

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2017120847

DECISION

Administrative Law Judge Carmen D. Snuggs, Office of Administrative Hearings, State of California, heard this matter in Long Beach, California, on January 30, 2018.

Claimant, who was not present, was represented by his mother.<sup>1</sup>

Latrina Fannin, Manager of Rights and Quality Assurance, represented the Service Agency, Harbor Regional Center (HRC or Service Agency).

Maria Guadalupe Meza, an interpreter, was present at the hearing and provided Spanish interpretation services.

The record was closed and the matter was submitted for decision on January 30, 2018.

ISSUES

1. Shall HRC be responsible for funding Cognitive Behavioral Therapy (CBT) services, provided by Perry D. Passaro, Ph.D., for Claimant?

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<sup>1</sup> Initials and family titles are used to protect the privacy of Claimant and his family.

2. Shall HRC be responsible for funding personal fitness training services for Claimant?

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## EVIDENCE CONSIDERED

The Service Agency's Exhibits and Witnesses: Service Agency's exhibits 2-8. Service Agency witnesses included Judy Taimi, Client Services Manager, and Denise Godfrey-Pinn, Ph.D.

Claimant's Exhibits and Witnesses: Exhibits B, C, and E-M. Claimant's witnesses included Perry Passaro, Ph.D. (telephonically), Gayle Polsky, M.D. (telephonically), Claimant's grandmother, and Claimant's mother.

## FACTUAL FINDINGS

1. On November 20, 2017, the Service Agency sent a Notice of Proposed Action to Claimant's parents indicating that Claimant's request for the Service Agency to fund Claimant's CBT<sup>2</sup> sessions with Perry D. Passaro, Ph.D., as well as personal fitness training services, was denied. Claimant filed a timely request for fair hearing.<sup>3</sup>

2. Claimant is a 17 year-old male consumer of the Service Agency who is eligible for services due to an autism diagnosis. He also suffers from anxiety and depression, with psychotic features in remission. Claimant is 5' 8" tall and weighs 270 pounds. As such, he is considered morbidly obese. He is also pre-diabetic. Claimant takes Zoloft to treat anxiety and Metformin to treat prediabetes. He is eligible for Medi-Cal.

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<sup>2</sup> CBT is a short-term, goal-oriented psychotherapy treatment that aims to change patterns of thinking or behavior in order to modify dysfunctional thinking and behavior.

<sup>3</sup> Claimant also requested transportation services. The parties resolved Claimant's request prior to this hearing.

3. Claimant lives in the family home with his mother and father. He has a history of suffering anxiety attacks in the form of emotional outbursts and suicidal ideation. Claimant's Individual Family Service Plan (IFSP)<sup>4</sup> dated September 28, 2017, and amended December 6, 2017, indicates that Claimant's behavior continued to be inappropriate at times and that he engaged in socially inappropriate behaviors during periods of upset. The IFSP further indicates that Claimant needs to develop coping skills, and that he has difficulty reading non-verbal and social cues. Claimant is socially awkward and becomes nervous about interacting with his peers. He also tends to become nervous and anxious at times when he is out in the community. However, Claimant's mother described Claimant as less emotional and impulsive than he was the previous year. Claimant's desired outcome for his behavioral health is to develop his coping skills and learn more appropriate ways to manage stressful situations, as well as significantly reduce his depressive symptoms and anxiety.

4. Claimant's health was discussed during the September 28, 2017 IFSP meeting. Specifically, it was noted that Claimant struggled with his weight and borderline diabetes, but began to exercise more regularly. Claimant's grandparents purchased six months of personal training services for Claimant beginning August 2017, and Claimant began working with a personal trainer at that time. Claimant's desired health and medical outcome is to lose 10 pounds and resolve his borderline diabetes.

5. Also during the IFSP meeting of September 28, 2017, Claimant's mother requested that HRC fund Claimant's CBT sessions with Dr. Passaro. Dr. Passaro has been treating Claimant since June 2015. Claimant's mother reported that the CBT sessions were effective and that Claimant had developed a rapport with Dr. Passaro, whereas Claimant

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<sup>4</sup> HRC uses the designation IFSP instead of Individualized Program Plan (IPP), to which the Developmental Disabilities Services Act (Lanterman Act) refers. However, any statutory references to IPPs are applicable to HRC's IFSPs.

regressed or failed to progress when he was treated by other therapists prior to beginning CBT sessions with Dr. Passaro. Claimant's grandmother testified at the hearing that she sees Claimant every two weeks. She has observed Claimant implementing the techniques he learned from Dr. Passaro when they are out in the community. In her view, he better manages agitation, and he seems more comfortable with himself, whereas when Claimant was being treated by other therapists, she did not see any difference in his behavior.

6. Claimant's family has been paying out-of-pocket for his CBT sessions with Dr. Passaro at a cost of \$250 for each 45 minute session. Dr. Passaro is not an in-network provider for any insurance company or managed care plan. (Ex. I.) Claimant's grandparents can no longer assist with the payments due to a change in their financial situation. Claimant's parents are also currently suffering financial hardship. Claimant's family, therefore, can no longer pay for Claimant's CBT sessions with Dr. Passaro or his sessions with a personal trainer.

7. HRC follows its Therapy Services and General Standards policies when authorizing consumers' and families' service requests. (Exs. 7 & 8.) HRC's General Standards policy prohibits HRC from purchasing services and supports for its clients where the service is available through Medi-Cal. Similarly, HRC's Therapy Services policy provides that HRC can only purchase therapy services for a client only if (a) the client requires therapy to prevent a specific deterioration in his or her condition or to achieve a specific desired outcome in the IFSP; (b) an independent assessment has been completed and indicates that the therapy will assist the client to achieve a specific desired outcome; and (c) the client has been denied or is not eligible for Medi-Cal or other third-party payer coverage.

8. Judy Taimi, a HRC Client Services Manager, testified at the hearing. She has a Bachelor of Arts degree in social work and was previously employed as a social worker for children and youth ages zero through 21. Ms. Taimi worked as a HRC Service

Coordinator for three and one-half years and currently manages nine Service Coordinators including Claimant's Service Coordinator. She also participated in the September 28, 2017 IFSP meeting. Ms. Taimi is familiar with the statutes governing the provision of HRC services as well as HRC's Therapy Services and General Standards policies. Her testimony established, consistent with the General Standard Policy, that HRC is a payor of last resort. In other words, if another program or insurer has the responsibility to pay for the costs of a service or support needed by a HRC client, that entity is generally required to pay for all or part of the services prior to HRC funding the service or support. HRC denied Claimant's request for funding for CBT services because it is a covered service under the Medi-Cal program.

9. HRC offered to assist Claimant access CBT services through the Medi-Cal program and informed Claimant's mother that she would need to execute the required consent forms so that HRC could begin that process. On December 21, 2017, Claimant's mother withdrew all previous authorization forms that she executed that would allow HRC to communicate with, request information from, or give information to other agencies, institutions, or persons concerning Claimant. As such, Claimant has failed to cooperate with HRC in assessing the availability of funding for CBT services through a generic resource.

10. Dr. Passaro testified telephonically on Claimant's behalf. He obtained his Ph.D. in psychology in 1989 from the University of Kentucky. He has been licensed in educational psychology and clinical psychology since 2001 and 2005, respectively. Dr. Passaro is a Diplomat of the Academy of Cognitive Therapy and has been in private practice for 20 years. He currently treats, and has historically treated, patients who suffer from autism, anxiety, and depression.

11. Dr. Passaro has provided CBT services on a weekly basis to Claimant to treat his autism-linked anxiety and depression. While CBT is typically provided during a limited number of sessions, the length of CBT treatment depends on the individual and

his or her diagnosis. Dr. Passaro explained that short-term CBT treatment is effective for an adult with good insight and who is highly motivated. Conversely, an individual who suffers from psychosis and is suicidal will typically require CBT services for a longer period of time. Dr. Passaro further explained that an individual with autism may require CBT services for a period of years.

12. Claimant's behaviors in the community have improved since Dr. Passaro began treating him and he no longer has suicidal ideations. However, it is clinically necessary for Claimant to continue with CBT with Dr. Passaro or someone with his qualifications because Claimant still suffers a great deal of anxiety and depression.

13. Dr. Passaro explained Claimant's CBT services must be provided by someone who has a great deal of experience with its implementation, is highly trained in applying CBT's strategies, and preferably is a diplomat or member of the Academy of Cognitive Therapy. It is important for Claimant to connect with and trust the provider, which could take time to occur. If there is no connection or trust between Claimant and another provider, Claimant is in danger of regressing, which may be demonstrated by increased anxiety. Dr. Passaro also testified that if Claimant's CBT services are not continued, Claimant will most likely suffer increased depression manifested by overeating, over sleeping and isolation. Dr. Passaro's opinion concerning the necessity for Claimant to continue CBT and the experience needed by the provider of the CBT is afforded weight in light of his background and experience treating patients with conditions similar to Claimant's.

14. Gayle Polsky, M.D. has treated Claimant since June 2015. She manages Claimant's medications and she collaborates with Dr. Passaro. She described Claimant as depressed and suicidal when she began treating him. Dr. Polsky supports the continuation of Claimant's CBT services with Dr. Passaro in light of the progress Claimant has made with Dr. Passaro and because Claimant has developed a special relationship with him. She testified that Claimant has difficulty connecting with people and that

Claimant will experience increased depression and anxiety if Claimant's CBT provider were changed from Dr. Passaro to a different therapist, given his difficulty in connecting with people. Dr. Polsky shared that Claimant may regress if Claimant's CBT sessions lapse. However, Dr. Polsky conceded that although Claimant has difficulty opening up to new people, it is possible for him to develop a relationship with another provider.

15. Denise Godfrey-Pinn, Ph.D., testified on behalf of HRC. She obtained a Bachelor of Science degree in psychology, as well a Master's degree and doctorate in clinical psychology from the University of Massachusetts, Amherst. Dr. Godfrey-Pinn has been licensed as a psychologist in California since 1988. Over her 35 year career, she has worked primarily with children and adolescents, and she is endorsed by the state of California as an infant mental health specialist. Dr. Godfrey-Pinn has worked as a HRC Psychology Consultant and Mental Health Liaison since 2003. She reviewed correspondence written by Dr. Passaro dated September 25, 2017 and October 11, 2017, which contain Claimant's current symptomology, as well Dr. Passaro's opinions regarding the benefit of continued CBT services for Claimant as outlined in Factual Findings 11 through 13. HRC consulted with Dr. Godfrey-Pinn in deciding whether to fund CBT services for Claimant to be provided by Dr. Passaro.

16. Dr. Godfrey-Pinn testified that CBT is available through generic resources such as Medi-Cal since it is a popular, evidence-based practice. She agreed that CBT can be a very successful mode of intervention for Claimant. However, she expressed concern regarding the length of time Claimant has been receiving CBT services from Dr. Passaro because CBT is intended to be a limited-time therapy. She is also expressed concern that there has been no significant reduction in Claimant's anxiety and depression in light of the time Dr. Passaro has treated Claimant. Moreover, the letters written by Dr. Passaro contain no progress reports or treatment plans. Finally, Dr. Godfrey-Pinn opined that there would be no danger to Claimant if he was not in therapy with Dr. Passaro and received CBT from another provider. She also shared that in evaluating the benefit of

Claimant's CBT services, the focus should be on whether a therapist can assist Claimant with modifying his dysfunctional behaviors and thoughts, and not the Claimant's relationship with Dr. Passaro. Dr. Godfrey-Pinn, however, is not an expert in CBT and she has not provided direct services to patients with Claimant's developmental and mental health conditions.

17. Dr. Passaro's testimony regarding the amount of CBT services Claimant requires and the risks to Claimant if CBT services lapse, is afforded more weight than the opinions offered by Dr. Godfrey-Pinn because of Dr. Passaro's expertise in CBT.

18. Claimant's IFSP lists the services and supports and services that HRC agreed to purchase. Any service sought by Claimant and funded by HRC must be contained in the IFSP. Ms. Taimi testified that personal training services were not agreed upon at the September 28, 2017 IFSP meeting. Ms. Taimi's testimony is corroborated by Claimant's IFSP, which does not personal training services. Ms. Taimi also explained that legislation prohibits HRC from purchasing social recreational services.

19. Dr. Passaro supports Claimant's request for funding for personal training services as a treatment for depression. Claimant has reported to Dr. Passaro that his mood is improved after exercising and he does not isolate. However, because of Claimant's anxiety and social deficits, he is unable to exercise in a group. He also has a history of failing to exercise independently. Dr. Polsky is similarly in favor of personal training services for Claimant. She explained that because of Claimant's autism and its accompanying social deficits, it is difficult for Claimant to go to the gym. Claimant also lacks the motivation to participate in individual exercise such as walking. However, as established by Ms. Taimi's testimony, HRC is statutorily prohibited from funding recreational services for Claimant in the form of personal training.



## LEGAL CONCLUSIONS

1. This case is governed by the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 et. seq., referred to as the Lanterman Act Lanterman Act).<sup>5</sup> Under the Lanterman Act, an administrative “fair hearing” is available to determine the rights and obligations of the parties. (§ 4710.5.) Claimant requested a fair hearing to appeal the Service Agency’s proposed denial of funding for CBT services to be provided by Dr. Passaro and for personal training services. Jurisdiction in this case was thus established.

2. 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.) Claimant is requesting that the Service Agency fund personal training services and his CBT services with Dr. Passaro. Under these circumstances, Claimant bears the burden of proof.

3. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community.” (§ 4501.) These services and supports are provided by the state’s regional centers. (§ 4620, subd. (a).)

4. The California Legislature enacted the Lanterman Act “to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community . . . and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more

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<sup>5</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

independent and productive lives in the community." (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

5. Regional centers must develop and implement IPPs, which shall identify services and supports "on the basis of the needs and preferences of the consumer, or where appropriate, the consumer's family, and shall include consideration of . . . the cost-effectiveness of each option . . ." (§ 4512, subd. (b); see also §§ 4646, 4646.5, 4647, and 4648.) The Lanterman Act assigns a priority to services that will maximize the consumer's participation in the community. (§§ 4646.5, subd. (a)(2); 4648, subd. (a)(1), (2).)

6. Regional centers have a duty to identify and pursue all possible sources of funding for consumers receiving regional centers, including Medi-Cal. (§ 4659, subd. (a).) They are prohibited from purchasing any service that would otherwise be available from Medi-Cal, private insurance, or a health care services plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage. (§ 4659, subd. (c).) In addition, a regional center is prohibited from purchasing medical services for a consumer unless the regional center is provided with documentation of a Medi-Cal, private insurance, or a health care service plan denial, and the regional center determines that an appeal by the consumer or family of the denial does not have merit. (§ 4659, subd. (d)(1).) However, a regional center may pay for medical or dental services while coverage is being pursued, but before a denial is made. (§ 4659, subd. (d)(1)(A).) The regional center may also pay for medical or dental services until the commencement of services by Medi-Cal, private insurance, or a health care service plan. (§ 4659, subd. (d)(1)(C).) HRC's General Standards and Therapy Services policies are consistent with the foregoing statutes in that HRC is prohibited from purchasing therapy services where the service is otherwise available through Medi-Cal or another program, private insurance, or a health care service plan. (Exs. 7 & 8.)

7. Beginning July 1, 2009, regional centers are prohibited from purchasing social recreation activities, except for those activities vendored as community-based day

programs; however, an exception can be made where the regional center “determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer’s developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer’s needs. (§ 4648.5, subds. (a)(2), (c).)

8. Claimant has not met his burden of proving that HRC should fund CBT services provided by Dr. Passaro. HRC is a payor of last resort and, as provided by statute and set forth in HRC’s General Standards and Therapy Services policies, it is prohibited from purchasing the CBT services where, as here, the services are available through a generic resource such as Medi-Cal. Claimant is eligible for Medi-Cal, however, Claimant’s mother has withdrawn authorization that would allow HRC to obtain and provide information regarding Claimant or to correspond with Medi-Cal representatives or providers of other generic resources in order to secure coverage of CBT services for Claimant. A regional center, such as HRC, cannot comply with its duty pursuant to sections 4659 to pursue all possible sources of funding for Claimant’s CBT services if it does not have the right or power to do so. At the same time, a person who seeks benefits from a regional center must bear the burden of providing information, submitting to reasonable exams and assessments, and cooperating in the planning process. (See Civ. Code § 3521 [“He who takes the benefit must bear the burden.”].) Of course, Claimant’s parents can refuse to do anything that they feel works to Claimant’s detriment. However, if the exercise of that right interferes with the implementation of the Lanterman Act, then a regional center may have no choice but to refuse to render services, as the failure of cooperation may negate the authority to compel the regional center to fund services and supports.

9. It is undisputed that CBT is an appropriate intervention for Claimant. The CBT services are not required to be provided by Dr. Passaro; however, the preponderance of the evidence established that the provider should be highly trained and experienced in

providing CBT. Should Claimant’s parents cooperate with HRC and authorize HRC to communicate with, request information from, or give information to other agencies, institutions, or persons concerning Claimant in order to secure funding of CBT services through the Medi-Cal program or any other generic resource, HRC should make best efforts to do so and help secure a trained and experienced CBT provider. Moreover, pursuant to section 4659, subdivisions (d)(1)(A) and (d)(1)(C), while HRC pursues coverage and until commencement of services through the Medi-Cal program or other generic resource, HRC shall fund CBT services provided by Dr. Passaro.

10. Claimant has not met his burden of proving that HRC should fund his personal training services. Section 4648.5, subdivision (a)(2), prohibits HRC from funding this service because it is considered a social recreation activity. Claimant is not entitled to an exemption from this prohibition because he did not establish that personal training services are a primary or critical means for ameliorating the effects of autism. Rather, CBT and the other services and supports contained in Claimant’s IFSP are identified as the primary services that ameliorate Claimant’s social deficits, anxiety and depression. Moreover, Claimant did not establish that personal training services are necessary to enable Claimant to remain in his home. For the foregoing reasons, Claimant’s appeal shall be denied.

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## ORDER

1. Claimant's appeal is denied. The Service Agency's denial of Claimant's request for the Service Agency to fund the provision of CBT services by Perry D. Passaro, Ph.D. and personal training services is affirmed.

2. In the event Claimant's parents cooperate with HRC and authorize HRC to communicate with, request information from, or give information to other agencies, institutions, or persons concerning Claimant to secure CBT services through the Medi-Cal Program or any other generic resource, HRC shall fund CBT services for Claimant provided by Dr. Passaro while it pursues coverage, and until commencement of services through the Medi-Cal program or other generic resource.

Dated:

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CARMEN D. SNUGGS

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.