

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

HARBOR REGIONAL CENTER,

Service Agency.

Case No. 2014090278

DECISION

Administrative Law Judge David B. Rosenman (ALJ) heard this matter on December 18, 2014, in Torrance, California.

Gigi Thompson, Manager Rights Assurance, represented Harbor Regional Center (HRC or Service Agency). Claimant was represented by his father. (Titles are used to protect confidentiality.)

Evidence was received and the matter argued. The record was closed and the matter was submitted for decision on December 18, 2014.

ISSUES PRESENTED

As noted in more detail below, the Issues were determined by the ALJ, not necessarily with the agreement of the parties.

1. Did HRC violate the law¹ by rejecting parents' participation in the meeting on July 22, 2014, between HRC and Behavioral Education for Children with Autism (BECA)?

2. Did HRC violate the law by failing to communicate with BECA and Claimant's family about its concerns and recommendation relating to Claimant's behavior management program planning?

3. Did HRC violate the law by making a demand for a program termination plan from BECA?

4. Does HRC's letter dated August 29, 2014, violate the law by forcing changes on the service provider, BECA, based on false conclusions and without considering the impact on Claimant's plan and his family?

FACTUAL FINDINGS

1. Claimant is 15 years old and receives services from HRC based on diagnoses of moderate intellectual disability and autism.

2. The present dispute relates to the circumstances surrounding HRC's proposed termination of funding of Claimant's services through BECA as of September 30, 2014. This was communicated in a letter dated August 29, 2014. (Exhibit 3.)

3. Claimant's father submitted a Fair Hearing Request dated September 4, 2014, and the matter was set for hearing on October 22, 2014. Claimant's father submitted a request for continuance, accompanied by a time waiver. The continuance was granted and the hearing took place on December 18, 2014.

¹ The relevant law is the Lanterman Developmental Disabilities Services Act (Lanterman Act), found at Welfare and Institutions Code section 4500 et seq. All statutory references are to the Welfare and Institutions Code.

4. The Fair Hearing Request (exhibit 2) has a section asking for the reason for the hearing. Claimant's father noted:

- "1) HRC violated the Lanterman Act by rejecting parent's participation in the HRC/BECA meeting on 7/22/2014.
- "2) HRC failed to communicate the concerns and recommendation to [Claimant's] behavior management program planning.
- "3) HRC's demand for a program termination plan from BECA violated [Claimant's] right under the Lanterman Act and is a potential misconduct issue.
- "4) HRC's letter dated 8/29/2014 violates the law by forcing changes on the service provider based on false conclusions and without considering [the] impact to [Claimant's] integrated program and family as a whole."

The Fair Hearing Request has a section asking for a description of what is needed to resolve the complaint. Claimant's father noted:

- "1) HRC retracts the letter of notice dated 8/29/2014.
- "2) HRC has corrective action to eliminate the internal practice that violates the Lanterman Act that [are] listed in item 1 & 3.
- "3) A letter from HRC board of directors to acknowledge the extra burden to the family & service provider in the case.
- "4) Reimburse the family for the cost and effort to generate document and preparation for this appeal process due to HRC's violation of the Lanterman Act."

As noted in more detail below, the ALJ determined that the reasons for complaint in the Fair Hearing request were within the ambit of the fair hearing process, but that the resolutions sought were outside of the ALJ's authority.

5. At the hearing, HRC established that its decision to terminate funding for

services by BECA was based on HRC's mistaken belief that BECA had not provided requested information. HRC subsequently determined that the information had been prepared but had been sent to incorrect email addresses. HRC belatedly received the information. HRC has continued to fund services for Claimant by BECA. At the hearing, HRC withdrew that portion of the August 29, 2014 letter indicating it would terminate that funding.

6. Under these circumstances, relatively few facts are needed concerning the history of services provided by HRC. Claimant has received behavioral services through HRC for 13 years, in one form or another and from different vendors. The most current Individual Family Services Plan (exhibit 4, dated September 25, 2014) indicates that funding for BECA will continue through November 30, 2014 at the rate of seven hours per month. The most recent progress report from BECA (exhibit 8, dated May 14, 2014) indicates BECA began providing services on December 1, 2011, and that the present services are comprised of seven hours per week through HRC, 40 hours per week through Claimant's school district, and 18 hours per month for supervision/program design through Claimant's school district.

7. HRC's Board Certified Behavior Analyst, Rebecca Edgecumbe, prepared a review of progress reports from February 2009 through May 2014 by a prior provider and BECA relating to applied behavioral analysis services (ABA) for Claimant (exhibit 13). In summary, Claimant does not engage in behaviors that place himself or others in immediate danger. However, his safety awareness is compromised and he responded to only 50 per cent of one-step safety commands from his parents while in the community. His appreciation of hot objects is incomplete. Claimant's socialization, with respect to waiting his turn, needs more work. Claimant's parents have learned from BECA how to implement certain strategies, and it is believed that they can teach new skills to Claimant. However, Claimant may continue to need assistance with some self-care and

life skills.

8. HRC funded an updated psychological evaluation by Gabrielle du Verglas, Ph.D., with testing and observations in September and December 2013. Her report (exhibit 7) indicates that her evaluation five years earlier was limited because Claimant could not participate in standardized testing, in part because he is nonverbal. That prior evaluation resulted in diagnoses of Autistic Disorder with moderate mental retardation, provisional. Claimant now uses a computer for basic, limited communication. The current evaluation included tests in which Claimant was able to participate, information gathered from Claimant's parents and his school, and observations of Claimant. Using recently revised diagnostic language, Dr. du Verglas made diagnoses of Autistic Spectrum Disorder, severe, with intellectual impairment, moderate range; severe language impairment; and a comorbid diagnosis of Attention Deficit Hyperactivity Disorder, combined.

9. At the hearing, the earliest evidence of the need for a transition plan for Claimant's services appears in a consumer transaction (CT) note dated January 7, 2014, prepared by his service coordinator, Steven Campos. (Various consumer transaction notes are collected in exhibit B. They will be referenced by date.) Funding for BECA services was approved for the month of February; a correction was needed to the report of Dr. du Verglas; Edgecumbe's report was acknowledged; and reference was made to the need for a transition plan. Per a CT note dated February 12, 2014, services were funded for the month of March 2014 and further reference is made to the need for a transition plan. The need for transition planning is addressed in CT notes dated March 3, 2014 and March 6, 2014. The March 6, 2014 CT note adds a reference to a fade plan. The March 28, 2014 CT note indicates that a request for two months' extension of funding was denied, but one month of funding was approved to complete a school observation and for a meeting with Dr. du Verglas and the parents. The note concludes: "No further

extension will be approved absent of a concrete plan to end.” (Exhibit B.)

10. Campos testified that a transition was needed for several reasons, including that Claimant was older, his school setting changed from elementary to middle school, the psychological data needed updating, and the progress reports summarized by Edgecumbe indicated some progress. Campos denied that there were plans to terminate ABA for Claimant. For the reasons noted below, this testimony about termination is not credible.

11. A CT note dated July 21, 2014, references an action plan discussed at a behavioral services meeting on June 23, 2014. There was no note or other evidence of that June 23, 2014 meeting or of the action plan. HRC wanted BECA to review the information in the report of Dr. du Verglas and incorporate any changes based on the diagnoses and other information in that report. Further funding for BECA was on hold pending further scheduled meetings.

12. Two CT notes relate to HRC meetings: with BECA on July 22, 2014, and with Claimant’s father on July 24, 2014. Although the Issues stated above, and many of the questions asked by Claimant’s father at the hearing implied that he had asked to be present at the BECA meeting, Campos did not recall such a request. Campos and his supervisor credibly testified the July 22 BECA meeting was of the type often held between HRC and its vendors relating to contracts, provision of services, and quality assurance. Such meetings usually do not include consumers. Further, Claimant’s father testified that he asked HRC to combine both meetings, which HRC refused. Father did not testify that he made a request specifically to attend the July 22 meeting. At the July 22 meeting, HRC requested that BECA factor the new data from the psychological assessment into its treatment goals and report back quickly. HRC indicated “there may be a change [of] ABA service provider if a plan/proposal cannot be developed with the eventual transition of services, however at this time BECA understands that termination

of services is not an issue, it is about the proposal/plan, with specific timeline incorporated to the transition of services.” (Exhibit B, CT note of July 22, 2014.)

13. The July 24, 2014 meeting was with HRC and Claimant’s father. The CT note indicates father objected to not being invited to attend the BECA meeting on July 22. HRC reviewed the events of the July 22 meeting, at which “HRC did not speak of termination of services, but requested a plan/proposal” of how the Intellectual Disability diagnosis from Dr. du Verglas would change some of Claimant’s targeted goals. (Exhibit B.) HRC wanted a new plan from BECA and, if BECA could not provide one, HRC would locate another provider for ABA services. On July 30, BECA funding was approved for the month of August.

14. BECA prepared a short recommendation, dated August 5, 2014 (exhibit G), proposing that services from HRC continue at the level of seven hours per week. Certain skills were targeted and behaviors were listed. The recommendation notes that Claimant has made slow but steady progress, and states: “Given [Claimant’s] historic learning profile, it is difficult to outline specific dates in which he and his family will achieve the necessary skills without compromising his overall development. As a result, it is recommended that a reduction or termination of services be determined when: [Claimant’s] terminal goals and objectives in the domain of independent living skills, safety skills and behavior management, are achieved according to predetermined mastery criterion. . . . [R]ecommended goals and objectives . . . shall be discontinued only if those updated treatment goals and objectives are not deemed necessary to acquire ABA or intensive behavioral intervention services.” (Exhibit G.) Other factors to consider before reduction or termination of services include his parents’ ability to adapt teaching methodologies to Claimant’s learning style, and a decrease in Claimant’s challenging behaviors.

15. The BECA recommendation was sent to two incorrect email addresses at

HRC and was not received when sent. BECA did not follow up, and HRC did not check with BECA. By August 29, 2014, HRC believed that BECA had not responded to the meeting held July 22, 2014. HRC then decided to send the letter terminating BECA as a vendor (see Factual Findings 2 and 5).

16. After he received the letter, Claimant's father checked with BECA and learned that it had sent the August 5 email, and checked with HRC and learned it had not received the email. As a result, BECA re-sent the email on September 26, 2014, and it was received by HRC.

17. There was contrasting evidence of whether HRC desired a termination plan for Claimant's ABA services and requested such a plan from BECA. As noted above, Campos denied that a termination plan was contemplated, explaining that the reference in his CT note of a "concrete plan to end" was really a reference to a transition plan of some sort. (See Factual Finding 9.) This was supported by the testimony of his supervisor, Antoinette Perez, that there was no plan to end ABA services; rather, a transition was needed in the focus of the services, for Claimant to be as successful as possible. However, some of the HRC CT notes include reference to a fade plan or a concrete plan to end services. The BECA recommendation refers specifically to a reduction or termination of services. The inference is that BECA understood, among other things, it was to address the possible reduction and termination of Claimant's services.

18. HRC submitted a position paper (exhibit 1, for identification only), prepared for the first hearing date in October 2014. The position paper is not evidence but, rather, is in the nature of argument to be considered by the ALJ. Such written arguments are permitted under California Code of Regulations, title 17, section 50938. The position paper unequivocally states: "Although HRC has tried to reduce services for many years, the family has not been in agreement and HRC has tried to continue to

collaborate with the family in order to bring closure to the ABA services [Claimant] has been receiving for almost 13 years.” (Exhibit 1.) Briefs and arguments may constitute admissions by a party. (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1152, citing and quoting *De Rose v. Carswell* (1987) 196 Cal.App.3d 1011, 1019, fn 3.) Statements of counsel in arguments, pleadings or briefs may bind the client. (See, *Browne v. Superior Court* (1940) 16 Cal.2d 593, 599; 1 Witkin, Cal. Procedure (4th ed.) Attorneys, § 235 et seq.) It is presumed that HRC was, in fact, exploring the circumstances under which Claimant’s behavior management services could be transitioned, faded or terminated.

LEGAL CONCLUSIONS

1. Code section 4501 sets forth the purpose of the Lanterman Act. It states:

“The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. [¶] An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.”

2. Several sections of the Lanterman Act are instructive here, relating to services and the IPP process. Section 4512, subdivision (b), defines “services and supports” as:

“[S]pecialized services and supports . . . directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The

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"

STATUTORY AUTHORITY TO CONSIDER ISSUES AND ORDER HRC TO TAKE ACTIONS

3. As noted above, at the hearing HRC withdrew that portion of its letter indicating that it would not continue funding services through BECA after September 30, 2014. There is no present issue to be resolved relating to this funding. Nevertheless, Claimant's father wanted the hearing to proceed related to the reasons he listed for requesting the hearing, each of which contends that HRC violated the law in some manner.

4. A fair hearing is authorized under the Lanterman Act when an authorized representative of a recipient of services, such as Claimant's father, "is dissatisfied with any decision or action of the service agency which he or she believes to be illegal, discriminatory, or not in the recipient's or applicant's best interests" (§ 4710, subd. (a).)

5. The ALJ is therefore authorized to determine the four issues noted at the outset of this Decision.

6. There is no direct authority for the ALJ to order the actions requested by Claimant's father. The fair hearing process starts with the regional center making a decision as to a person's eligibility to receive services, or notifying a recipient of the action it proposes to take, without mutual consent, to reduce, terminate or change an existing service. (See, §§ 4701, 4701.1, 4703.7, 4706, 4710 and 4710.5.) The written

decision following the hearing must identify and rule on each issue and include supporting facts and laws. (§ 4710.7.)

7. There is no authority requiring the ALJ to order HRC to retract its letter, create an action plan to eliminate internal practices, issue a letter from its board of directors or reimburse the family for costs of the appeal process, as requested by Claimant's father.

8. Under section 4731, Claimant's father may pursue a complaint against HRC if he "believes that any right to which a consumer is entitled has been abused, punitively withheld, or improperly or unreasonably denied by a regional center" Under that section, HRC can propose a resolution. If Claimant's father is dissatisfied with that proposal, he can refer the matter to the Director of the Department of Developmental Services which shall issue a written administrative decision. Under section 4731, subdivision (e), "This section shall not be used to resolve disputes concerning the nature, scope, or amount of services and supports that should be included in an individual program plan, for which there is an appeal procedure established in this division Those disputes shall be resolved through the appeals procedure established by this division or in regulations." This authority is noted without determining whether the proposed resolutions listed by Claimant's father in the Fair Hearing Request are of the nature that can be included in the complaint process under section 4731.

LANTERMAN ACT SECTIONS WHICH CLAIMANT'S FATHER CONTENDS HAVE BEEN VIOLATED BY HRC

9. Claimant's father contends that HRC has violated the following sections of the Lanterman Act. Section 4640.7 states:

"(a) It is the intent of the Legislature that regional centers assist persons with developmental disabilities and their families in securing those services and supports which maximize opportunities and choices for living, working,

learning, and recreating in the community.

“(b) Each regional center design shall reflect the maximum cost-effectiveness possible and shall be based on a service coordination model, in which each consumer shall have a designated service coordinator who is responsible for providing or ensuring that needed services and supports are available to the consumer. Regional centers shall examine the differing levels of coordination services needed by consumers and families in order to establish varying caseload ratios within the regional center which will best meet those needs of their consumers.”

10. 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 the 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. [¶] . . . [¶]

“(d) Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer’s goals, objectives, and services and supports that will be included in the consumer’s individual program plan and purchased by the regional center or obtained from generic agencies shall be made by agreement between the regional center representative and the

consumer or, where appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting.

“(e) Regional centers shall comply with the request of a consumer, or when appropriate, the request of his or her parents, legal guardian, conservator, or authorized representative, that a designated representative receive written notice of all meetings to develop or revise his or her individual program plan and of all notices sent to the consumer pursuant to Section 4710. The designated representative may be a parent or family member.”

11. Section 4646.5, subdivision (a) states, in pertinent part:

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

“(1) Gathering information and conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. For children with developmental disabilities, this process should include a review of the strengths, preferences, and needs of the child and the family unit as a whole. Assessments shall be conducted by qualified individuals and performed in natural environments whenever possible. Information shall be taken from the consumer, his or her parents and other family members, his or her friends, advocates, authorized representative, if applicable, providers of services and supports, and other agencies. The assessment process shall reflect awareness of, and sensitivity to, the lifestyle and cultural background of the consumer and the family.

“(2) A statement of goals, based on the needs, preferences, and life choices of the individual with developmental disabilities, and a statement of specific, time-limited objectives for implementing the person's goals and addressing his or

her needs. These objectives shall be stated in terms that allow measurement of progress or monitoring of service delivery. These goals and objectives 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."

12. Under section 4648, subdivision (a)(6), when securing needed supports and services pursuant to the individual program plan (IPP), the regional center and the consumer's family shall consider various factors when selecting a provider of services, including: "(E) The consumer's choice of providers, or, where appropriate, the consumer's parent's, legal guardian's, authorized representative's, or conservator's choice of providers."

DETERMINATION OF THE ISSUES

13. The Issues stated at the outset of this Decision were reformulated by the ALJ from the Fair Hearing Request submitted by Claimant's father, as set forth in Factual Finding 4. Each Issue will be discussed individually.

14. Issue number 1 is: Did HRC violate the law by rejecting parents' participation in the meeting on July 22, 2014, between HRC and BECA? It was not established by the evidence that Claimant's parents requested to participate in the meeting on July 22, 2014, between HRC and BECA. As noted in Factual Finding 12, Claimant's father testified that he requested HRC to combine the two meetings (July 22, 2014, between HRC and BECA, and July 24 between HRC and father), and that HRC did not do so. As noted in Factual Finding 13, Claimant's father, in the July 24, 2014 meeting with HRC, wanted it noted that he had not been invited to the July 22, 2014 meeting with BECA. There was no direct evidence that Claimant's father requested to attend the

July 22, 2014 meeting with BECA. Therefore, the factual predicate to the issue has not been established, and it is not necessary to determine whether any law was violated. As an aside, HRC is required, under section 4647, to monitor implementation of the IPP to ascertain that objectives have been fulfilled. Other provisions of the Lanterman Act and the applicable regulations specifically relate to the relationship between a regional center and its vendors. A meeting between HRC and BECA related to quality assurance for services provided is an appropriate process and does not necessarily require the attendance of a consumer's parent. There is a legal requirement in section 4646, subdivision (e), to comply with a parent's request to be notified of IPP meetings. This requirement relates only to IPP meetings, which was not the nature of the July 22 meeting with BECA. And the statutory requirement is to notify the parent of the meeting, not to include the parent in the meeting. Participation in meetings, authorized under section 4646, subdivision (d), is, again, limited to IPP meetings.

15. Issue number 2 is: Did HRC violate the law by failing to communicate with BECA and Claimant's family about its concerns and recommendation relating to Claimant's behavior management program planning? There was insufficient evidence to establish that HRC did not communicate with BECA and Claimant's family its concerns relating to Claimant's behavior management program planning. A transition plan is mentioned in the CT note dated March 3, 2014, of an HRC review of Claimant's ABA services. A CT note dated March 6, 2014, refers to a status meeting with Claimant's parents to discuss the current status of services and progress, including that there will be further meetings to discuss an action plan, funding, and fading. After the July 22 meeting with BECA, HRC followed up on July 24 with a meeting with Claimant's father. There was adequate communication with Claimant's family. HRC did not violate the law.

16. Issue number 3 is: Did HRC violate the law by making a demand for a program termination plan from BECA? Despite the denials from Campos and Perez that

termination of ABA services plan was being considered, there was sufficient evidence, in CT notes and the BECA email, that termination of services was a factor in the ongoing discussions and meetings. Considering the number of years that Claimant received behavior management services, including ABA, and the slow progress made by Claimant in mastering safety and daily living skills, it was not inappropriate for HRC to consider and inquire of BECA what circumstances would support terminating the service. BECA appropriately replied in its email, indicating that this was difficult to predict considering a number of factors that were specific to Claimant. Under section 4647, service coordination includes, among other things, considering all appropriate options to meet IPP objectives, and collecting and disseminating information. Further, under sections 4648 and 4571, the regional center must provide "quality services and supports." The effectiveness of services is a valid consideration as well, as noted in section 4512. Under section 4648.1, regional centers have an affirmative duty to monitor service providers to assure compliance with the law, regulations and their contract. Under all of the circumstances, HRC did not violate the law by considering the circumstances under which ABA services could be transitioned, faded or terminated.

17. Issue number 4 is: Does HRC's letter dated August 29, 2014, violate the law by forcing changes on the service provider, BECA, based on false conclusions and without considering the impact to on Claimant's plan and his family? Claimant's father did not specify the "false conclusions" he was referencing in this issue. It is possible he was referring to HRC's incorrect assumption that BECA had not responded to the request, from the July 22, 2014 meeting between BECA and HRC, to provide modified recommendations that factored in the information from Dr. du Verglas's report and other information. However, the evidence did not establish that HRC forced BECA to make any changes to services for Claimant. Rather, HRC previously requested BECA to factor in new information, and to provide information on the circumstances under which

services could be transitioned, faded and/ or terminated. When HRC did not believe that BECA had responded to this request, HRC sent the August 29, 2014 letter indicating that funding for BECA would be terminated. HRC's position in the letter was not supported by the facts, as BECA had prepared a recommendation, but sent it to incorrect addresses. Admittedly, the indication that HRC would terminate funding is extreme, but not unjustified under the assumption that BECA was not providing information that had been requested and that BECA apparently had agreed to provide. There is no violation of law under these circumstances. Of course, once the error in sending the emails to incorrect addresses was discovered and corrected, HRC continued to fund ABA services by BECA.

18. Under California Code of Regulations, title 17, section 50966, subdivision (b), a motion to dismiss a fair hearing request is authorized when "a fair hearing request raises issues not appropriately addressed" in the fair hearing process or "does not comply with statutory requirements." Here, although the issues are authorized under section 4710, the responses suggested by Claimant's father are not authorized under the Lanterman Act. Under the circumstances, there is no basis to order HRC to do anything. The Fair Hearing Request will be dismissed.

ORDER

Claimant's fair hearing request is dismissed.

DATED: December 30, 2014.



DAVID B. ROSENMAN

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.