

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CHRISTIAN G.,

Claimant,

vs.

FAR NORTHERN REGIONAL CENTER,

Service Agency.

OAH Nos. 2011110183, 2011120044,
2011120567, 2012010095, 2012020327

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead, State of California, Office of Administrative Hearings (OAH), in Sacramento, California, on January 30, 2012, and in Chico, California, on January 31, and February 1, 2, and 3, 2012.

Phyllis J. Raudman, Attorney at Law, represented the service agency, Far Northern Regional Center (FNRC).

Lina Foltz, Attorney at Law, represented claimant. Claimant's parents/conservators were present throughout the hearing.

Oral and documentary evidence was received. Submission of this matter was deferred pending receipt of Closing Briefs. Service Agency's Closing Brief and Claimant's Closing Brief were submitted on February 21, 2012, and marked respectively as Exhibits 4 (Part 2), (RC 63) and CC (Part 2), (CB II 29). Service Agency's Reply to Claimant's Closing Brief and Claimant's Reply Brief were received on February 27, 2012, and marked respectively as Exhibits 5 (Part 2), (RC 64) and DD (Part 2), (CB II 30).

The record was closed and the matter submitted for decision on February 27, 2012.

ISSUES

1. Is FNRC required to fund Board Certified Behavior Analyst (BCBA) consultation services (72 hours of direct consultation), and travel expenses up to twelve times per year from San Diego to Paradise, California for Andrea

Macken, BCBA? This request includes funding for a rental car, lodging, meals and expenses, up to \$950 per trip, inclusive.

2. Is FNRC required to fund transportation and travel expenses for claimant to see Dr. Gupta and Dr. Kartzinel in Irvine, California? This request includes funding for a rental car, airfare for four persons, parking, tolls, expenses and food for four persons, and mileage to and from the Sacramento Airport at the IRS rate.
3. Is FNRC required to fund up to 173 hours of behavior services per month, (in addition to the 72 hours per year of direct behavioral consultation with Andrea Macken requested in Issue One), and staff training meetings conducted as part of the consultation services for up to 10 hours per month? If so, should the behavior services be funded at \$20 per hour plus \$5 per hour to be used at the parents' discretion?
4. Is FNRC required to fund assessments and services in increments of \$5,000?
5. Is FNRC required to fund 744 hours per month of personal attendant services at \$20 per hour, plus an additional \$5 per hour to be used at the discretion of claimant's parents?

Is claimant entitled to reimbursement for 629 hours per month of parent vendored services provided from March 25, 2010, to present?

Is FNRC required to provide Employer of Record services for staff providing claimant's personal attendant and behavioral services?

6. Is FNRC required to fund transportation and travel expenses to see Dr. Meier twelve times per year for vision therapy in Reno, Nevada? This request includes lodging (two rooms), travel expenses and per diem for four persons.
7. Is FNRC required to fund conservatorship court fees in the amount of \$421.50, incurred by claimant's parents to establish a limited conservatorship for claimant?
8. Is FNRC required to fund legal fees for Ms. Foltz and witness fees for Dr. Hessel and Dr. Brandon in this matter?
9. Is FNRC required to fund 62 hours of personal attendant care for claimant during the week of this hearing?
10. What is the correct determination of "total cost to FNRC of providing crisis management training through PCM" (Professional Crisis Management) for purposes of discharging FNRC's obligation to provide training as ordered in the September 29, 2011, Decision on the bifurcated issues previously heard?

FACTUAL FINDINGS

1. Claimant is an eighteen-year-old young man who qualifies for regional center services based on a diagnosis of autism and mild mental retardation. He became eligible for FNRC services in July 1995. Claimant was born on June 11, 1993, and reached age eighteen on June 11, 2011, during the pendency of this bifurcated hearing. Claimant is now conserved; his parents being named as limited conservators of the person by letters issuing in October, 2011. He has been receiving services from FNRC pursuant to the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code Section 4500 et seq.)¹

Procedural History

2. This hearing was convened to address six remaining issues which were bifurcated from thirteen original issues scheduled for hearing in July, 2011. Seven of the thirteen issues, (along with an additional consolidated issue), were heard by Administrative Law Judge Hollingshead in OAH No. 2010100666 (Part One) and Decision issued on September 29, 2011. The remaining issues were bifurcated for separate hearing upon claimant's completion of addition assessments which were subsequently completed in October, 2011. These remaining issues, (one of which was withdrawn prior to hearing), were consolidated with the issues raised in four subsequent Fair Hearing Requests and comprise the ten issues set forth above (Part Two).

This Decision is intended to be read in conjunction with the previous decision in OAH No. 2010100666 (Part One), and incorporates all oral and documentary evidence and legal argument previously received.

Due to the complexity of the procedural history, and the importance of its impact in determining the current issues, part of the relevant history will be restated and updated as it specifically applies to the issues set forth above. References to previous findings in Part One will be identified (PF).

3. The parties have a protracted history of disagreements regarding FNRC funding of services for claimant. Of specific concern to the present matter are actions that have occurred during the approximately three-year period preceding this hearing. Numerous requests were made for service funding during that time. FNRC has funded services, denied services, and existing services have been terminated, suspended or modified. These actions have resulted in numerous Notices of Proposed Action (NOPA) and more than twenty-five related Fair Hearing Requests containing more than sixty, new and repeated, issues. Some requests have proceeded to Fair Hearing, with final decisions rendered, and others have been withdrawn or dismissed without prejudice and refiled at a later date. Actions have also been filed in the Butte County Superior Court and the U.S. District Court for the Eastern District of California. The latter,

¹ All subsequent statutory references are to the Welfare and Institutions Code, unless otherwise specified.

which also named as a defendant the California Department of Developmental Services (DDS), was subsequently dismissed without prejudice for failure to cure defects in the pleadings. One of the Butte County Superior Court actions will be discussed further, below, and a second matter is still pending.

4. Numerous Fair Hearing Requests were consolidated for hearing before Administrative Law Judge Stephen J. Smith, originally scheduled for March 9, 2009. Claimants requested withdrawal and dismissal of all pending requests and Judge Smith issued the following “Order Following Fourth Status Conference, Order for IPP Meeting and Order for Dismissal Upon Stipulated Withdrawal” on March 13, 2009:

IPP Meeting: Counsel for the Regional Center moved on March 10, 2009, for an Order to convene an IPP meeting as soon as possible to review claimant’s program, supports and services based upon Dr. Siegal’s assessments. Counsel for claimant did not oppose the motion and the parties noted the meeting has been scheduled for March 25, 2009 at the Regional Center.

Stipulated Withdrawal and Dismissal of Fair Hearing Requests: Counsel for claimant advised her clients have authorized her to withdraw the several Requests for Fair Hearing enumerated above now pending. Counsel acknowledged the withdrawals will result in dismissal of all the now pending Requests for Fair Hearing.

THEREFORE, GOOD CAUSE APPEARING, the Motion to Compel an Individual Program Plan Meeting for claimant is GRANTED. The IPP meeting shall take place on March 25, 2009, at the Regional Center, unless good cause requires scheduling an additional of [sic] different date and time.

The now pending Requests For Fair Hearing, as enumerated in the Caption above, and all of them, are WITHDRAWN AND DISMISSED.

5. The IPP (Individual Program Plan) meeting ordered by Judge Smith convened on March 25, 2009.

6. During March, April, and May 2009, numerous NOPAs were issued and Requests for Fair Hearing filed.

7. In June 2009, approximately four Requests for Fair Hearing with seventeen issues were consolidated for hearing. Administrative Law Judge Judith A. Kopec heard these matters and her decision issued on July 17, 2009 (Kopec Decision). Judge Kopec’s findings and decisions related to seven issues set forth above:

- Issue One: Andrea Macken’s BCBA Consultation Services and Travel Expenses.
- Issue Two: Transportation and Travel Expenses to Drs. Gupta and Kartzinel in Irvine, California.
- Issue Three: Behavior Services.
- Issue Five: Personal Attendant Services and Employer of Record.
- Issue Six: Transportation and Travel Expenses to Dr. Meier in Reno, Nevada.
- Issue Eight: Legal Services.
- Issue Ten: Crisis Management Training

8. Effective July 28, 2009, Assembly Bill 9 (A.B. 9, Chapter 9, Statutes 2009), also known as the “trailer bill,” amended sections of, and added new sections to the Lanterman Act. Because it “addresses the fiscal emergency declared by the Governor by proclamation of July 1, 2009,” the act was declared an urgency statute and took effect immediately. Mandated changes were retroactive to July 1, 2009, or August 1, 2009, for consumers with existing services.

9. On August 5, 2009, FNRC sought reconsideration of Judge Kopec’s July 17, 2009, decision based on the subsequent statutory amendments to the Lanterman Act.

10. By letter dated October 20, 2009, FNRC informed claimant that certain services would be suspended, terminated or modified pursuant to the statutory amendments to the Lanterman Act enacted under Assembly Bill 9 (AB 9). The letter explained that the budget reductions and subsequent changes to the Lanterman Act, a copy of which was attached, prohibited the regional center from paying for some services. The letter also explained “if you disagree with our decision that found you not eligible for an exception, you may file an appeal by completing the attached Fair Hearing Request form” and “if you have any questions, please feel free to call your Service Coordinator.” Claimant’s “services that were affected by these changes,” as relevant to the present matter, were set forth as follows:

The following services are being TERMINATED effective 30 days from receipt of this notice:

Vendor Name: [Parents]	Service Type: Travel Reimbursement
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Reason for Action:
 Legislative changes to the Lanterman Act prohibit Far Northern Regional Center from funding these services, except in extraordinary circumstances. Far Northern has reviewed your case and determined that you do not meet the criteria for an exception.

Authority for Action:
California Welfare and Institutions Code Section 4648.5 (attached)
California Welfare and Institutions Code Section 4648.35
(attached)
California Welfare and Institutions Code Section 4686.5 (attached)

The following services are being MODIFIED to come into compliance with the Lanterman Act effective 30 days from receipt of this notice:

Vendor Name [Parents]	Service Type: In Home Behavior Program
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Reason for Action:
Legislative changes to the Lanterman Act limit the number of hours per week for a behavior program, and requires parental participation without parental payment.

Authority for Action:
California Welfare and Institutions Code Section 4686.2 (attached)

11. On October 28, 2009, claimant filed Fair Hearing Requests disputing the change in services noted in the October 20, 2009 letter, as well as additional issues. The reasons for the fair hearing requests included the following:

Modification of [claimant's] in home/community program

Describe what is needed to resolve your complaint:
40 hrs. per week of ABA program
24 hrs. per day – 7 days per week of personal attendant care (with aid paid pending)

Termination of travel reimbursement to Dr. Meier as ordered by ALJ Judith Kopec on July 17, '09...

Describe what is needed to resolve your complaint:
Reinstatement of travel reimbursement to Dr. Meier as ordered (w/ aid paid pending)

12. On November 23, 2009, FNRC issued a NOPA denying “funding of Crisis Management Training provided by Crisis Prevention Institute, Inc. and/or Staff Resources and staff wages for attendance of [sic] training conducted on 10/15-10/16/09.” The reason for the action was, “FNRC did not authorize the service to be provided by Crisis Prevention Institute, Inc. FNRC has offered and provided required Crisis Management Training through Professional Crisis Management. Congruent with Welfare and Institutions Code 4646(a),

FNRC has determined that the purchase of services from Professional Crisis Management is most cost effective.”

13. On November 26, 2009, claimant filed a Fair Hearing Request appealing FNRC’s “denial of funding crisis training for C.P.I. & [claimant’s] personal attendants and family.” To resolve the complaint, claimant asked for FNRC to “fund training and wages,” with aid paid pending.

14. On December 7, 2009, Judge Kopec issued an order denying reconsideration of her July 17, 2009, decision stating:

The Lanterman Act provides that the decision rendered after a fair hearing is the final administrative decision. There is no provision for reconsideration of the decision under the Lanterman Act.

FNRC did not appeal Judge Kopec’s decision. FNRC was not disputing the decision rendered but was seeking assistance in implementing the decision in light of the subsequent AB9 mandates.

15. On March 25, 2010, claimant dismissed all the pending Fair Hearing Requests without prejudice.

16. On July 16, 2010, claimant filed a Complaint in the Butte County Superior Court containing multiple causes of action including a request to enforce the Kopec Decision. A Petition for Writ of Mandate, Prohibition, or Other Extraordinary Relief was subsequently filed in this matter and heard on February 23, 2011.

17. On October 4, 2010, FNRC issued thirteen NOPAs that are the subject of Part One and Part Two of this bifurcated matter. Claimant filed Fair Hearing Requests as to those issues on October 15, 2010. The hearing originally scheduled for February 2011, was continued to June 2011.

18. On October 5, 2010, an additional Fair Hearing was conducted by Administrative Law Judge Ann Elizabeth Sarli. Judge Sarli’s decision issued on November 23, 2010 (Sarli Decision) and her findings and decisions related to two issues set forth above:

Issue Three: Behavior Services.

Issue Five: Personal Attendant Services and Employer of Record.

19. On March 22, 2011, Butte County Superior Court Judge Sandra L. McLean issued her Order on Petition of Mandate, Prohibition, or Other Extraordinary Relief. This Order addressed requests made pursuant to the Kopec Decision that are relevant to the present matter as follows:

Issue Ten: Crisis Management Training

Item 1 of [Judge Kopec's] ORDER states that "Regional center shall fund training services for claimant's family members who provide direct care to him and his home program service providers in effective and appropriate methods to respond to the specified types of aggressive behaviors that claimant exhibits."

As to this item, the Petition is denied.

Issue Six: Transportation and travel expenses to Dr. Meier in Reno

Item 2 of said ORDER states that "Regional center shall fund travel expenses for appointments with Dr. Meier as included in the last agreed-upon IPP that authorizes such travel."

As to this item, the Petition is granted, with Respondent to fund such expenses from the date of said IPP through the Fair Hearing Requests of October 28, 2009, if they have not already done so. Any other orders or determinations with regard to said item are to be made in the Fair Hearing process.

Issue Five: Employer of Record

Item 3 of said ORDER states that "Regional Center shall fund an employer of record for claimant's home program."

As to this item, the Petition is granted subject to the ruling as to item 4, as given the ambiguity on this item in the ORDER, the matter is remanded to Respondent to make a determination in regard to the number of hours of any behavioral care as opposed to any day care for the time period from the date of the ORDER through October 28, 2009. Any other orders or determinations with regard to said Item are to be made in the Fair Hearing Process.

Issues Three and Five: Behavior and Personal Attendant Services

Item 4 of said ORDER states that "Regional Center shall provide or obtain the appropriate service code, or other mechanism, that is necessary to continue to fund claimant's home program and its required services."

As to this item, the Court reserves jurisdiction pending

determination described in 3 above.

Judge McLean also ordered “with regard to Petitioner’s request for ‘aid paid pending,’ Respondent is ordered to provide aid paid pending from the date of said ORDER through October 28, 2009, if they have not already done so. Any other orders or determinations with regard to such requests are to be made in the Fair Hearing process. Any issues with regard to the requested relief in the Petition, other than those identified above, are to be addressed in the Fair Hearing process. Any issues subsequent to this order, other than those identified above, are to be addressed in the Fair Hearing process. The Petitioners will fully cooperate with Respondent in regard to the above.”

20. A Prehearing Conference was held before Administrative Law Judge Jonathan Lew on June 9, 2011. Thirteen issues were identified in the above-reference NOPAs issued by FNRC on October 4, 2010. Judge Lew ordered that six of these issues shall be bifurcated for separate hearing after a new assessment of claimant is performed.

21. Part One of this bifurcated hearing was conducted on July 11-15, 28 and 29, 2011. Decision issued September 29, 2011 (OAH No. 2010100666).

22. At Part One of the bifurcated hearing the parties reached agreement that claimant would receive independent assessments by David Hessel, Ph.D. of the UC Davis MIND Institute, and William Brandon, Ph.D., BCBA-D, of Learning ARTS, prior to the hearing on the remaining bifurcated issues. Those assessments were completed, with reports issued by October, 2011.

23. Additional NOPAs were issued in November and December, 2011, and January, 2012. Fair Hearing Requests were timely filed and those additional issues were consolidated with the previously bifurcated issues for inclusion in this hearing.

Andrea Macken’s BCBA Consultation Services and Travel Expenses

24. There was extensive testimony and documentary evidence presented at Part One regarding the IPP process for claimant (PF 42, 44-49). The process of scheduling and completing claimant’s IPP was “atypical”, extended over a considerable period of time and culminated in a written document which included the services being provided and those requested and in dispute. This document was essentially completed on September 30, 2010 (September 30, 2010 IPP). Claimant’s Service Coordinator, Rachael Newkirk, discussed changes/additions to this IPP with claimant’s mother by telephone on October 1, 2010, which she then incorporated into the document.

Ms. Newkirk testified that she addressed requests during the IPP process by stating in the completed document, “SC (Service Coordinator) on behalf of parents will request...” NOPAs subsequently issued for denied service requests.

25. FNRC denied claimant's "request for funding of travel expenses of up to twelve (12) trips per year by Andrea Macken, M.A., BCBA, from San Diego to Paradise, CA. This request includes: rental car, lodging, meals and expenses, up to \$950.00 per trip inclusive," and issued the NOPA dated October 4, 2010.

The reason for the action stated:

(1) An increase in the number of consultations with Andrea Macken from six (6) to 12 per year was denied in the June 3-10, 2009 fair hearing decision by Judith A. Kopec. (2) There are alternative resources available to provide behavior consultation services in Northern California which are more cost-effective to access. The regional center is required to ensure that funding for services represents a cost-effective use of public resources." The authority for the action was "OAH Case Nos. 2009040887, 2009040888, 2009050784, 2009050791 – Decision by Administrative Law Judge Judith A. Kopec signed on July 17, 2009. California Welfare and Institutions Code 4646(a); 4648(a)(3).

Claimant filed a Fair Hearing Request on October 15, 2010.

26. The parents contend that the September 30, 2010 IPP, discussed above, provides for an increase in Ms. Macken's services to 12 times per year to meet claimant's objective to "receive behavior consultation services." The plan states "SC (Service Coordinator) on behalf of parents will request FNRC will fund up to 72 hours of direct behavioral consultation services through Comprehensive Autism Center, Inc. with Andrea Macken, MA, B.C.B.A. This will be delivered in the form of 12 direct consultations per year and up to 6 hours per consultation with [claimant], his family and trained instructors." The IPP also stated that "SC will request on behalf of parents FNRC will fund all travel expenses for behavioral consultation (airfare from San Diego-Sacramento, rental car, lodging and meals are approved up to \$950.00), up to twelve (12) trips per year. All mileage will be reimbursed at the IRS rate for the time the trip took place."

Ms. Newkirk included all parent requests in the IPP in this manner and the request was denied.

27. Claimant has been receiving services from Ms. Macken which includes six consultations per year, for up to ten hours per visit, and one sixty minute phone consultation per week. FNRC funds Ms. Macken's travel expenses incurred in providing these services.

28. At the July 2009 Kopec Hearing, claimant sought to increase Ms. Macken's services from six to twelve times per year. Judge Kopec noted that "Ms. Macken recommended in July, 2008, that she provide consultation each month instead of every other month, due to the increase in claimant's maladaptive behaviors." Judge Kopec determined:

Claimant exhibits aggressive behavior, but Ms. Macken did not explain why this required her to double the intensity of her services. She did not describe the additional services that she would provide, or why she was unable to meet claimant's behavior needs with the current level of services. As a result, claimant did not establish that increasing Ms. Macken's services would alleviate his developmental disability, assist his habilitation or rehabilitation, or achieve and maintain an independent, productive, and normal life. In addition, claimant did not establish that an increase in Ms. Macken's services is required to effectively meet his goals or is cost effective.

Judge Kopec concluded that FNRC was "not required to increase services from behaviorist Andrea Macken."

29. In subsequent IPP planning sessions, claimant continued to seek an increase in Ms. Macken's services, which FNRC continued to deny contending that a final determination had been made by Judge Kopec.

30. Claimant's parents contend that increased services were necessary to address claimant's behaviors and needs going into adulthood. They testified regarding their concern that claimant's behaviors were escalating and, at Part One, admitted into evidence a DVD demonstrating two acts of aggression by claimant against his parents which occurred in September and October, 2009. Claimant's family and staff completed crisis management training on October 15 and 16, 2009, subsequent to these incidents. (PF 23, 28-29)

31. Ms. Macken has been providing behavior services to claimant since approximately 1998, currently through Comprehensive Autism Center, Inc. (CAC). In a Progress Report dated June 28, 2011, Ms. Macken noted that:

[Claimant] continues to benefit from interventions based on Applied Behavior Analysis (ABA). The Behavioral Intervention Plan (BIP) is used to manage and ameliorate [claimant's] behaviors. The BIP is detailed to detect escalating behavioral patterns. The behaviors exhibited are agitation which can lead to tantrums, aggression, vocal stereotypy, inflexibilities, and perseverations.

In addition, [claimant] continues to have deficits in the areas of socialization, pragmatic language, and leisure activities. These areas are addressed to increase independence and quality of life. Language and coping skills need to be built in a natural environment learning setting which includes the community so that he may learn and generalize the skills quickly. Caregivers

and peers should be involved in the program to target the above mentioned goals. Lastly, parent training and involvement will be a critical component of [claimant's] program to promote consistency and generalization of skills.

The following recommendations are through the Far Northern Regional Center:

1. Consultation: 60 hours face to face consultation per year
2. Report Writing: 4 per authorization period
3. Phone/Video Consult: 2 hours per month
4. Travel 77 hours per year
5. Travel Reimbursement: Car, parking, air fare, hotel, etc.

The authorization for service will be for one year. . . Changes to [claimant's] program will be based on data collection and analysis and individualized to his specific needs.

32. There was no evidence in the 2011 Progress Report, or other recent Progress Reports completed by Ms. Macken, to support a need to double her services. She did not testify at Part One or Part Two of this Hearing, and did not establish what additional services would be provided or that she could not meet claimant's behavioral needs with the current level of service.

33. William Brandon, Ph.D., BCBA-D, of Learning ARTS, assessed claimant in August and September, 2011, and provided an undated report from that assessment (Brandon Report). Dr. Brandon considered "the behavior support plan written by Macken (6/2011)," and stated that it "is showing reductions in behaviors as well as providing a wide variety of successful antecedent manipulations. Team report and data from the Macken report indicate a gradual reduction in behaviors." He noted that "a long standing tenant in behavior analysis is not to modify an intervention that is working. Macken's report is sufficiently detailed and is showing progress. The team should continue to follow the BIP."

Dr. Brandon stressed the importance of removal or changes in interventions being data driven and done systematically. This supported Ms. Macken's similar conclusions. While he testified that he might prefer to see a client on a monthly basis, direct service hours every other month with monitoring hours on the alternating months can be appropriate to accomplish goals; a professional can make that determination. He also stated that, based on the data considered, he did not consider that a reduction in services was appropriate.

34. Throughout this hearing process, the emphasis has been on continued behavior services provided to claimant by Ms. Macken. At the end of the hearing, claimant's parents indicated their willingness to consider other providers closer to their home. One of the options suggested was Dr. Brandon, and another was a young woman nearing completion of her BCBA that has a successful history of working with claimant and his family. Dr. Brandon stated that

claimant's parents asked him about the possibility of becoming claimant's treating behaviorist but that he had not yet committed.

35. The evidence did not support the contention that claimant requires an increase in Ms. Macken's services. It did appear that resources exist closer to claimant's residence that could meet his goals in a more cost-effective manner. A new service provider would be responsible for developing the level of services appropriate for the claimant during any transition period. FNRC shall continue funding behavior services through Ms. Macken until such services are transitioned to a new provider.

Transportation and Travel Expenses to See Dr. Gupta and Dr. Kartzinel in Irvine, California

36. During the IPP process, claimant again sought funding for two trips per year for appointments with Drs. Gupta and Kartzinel based on his need to "receive health care as needed." FNRC denied claimant's request and issued the NOPA dated October 4, 2010, denying "your request for funding of transportation to see Dr. Gupta and Dr. Kartzinel in Irvine, CA. This request includes the funding of a rental car, airfare for 4 persons, parking, tolls, expenses and food for 4 persons, and mileage to the Sacramento Airport at the IRS rate."

The reason for the action was:

(1) These requests were denied in the June 3-10, 2009 fair hearing by Judith A. Kopec. (2) There are alternative resources available to provide the necessary pediatric services which are located in Northern California and more cost-effective to access. It is Far Northern Regional Center's responsibility to ensure that service funding represents a cost-effective use of public funds.

Claimant filed a Fair Hearing Request on October 15, 2010.

37. Judge Kopec determined at hearing that the regional center established that services from Dr. Kartzinel and Dr. Gupta "do not alleviate claimant's developmental disability, assist habitation or rehabilitation, or achieve and maintain an independent, productive, and normal life." As a result, the regional center was not required to provide transportation services for claimant visits to them.

38. Dr. Gupta is an immunologist that has treated claimant since he was about four years old for hypogammaglobulinemia, "an antibody deficiency syndrome that causes susceptibility to infection." Claimant receives gamma globulin infusions, the cost of which is covered by his medical insurance, but his parents testified that the insurance company requires visits to Dr. Gupta twice each year to continue that funding.

39. Judge Kopec considered witness testimony that there was some evidence that immune function is decreased in some children with autism but that there was no agreement on what that means for their treatment, and that Dr. Gupta's treatment of children with autism is

controversial. Claimant introduced evidence to demonstrate that, since judge Kopec's decision, there is more evidence linking autism with decreased immune function. The information is not conclusive and evidence at hearing continued to support the controversy in this area.

40. Lisa Benaron, M.D., FNRC's Medical Director, testified that claimant is being treated for a "common variable immune deficiency which will require the same treatment for life." She stated that he is "being treated for low antibody counts, not because he has autism."

41. Dr. Kartzinel is a pediatrician whom Dr. Benaron termed a "self-proclaimed expert in autism." She testified persuasively regarding the controversial nature of his treatments. She stated that he is a "pediatrician with no sub-specializations," that some of his treatments "do not comply with the standards of medical care" and "are not medically justified."

42. The evidence supported the existence of continued controversy surrounding claimant's medical treatments with Dr. Kartzinel, many of which are not generally accepted in the scientific community.

43. In Part One, there was extensive testimony regarding the requirements in section 4648.35, subdivision (d), which precludes the regional center from funding transportation services for a minor child in the family residence, unless the family of the child provides sufficient documentation to the regional center to demonstrate that it is unable to provide transportation to the child. The family did not meet that burden. (PF 60, 62, 66).

After June 11, 2011, claimant was no longer a minor. When transportation to medical appointments is found to be a necessary service for an adult consumer, section 4648.35, subdivision (d), requires funding transportation from the consumer's residence to the lowest-cost vendor that provides the service that meets the consumer's needs. The evidence was not persuasive that claimant could not retain medical services from a local immunologist and/or pediatrician. In addition, now that claimant is an adult, it is typical to transition services from a pediatrician. It is an IPP team decision whether claimant's transportation needs are to be met through natural supports or the regional center.

44. Section 4646 provides in part:

(a) It is the intent of the Legislature 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 family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the legislature 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.”

Section 4646.5, subdivision (a)(4), states:

(a) The planning process for the individual program plan described in Section 4646 shall include all of the following:

(4) A schedule of the type and amount of services and supports to be purchased by the regional center or obtained from generic agencies or other resources in order to achieve the individual program plan goals and objectives, and identification of the provider and providers of service responsible for attaining each objective, including, but not limited to, vendors, contracted providers, generic service agencies, and natural supports. The plan shall specify the approximate scheduled start date for services and supports and shall contain timelines for actions necessary to begin services and supports, including generic services.

Section 4512, subdivision (e), defines “natural supports” to mean:

personal associations and relationships typically developed in the community that enhance the quality and security of life for people, including, but not limited to, family relationships, friendships reflecting the diversity of the neighborhood and the community, associations with fellow students or employees in regular classrooms and workplaces, and associations developed through participation in clubs, organizations, and other civic activities.

45. Family relationships are considered a natural support. However, what that support may or may not encompass depends on the individual circumstances. While the parent of a minor child has a duty to provide care for that child, that responsibility changes when the consumer becomes an adult.

In determining needs, it is appropriate for the IPP team to determine what services and supports a consumer’s “natural supports” are willing and able to provide. Claimant’s father testified that the parents “no longer have a legal responsibility but maybe a moral one.” Claimant’s parents have been actively involved in claimant’s life. It is assumed that they will continue some level of “natural support.” The IPP team should consider whether claimant’s parents would be willing to transport claimant to these medical appointments with local providers, twice each year, as a natural support, if the parent’s chose to obtain a local immunologist and/or pediatrician/treating physician. The IPP team should also consider the ability of claimant’s service providers to provide that service.

46. There is nothing in the Lanterman Act granting an entitlement to all services that persons without developmental disabilities might need from time to time. Regional centers are not generally required to find private physicians that they do not fund for each individual consumer.

47. Claimant did not establish that he is entitled to FNRC funding of transportation and travel expenses to see Drs. Gupta and Kartzinel in Irvine, California.

Behavior Services

48. During the IPP process, claimant sought behavioral services and funding which FNRC denied in part. The October 4, 2010, NOPA denied “your request for 173 hours of behavioral services per month, plus 72 hours per year of direct behavioral consultation with Andrea Macken. This request includes: (1) the funding of up to 10 additional hours per month for staff to attend trainings and meetings; (2) An additional \$5.00 per hour “...to be used at the discretion of the parents”; (3) Medical benefits for behavioral services staff; (4) Funding of continuing education for behavioral services staff.

The reason for the action was:

Recent changes to the Lanterman Act limit behavioral services to 40 hours per week, including consultation, training and meetings. This service is not a cost-effective use of public resources and local, more cost-effective service providers are available. Moreover, the funding of benefits, continuing education and the \$5.00/hour discretionary, is not a cost-effective use of public resources.

Claimant filed a Fair Hearing Request on October 15, 2010.

49. FNRC has continued to provide forty hours per week of behavioral services for claimant. There was some question as to whether that service amounts to 172 or 173 hours per month. Application of the commonly used multiplier of 4.33, results in 173 hours per month.

50. The evidence presented at hearing supported the continued need for this service and the regional center agrees to continue funding. The regional center voiced concern over potential changes in the law which may occur as a result of SB 946, chaptered in October 2011, which addresses private insurance funding of behavioral services.

The legislature may repeal or modify entitlements of the Lanterman Act which result in termination, suspension or modification of services. When that occurs, consumers receive notice of proposed changes and recourse is through the fair hearing process.

51. Direct behavioral consultation services with Andrea Macken was addressed in Issue One, above. There was insufficient evidence to support a change in the provision of

claimant's behavioral services. Therefore, training for claimant's parents and staff shall continue as currently provided.

In the event that claimant seeks services from a new provider, staff training would be a consideration in service development.

52. Claimant's behavior services are currently funded at \$20.00 per hour and claimant seeks an increase of \$5.00 per hour to provide "\$20.00 per hour employee compensation, plus 20% for employer costs, benefits and administrative costs." This request will be addressed in Issue Five, below.

Assessments and Services in Increments of \$5,000

53. During the IPP process, claimant sought funding for assessments and services. FNRC denied claimant's request and issued the NOPA dated October 4, 2010, denying "your request for funding of assessments and services in increments of \$5000." The reason for the action was:

(1) Funding of assessments as requested is the responsibility of the local educational authority. Changes to the Lanterman Act prohibits regional centers from funding educationally related services. (2) The services as requested do not represent a cost-effective use of public resources and are to [sic] vague for FNRC to monitor quality and/or cost-effectiveness.

Claimant filed a Fair Hearing Request on October 15, 2010.

54. At hearing, claimant's parents testified that the request for assessment funding in increments up to \$5,000 was sought to meet a proposed objective in his IPP as follows:

[Claimant] will be able to receive therapeutic recommendations and assessments as required to help him to access the entire scope of his environments. He will receive therapeutic evaluation(s) to assist in determining the most effective training methodology to help him access the entire scope of his environments including; learning and developing mature social skills, Independent living skills and appropriate emotional coping skills.

55. Larry Withers, FNRC Case Management Supervisor, testified that it would not be appropriate or a cost-effective use of public funds for the regional center to grant open-ended authorizations "in case" there is a potential need. He explained the request is too vague and that some assessments are the responsibility of the school district. He also stated that the changes to the Lanterman Act in section 4648.55 prevent regional center funding of certain services, including independent living for a consumer who is 18 to 22 years of age, inclusive, if

the consumer is eligible for special education and related services and has not received a diploma or certificate of completion

56. Claimant recently completed a psychological assessment with Dr. David Hessel, at the UC Davis MIND Institute, as well as the behavior assessment with Dr. Brandon. Dr. Hessel opined as follows:

The amount of testing and interventions that he's had seem a lot more than usual and I was concerned, thinking about [claimant], how that has affected him and whether that could have a negative impact on his development or not. . . I guess I was just worried for his well being that there's been so much focus on all of this that we are doing right now and all of the testing and repeat testing. I don't know, I mean there are other things in life, even for a person with autism, than having to go through all this.

57. There was insufficient evidence submitted to establish a current assessment need. Regional centers are not required to commit funds in anticipation of a potential need. Any specific request should be made for regional center consideration. Assessment needs that are educationally related would be the responsibility of the Local Education Agency (LEA).

FNRC is not required to fund assessments and services in increments of \$5000.

Personal Attendant Services, Parent Vended Services and Employer of Record

58. What constitutes the make-up of claimant's "home program" has resulted in serious contention. At the time of the Kopec hearing, FNRC "funded up to 629 hours a month at \$20 per hour, for a total of \$12,580 a month for his home program, and an aide and dog handler at school." Judge Kopec stated that "under claimant's 2007 IPP, as amended in March 2008, the regional center funded a parent-voucher day care program to provide a clinical team to implement claimant's individually prescribed program." In approximately 2004, the regional center vended claimant's father under the day care service code because it was the only way for claimant's parents to have the home program they desired. By using the day care service code², claimant's parents were able to control the program in their home. They hired staff and were responsible for all employment-related record keeping. Funds to pay the staff were reimbursed to claimant's father as the vendor.

59. Over the years, FNRC became concerned about the amount of money that flowed through the home program (termed Project Christian), and the accompanying burden on the family. They were also aware of an investigation into the family's use of some of the provided funds.

² A service code is assigned to each service provided by the regional center in order for funds to be authorized to pay for the service.

60. A decision was made to discontinue the services funded under the day care code because FNRC stated that it had located a behavioral services vendor to assess claimant, develop a level of service to meet his needs, and supply the necessary staff. This issue proceeded to Fair Hearing and was determined in the Kopec Decision.

61. Judge Kopec found:

Claimant's June 2007 IPP acknowledged that he required supervision throughout the day and night. This was met by up to 283 hours a month of in-home supportive services (IHSS) through Butte County. Mother was the IHSS provider. In September 2007, regional center increased the available hours for Project Christian, from 500 hours to 629 hours a month, to fund the cost of Mother attending School as claimant's dog handler. When this happened, Mother was no longer eligible to be an IHSS provider, and claimant no longer received IHSS services. When claimant enrolled in the charter school, Mother no longer served as a dog handler. Instead, these hours were used to fund one of claimant's home tutors to serve as a classroom aide.

62. Judge Kopec determined that "an independent agency qualified to take over claimant's services was not selected or available at the time of the notice of proposed action." She also noted that FNRC was discussing the option of replacing Project Christian with an agency capable of providing his needed services. They had been working with one agency, Remi Vista, to develop unique programs for consumers with autism, including a program for adolescents. "While Mother was involved in discussions concerning the option of using Remi Vista, she never agreed to discontinuing claimant's home program and replacing it with a program from Remi Vista, or another service agency." Therefore, Judge Kopec concluded that "FNRC's argument that an employer of record was not needed because claimant's services will be provided through an independent agency is without basis," and she ordered the regional center to "fund an employer of record for claimant's home program."

Judge Kopec concluded, "Regional center is required to fund the services to which claimant is entitled under the Lanterman Act. If those services cannot be funded through the use of the day care service code, regional center is required to provide another service code, or some other mechanism by which it may continue to fund claimant's required services."

63. What exactly constituted "the services to which claimant is entitled" was not specifically set forth. It was clear that a component was "behavioral services."

64. In June 2008, FNRC retained Nystrom Company to "conduct an audit to determine the manner in which FNRC's payments to Project Christian were utilized and to determine if there were adequate records to verify those expenditures." The Final Audit Report was completed by January 29, 2009. On March 2, 2009, claimant's father, (Appellant in that matter), made written request to the Department of Developmental Services (DDS) for an

administrative review of that report. DDS issued its Letter of Findings on October 12, 2009, and concluded, in part, as follows:

Further, timecards submitted to FNRC as support for future billings/payments should indicate which hours are spent on dog handling and behavior plans and should also indicate whether the service was rendered in the community, at school, or in the home.

This conclusion was based on Finding 3 which stated:

Future timecards must provide more descriptive information that identifies what services were actually performed and where those services took place.

65. Claimant's father disagreed with certain DDS audit findings and brought an appeal and request for formal hearing under California Code of Regulations, title 17, section 50750. The matter was heard by Administrative Law Judge Jonathan Lew in August, 2010, and his decision issued October 1, 2010.

66. Judge Lew found that claimant "receives FNRC services to address a variety of behaviors associated with his autism. He has difficulty interacting with peers and independently accessing the community in which he lives. He requires assistance with toileting and activities of daily living. A behavioral treatment plan has been established for [claimant] that requires a team of trained instructors who assist him in the development of desired social skills. The instructors are called "day care instructor" for vendorization purposes. "Project Christian" is a sole proprietorship owned by claimant's father. For approximately 10 years, FNRC has paid for intensive home and community based treatment for claimant through Project Christian. This is essentially a parent-vouchered day care services program that was set up to implement [claimant's] behavioral program. Over the relevant time period...FNRC funded up to 629 hours per month for parent-vouchered day care services for [claimant].

Judge Lew stated that claimant's "IPP (June 2008) provided that 'he will have access to a clinical team assigned to implement an individually prescribed behavior plan.' The IPP explained that it was understood that many of the functions provided by the staff were of a diverse nature and may not typically fall under day care service. It further noted that it was intended that these services 'be provided with the level of flexibility that is consistent with the needs of the family household.'"

67. Judge Lew affirmed the DDS finding citing the following authority in his legal conclusions:

A vendor must maintain "complete service records to support all billing/invoicing for each regional center consumer in the program including a detailed billing record of services provided." (Cal. Code Regs., tit. 17, § 50604.)

A vendor must maintain records of services provided to consumers in sufficient detail to verify the delivery of the services billed. These records “must specify the date, actual service time, location, and nature of services provided.” (Cal. Code Regs., tit. 17, §54326, subd. (a)(3).)

68. The parties disagree as to exactly what constitutes “Project Christian” but agree that it “consists of many things.” The breakdown of specific service hours was not at issue in the Kopec Decision and only became a direct concern in light of the passage of AB 9 and subsequent audit findings.

69. FNRC contends that Project Christian is an in-home behavior program. Staff testified that “day care” is appropriate when a parent works outside the home, which mother did not do. That service code was used because of the difficulty in finding an appropriate service code to authorize payment for claimant’s program. The inaccuracy of the service code was an issue in the Kopec Decision.

70. AB 9 was enacted and FNRC concluded that it was no longer able to fund 629 hours for claimant’s home program. It was FNRC’s opinion that claimant’s home program was entirely a behavior program and that section 4686.2 prohibited funding more than forty hours per week of behavior services. The NOPA issued and parents filed a Fair Hearing Request which is the proper method of contesting action by the regional center which they believe to be inappropriate or in error.

71. Claimant withdrew his Fair Hearing Request on March 25, 2010, and initiated action in the Butte County Superior Court to enforce the Kopec decision. When the fair hearing request was withdrawn, FNRC implemented the proposed action and reduced claimant’s day program services to up to forty hours per week (172 hours per month).

72. During this time Judge Sarli, in her November 23, 2010 Decision, determined that the use of companion-dogs in the treatment of autism is experimental and, due to changes in the law resulting from enactment of AB9, the regional center is “prohibited from purchasing experimental services pursuant to section 4648, subdivision (a)(15).” She also concluded that “the evidence established that the regional center is prohibited from paying for Non-Medical, Recreational and Educational services pursuant to section 4648. 5, subdivision (a), and the services at issue are non-medical, recreational and educational services.”

73. Judge Kopec, prior to enactment of AB9, had previously determined in Factual Finding 60 of her decision that claimant’s home program hours were increased “from 500 to 629 hours per month, to fund the cost of Mother attending school as claimant’s dog handler.”

74. Judge McLean also had difficulty determining what constituted claimant’s home program. Noting the “ambiguity in the [Kopec] Order, she remanded to FNRC “to make a determination in regard to the number of hours of any behavioral care as opposed to any day

care from the date of the [Kopec] Order through October, 28, 2009.” She retained jurisdiction pending that determination. FNRC “determined” that the entire home program was “behavioral.” As noted above, claimant has been continually seeking enforcement of Judge Kopec’s July 17, 2009 decision.

75. The Audit was also in process during this time and concluded that the record keeping for claimant’s program was insufficient. It could not be determined from the records precisely what comprised the 629 service hours.

76. FNRC funded 629 service hours through March 2010. Beginning April 1, 2010, the proposed reduction in services was implemented and claimant has been received funding for services up to 172 per month since that time.

77. During the IPP process, FNRC denied claimant’s program requests and issued the NOPA dated October 4, 2010, denying “your request for 744 hours of personal attendant at \$20.00 per hour, plus and [sic] additional \$5.00 per hour to be used ‘...at the discretion of his parents.’ This request also includes the funding of the medical benefits for personal attendants and ongoing funding of staff training.”

The reason for the action was:

(1) This is a retitling of an earlier existing services [sic]. A similar request for 24 hour behavior services was denied by Administrative Law Judge Judith Kopec in her July 2009 decision and now is re-titled by you as personal care due to legislative changes limiting behavioral services to 40 hours per week. (2) The services requested is not a cost-effective use of public resources. (2) [sic] This request does not take into account a family’s responsibility in providing care to their own children. (3) Alternative resources such as In-Home Supportive Services (IHSS) must be utilized.

Claimant filed a Fair Hearing Request on October 15, 2010.

78. At this time the parents are seeking appropriate current services for claimant. They also contend that they are entitled to reimbursement for services that he received since March 26, 2010, when FNRC reduced service funding from 629 to 172 hours per month because “FNRC was not permitted to stop funding based on § 4686.2.” They allege that “FNRC’s termination of [claimant’s] parent vendored services above 40 hours per week was void because the Lanterman Act did not authorize FNRC’s termination of those necessary services.” The latter issue remains within the jurisdiction of the Butte County Superior Court, and is not the subject of this Fair Hearing.

79. In Part One, claimant sought and was denied aid paid pending for 629 hours per month funding for claimant’s “parent-vendored home program” from the date of the Kopec

decision because the March 25, 2010, withdrawal of the action terminated that right. (PF 114-129).

In this hearing, claimant contends that he is seeking payment for services provided by his parents since March 26, 2010, not as aid paid pending, but because his parent vendor is entitled to reimbursement for services claimant received, “which FNRC was not permitted to stop funding based upon § 4686.2.” The mechanism for challenging that action was in the Fair Hearing process which claimant dismissed. The Butte County Superior Court retains jurisdiction for issues relating to the enforcement of the Kopec decision.

80. Claimant, having reached age 18 on June 11, 2011, is now an adult and his parents have been appointed his limited conservators. They assume the responsibilities of a limited conservator and the parent of an adult child.

81. The evidence was convincing that claimant requires 24 hour care and supervision.

82. Dr. Hessel testified to claimant’s well-documented symptoms of autism and global developmental delay, and his assessment concluded that claimant met the DSM-IV-TR criteria for autistic disorder and mild/moderate mental retardation (which he references as “intellectual disability.”) His cognitive assessment showed a Stanford Binet Intelligence Scales, 5th Edition, full-scale IQ score of 42. He opined that claimant has the “capacity of a five year old” and while he might be able to be left alone, that would not be recommended.

83. IHSS, as a generic agency, will provide some of the services claimant requires, including personal care needs, protective supervision, and hygiene. More than 270 hours per month (approximately 9 hours per day) may be available based on his previous qualification.³ No evidence was presented that claimant is unable to re-start this service. As noted in Factual Finding 61, the family has utilized these services in the past, with claimant’s mother being his IHSS worker.

At Part One, the parents had not yet requested reinstatement of these services. There was testimony that the regional center had requested that the family reapply for IHSS but the family did not choose to do so. The parents’ testimony at this hearing was that they were now attempting to access this service, were having some difficulty, and were receiving assistance from their advocate, Mr. Hollister. They may also seek assistance from claimant’s service coordinator in obtaining this necessary service.

84. As set forth in Factual Findings 48-52, claimant will continue to receive behavioral services forty hours per week.

³ Claimant previously received the maximum number of IHSS hours per month allowable, 283. The current estimate of 270 considers subsequent reductions in available hours due to the state budget crisis.

85. As set forth in Factual Findings 43-45, natural supports exist and family responsibility should be clarified.

86. Claimant's father testified that claimant attends school from approximately 8:00 a.m. to 12:00 p.m., four days per week, depending on his DIS (designated instruction and services). He is accompanied by an attendant/dog handler. If claimant can not access his education without the presence of the attendant/dog handler, that would be the responsibility of the LEA.

Section 4648.55 provides for additional services that may be pursued through the education agency, including vocational and independent living services.

87. At hearing, FNRC offered funding for in-home respite care up to 90 hours per quarter and out-of-home respite care, up to 21 days per fiscal year.

88. Diana Anderson, Associate Director of FNRC's Community Services Division, testified that there are four types of service rates utilized for regional center consumers: Schedule of Maximum Allowance and DDS rates, which are both set rates; negotiated rates, which are based on cost summaries; and "usual and customary" rates, which are the standard rates a professional charges for a service.

Ms. Anderson explained that the State of California imposed a rate freeze in 2004, and again in 2008. The rate paid to staff of claimant's parent-vendored program was a negotiated rate that has been frozen at \$20.00 per hour and reduced by 4.25 percent mandated in response to the subsequent budget crisis. She also explained that when a service code is changed, a new vendorization occurs and the rate used is either the regional center rate or a statewide median rate—whichever is lower. A negotiated rate is not transferrable.

Ms. Anderson also acknowledged the state's unprecedented budget crisis and the responsibility of the regional centers to utilize funds in a cost-effective manner and to conserve resources for the benefit of all their consumers.

89. Effective November 1, 2007, the hourly rate paid to employees of claimant's parent-vendored program was \$20.00 per hour which included \$16.00 per hour wages and \$4.00 per hour for benefits. Claimant's parents are seeking an increase to \$25.00 per hour which would include "\$20.00 per hour for employee compensation, plus 20% for employer costs, benefits and administrative costs."

90. FNRC established that there is not a service code for "Personal Attendant" but there is one for "Personal Assistance." The service code is 062.

91. Claimant's mother testified that the rate increase was required to be competitive and to retain qualified employees. In addition, she stated that the \$4.00 per hour was insufficient to cover employer costs. She was concerned with keeping "highly trained" aides and opined that lower paid IHSS workers could not provide the services claimant needs. She

also stated that individuals trained to deliver ABA services can receive higher pay, better working environment and benefits from school districts.

No evidence was introduced to show school district pay rates or demonstrating an inability to retain staff. Evidence did not show that IHSS would be unable to meet claimant's daily care needs. Supervision through the day and night was previously provided through this service.

92. Claimant established that he requires care and supervision 24 hours per day. The regional center is first required to utilize generic resources and natural supports.

93. In October, 2010, when this Fair Hearing Request was filed, claimant was 17 years old. He was receiving up to 172 hours per month of behavior services.⁴ He established at hearing that he was entitled to additional assistance as his needs required more support than that of a non-disabled child of similar age. However, as set forth above, it is extremely difficult to ascertain exactly what assistance was needed.

What can be established is that he was previously receiving regional center funding for 500 hours per month of services for his "home program." There was also evidence of additional needs being met through generic resources and natural supports. The 500 hours of funding was increased to 629 hours to accommodate dog handling. This amounted to more than 20 hours per day of funded services. At that time, claimant no longer received his 283 hours of IHSS. Judge Kopec determined that the 629 hours of services met claimants need at that time.

94. FNRC subsequently determined that the change in the law prevented funding of more that 40 hours per week because the claimants "home program" was a "behavioral program," as previously discussed. At issue then was claimant's need for care and supervision

95. As Judge Sarli subsequently determined, the regional center could no longer fund the additional 129 hours due to the change in the law which prohibited funding of expenses related to claimant's companion dog. FNRC's funding was then limited to 500 hours per month. The regional center funded 172 hours which left a void of 328 hours per month.

96. Claimant's parents had the option to re-apply for IHSS but chose not to do so. They are aware of the availability of IHSS and have demonstrated that they understand how to access that system, as they have done so before. It is also well documented that they are able to seek assistance when they believe claimant is entitled to a service. While the regional center has an obligation to seek out generic resources, the parents/conservators must submit the application. There was no evidence that the regional center had been asked to assist or was otherwise not fulfilling their responsibility.

⁴ Per Factual Finding 49, the correct calculation is 173 hours per month of allowable hours.

Therefore, the evidence supports an obligation of the regional center to fund 500 hours per month of services from the date of the Fair Hearing Request, October 15, 2010. Payment shall be made at the negotiated rate of \$20.00 per hour until Employer of Record services are retained and an appropriate service code is utilized. This obligation shall be reduced by hours previously paid for behavioral services (up to 172 hours per month) and the amount that is the responsibility of IHSS as a generic resource, 270 hours per month, which would not be the responsibility of the regional center. This leaves 58 hours per month to be funded by the regional center.⁵

If IHSS services have not yet been reestablished, the parents/conservators may request regional center assistance with that process. When the actual award of IHSS hours is established, if the award is less than 270 hours, FNRC shall fund the additional hours. If the award is greater than 270 hours, that shall reduce FNRC's obligation accordingly.

97. On June 11, 2011, claimant became an adult. While the responsibilities of his parents change at that point, they remain involved as conservators and natural supports. Any change in the level of natural support should be made by the IPP team. When the IPP team determines the number of hours per month allocated to natural supports, the difference shall be reimbursed to the parents from the date of claimants 18th birthday.

The Butte County Superior Court retains jurisdiction for any further relief resulting from the Kopec decision.

98. The evidence was conclusive that "day care" is not an appropriate service code. FNRC is required to provide the appropriate service code to fund future services. Wages paid shall be in accordance with the service code requirements and reflect the current rates that are applicable for regional center consumers receiving that service.

99. Evidence was persuasive that FNRC is required to provide Employer of Record services for staff otherwise parent-vendored. The Employer of Record would be responsible for maintaining all of the employment related records. Use of this service removes employer responsibilities from the parent, so the issue of increased funding to the parent to cover that expense would no longer be at issue

Claimant contends that FNRC insists on terms that preclude any vendor from providing Employer of Record services. FNRC shall immediately take all steps necessary to obtain an Employer of Record.

Transportation and Travel Expenses to See Dr. Meier in Reno, Nevada

100. Claimant sought reimbursement for travel expenses to see Dr. Meier, an optometrist, in Reno, Nevada. FNRC issued a NOPA dated December 13, 2011, proposing to

⁵ In any month where 172 hours were not previously funded, the remainder would also be due.

“deny your request for Far Northern Regional Center (FNRC) to fund reimbursement for 12 trips per year to see Dr. Meier for vision therapy. This request includes lodging, travel expenses and per diem.”

The reason for the action was:

The service requested was previously denied in the OHA [sic] decision of 9/29/2011 (finding # 106). The service is not a cost-effective use of public funds and the transportation reimbursement is requested to access a service that is experimental, which FNRC is precluded from funding.

Claimant filed a Fair Hearing Request dated December 13, 2011, which was consolidated with the bifurcated issues previously scheduled for this hearing.

101. Dr. Richard Meier is an optometrist who has provided vision therapy to claimant since approximately 1999. FNRC provided this service through March 2010.

102. This issue was addressed at Part One (PF 89-106) where it was determined that claimant’s vision therapy needs could not be determined because he needed to be reassessed. On November 15, 2011, Dr. Meier reassessed claimant’s need for vision therapy and testified that his skills had regressed and additional therapy was recommended.

103. Dr. Meier acknowledged that professional literature is inconclusive about whether deficits like claimant’s are a result of autism. He testified persuasively that this vision therapy itself is not experimental and “every optometrist in the state of California or actually every optometrist in the United States has to pass a test in visual therapy in order to practice optometry.” However, he stated that while these conditions can be present in individuals with autism, he had no knowledge as to whether these conditions were caused by autism. These conditions are also commonly present in individuals without autism.

104. Dr. Benaron testified persuasively that vision therapy is not a proven therapy for remediation of problems of autism. Her opinion is that the diagnoses cited by Dr. Meier are found in 53 percent of typically developing children and no scientific study has linked these types of diagnoses to autism.

105. While vision therapy itself is not an experimental treatment, it was not proven to be an established treatment for autism. Now that claimant is an adult consumer, cost effectiveness is still relevant even though the requirements for transportation services change. In the event that transportation to medical appointments is found to be a necessary service for an adult consumer, section 4648.35, subdivision (d), requires funding transportation from the consumer’s residence to the lowest-cost vendor that provides the service that meets the consumer’s needs. Claimant did not establish that he could not obtain vision therapy from a local optometrist since, according to Dr. Meier, all optometrists are trained in this therapy.

Claimant did not establish that he is entitled to FNRC funding of transportation and travel expenses to see Dr. Meier in Reno, Nevada.

Conservatorship Court Fees

106. Claimant's parents sought reimbursement of court fees in the amount of \$421.50 incurred in establishing claimant's limited conservatorship. After considering evidence presented at hearing, FNRC agreed to reimburse the amount requested.

Legal Fees for Ms. Foltz and Witness Fees for Dr. Hessel and Dr. Brandon

107. Claimant requested regional center funding of his attorney fees for this hearing and witness fees for Dr. Hessel and Dr. Brandon. FNRC issued a NOPA dated December 27, 2011, proposing to "(1) Deny your request for Far Northern Regional Center (FNRC) to fund legal fees from Ms. Foltz in the upcoming bifurcated portion of a fair hearing against FNRC; (2) Deny your request to fund witnesses (Dr. Hessel and Dr. Brandon) against FNRC at the same hearing described in #1 above." The reasons for the action stated:

The service requested was previously denied in the OAH decision of 9/29/2011 (factual findings 107-113). The Lanterman Act does not imply a broad obligation to fund litigation for all of their consumers. Attorney's fees and related expenses may only be awarded in the resolution of disputes between parties when specifically authorized by statute or when the parties have agreed, by contract, to the award of such damages. Further, the requested service is not a cost-effective use of public funds. Lastly, the services requested, in the existing circumstances, are not directed toward the alleviation, habilitation, or rehabilitation of the consumer's developmental disability.

The NOPA provided contact information for advocacy assistance with the appeal through the Office of Client's Rights Advocacy, Local Area Board, Disability Rights California and/or Legal Services of Northern California.

Claimant filed a Fair Hearing Request dated December 27, 2010, which was consolidated with the bifurcated issues previously scheduled for this hearing.

108. At hearing, FNRC agreed to fund the fees for Dr. Hessel's expert witness testimony. Dr. Brandon's fees remained at issue.

109. While FNRC retained and funded Dr. Brandon's assessment of claimant, there was no evidence presented that FNRC subpoenaed or contacted him for purposes of providing his testimony at hearing.

110. At Part One, claimant's request for funding of attorney's fees was denied. A similar request was denied in the Kopec Decision. Claimant's mother then expressed her interest in obtaining regional center funding for legal services for regional center hearings and their civil suit against the regional center (PF 107-113).

111. Attorney's fees may be awarded in the resolution of disputes between parties only when specifically authorized by statute or where the parties have a contractual agreement to award fees. While recognizing the availability of "advocacy" for persons with developmental disabilities, the Lanterman Act does not specifically authorize the award of attorney fees in a Fair Hearing.

In addition, section 4433 demonstrates the legislative intent to avoid regional center conflicts of interest by requiring DDS to contract for client's rights advocacy services for persons with developmental disabilities who are consumers of regional centers. There was no evidence presented that claimant, as an adult consumer, was denied advocacy services through the appropriate agencies.

112. FNRC's argument was persuasive that while section 4512 provides for "advocacy assistance" as an available service and support for persons with developmental disabilities, that does not imply a broad obligation to fund litigation for all of their consumers. Claimant's parents/conservators have demonstrated their ability to advocate for their son, and to obtain representation. In addition, they have a continuing relationship with their advocate, Mr. Hollister. Claimant did not establish that he was entitled to regional center funding of Ms. Foltz's attorney's fees.

113. Dr. Brandon completed his assessment and provided the parties with a report documenting his findings and conclusions. The assessment was funded by the regional center.

114. Ms. Foltz contacted Dr. Brandon and scheduled his testimony for the first day of hearing. Ms. Raudman testified that she did not request Dr. Brandon's testimony nor did she schedule or subpoena his appearance. There was no evidence to the contrary. Therefore, claimant is responsible for the cost of this witness.

62 Hours of Personal Attendant Care for Claimant During Hearing

115. Claimant sought 62 hours of Personal Assistance (PA) services during the week of this hearing. FNRC issued a NOPA dated January 20, 2012, "denying your request for 62 hours of Personal Assistance (PA) hours during the week of January 30-February 3 during a state-level fair hearing." The reason for the action was:

The service requested is not cost effective. Unpaid natural supports exist-both parents/conservators do not have to attend the entire fair hearing. The needed assistance could be secured through generic resources such as In-Home-Supportive Services, which the family refuses to utilize. The service requested is

essentially a cost of the fair hearing for which no statute or agreement provides for compensation.

Claimant filed a Fair Hearing Request dated December 27, 2010, which was consolidated with the bifurcated issues previously scheduled for this hearing.

116. It is not unreasonable for both of claimant's parents/conservators to be present during the duration of the hearing. They represent his interests, are most familiar with the facts surrounding each issue and coordinate with claimant's counsel and advocate. In this specific situation, it is appropriate for FNRC to fund this request

Crisis Management Training

117. The Kopec Decision specifically addressed the following issue related to crisis management training services:

Is regional center required to fund training services for the management of assaultive behavior for family and staff through Crisis Prevention Institute [CPI], or alternative training for parents to address claimant's assaultive behavior in the home?

118. Judge Kopec determined that "claimant has established that his family and service providers require training in responding to his assaultive behavior ... However, claimant has not established that training from CPI is appropriate to serve his needs." She then concluded that the "regional center is required to fund training pertaining to the management of assaultive behavior for claimant's family members who provide direct care to him and his home program service providers, including his tutors, concerning methods of responding to the specific types of aggressive behaviors he exhibits. But regional center is not required to provide the training through CPI."

119. The order was as follows:

Regional center shall fund training services for claimant's family members who provide direct care to him and his home program service providers in effective and appropriate methods to respond to the specific types of aggressive behaviors that claimant exhibits.

120. The parties have been in disagreement as to the provider of the required crisis management services. There was extensive testimony and documentary evidence concerning this issue in Part One of this bifurcated hearing (PF 20-34). FNRC arranged for training from Professional Crisis Management (PCM) in Chico on either November 5 or 6, 2009, at the parents election. Claimant's parents contend that they were concerned that claimant's behaviors were escalating and that they needed the training before the dates given for PCM training. As a result they pursued crisis management training on their own, arranged and completed training

with CPI on October 15 and 16, 2009, and sought reimbursement for costs incurred in the amount of \$9,449.55. FNRC denied the request in the November 23, 2009, NOPA that resulted in claimant's Fair Hearing Request of November 26, 2009.

121. During Part One, it was determined that "claimant is entitled to provision of crisis management training services. None of the evidence considered established that he is entitled to reimbursement for the training provided, without FNRC authorization, by CPI. Because there was no argument made that the training provided by CPI was inappropriate to meet claimant's needs, FNRC may meet its obligation to fund crisis management services by reimbursing claimant in an amount equal to the total cost to FNRC of providing this training through PCM, which parents may chose to use to offset their obligation for the CPI training costs. FNRC's obligation to fund this service would then be fulfilled."

122. FNRC provided claimant's parents with a check in the amount of \$1,567.43 stating, "this sum approximates as closely as practical what FNRC would have incurred for providing crisis management training for the family and the direct care staff through Professional Crisis Management (PCM) as originally offered by FNRC. This amount was calculated based on the offer of one entire day of training on either November 5 or November 6, 2009, and 1/5 of the total costs billed for the 5 days of training (November 2 to November 6, 2009) being provided by PCM."

123. Receipts showed that the cost for the five days of "Behavior Analysts Consulting/Behavior Tools Training" was \$4,800 and \$1,837.15 for travel expenses; airfare, rental car, hotel and meals. Two days were allocated for "Behavior Tools Instructor Certification Course trainings," two for "On-Site Behavior Analyst Consultation" and one day consisted of the "Behavior Tools Basic Practitioner Certification Course training, provided at no cost to the regional center."

124. Claimant's parents objected to the amount reimbursed alleging, among other things, that training should have been provided separately to claimant's family, and should have included a component for certified training for future care providers.

The contention that the training needed to be separate is without merit. In addition, training for future care providers was never part of the Order. However, it is more cost effective for FNRC to cover that cost in this training rather than to be responsible for training claimant's future staff individually.

Therefore an equitable reimbursement would be payment for the Basic Practitioner and Instructor Certification Course trainings at \$ 2,400, plus a two-day apportionment of expenses (also shared by others) in the amount of \$734.86. The total due for reimbursement is \$3,134.86.

LEGAL CONCLUSIONS

1. *Burden of Proof:* A party seeking to change a service in a consumer's IPP typically has the burden of demonstrating that the proposed change is correct.⁶ The burden of proof in this matter requires proof by a preponderance of the evidence. (Evid. Code, § 115.)

Andrea Macken's BCBA Consultation Services and Travel Expenses

2. As determined in Factual Findings 24 through 35, claimant did not establish that he is entitled to an increase in funding of BCBA consultation services and travel expenses, from six times to twelve times per year for Andrea Macken.

It was established that claimant has a continued need for the present services and FNRC shall continue to fund Ms. Macken's behavior consultation services until services are transitioned to an alternate provider.

Transportation and Travel Expenses to See Dr. Gupta and Dr. Kartzinel in Irvine, California

3. As determined in Factual Findings 36 through 47, claimant did not establish that he is entitled to regional center funding of transportation and travel expenses to Irvine, California to see Dr. Gupta and Dr. Kartzinel.

FNRC is not required to fund the cost of transportation and travel expenses to see Drs. Gupta and Kartzinel.

Behavior Services

4. As determined in Factual Findings 48 through 52, there was insufficient evidence to support a change in the provision of claimant's behavioral services; however, evidence presented supported the continued need for the current services.

FNRC shall continue funding up to 173 hours per month of behavioral services. Training for claimant's parents and staff shall continue as currently provided.

Assessments and Services in Increments of \$5000

5. As determined in Factual Findings 53 through 57, claimant did not establish that he is entitled to funding in increments of up to \$5,000.00 for potential assessments and services.

FNRC is not required to fund assessments and services in increments of \$5,000.00.

⁶ California Evidence Code section 500 states that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

Personal Attendant Services, Parent Vendored Services and Employer of Record

6. As determined in Factual Findings 58 through 99, claimant established that he is entitled to care and supervision 24 hours per day. FNRC is responsible for first utilizing generic resources and natural supports, and then funding the remaining service hours.

In addition, FNRC must provide an Employer of Record and utilize appropriate service codes to address claimant's needs.

Transportation and Travel Expenses to See Dr. Meier in Reno, Nevada

7. As determined in Factual Findings 100 through 105, claimant did not establish that he is entitled to FNRC funding of transportation and travel expenses to see Dr. Meier in Reno, Nevada.

Conservatorship Court Fees

8. As determined in Factual Finding 106, FNRC has agreed to reimburse claimant for court filing fees in the amount of \$421.50.

Legal Fees for Ms. Foltz and Witness Fees for Dr. Hessel and Dr. Brandon

9. As determined in Factual Findings 107 through 114, claimant did not establish that he is entitled to regional center funding of Ms. Foltz's attorney's fees or Dr. Brandon's witness fees.

FNRC has agreed to fund Dr. Hessel's expert witness fees.

62 Hours of Personal Attendant Care for Claimant During Hearing

10. As determined in Factual Findings 115 through 116, FNRC shall reimburse claimant for personal attendant care during the hearing

Request for Reimbursement of CPI Services Provided in October 2009

11. As determined in Factual Findings 117 through 124, claimant is not entitled to reimbursement for the full cost of CPI services provided in October 2009. FNRC is required to fund crisis management training services and may choose to discharge that obligation by reimbursing claimant in an amount equal to the total cost to FNRC of providing this training through PCM, which parents may choose to use to offset their obligation for the CPI training costs.

Therefore an equitable reimbursement would be payment for the Basic Practitioner and Instructor Certification Course trainings at \$ 2,400, plus a two day apportionment of expenses (also shared by others) in the amount of 734.86. The total due for reimbursement is \$3,134.86.

ORDER

The appeal of claimant Christian G. is granted in part and denied in part.

1. FNRC shall continue to fund Ms. Macken's behavior consultation services until services are transitioned to an alternate provider.
2. FNRC shall continue funding up to 173 hours per month of behavioral services. Training for claimant's parents and staff shall continue as currently provided.
3. Claimant is entitled to care and supervision 24 hours per day. FNRC shall first obtain generic resources and natural support, as appropriate, before funding the remaining hours.

The regional center shall fund 500 hours per month of services from the date of the Fair Hearing Request, October 15, 2010. Payment shall be made at the negotiated rate of \$20.00 per hour until Employer of Record services are retained and an appropriate service code is utilized. This obligation shall be reduced by hours previously paid for behavioral services (up to 172 hours per month) and the amount that is the responsibility of IHSS as a generic resource, 270 hours per month, which would not be the responsibility of the regional center.

If IHSS services have not yet been reestablished, the parents/conservators may request regional center assistance with that process. When the actual award of IHSS hours is established, if the award is less than 270 hours, FNRC shall fund the additional hours. If the award is greater than 270 hours, that shall reduce FNRC's obligation accordingly.

The IPP team shall determine any changes to the parents/conservators' obligation to provide natural support from the time claimant reached age eighteen and provide any reimbursement required per factual finding 97.

FNRC shall immediately take all action necessary to provide an Employer of Record and shall utilize appropriate service codes to fund claimant's service needs. Wages shall be in conformity with the service codes.

4. FNRC shall reimburse claimant for court filing fees in the amount of \$421.50.
5. FNRC shall immediately provide payment for Dr. Hessler's expert witness fees, if not previously paid.
6. FNRC shall reimburse claimant for personal attendant care during this hearing.
7. FNRC shall reimburse claimant \$3,134.86 to discharge its obligation for crisis management training.

8. All other relief requested by the parties is denied.

DATED: March 9, 2012

SUSAN H. HOLLINGSHEAD
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)