunctional relationship, Parents and ELARC came to an uneasy and, for Parents, not entirely satisfactory yet hard-won resolution, the 2018 IPP amendment. As Mother explained it, the cost to the family was that they had to agree to withdraw their complaints against ELARC despite their sense ELARC had been derelict in its duties. Parents also had to step in as Claimant's main caretakers and at pay rates less than vendorized service providers would receive.

24. Mother maintained ELARC's treatment and the difficulties the family encountered while Claimant was a consumer there had a longstanding impact on her in particular. She was diagnosed with post-traumatic stress disorder, as corroborated by her longtime counselor, LCSW Royer, who also testified at the hearing.

25. During her testimony, Mother did not deny resisting FDLRC's attempt to make its own assessment of Claimant's condition and his goals and needs. Mother provided FDLRC with multiple reports from doctors and psychologists who had treated Claimant over the years and who Mother believed to be far more capable of accurately assessing Claimant and communicating his needs. Dr. Palafox, a psychologist, has treated Claimant on and off since 2006 prepared multiple reports in the intervening years, many of which were introduced into evidence at the hearing. (See, Exhs B-2, B-3, B-4, B-5, B-6, B-7, B-8, C-1, C-2, D-1, D-2.) Dr. Palafox also testified at the hearing where she stated, consistent with her reports, the ideal situation for Claimant would be to reside in a professionally run and staffed group home where he would be among peers while being appropriately supervised and cared for and where there are activities for his enjoyment and betterment. She clarified, however, that there are no available group homes and there are unlikely to be in the foreseeable future.

26. Mother stated she did not sign FDLRC's proposed IPP amendments because she found components of the documents incomplete or inaccurate. For instance, she found one version did not include Claimant's expressive language disorder or certain issues related to his hearing. Other documents failed to fully describe the extent to which Parents care for Claimant. Mother tried to provide comprehensive information about Claimant to help FDLRC prepare more accurate documents (see, e.g., Exh. 23, a detailed overview of Claimant's services and hourly breakdown of his daily routine) but when this failed to improve the situation, she became increasingly distrustful and hesitant to "let go" enough to sign off on any proposed documents.

27. Mother did not deny she sometimes failed to respond to FDLRC's communications. She maintained this was in part due to her understanding of the

protocol going forward when, in November 2021, the family agreed to pursue SDP and the parties agreed to discontinue efforts to update Claimant's IPP under the traditional method. Mother also stated other obligations – her many responsibilities in caring for Claimant, family gatherings, and philanthropic work – sometimes made it impossible to keep abreast of the constant stream of emails, messages, and mail from FDLRC. Finally, Mother stated there were times when the PTSD from her experience with ELARC flared up and overwhelmed her and she could not bring herself to engage with FDLRC.

28. Mother believes regional centers sometimes conflate blind agreement with collaboration, insisting consumers or their families capitulate to their recommendations, and if they do not, labeling them uncooperative. Yet family members such as Parents have no choice but to insist IPP's, as the instruments for obtaining needed services, be accurate and comprehensive.

29. During his testimony, Father explained that, from early in Claimant's life as a regional center consumer, he and Mother had agreed to a division of labor under which he, a busy lawyer, primarily focused on his work as the family breadwinner while Mother, an accomplished advertisement executive, took on most of the brunt work related to caring for Claimant, particularly to the extent it involved dealings with ELARC and later, FDLRC. One area entirely in Father's domain, however, was preparing the billings for the services he and Mother provided. Father freely admitted that, particularly during 2021 and 2022, when he was preparing to retire from his law firm and also negotiating a potential agreement for his law firm to merge with another, he stopped regularly completing the complicated billing records. In fact, it was only in preparing for this hearing he discovered he failed to bill the last several months of work he and his wife completed before FDLRC ceased funding services. Father

maintained he was not aware his late billings would cause FDLRC personnel to surmise Claimant was no longer receiving services.

30. Parents admit some of the components of the 2018 IPP amendment no longer comply and may never have complied with applicable law but believe FDLRC only pursued changes to bring it into compliance when it began to be concerned for its own interests, particularly the possibility that DDS would audit FDLRC and demand the repayment of moneys paid pursuant to the 2018 IPP Amendment. As stated in Claimant's Closing Brief:

For three years FDLRC benefitted from our provision of [Claimant's] services at lower rates – until FDLRC's admitted concern[s] about an upcoming DDS review that might very well reveal FDLRC compliance with an arrangement that was "out of compliance." It was then, in August of 2021, that FDLRC brought to our attention that the mechanisms FDLRC had been using to fund [Claimant's] authorized and necessary services had expired. And, if we did not sign and return [IPP amendments] which FDLRC knew we were not in agreement with, all of [Claimant's] services would be terminated.

(Exh. E-8, p. Z25.)

31. Both parents testified that they were unaware that failing to respond to FDLRC communications and keep abreast of their billings would cause FDLRC to assume Claimant was no longer using or needing its services.

FDLRC's Arguments

32. In its closing brief, FDLRC listed the following Code sections as support for its decision to terminate funding the PAS and ILS/SLS-like services:

- Section 4434, subdivisions (a) and (c), requiring regional centers to operate within the bounds of applicable law (subd. (a)) and granting the DDS the authority to enforce regional centers' compliance (subd. (c));
- Section 4646, subdivisions (a), (b), and (i), requiring IPP's to be "centered" on consumers' needs but be as cost-effective as possible (subd. (a)), developed through "a process of individualized needs determinations" and with consumers' families input if possible (subd. (b)), and permitting consumers to accept a proposed IPP in part and dispute and challenge proposed IPP in part;
- Section 4646.4, subdivisions (a); requiring regional centers to establish DDS-approved internal procedures for developing and revising IPP's, including ensuring these internal procedures to comply with applicable federal and state laws and the regional center's purchase of service policies and utilization of generic services and supports as appropriate;
- Section 4646.5, subdivisions (a)(1) requiring the planning process for the IPP include gathering information and conducting assessments of the consumer, (a) (2) requiring IPP's include statements of the consumer's goals and "time-limited objectives" and requiring the objectives be stated in terms that allow measurement of progress and monitoring of service delivery, among other requirements, and (b) requiring "[f]or all active cases, individual program plans shall be reviewed and modified by the planning team, through the

process described in Section 4646, as necessary, in response to the person's achievements and changing needs, and no less than once every three years."

- Section "4646 (8)" There is no such provision in the Lanterman Act.
- Section 4648, subdivision (a)(6)(A)-(E) requiring a regional center and the consumer and family consider, in choosing a provider for services, the provider's ability, record of success, accreditations and licensing as appropriate, comparative cost, and consumer's or consumer's family's choice; and
- Section 4710, subdivision (a) requiring regional centers to send adequate notice of various actions, including an action to terminate services.

33. Applying these provisions as a whole, FDLRC argued that, because FDLRC was not allowed to assess Claimant or to monitor his progress and have evidence of the continued utilization of services, it could not timely "review" the IPP as is required.

34. In addition, FDLRC cited multiple regulations establishing service code and vendorization requirements it contends the 2018 IPP amendment does not adhere to. It also argued the current \$14.50 hourly rate for PAS in the 2018 IPP amendment no longer met California minimum wage requirements and, because the 2018 IPP amendment calls for 56 hours a week of such services without authorizing overtime wages, it also violates employment laws requiring overtime pay for work exceeding 40 hours per week. FDLRC noted its proposed amendments sent to Parents in July and August, 2022, included the appropriate wage rates and allowed for overtime hours in compliance with the relevant laws.

35. Regarding Claimant's affirmative requests, FDLRC argued that Claimant was not entitled to aid paid pending or backpay in any form for support services provided after November 10, 2022, because: (i) Claimant did not timely file his request for a hearing; (ii) no other law authorized such payments or damages; and (iii) Parents failed to mitigate their damages by allowing FDLRC to utilize any of the vendors or alternate programs such as parent coordinated services or by signing the interim IPP agreements which would have extended funding by 90 days. FDLRC further argued the availability of these alternate avenues of services foreclosed any prospective funding of the services PAS and ILS/SLS-like services pursuant to the 2018 IPP amendment for the same reasons.

36. Regarding Claimant's request for fees and expenses incurred for securing the testimony of LCSW Royer and Dr. Palafax, FDLRC argued, pursuant to Government Code section 11450.40, only witnesses who are subpoenaed are entitled to fees. Government Code section 11450.40 is part of the California Administrative Procedure Act (APA) and requires witnesses appearing at proceedings governed by the APA pursuant to a subpoena to be paid the rates for mileage and appearance fees as witnesses appearing at civil proceedings.

37. During the hearing, Claimant argued any aid paid pending or damages for unpaid services should be calculated not just by the hourly rate provided in the 2018 IPP amendment but should also include a multiplier to account for inflation and changes in minimum wage amounts implemented since 2018. In its closing brief, FDLRC argued there was no legal authority permitting such damage awards.

Claimant's Arguments

38. Claimant disputes FDLRC's contention that either the 2015 IPP or the 2018 IPP amendment expired after three years. The 2018 IPP amendment expressly states it remains in effect until changed by the mutual agreement of the parties and contain no other expiration dates.

39. Claimant contends there is no other basis for determining the 2018 IPP amendment was legally deficient. According to Complainant, the document was the product of mediation sessions assisted by an administrative law judge and both sides were assisted by attorneys. Nothing in the agreement prevents such legally mandated actions as ongoing regional center monitoring and Parents, by making themselves available for multiple meetings, permitted and facilitated FDLRC's ability to monitor Claimant's progress under the existing services.

40. Claimant also asserts the funding authorization for the PAS and ILS/SLS-like services remains valid because the 2015 IPP and the 2018 IPP amendment did not provide services end dates. Pursuant to sections 4710, subdivision (a)(1) and 4646, subdivision (g), authorized services continue until no longer needed. Parents were never informed of FDLRC's internal practice of setting expiration dates on funded services. Claimant argues FDLRC's assertions that the services expired are contradicted by its own actions in permitting line items for these services in preparing draft budgets for Claimant's move to SDP.

41. Claimant further argues Mother's failure to respond to some of FDLRC's communications should not have triggered FDLRC's termination of funds and, in any event, FDLRC's real motive in attempting to contact Mother was to determine whether she was still pursuing transitioning to SDP. Thus, FDLRC's argument that Mother's

failures brought on the termination of funding for Claimant's services is disingenuous. According to Claimant, Mother's failure to respond to all of FDLRC's communication should also be excused as it arose in part from Parents' understanding that they would not be continuing to engage with FDLRC until they completed the transition to SDP.

42. Claimant contends that Parents are entitled to backpay for services rendered from November 10, 2022, the day FDLRC ceased funding services "to the present." (Exh. E-8, p. Z33.) Parents calculate the amount current to the date of submission of the Closing Statement to be \$66,787.95. Parents contend their failure to file the fair hearing request in time to receive aid paid pending was because of their unawareness of the time limit and should be excused. In the alternative, Parents contend they should receive retroactive reimbursement in the interest of justice. To the extent backpay is awarded, Claimant contends rates paid for services rendered on Claimant's behalf should be increased consistent with California employment law.

43. Claimant contends Parents should be reimbursed for fees incurred for Dr. Palafox's preparation for, and appearance at, the hearing.

LEGAL CONCLUSIONS

General Provisions

1. The purpose of the Lanterman Act is twofold: "to prevent or minimize the institutionalization of developmentally disabled person and their dislocation from family and community" and "to enable them to approximate the pattern of everyday living of nondisabled person of the same age and to lead more independent and productive lives in the community." (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

2. Under the Lanterman Act, an administrative proceeding or “fair hearing” is available to determine the rights and obligations of the parties. The standard of proof for these proceedings is the preponderance of the evidence because no other law or statute, including the Lanterman Act, provides otherwise. (Evid. Code, § 115.)

3. The party proposing a change in existing services or asserting a new claim holds the burden of proof in administrative proceedings. (See, e.g. *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, fn. 9.) Thus, here, the regional center holds the burden of proof for establishing its right to terminate funding. Claimant holds the burden of proof for establishing his right to the affirmative relief set out in his fair hearing request: an IPP reflecting his preferred language and services, back and prospective pay for services set out in the 2018 IPP amendment, and reimbursement for expenses incurred for engaging Dr. Palafox to testify at the hearing.

Individual Program Plan Process

4. Services to be provided by a regional center are established through the Individual Program Plan process. (§ 4646.) The IPP includes a statement of the consumer’s goals and objectives; the services provided must be based on these goals and objectives and, when possible, the consumer’s and consumer’s family’s preferences and unique circumstances. (§4685, subd. (b).) Services provided to the consumer must prove to be effective in meeting his or her goals and needs. (§4512, subd. (b); see also, 4646.5, subd. (a)(2).) Regional center funds cannot be used to supplant those that should be provided by another source of funding. (§ 4648, subd. (a)(8).)

5. IPP's must be reviewed and modified if necessary, at least every three years. (§ 4646.5.) The IPP planning process includes regional centers' gathering information and conducting assessments. (§4646.5, subd. (a)(1).) The IPP planning process also includes a schedule of periodic review and reevaluation to ensure objectives identified in the IPP have been fulfilled. (§ 4646.5, subd. (a)(8).)

6. If the consumer or the consumer's authorized representative does not agree with all components of the IPP, they may indicate that disagreement. Disagreements with specific plan components shall not prohibit the implementation of those services and supports agreed to by the parties. (§ 4646, subd. (g).)

7. Each regional center design shall reflect the maximum cost-effectiveness possible and shall be based on a service coordination model in which each consumer shall have a designated service coordinator responsible for providing or ensuring that needed services and supports are available to the consumer. (§§ 4640.7, subd. (b), 4646, subd. (a).) A regional center is not required to provide all of the services that a consumer may require but is required to "find innovative and economical methods of achieving the objectives" of the IPP. (§ 4651.)

8. Regional centers may not fund duplicate services available through another publicly funded agency or other "generic resource." Regional centers are required to "identify and pursue all possible sources of funding." (§ 4659, subd. (a).) The IPP process "shall ensure . . . [u]tilization of generic services and supports when appropriate." (§ 4646.4, subd. (a)(2).) But if no generic agency will fund a service specified in a consumer's IPP, the regional center must itself fund the service in order to meet the goals set forth in the IPP; thus, regional centers are considered payers of last resort. (§§ 4648, subd. (a)(1), 4659.) These cost control measures are in place to

conserve resources that must be shared by many consumers. (See, e.g., §§ 4640.7, subd. (b), 4651, subd. (a), 4659.)

9. Regional centers have discretion to determine which services they should purchase to best accomplish the goals and objectives in a consumer's IPP. (§ 4648.) An appropriate use of this discretion is accomplished by a regional center undertaking its own review of a consumer's needs, progress and circumstances, as well as consideration of its service policies, resources and professional judgment as to how the IPP can best be implemented. (§§ 4646, 4648, 4630, subd. (b), 4651, subd. (a).) Conversely, regional centers do not have unfettered discretion to provide services outside the policies and procedures dictated by the Lanterman Act and its regulations.

Discussion

10. It is clear Parents have put in herculean efforts on behalf of Claimant. Nonetheless, their efforts have stymied the lawful procedures for accessing funding from FDLRC. FDLRC are obligated to work within the legal framework of the Lanterman Act, even if the results fall short of the ideal scenario Parents favor for their child.

11. The Lanterman Act requires a current and complete assessment of Claimant's needs and goals as a prerequisite for FDLRC for funding services. Once services responsive to those needs are identified, the Lanterman Act requires that the provision of such services is done lawfully. FDLRC cannot continue funding services under an outdated, incomplete and at least partially unlawful IPP. Further, it cannot continue to service Claimant without the opportunity to assess and monitor his needs. That review must happen at a minimum of every three years. Parents' own assessors, monitoring tools, and understanding of Claimant's needs, however well-informed are not a substitute for FDLRC's own procedures and direct access to Claimant.

12. Because more than three years have passed without FDLRC or any other regional center having completed this portion of the IPP review, Claimant has not had a current IPP since August 2021, the three-year point since the last IPP document, the 2018 IPP amendment. It is clear from the PAS rates alone, which now fail to meet California's minimum wage laws and were never in compliance with overtime requirements, that the 2018 IPP amendment is outdated and legally deficient. Under these circumstances, FDLRC had no choice but to cease funding services and issue the NOPA and its decision must be upheld.

13. Claimant's affirmative request for an IPP "that properly expresses [Claimant's] goals and objectives and identifies FDLRC funding to effectively support them with the 595 monthly hours that [Claimant] continues to need as well as the services that [Claimant's] parents/full conservators previously requested and Dr. Palafox has deemed necessary" is denied. This request can fairly be interpreted to require maintaining the status quo. For the same reasons FDLRC appropriately ceased funding services under the 2018 IPP amendment, the status quo is not acceptable because it is contrary to the Lanterman Act.

14. Claimant's request for retroactive and prospective pay and rate increases is also denied. Claimant's failure to timely request a hearing forecloses aid paid pending. Retroactive pay in the interest of justice has not been established. Claimant had the opportunity multiple times to extend services pending ongoing negotiations and this hearing but chose not to do so. Although Parents' are under substantial stress, the reality is that these circumstances do not insulate individuals from the press of daily responsibilities.

15. Finally, Claimant's request for reimbursement of expenses related to Dr. Palafox's appearance at the hearing is denied. FDLRC's reliance on Government Code

section 11450.40 is misplaced. The APA does not apply to fair hearings under the Lanterman Act. However, as this is an affirmative request from Claimant, he bears the burden of establishing his right to it. Claimant has not cited any law allowing this type of award and the undersigned ALJ is not aware of any such authority of reimbursing expert or witness expenses under the Lanterman Act.

ORDER

Claimant's appeal is denied in its entirety.

DATE:

DEENA R. GHALY

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Each party is bound by this decision. Either party may request a reconsideration pursuant to subdivision (b) of Welfare and Institutions Code section 4713 within 15 days of receiving the decision, or appeal the decision to a court of competent jurisdiction within 180 days of receiving the final decision.