

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2014051116

DECISION

Administrative Law Judge (ALJ) Laurie R. Pearlman, State of California, Office of Administrative Hearings (OAH), heard this matter on April 16, 17, 21, and 29, May 5, June 22 and 30, July 1, and August 7, 2015, in Torrance, California.

Julie Ocheltree, Attorney at Law, represented the Harbor Regional Center (HRC or Service Agency). John G. Nolte, Attorney at Law, represented Claimant, who was not present at the hearing. Claimant's mother/co-conservator was present.¹

Testimony and documentary evidence was received. The record was left open until September 28, 2015 for the parties to file closing briefs and reply briefs. Their submissions were timely received. HRC's closing and reply briefs were marked for identification as Exhibits RR and SS, respectively. Claimant's closing briefs and reply briefs were marked for identification as Exhibits 160 and 161. The briefs were not admitted into evidence. The record was closed and the matter was submitted for decision on September 28, 2015.

¹ Titles are used to protect the family's privacy.

///

///

///

///

///

///

///

ISSUES

The issues in this case are: 1) whether HRC should be required to fund a 1:1 day program (STEP I) through vendor Institute of Applied Behavior Analysis (IABA), and 2) whether HRC should be required to reimburse claimant's parents for the therapeutic companion services that they have been funding from June 2014 to the present, to replace the IABA 1:3² (STEP III) day program, which was terminated by IABA.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits A-QQ; Claimant's exhibits 1-156 and 159.

Testimonial: Valerie Dawson, HRC Case Counselor; Gary W. LaVigna, Ph.D., IABA Chief Economic Officer (CEO) and Clinical Director; Amy Stirman, Board-Certified Behavioral Analyst (BCBA); Mia Gurri, HRC Program Manager; Colleen Mock, HRC Director of Community Services; Cynthia Underwood, BCBA; Clara Joslyn Pascascio, IABA Supervisor of STEP Day Program; Jennifer Richey, IABA Assistant Director; and Claimant's mother and co-conservator.

² 1:1 ratio refers to one staff member and one disabled individual. A 1:3 ratio refers to one staff member and three disabled individuals.

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is a 29 year-old conserved adult male who is receiving regional center services based upon qualifying diagnoses of Autism and Moderate Intellectual Disability. He has limited verbal communication skills. His receptive language skills are stronger than his expressive language skills. Claimant's receptive language skills have been assessed to reflect an age equivalent of 4 years, 10 months. He is able to follow single-step verbal instructions with multiple instructions and additional prompting. Claimant uses written communication, though his writing is often illegible. Claimant knows and communicates his likes and dislikes through facial expressions, gestures, and vocalization, and is able to choose an activity he likes when given choices. His behavioral challenges include non-compliance, agitation, and aggression towards himself and others. He lives with his parents, who are his co-conservators, and with his younger brother, who is also an HRC client.

2. Claimant's Individual Family Service Plan (IFSP)³ goals are to live in the least restrictive home environment, to participate in an appropriate day program that addresses his needs, and to access and participate in community activities. Hopes and dreams for the future include achieving greater independence and improving his job skills, so that Claimant can obtain a supported individualized job in his community. (Exhibit DD.) Claimant is not brought to IFSP meetings and his mother appears to make

³ Services and supports needed by a consumer are determined by way of the Individual Program Planning (IPP) process. HRC uses the term Individual Family Service Plan (IFSP) in place of IPP. Both terms are used interchangeably herein.

all decisions for her son. The evidence presented did not establish whether she does so with Claimant's involvement or input.

3. From April 2008 through June 2014, Claimant was a participant in the IABA STEP III day program, as indicated in his IFSP and as funded by HRC.

4. On May 8, 2014, the IABA STEP III day program informed HRC that IABA had decided to terminate services for Claimant, effective June 6, 2014. Claimant requested that HRC secure IABA STEP I services for Claimant (which would entail funding at a 1:1 staffing ratio), or reimburse Claimant "for additional expenses and/or compensatory services." (Exhibit B.) HRC denied Claimant's request, on the grounds that "HRC feels that there are programs available to meet [Claimant's] specific individualized needs, including respecting his morning routine, that are more inclusive than the 1:1 service proposed." (Exhibit A.) Claimant filed a fair hearing request on May 26, 2014, and this matter ensued. (Exhibit B.)

SCHOOL DISTRICT SERVICES/THERAPEUTIC COMPANIONS

5. Prior to age 22, Claimant attended a 1:1 program administered and funded by the ABC Unified School District and HRC. During this time, with support, Claimant was able to use public transportation, go to the food court at Cerritos College, and go to the mall. He successfully held jobs at Chuck E. Cheese's (wiping down tables and chairs), Old Navy (hanging and folding clothing), and Barnes and Noble. He also received 1:1 support from therapeutic companions (TCs.) The TCs are generally college students with no special training or education in the care or treatment of the developmentally disabled. The TC program has continued to date. In the afternoons (for two hours during the week and on Saturdays), Claimant participates in an HRC-funded social/recreation program provided by the TCs. HRC funds up to 46 hours per month for the TCs, who are chosen by Claimant's mother to work with Claimant. The TCs receive

some training from consultant Cynthia Underwood, a board-certified behavior analyst (BCBA). Underwood is not an HRC vendor, and is paid by the parents.

6. Claimant's parents have funded additional TC services from June 2014 to the present, to replace the IABA 1:3 (STEP III) day program, after IABA chose to terminate Claimant's participation in that program. No evidence was presented to establish the amount Claimant's parents paid for the TC services during that time period.

2007 APPEAL REGARDING FUNDING FOR A 1:1 STAFFING RATIO

7. When Claimant transitioned out of school when he turned 23, HRC declined to continue funding for 1:1 supports, and his parents filed an appeal. In OAH case numbers L2006120057 and L2007010855 (consolidated for hearing), HRC contended that a 1:1 staffing ratio was unduly restrictive and that time spent with non-disabled peers had resulted in Claimant's over-reliance on the 1:1 companion, had caused Claimant to become overly "prompt dependent," and had interfered with his ability to cope and gain independence. The ALJ issued a decision finding that "it is time for claimant to transition to a program with a greater than 1:1 support staff ratio. His parent subsequently enrolled Claimant in the IABA STEP III day program, which is not vendored by HRC."⁴

⁴ Regional centers have service catchment areas. If a service provider has its office within that regional center's service catchment area, only that regional center can be the vendoring regional center. The vendoring regional center performs quality assurance, although other regional centers may choose to utilize a non-vendored program for one of its clients. HRC funded IABA STEP for Claimant as a non-vendored program.

IABA STEP III DAY PROGRAM

8. The IABA STEP III day program has a 3:1 staffing ratio. Teaching primarily takes place at local businesses where consumers live, work, and recreate such as stores, restaurants, banks, libraries, and recreational centers. Anticipated outcomes include increased opportunities to participate in self-chosen activities; decreases in challenging behaviors that inhibit full community integration and participation; increases in behaviors that enhance full community integration and participation and result in an improved quality of life; increased participation in community integration activities and career education; and participation in integrated volunteer work, if desired. Participation in integrated paid employment is a primary focus of the IABA program, and IABA staff members are referred to as "job coaches." However, the IABA program made no effort to return Claimant to places where he had previously been successfully employed (Chuck E. Cheese's, Old Navy, and Barnes and Noble) or to place him in other paid employment during his six years in the IABA program.⁵

9. Gary W. LaVigna, Ph.D., IABA's CEO and Clinical Director, testified about his philosophy and that of the IABA day program. He did not know details about Claimant and could not answer questions about any lack of data in the IABA reports, but opined that 1:1 staffing was required for Claimant.

10. Clara Joslyn Pascascio, supervisor of the IABA STEP Day Program, testified that during the six years that Claimant was in the STEP III program, there were three incidents of aggression by Claimant. At times, IABA could not provide the day program

⁵ Before IABA services began, IABA staff inquired with Chuck E. Cheese's manager as whether Claimant could work there again. The manager was willing to have Claimant return to work. However, no evidence was presented to establish that IABA pursued that work opportunity for Claimant.

to Claimant because there was no staff available. IABA fell behind in preparing reports, which they failed to timely submit to HRC. IABA staff members are permitted to drive clients if they have a California driver's license, a safe and reliable vehicle, and automobile insurance.

11. Although IABA had had difficulty ascertaining which activities would be reinforcing for Claimant, Pascascio opined that a 1:1 staffing ratio would enable IABA to make that determination. IABA found Claimant "challenging" not only because of his behavior, but also because IABA had difficulty matching him with other clients during the same six-hour time period.

12. After the 2007 Fair Hearing decision, Claimant's mother visited a variety of day programs and chose to enroll Claimant in the IABA STEP III day program (IABA STEP III.) In April 2008, Claimant began attending IABA STEP III. It provided a 2:1 staffing level for several years. IABA is not an HRC vendor and HRC has no quality control over the services it provides. The goal was to support Claimant in job development, developing emergency skills, and reducing outbursts, self-injurious behaviors, and aggression. IABA is entirely community-based. There is no center at which program participants access services. Participants and staff travel to various locations in the community using public transport or the staff's personal vehicle. On various days, Claimant would travel to Cerritos College where he would participate in a reading lab and an adaptive physical education (APE) class, and purchase lunch at a food court. On other days, Claimant would go to a local shopping mall. On Fridays he participated in a bowling class at a local bowling alley. As of June 2008, it was reported that Claimant attended IABA STEP III for only two hours per day, because he reportedly experienced sleep difficulties, which made it difficult for him to arrive at 9 a.m.

13. From 2008 through 2013, IABA's STEP III Individual Service Plans (ISPs) for Claimant provided the same activities at the same places, with the same peer. This individual was higher-functioning than Claimant, which pleased Claimant's mother, but

he was not particularly well-suited to being paired with Claimant. Claimant was to go to Cerritos College, the Cerritos Mall, the Cerritos Towne Center, and a local bowling alley. Each of the ISPs was based on a July 2008 functional assessment. IABA did make some minor changes to Claimant's program over time. For example, the November 2012 ISP added a visit to the volunteer site for Meals on Wheels in Lakewood, California from 10 a.m. to noon, to prepare hot lunches for delivery. This activity was not included Claimant's November 2013 ISP.

14. In May 2014, Pescasio told Mia Gurri, HRC Program Manager, that IABA was losing money because Claimant was not participating in a full day of his program, due to his chronic tardiness.

15. When HRC became aware of Claimant's increased difficulties and lack of participation in the IABA day program, HRC staff asked IABA representatives if they knew of other activities Claimant might enjoy. IABA representatives said that they were "out of ideas." Claimant's mother was asked to provide a list of Claimant's preferred activities. If mother prepared such a list, it was never provided to HRC. HRC also offered to fund an HRC-vendored behavioral program to assist Claimant and his family with behaviors occurring in the home which were preventing Claimant from leaving the house in a timely manner. His parents declined HRC's offer.

JULY 2008 COMPREHENSIVE FUNCTIONAL ASSESSMENT

16. In July 2008, a comprehensive functional assessment report and recommended support plan was developed for Claimant as part of an IABA training institute. The assessor focused on Claimant's behavioral problems, specifically instances of tantrums and outbursts. He noted that Claimant had had no outbursts while working at Chuck E. Cheese, despite the crowded, noisy environment and the fact that he was asked to take on undesirable tasks that he generally rejected in the home-setting. The report recommended that Claimant be provided with tasks he enjoys, as motivation for

doing less-preferred tasks; engage in regular employment three times a week for two hours; and attend social events to enhance his social network and potential for peer support. It was noted that Claimant might need 1:1 support. It was not established that IABA implemented this support plan.

DECEMBER 2008 FUNCTIONAL BEHAVIOR ASSESSMENT BY FAMILY BEHAVIOR SERVICES

17. In December 2008, HRC funded a functional behavior assessment (FBA) by Family Behavior Services to address concerns about several non-severe behavioral issues. Claimant was observed to have obsessive-compulsive behaviors and non-compliance, maintained by the avoidance of non-preferred activities. The assessor recommended giving Claimant choices whenever possible to increase his sense of control over his environment, and suggested that Claimant be provided a variety of activities, built upon his motivations and interests. The evidence presented did not establish whether this plan was accepted by Claimant's parents and implemented.

COMPREHENSIVE FUNCTIONAL ASSESSMENT (COREY REPORT)

18. Complainant's tardiness in arriving at his IABA day program continued to be a problem. For the November 2012 through April 2013 reporting period, the punctuality objective was to have Claimant arrive by 10 a.m. for 50 percent of the days he attended the IABA program. The start time of the IABA day program was 9:00 a.m., but Claimant generally arrived between 11:30 a.m. and 12:30 p.m.

19a. As part of an IABA training institute, Jim Corey prepared a comprehensive functional assessment report and recommended support plan, dated August 8, 2013 (Corey Report). It focused on Claimant's chronic tardiness, which threatened his day program. Claimant was 2.5 to 3.5 hours late arriving for the day program on the two days per week that he attended. He did not attend three days per week, since he was unable to meet the 11:15 a.m. cut-off time that IABA had established by this point.

19b. Claimant's mother reported to Corey that Claimant is a poor sleeper who wakes up late, and will not leave the house until he has had his morning bowel movement.⁶ During the three years prior to the Corey report, Claimant maintained good attendance at the outset of his IABA day program. However, over time his attendance began to decline, and at the time of the Corey report, Claimant was attending the IABA day program only two days per week. Claimant's parents attributed the change to delaying behavior and to toileting issues. Corey reported that the parents "say his Day Program is not a preferred activity, is not reinforcing and the activities are becoming less interesting to him since they are becoming more tailored to the members of the 3:1 group who do show up." Corey concluded that Claimant's chronic tardiness is one way of saying, "No I don't want to go [to the IABA program] today." Corey suggested that adding new or more interesting things to Claimant's schedule would allow Claimant "the typical ability to choose." (Exhibit Y, p. 235.) Among IABA staff, there was a lack of communication and consensus as to which activities Claimant might prefer.

19c. Corey noted that the STEP III objectives were: 1) Quality of Life Indicator Objectives; Community Presence- Claimant would spend 55 percent of his day in the community; 2) Job Development, Punctuality- On 50 percent of the days he attends, Claimant was to show up for the IABA program by 10 a.m.; 3) Social/Recreational, Social Interactions- Claimant would interact five times each day; 4) Community Presence and Participation, Community Activities - Claimant would participate in at least one new community activity per month; 5) Behavior, Outburst - Claimant would have two or fewer outbursts per month, 6) Behavior, Physical Aggression- Claimant would have zero

⁶ Participants in the IABA program must utilize public restrooms, since it is not center-based.

episodes of physical aggression each month. The employment goal was dropped entirely. (Exhibit Y, p. 215.)

19d. As a result of his constant tardiness, Claimant was missing volunteer work and community integration, and IABA staff was not able to implement the behavior support plans. The Corey Report states that Claimant “refuses to leave home by engaging in a series of cyclic activities his parents feel are behaviors delaying his departure for the Day Program despite their constant prompts.” (Exhibit Y, p. 210.)

19e. Claimant was not tardy for preferred activities, such as outings to the Farmers Market on Saturday mornings with his TCs. In the IABA STEP III day program, Claimant always missed the visit to the Meals on Wheels volunteer site, and was usually late to, or entirely missed, the bowling activity on Fridays. When Claimant did go to the bowling alley, he was no longer interested in the activity because the bowling class was no longer offered.

19f. As set out in the Corey Report, goals included discerning how to make the IABA program more motivating to Claimant, incorporating more preferred activities into the program, and providing Claimant with more structure and tools. Corey recommended that IABA provide Claimant with a wider array of vocational opportunities, since he had demonstrated success in previous employment and volunteer settings. Corey also opined that Claimant would be better served at IABA with a 1:1 staffing ratio.

20. In contrast, at the time of the Corey report and to date, Claimant eagerly participates in the TC program which takes place on weekdays during the late afternoon and on Saturday mornings and afternoons. He is generally on time for those activities, and successfully engages in a variety of independent living skills and community skills activities with the TCs. He particularly enjoys his weekly visits on Saturday mornings to the local farmers’ market, and is able to leave his house in a timely manner in the morning to go there with his TCs.

NOVEMBER 2013 ISP

21. In the STEP III ISP dated November 1, 2013, IABA reported that Claimant met only one out of seven objectives. The objectives chart for the period of May 2013 through October 2013 shows zero percent for punctuality (with a goal of 50 percent). As for "Outbursts," the chart shows incidences each month, ranging from one per day up to four per day. The IABA report concludes with a strong recommendation for 1:1 support.

TESTIMONY OF HRC CASE COUNSELOR VALERIE DAWSON

22. Valerie Dawson has served as Claimant's case counselor at HRC from May 2009 to the present. When he began the IABA day program in April 2008, Claimant was meeting the program goals. But by 2010, he was no longer meeting many goals. Dawson noticed this change and requested that IABA provide her with Claimant's attendance records. She noted he chronically arrived late. At a November 17, 2010 program planning meeting, HRC asked IABA if it could provide Claimant with a 6-hour program that could begin later in the morning. IABA representatives said that they were not able to accommodate HRC's request to provide such a program to Claimant.

23. It is unusual for a case counselor to have a client with whom she has not met. Dawson has asked Claimant's mother to bring her son to program planning meetings, but Claimant's mother has never done so. Dawson stated that, "I know what [Claimant's mother] wants me to know about [him]. We have to rely on reports." The day program goals are those of Claimant's mother. No evidence was presented to establish whether Claimant is given any choice in the matter. On occasions when Claimant's mother has visited various day programs to assess them, she has not brought Claimant with her.

24. Dawson observed Claimant in the community on three occasions. She observed Claimant at Carl's Jr. on September 24, 2013, and he appeared to be happy there. When she observed him in the library, he had trouble keeping quiet, but had to

stay and wait there for the other client in his IABA group. In 2010, at the APE class, he did not participate although he was prompted to do so. She was told by staff that Claimant attended but did not typically participate in the APE class.

25. In 2011, HRC funded a functional behavior assessment. HRC decided that the recommended goals/objectives in that assessment report were things that the IABA STEP III program were, or should be, addressing and offered no other services as a result of that report.

26. In April 2012 and on April 4, 2013, Dawson asked Claimant's mother to sign an authorization allowing health care providers to release Claimants' medical records so that HRC could consider whether there was a medical issue causing Claimant to be chronically late for the IABA day program. No authorization for release of medical records was provided to HRC.

27. To address Claimant's continued tardiness, IABA created a drop-off schedule so that Claimant's parents could meet up with staff and other participants in the STEP III program at set times, at various places in the community. At some point, IABA told the parents that the cut-off for dropping Claimant off would be 11:15 a.m. Claimant was generally not able to meet that deadline.

28a. In an email dated November 6, 2013, IABA informed HRC that Claimant had had an incident of aggression that day, and also two days prior. HRC had not received any notifications of aggressive incidences prior to November 6, 2013, although the day program was required to timely provide such notices. On the date of the email, Claimant had been dropped off at Cerritos College at 1 p.m. and was visiting his group mate's exercise class when he exhibited tantrum-like behavior, grabbed the staff's drink, and threw it. Claimant also struck IABA staff. The instructor of the class stated that Claimant could not return if he behaved in that manner. Claimant's father had to pick up Claimant and drive him home.

28b. In November 2013, IABA also reported that in recent months, Claimant's attendance and punctuality had "flatlined" and outbursts, physical aggression, darting, and throwing drinks had increased. IABA indicated that it would be submitting a formal request for 1:1 staff support to assist Claimant in getting out of the house on time, and to give staff the flexibility to leave a location before Claimant became aggressive. Another rationale for IABA's request for 1:1 staffing was that "other clients are not able to engage in meaningful activities when they are waiting around for [Claimant] to be dropped off, or suddenly have to leave an activity because [Claimant] darts away and refuses to return." (Exh. F, p. 25.)

29. A program planning team meeting was held on November 8, 2013. IABA presented a written request to HRC for 1:1 staffing for Claimant. The IABA request included descriptions of behavior that required 1:1 support, but no data was provided to support the need for 1:1 staffing. Dawson asked IABA for copies of any incident reports or other reports which would support the need for 1:1 staffing. Several of those documents were not provided to HRC by IABA until the end of March 2014. As of November 8, 2013, IABA staff did not have a copy of the Corey Report or a final copy of the ISP by IABA to provide to HRC. HRC did not receive the November 2013 Corey Report until January 29, 2014. HRC generally did not receive IABA's progress reports on a timely basis. During the time IABA was providing services to Claimant, HRC had difficulty getting IABA to return telephone calls, or respond to emails from HRC. Semi-annual reports, which were provided to HRC by IABA every six months, were always submitted late.

30. In November 2013, IABA provided two special incident reports to HRC regarding behavioral incidences that had occurred on July 17, 2013 and November 4, 2013, but had not been timely reported to HRC. Typically, a day program would notify HRC about such behaviors at the time of occurrence, but IABA had not done so.

31. On January 30, 2014, HRC was notified that Claimant had arrived at the IABA day program at 1:30 p.m. that day. He was the only client with staff, because the other client was in class. Despite the 1:1 staffing level on that occasion, Claimant exhibited darting behavior on the Cerritos College campus. He knocked into other people, grabbed a teacher's elbow, and hit a student in the upper torso. IABA also reported that he had displayed similar behavior on three occasions in November, 2013. IABA again requested 1:1 staffing for Claimant.

32. On March 24, 2014, Dawson followed up on her request for information regarding the number of participants in Claimant's STEP III group, and a copy of his attendance records from November 1, 2013 through February 2014. On March 27, 2014, IABA responded to HRC's request. IABA informed HRC that there was a third member in Claimant's STEP III group, but that he also had problems attending the program, and he was not present during the January 30, 2014 incident.

FUNCTIONAL ASSESSMENT BY FAMILY BEHAVIORAL SERVICES (STIRMAN REPORT)

33a. HRC funded another functional assessment by Family Behavioral Services (FBS) prepared by Amy Stirman on September 29, 2014 (Stirman Report.) Stirman wanted to observe both parents with Claimant, but was not provided the opportunity to do so. Instead, she met Claimant's mother at a hotel, which was mother's choice. Stirman observed Claimant with his father in the home and on a short community outing with his father. She also observed Claimant with the TCs in the community. Stirman followed father and Claimant as they visited a dental office to greet the staff, as they do on a regular basis. Claimant appeared to be wearing what he had slept in, and his underwear was showing through a hole in his pants. Stirman did not see any benefit to this outing, and it was not what someone his age would typically do. She observed that very few demands, if any, were placed on Claimant by anyone. She observed Claimant in the gym with the TCs with mother present. Stirman did not see any benefit

to what he was doing at the gym; Claimant preferred walking. Claimant did not comply with the demands put on him in the gym, he asked for food, and he moved toward the TC in an attempt to strike him. They left for the food court because mother told the TC that Claimant needed to go there. Stirman viewed this action as a reinforcer for Claimant's non-compliance, rather than as a task for Claimant to accomplish. Stirman concluded that Claimant did not want to be in the APE class.

33b. Stirman opined that Claimant's home and TC/community environments required change because they were not meeting his needs. Stirman concluded that Claimant needs to move away from being dependent on 1:1 staffing and intensive prompting. His parents should learn to create a structured daily schedule in which Claimant is required to complete typical activities of daily living, such as changing from pajamas into a clean pair of underwear and pants every morning, and putting on shoes prior to leaving the home. Claimant should be required to complete activities of daily living prior to being allowed to engage in desired activities, such as going for a car ride.

33c. Claimant's mother stated at the November 8, 2014 HRC program planning meeting that she did not agree with the Stirman report, but did not specify why.

34. Dawson opined that IABA has not provided Claimant with varied activities to choose from and, in fact, has not been given the opportunity to make choices. She agrees with the view stated in the Corey Report that Claimant's behavior could be his way of communicating that he no longer wishes to attend the IABA day program or participate in the same limited activities which IABA has provided to him for six years. Dawson does not believe that IABA taught Claimant any independent living skills, and she believes that IABA failed to introduce any new activities during the six years that Claimant was enrolled in IABA's day program. The evidence presented suggested that IABA was providing activities preferred by Claimant's mother, rather than those of interest to Claimant.

35. The evidence established that Claimant steadily declined while he was enrolled in the IABA day program. For a six year period, he had no employment, his day program attendance dwindled, and there was an overall lack of progress in achieving his IFSP and program goals. Claimant did not present sufficient evidence to establish that enrolling in an IABA day program with 1:1 staffing would be likely to reverse this trend.

DAY PROGRAMS OFFERED BY HRC

36. On June 6, 2014, IABA informed HRC that it would no longer serve Claimant in the IABA STEP III day program. HRC denied the parents' request to fund the IABA day program at a 1:1 staffing level in a Notice of Action Letter, dated October 9, 2014.

37. HRC offered several HRC-vendored day programs to Claimant's parents, including Easter Seals in Bellflower, Easter Seals in Norwalk, Dungarvin in Long Beach and Norwalk, Injoy in Bellflower, and Integrated Life in Long Beach. Colleen Mock, HRC Director of Community Services, testified at the hearing about the day programs HRC offered to fund for Claimant. Each is located relatively close to Claimant's home in Cerritos. In addition to morning sessions, the latter three programs also offer 1:00 p.m. to 5:00 p.m. sessions, which would accommodate Claimant's later start in the morning. Transportation to the day programs could be funded by HRC. The staffing level at these programs is 3:1, with an additional float staff typically assigned to new clients or to clients with difficulties. Each one is a behavioral day program, meaning they have a BCBA who assists with behavior problems, and staff is trained to address the needs of individuals with behavioral issues.

38. The day programs that HRC has offered to fund for Claimant are deemed to be community programs, as opposed to "center based" day programs. They offer calendars of activities from which clients can choose. These programs would enable Claimant to exercise greater choice as to what he does and with whom he spends his

time. Clients also provide input as to activities they wish to have added to the calendar. These programs allow clients to go into the community daily to participate in activities that they have chosen. Clients may also choose to remain at the center to participate in programs there, if they do not wish to venture out into the community on a particular day.

39. At the day programs offered, data is collected as to whether a client is participating in activities. If Claimant refused to participate in community outings or other offerings, or exhibited problem behaviors, program staff would receive direct training from a psychologist or BCBA to address these issues. If Claimant could not verbalize a choice, he could behaviorally indicate a choice by means of a smile or by walking toward something he were interested in, such as the music room or kitchen, or by choosing to accompany certain staff or peers. At the IABA program, Claimant had little opportunity to choose preferred activities or individuals.

40. HRC has moved away from vendoring purely community-based day programs for its clients because it found the concept to be flawed. Clients have no base to return to if the weather is inclement, if they are not feeling well, or if they are simply having a bad day. In purely community-based day programs, HRC found clients often were not adequately supervised in the community, and were using public bathrooms that were unsafe or unclean. Each of HRC's vendored programs has a site from which clients are taken out into the community. The clients can go out as often as they wish, and the program designs require each vendor to provide a specified minimum percentage of community-based programming for each client.

41. At each of the day programs offered to Claimant, transportation is provided using licensed drivers, in vans, with one million dollars of insurance coverage. Staff does not drive clients around in their own cars. In purely community-based programs, entry level staff transports clients in staffs' own cars. In the offered day programs, for outings, a contracted transportation provider can be utilized, or the clients

and staff use Access, or bus passes. HRC funds for families or aids to transport clients to these day programs.

42. Among other things, the programs offered have computers and a kitchen. Clients can learn to follow recipes, go out to purchase the ingredients, and cook simple meals in the kitchen. There is music and gym equipment.

43. Two months prior to the hearing, HRC began requiring that the day programs take only four or fewer clients out into the community as a group. This is designed to facilitate community integration.

44. The Dungarvin program began this year, and has two sites. There is an 8:00 a.m. to noon session, and a 1:00 p.m. to 5 p.m. session. There are currently less than 20 clients in each session, but Dungarvin can serve up to 30. Injoy has 2 sites, also offers both morning and afternoon sessions, serves up to 30 clients in each session, and has a band. Easter Seals Norwalk is an all-day program serving up to 30 clients and it has several consultants, including a nurse, physical therapy, and like the others, a behaviorist. Easter Seals Bellflower serves up to 30 individuals, and prides itself on providing volunteer job opportunities.

45. Mock opined that merely being out in the community is not meaningful unless it involves skill development, as well as something that can be generalized into the community. If a client is not engaged in an activity, it does not constitute meaningful involvement. Mock's opinion is that having a 1:1 staff is socially isolating, encourages prompt dependence, and is not a good way to learn social interaction skills.

46. HRC does not require that Claimant attend any of the suggested day programs five days per week. Claimant could attend an HRC-vendored day program a few days per week, and choose to do other things on the remaining weekdays. If he were to attend one of the suggested day programs, it would assist his program planning team (which should include Claimant) to determine which activities Claimant enjoys. Identifying his areas of interest could assist Claimant to achieve his IFSP goal of

obtaining paid employment. Claimant could also choose to work with TCs on certain days, and attend a day program on the remaining days.

TESTIMONY OF CLAIMANT'S MOTHER

47. Claimant's mother has long advocated for Claimant's full inclusion in the community. To that end, she insists on having HRC fund a day program for her son which provides full community participation and "is not site-based"; uses ABA in all aspects of its activities and curricula, implemented by direct staff who receive ABA-directed supervision, and who are well-trained in ABA; must have attaining fully-integrated, paid employment as its main goal; and begins in the late morning, so that Claimant is likely to attend consistently. She contends that the IABA STEP program is the only day program that meets all of her criteria. Claimant's mother opined that the reasons for Claimant's lack of attendance in the IABA STEP III program would be fully remedied simply by funding his participation in the IABA day program at a 1:1 staffing level. Sufficient evidence was not presented to support that contention.

48. Claimant's mother would be willing to accept a four-hour IABA STEP I program which begins at 10 or 11:00 a.m. However, she would prefer a full-day program. She would like IABA to be given the flexibility to work in Claimant's home at the beginning of the day with the goal of gradually moving his start time earlier until he could participate in a full-day IABA STEP program.

49. Claimant's mother opined that day programs which begin in the morning are not viable options for Claimant due to his inability to leave his home early enough. As for those day programs which run from 1 p.m to 5 p.m., she believes that they are not a viable option because they would interfere with the TC program she has set up for her sons. Claimant and his brother participate daily in a late afternoon TC program (typically weekdays between 3 and 5 p.m., and on Saturdays). TCs are consistently available during those times because, as college students, they usually have classes or

work in the morning. Because of the consistency with which the TC program has been implemented, many non-disabled people know Claimant, and provide him with a circle of support. She also feels that Claimant's ability to sleep is enhanced by participating in late afternoon TC activities.

50. Since IABA terminated the STEP service, Claimant's parents have been self-funding⁷ a full-inclusion 1:1 TC program starting at 10:30 or 11:00, for two to four hours a day, depending on the availability of staff. Mother opined that while the TC program is not as strong a program as IABA STEP would be in terms of staff training, oversight, job development, and ABA implementation, it is a fair approximation, and Claimant never fails to attend. He chooses where he wants to go verbally, by writing things down, or by choosing from pictures. The TCs make a visual schedule and Claimant then spends the available hours out in the community. He does not always choose the same activities. He may go to Cerritos College, Ralph's, Albertson's, Subway, Supercuts, or the dentist's office. Claimant's mother plans to have the TCs enroll Claimant in Cerritos College's APE class again, when it becomes available.

51. Claimant's mother visited Integrated Life and Injoy. She informed HRC that she did not like them because they were not 100 percent community-based, and because she wants Claimant to participate in very specific activities, such as Cerritos College's APE class. The day programs are open to incorporating such activities into their schedule of offerings. Claimant's mother wants Claimant to be at Cerritos College in some capacity. She has a particular focus on academics, and wants Claimant to continue with the activities he was doing with IABA.

⁷ In Claimant's Closing Brief, \$9,600 is requested for the parents' costs to self-fund the TC program for sixteen months. However, no evidence was presented at hearing as to the amount expended.

52. Claimant's mother describes the day programs offered by HRC as "center-based." She is concerned that her son does not like crowds or small rooms and would be likely to make noises, try to escape, or find things to throw. She is concerned that Claimant would engage in maladaptive behaviors in order to get attention. She opined that developmentally disabled individuals need to learn skills in the natural environment where they will be implemented, rather than in a center. She believes that the suggested day programs would reduce Claimant's access to community places of his choice and to natural environments where he can progress effectively.

53. Claimant's mother does not wish to place Claimant in programs attended by disabled individuals with behavior issues, or those who function at or below Claimant's level of functioning. She is concerned that her son might adopt bad habits which would be difficult to extinguish.

LEGAL CONCLUSIONS

1. Cause does not exist to grant Claimant's appeal and to require HRC to fund a 1:1 day program (STEP I) through the Institute of Applied Behavior Analysis, as set forth in Factual Findings 1 through 53.

2. Cause does not exist to grant Claimant's appeal and to reverse HRC's decision to deny retroactive payment to Claimant for the therapeutic companion services they have been funding from June 2014 to the present, as set forth in Factual Findings 1 through 53.

3. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.)

4. When a party seeks government benefits or services, he bears the burden of proof. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) Specifically, in a case where a party is seeking funding not

previously provided or approved by a regional center, that party bears the burden of proof. In this case, Claimant made a new request for HRC to fund the IABA STEP I day program when IABA discontinued his participation in the IABA STEP III day program. Claimant also made a new request to have HRC retroactively reimburse Claimant's parents for the cost of self-funding a therapeutic companion program in place of a day program. Therefore, Claimant bears the burden of proof. He has failed to meet this burden.

5. The Lanterman Act, Welfare and Institutions Code section 4500 et seq., acknowledges the state's responsibility to provide services and supports for developmentally disabled individuals. It also recognizes that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (Welf. & Inst. Code, § 4501.)

6. The Lanterman Act also provides that "[t]he determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer, or when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option." (Welf. & Inst. Code, § 4512, subd. (b).)

7. Services and supports needed by a consumer are determined by way of the IFSP process. Welfare and Institutions Code, section 4646, subdivision (a) provides that it is the intent of the Legislature to ensure that the provision of services by the regional center is centered on the individual and his family, taking into account the needs and preferences of the individual and the family, and promoting community integration; independent, productive, and normal lives; and stable and healthy environments. It is the intent of the Legislature to ensure that the provision of services

to consumers is effective in meeting the goals stated in the individual program plan, reflects the preferences and choices of the consumer, and reflects the cost-effective use of public resources.

8. Welfare and Institutions Code, section 4646, subdivision (b), provides that the individual program plan is developed through a process of individualized needs determination, and that the individual with developmental disabilities and, where appropriate, his parent or conservator, shall have the opportunity to actively participate in the development of the plan.

9. Welfare and Institutions Code, section 4512, subdivision (j), defines "planning team" to include the individual with developmental disabilities, the parents or conservator of an adult consumer, regional center representatives, and certain invited individuals.

10. Welfare and Institutions Code, section 4646.5, subdivision (a)(2), provides that individual program plan goals should maximize opportunities for the consumer to develop relationships; be part of community life in the areas of community participation, housing, work, school, and leisure; increase control over his or her life; acquire increasingly positive roles in community life; and develop competencies to help accomplish these goals.

11. Welfare and Institutions Code, section 4646.5, subdivision (g), provides that the client himself should be included in the planning team, even if he needs assistance to do so. Facilitation should include the use of adapted materials, special equipment, or personal assistance with communications, to enable a consumer to understand and participate to the maximum extent possible in the decisions and choices that affect his life.

12. Welfare and Institutions Code section 4648, subdivision (a)(1) provides that to achieve the stated objectives of a consumer's individual program plan, the regional center shall secure needed services and supports to assist individuals with

developmental disabilities in achieving the greatest self-sufficiency possible, and to exercise personal choices.

13. The evidence presented established that Claimant has been denied the right to make choices to the extent he is able to do so. The aggressive behaviors recently exhibited by Claimant may well be due to his frustration and boredom with the IABA program, which provided little variety in programming for him over a six year period. In contrast, the various day program services offered by HRC would provide Claimant with numerous activities and environments to choose from, as well as a variety of staff, community members, and other clients with whom he can choose to interact. Claimant failed to establish that the IABA STEP program would be able to provide Claimant with the choices necessary to motivate him to accomplish the goals set out in his IFSP, regardless of the staffing level funded by HRC.

14. The day programs that HRC has proposed to fund appear to be appropriate, flexible, and competently administered, based on the evidence presented at the hearing. Claimant's mother is understandably reluctant to leave the IABA program, which she believes has benefitted her son. However, the evidence presented did not establish that Claimant has made progress in meeting his IFSP goals in that program, or that he would select that program, if given the choice. The IABA STEP III program chose to discontinue serving him as a client because he was rarely in attendance. HRC established valid reasons for declining to fund the same program, with a 1:1 staffing ratio. Claimant's witnesses' speculative concerns about the suggested day programs do not constitute substantial evidence that meets Claimant's burden of proof.

15. Welfare and Institutions Code section 4646 specifically provides that IPP's "shall be prepared jointly by the planning team." That section further provides that "decisions concerning the consumer's goals, objectives, and services and supports that will be included in the consumer's IPP and purchased by the regional center . . . shall be made by agreement between the regional center representative and the consumer" or

his representatives. It is not the intention of the Legislature to have IPP programming and implementation of that programming decided unilaterally, either by a consumer, his representatives, or the regional center. The fact that Claimant's mother has chosen a particular program or provider, is an insufficient basis upon which to compel the Service Agency to fund that choice. It was not the intent of the Act to extend to a consumer or his parents sole discretion, or unlimited unilateral authority, as to programming choices. Rather the intent is to assure that consumer and family choices and preferences are taken into consideration, and made a part of the consumer's IFSP, if all other requisites are met.

16. In order to successfully identify and implement Claimant's service needs, reasonableness and cooperation among all members of the planning team is essential. The Lanterman Act requires that all purchases of services be secured for, and calculated to meet the needs of, the consumer. Consumer preferences do not override a regional center's obligation under the Lanterman Act to administer the Act, and expend public funds, in a program-effective and cost-effective manner. Administering the Act as intended by the Legislature includes properly assessing, identifying, and providing for specifically identifiable services, in a manner which allows measurement of the effectiveness of those services against agreed-upon goals and objectives. Because it is so important that all services provided are appropriately calculated to meet a consumer's needs as planned, it is imperative that all team participants, including the consumer himself, fully cooperate in this collaborative effort.

17. Claimant and his parents have the right to provide the Service Agency with input into the Service Agency's selection of the providers of services, consistent with Welfare and Institutions Code section 4648, subdivision (a)(6). However, they do not have the right to dictate which decisions the Service Agency must make.

18. Although a consumer and his parents are empowered with important rights, there are also responsibilities that they must shoulder. A regional center cannot

discharge its duties if it does not have the right to obtain information, the power to obtain that information, and the opportunity to use that information in the IFSP process. (See *Wagner v. Short*, (USDC, D. Md., 1999) 63 F. Supp.2d 672.) At the same time, those who seek benefits from a regional center must bear the burden of providing information, submitting to reasonable exams and assessments, and fully cooperating in the planning process. (See Civil Code section 3521: "He who takes the benefit must bear the burden.") Parents can refuse to do anything that they believe would be detrimental to their child. But if services cannot be effectively delivered, monitored, and measured against goals and objectives, the regional center may deny funding for those services.

19. The planning team must be allowed to participate in all decisions relating to the provision of services. It follows that Claimant's parents must facilitate the Service Agency's attempt to develop appropriate goals and objectives for Claimant's services, and that the Service Agency must responsibly pursue the goal of providing services that have been determined to be the most beneficial for Claimant.

20a. With regard to reimbursement for Claimant's parents' funding of the TC program, the Lanterman Act does not specifically authorize retroactive reimbursement of service costs to families in the fair hearing context. Nevertheless, general equity principles may require reimbursement in particular cases in order to fulfill the purposes and intent of the Lanterman Act. (See *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal. 3d 384.)

20b. As set forth in Factual Findings 1 through 53, equitable considerations do not require that HRC reimburse Claimant's parents the amount they have expended to privately fund therapeutic companion services after IABA chose to discontinue Claimant's participation in the IABA STEP III program. HRC offered to fund a variety of appropriate day programs for Claimant, to replace the IABA STEP III day program. Claimant's parents chose not to avail themselves of that offer and, instead, unilaterally chose to utilize TCs in place of a day program, without input on that decision from HRC.

Moreover, Claimant failed to present evidence as to what amount they actually expended for the TC program during the time period in question.

ORDER

Claimant's appeal is denied. Harbor Regional Center is not required to fund a 1:1 day program (STEP I) through vendor Institute of Applied Behavior Analysis, and is not required to reimburse Claimant's parents for the therapeutic companion services that the parents funded from June 2014 to the present.

DATED: October 9, 2015

LAURIE R. PEARLMAN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision: both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.