

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2015100600

DECISION

Eileen Cohn, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on February 21, 2016, in Torrance, California.

Mary Hernandez, Director of Adult Services, represented Harbor Regional Center (HRC). Claimant was represented by his mother.

Oral and documentary evidence was received. By stipulation, the record was left open for one day for HRC to submit an additional exhibit. HRC timely submitted the exhibit and it was marked and admitted as Exhibit HRC-J. The record was closed and the matter was submitted on February 22, 2016.

ISSUE

The parties stipulated to the following issue.

Should HRC be required to reimburse claimant's parents for the cost of two daily round-trips of transportation between home and his day program, at the rate charged by a private driver, instead of HRC's offered reimbursement of one daily round-trip of transportation at the rate charged by a generic shared transportation service.

EVIDENCE RELIED UPON

Documents. HRC exhibits HRC-A through HRC-J; claimant's Exhibits C-A through C-C.

Testimony. Mary Hernandez; claimant's mother.

CONTENTIONS OF THE PARTIES

Claimant contends that he should be reimbursed for two daily round-trips of private transportation between his home and day program because his behaviors related to his autism prevent him from riding safely on either HRC provided transportation or generic transportation made available to all disabled individuals referred to as Access Paratransit (Access). Claimant requests \$20 for each day claimant attends his day program, equivalent to the cost of hiring a private driver for two round-trips.

HRC does not dispute that claimant is entitled to have his parents drive him to his day program, but maintains it is only required to provide one daily round-trip at the rate Access charges, the least costly generic service, not two round-trips at claimant's preferred rate. There is no dispute that HRC has made timely reimbursements to claimant for the cost of one round-trip each day claimant has attended the day program. HRC has been paying claimant the equivalent cost of using Access, \$2.75 each way, or \$5.50 round-trip for each day he attends his day program.

For the reasons set forth below, claimant's appeal is denied in part and granted in part.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. On October 7, 2015, the HRC rejected claimant's request for reimbursement for two round-trips his mother makes each day claimant attends a day program, through HRC's Parent Directed Transportation (PDT). (Exhibit HRC-C.) At the time of his initial reimbursement request, claimant requested a total of \$12 daily for PDT, but in his hearing request claimant requested \$20 daily to cover the cost of hiring a driver, instead of claimant's mother. Claimant timely filed a request with HRC for hearing on October 16, 2015, (Exhibit HRC-B), and, as required, provided documentation establishing his parents as conservators who are entitled to proceed to hearing on his behalf.

2. Claimant is a 24 year-old male who is eligible for regional center services based upon his diagnoses of autism and epilepsy. Claimant lives with his mother and father, and has a younger sister who is currently attending college away from home.

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TRANSPORTATION

3. Claimant has a history of severe and challenging behaviors that make shared public or private transportation extremely difficult, if not impossible. Due to his extreme sensitivity to sound, claimant's behaviors escalate when he is exposed to noises from other individuals using shared transportation. Claimant's autism is complicated by his obsessive compulsive disorder which informs his singular focus on retrieving soda drinks from vending machines. Claimant regularly elopes from any vehicle transporting him to his day program to get to a vending machine. His current day program shares a parking lot with the laundromat where the vending machine is located. To prevent

claimant from running across the parking lot, the administrators of his day program meet his vehicle in front of the laundromat.

4. Claimant's most recent Individual Family Service Plan (IFSP) dated July 29, 2015, provides that he attend the Dungarvin Day Program (Dungarvin) part-time in the afternoon, three days each week. (Exhibit HRC-G.) Claimant has previously attended Dungarvin five days a week, but due to his behaviors his days were reduced. Dungarvin is working with claimant on his behaviors with the goal of increasing his hours at the day program to a full time schedule. (Exhibits HRC-G and I, C-A.) Claimant requires close supervision. His day program is staffed with a ratio of one staff to three clients. (Exhibit HRC-G.)

5. Until the July 29, 2015, IFSP meeting, HRC provided claimant transportation from an HRC-contracted vendor, Roundtrip Transportation (Roundtrip). Roundtrip provided door-to-door roundtrip service between claimant's home and Dungarvin. Claimant's home is 4.4 miles from Dungarvin, (Exhibit HRC-E), but it often took Roundtrip over 70 minutes to transport claimant door-to-door, a duration of time in excess of Roundtrip's maximum time limit allowed under its contract with HRC. (Exhibit HRC-H.) Roundtrip's services cost far more than Access, over 25 dollars daily, but Roundtrip's costs include wages and insurance. Roundtrip is also subject to HRC's supervision.

6. Claimant's behaviors prevented him from consistently accessing Roundtrip. (Exhibit HRC-G.) At the time of the IFSP, claimant had not accessed Roundtrip since May 2015. (*Id.* at pp.10-11.) Claimant had refused to get on the bus from home, and also had refused to get on the bus to return home. Claimant's mother received calls from staff to pick him up. Claimant's behaviors also made it difficult for him to ride in a group van. Claimant searches others' purses, wallets and pockets for money, is prone to

verbal and physical behavioral outbursts which include elopement, grabbing, biting, and pinching. (*Id.*)

7. At the July 29, 2015 IFSP meeting, HRC agreed to terminate Roundtrip until claimant is able and willing to use the transportation services, and authorized PDT through August 31, 2016, retroactive to May 1, 2015. (Exhibit HRC-G, pp.10-11). HRC has consistently reimbursed claimant's parents for one round-trip at a rate of \$2.75 each way, or \$5.50, which is equivalent to the cost of Access, the generic public transportation service. If claimant's parents were reimbursed for mileage at the Internal Revenue Service (IRS) mileage rate of .54 cents a mile, they would receive \$2.376 one way, or \$4.752 roundtrip, less than the rate HRC pays for Access. (Exhibit HRC-D.)

8. At the July 29, 2015 IFSP meeting, claimant's mother requested reimbursement at a "higher rate." (Exhibit HRC-G, at p.10.) At the time of the IFSP, HRC did not respond to her request. (Exhibit HRC-G, at p.10.) On August 6, 2015, claimant's mother requested total reimbursement in the amount of \$12. (Exhibit HRC-I.) In a meeting with claimant's mother on September 3, 2015, the HRC confirmed that claimant would continue with PDT and be transported by his parents to his day program at the Access rate, but did not commit to paying two round-trips. Finally, on October 7, 2015, the HRC refused claimant's mother's request for additional reimbursement. (Exhibit HRC-C.)

9. Claimant provided convincing evidence that HRC's offer of one round-trip at the Access rate was inappropriate. Claimant cannot use the generic transportation service Access because his behaviors prevent him from riding a generic resource without one-on-one assistance. Claimant had tried using Access, but claimant bolted from the van. Claimant's parent or another caretaker cannot travel with claimant on Access because Access provides a one-way service, and will not return his caretaker to claimant's home.

10. Claimant's mother provided credible and persuasive evidence supporting reimbursement for personally driving two round-trips to Dungarvin, retroactive to her August 6, 2015 request. As the IFSP team acknowledged when it approved PDT, claimant's behaviors prevent him from accessing Roundtrip. (Exhibit G, pp.10-11.) Claimant's mother provided credible and sincere testimony of her efforts to get claimant to use Roundtrip, his resistance to the group van and his behavioral challenges, which were in part due to his sensory issues related to the noise in the group van. Claimant's mother continues to have great difficulty convincing claimant to drive with her to Dungarvin on his assigned days.

11. Claimant failed to show that the \$20 amount supported appropriate transportation services. Claimant's mother hired a driver from a nearby group home who was experienced working with disabled individuals hoping that claimant would be less resistant if this driver could provide a quiet environment and transport claimant in less time than Roundtrip. The driver charged claimant's parents \$20 daily for two trips between claimant's home and Dungarvin. Claimant was transported successfully for a limited period of time in fall 2015, and in January 2016, but after claimant began pulling the hair of another passenger, mother was forced to discontinue the private service. Mary Hernandez credibly and persuasively testified that HRC should not be obligated to pay claimant's elected vendor because, in contrast to HRC contracted vendors, it cannot monitor or supervise vendor's qualifications or passenger safety. Although her intentions were laudable, for the \$20 fee, claimant's mother failed to secure transportation that was more appropriate than Roundtrip.

12. At hearing, Mary Hernandez, HRC's Director of Adult Services, acknowledged claimant's challenges but maintained that by the time of the hearing, claimant did not require one-on-one assistance for transportation. Ms. Hernandez maintained that with the close supervision and behavior support Dungarvin provides

during his day program, including, when needed, one-on-one assistance, claimant should be able to access Roundtrip without additional assistance. Dungarvin has instituted a transition plan which incorporates behavior modification with the goal of increasing claimant's attendance at Dungarvin. Claimant's behaviors were exacerbated by the duration of Roundtrip's van ride. At the time of the hearing, Roundtrip rearranged the van route and committed to HRC that it would arrive at claimant's home in the morning at the end of its route with six passengers, and transport claimant to Dungarvin. Under the new plan, at the end of the day, Roundtrip would first return claimant from Dungarvin to his home before dropping off the other passengers. With the new transportation route, the total duration of the ride will be 15 minutes. Although Roundtrip's revised schedule should benefit claimant, persuasive evidence was provided that until intervention effectively modifies claimant's behaviors, claimant's parents will be required to transport claimant once, if not twice, daily when he attends Dungarvin. Ms. Hernandez's additional evidence regarding Roundtrip was not incorporated into any operative IFSP and there was insufficient evidence of claimant's current status to determine whether he could safely access Roundtrip.

13. The evidence established that the only appropriate alternative to transportation services by Roundtrip, is transportation provided by claimant's parents. Claimant's parents are entitled to reimbursement for up to two daily round-trips retroactive to August 6, 2015, the time claimant's mother repeated the request she made at the IFSP team meeting, July 29, 2015. HRC reimbursed parents for one round-trip to Dungarvin. Within 60 days of this Decision, the HRC shall reimburse claimant's parents for one additional roundtrip to Dungarvin, for each day of attendance at the day program, in the amount of \$5.50, based upon claimant's attendance records at Dungarvin and Roundtrip's passenger records, if any.

LEGAL CONCLUSIONS

1. The standard of proof in this case is the preponderance of the evidence. (Evid. Code, § 115.)

2. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)¹ An administrative “fair hearing” to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal HRC’s denial of his request for reimbursement for two daily round-trips from his home to Dungarvin.

3. When one seeks government benefits or services, the burden of proof is on him or her. (*See, e.g., Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) In this case, HRC has not before agreed to provide funding for two daily round-trips of private transportation. Therefore, claimant has the burden of proving that he is entitled to the relief he requests in this matter.

4. The purpose of the Lanterman Act is two-fold: 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 productive and independent lives in the community. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

5. Code section 4512, subdivision (b), defines services and supports for persons with developmental disabilities as specialized services and supports or special adaptations of generic 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

¹ All further statutory references are to the Welfare and Institutions Code.

the achievement and maintenance of independent, productive, normal lives. Thus, regional centers are responsible for developing and implementing individual program plans, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (Code §§ 4646, 4646.4, 4646.5, 4647, and 4648.)

6. Code section 4646, subdivision (a), requires that services be effective in meeting consumer needs, and maintain a balance between reflecting consumer and family preference on the one hand while being cost-effective on the other hand. In addition, Code section 4648, subdivision (a)(6), requires regional centers, when selecting service providers, to consider the provider's ability to deliver quality services which can accomplish all or part of the consumer's individual program plan, the provider's success in achieving objectives set forth in the consumer's IPP or IPSP, the costs of providing the service compared to other providers, and reasonable progress toward objectives as well as the consumer's choice of provider.

7. Regional Centers are required to fund appropriate and cost effective services.

7(A). Code section 4648.35, subdivision (a) provides that a regional center shall not fund private specialized transportation services for an adult consumer who can safely access and utilize public transportation, when that transportation is available.

7(B). Code section 4648.35, subdivision (b) provides that a regional center shall fund the least expensive transportation modality that meets the consumer's needs, as set forth in the consumer's IPP or IFSP.

7(C). Code section 4648.35, subdivision (c) provides that a regional center shall fund transportation, when required, from the consumer's residence to the lowest-cost vendor that provides the service that meets the consumer's needs, as set forth in the consumer's IPP or IFSP.

8. The Lanterman Act does not specifically authorize retroactive reimbursement of services costs to families in the fair hearing context. The statutes detailing the IPP process suggest that reimbursement is generally not available, particularly where the development of the IPP or IFSP is supposed to be a collaborative process between the parties and the process necessarily requires prior consideration and approval of any service or support provided to an individual client. Nevertheless, the absence of statutory authority is not necessarily dispositive of the issue of reimbursement because general principles of equity 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.)

9. Claimant proved by a preponderance of the evidence that he required reimbursement for two daily round-trips of one-on-one transportation at the Access rate. The weight of the evidence established that his parents will retain the primary responsibility for transporting him to Dungarvan until he can safely and consistently access Roundtrip. The parties do not dispute the appropriateness of Dungarvin, or that claimant requires transportation to Dungarvin, or that PDT is the most effective service. Consistent with claimant's IFSP, claimant's transportation services must be appropriate to his behaviors. HRC's position that it is only required to provide reimbursement for one round-trip based upon the generic resource of Access is not supported by the relevant facts and law. At the time of the July 29, 2015 IFSP, the HRC was aware that claimant's parents had been transporting claimant two daily round-trips daily to his program since May 2015. At the IFSP the parties agreed that PDT was the only appropriate mode of transportation to Dungarvin. From May 2015, claimant's parents provided the only appropriate and cost-effective transportation to claimant's day program, and at the July 29, 2015 IPP, HRC agreed to PDT to Dungarvin as the only mode of appropriate transportation. By necessity

claimant's parents make two daily round-trips from claimant's home to Dungarvin. A single round-trip ride on Access may be the lowest cost generic service, but the weight of the evidence establishes that claimant cannot ride unaccompanied on Access. As such, claimant's parents provide the lowest cost appropriate service and should be reimbursed for two daily round-trips.

10. Claimant failed to prove by a preponderance of the evidence that reimbursement for two daily round-trips from a private vendor of his choice at a rate of \$20 a day is appropriate. Claimant's behaviors were not managed appropriately by the private vendor of claimant's choosing, and the HRC is not obligated to fund a private vendor that is inappropriate. HRC pays more for Roundtrip than claimant is requesting for the private vendor but HRC contracts with Roundtrip and Roundtrip is subject to HRC's supervision.

11. Retroactive reimbursement is appropriate here, where claimant's parents have been providing an essential transportation service to claimant's day program. Parents and the HRC participated in good faith in a collaborative IFSP on July 29, 2015, but even though HRC knew claimant's parents were his sole mode of transportation to his day program since May 2015, it withheld approval of claimant's request for reimbursement at a "higher rate." After the IFSP, on August 6, 2015, claimant made a second and more specific request for \$12. The HRC did not provide a definitive response until October 2015, over two months after claimant's second request. Claimant's parents should not be deprived of reimbursement for necessary transportation services they provided. Based on Legal Conclusion 8, after considering a reasonable time for the collaborative process of the IFSP, equity supports retroactive reimbursement from the date of claimant's second request, August 6, 2015.

12. Based on the Factual Findings and Legal Conclusions, claimant is entitled to reimbursement for his parent's transportation costs to Dungarvin, at the rate charged

by Access, \$2.75 each way, or \$5.50 roundtrip, two daily round-trips, for a total of \$11 per day. Access is close to the IRS mileage reimbursement rate and, as such, it is appropriate for the HRC to reimburse claimant's parents for two daily round-trips at the Access rate.

13. The HRC has been paying claimant for one daily round-trip. Within 60 days of this Decision, the HRC shall reimburse claimant for an additional round-trip for each day of attendance at Dungarvin retroactive to August 6, 2015, after the IFSP when claimant made his second and more specific claim for reimbursement. The HRC shall calculate parent's reimbursement based upon claimant's days of attendance at Dungarvin, subtracting claimant's trips with Roundtrip, if any. The IFSP provides for PDT through August 31, 2016. As such, HRC shall provide reimbursement to claimant's parents for two daily round-trips to Dungarvin, until the parties reach an alternative transportation agreement, or until August 31, 2016, whichever event occurs first.

ORDER

1. Claimant's appeal is denied in part and granted in part.
2. Claimant's request for reimbursement for the cost of a private provider of claimant's choice for each day of attendance at Dungarvin at the daily rate of \$20 is denied.
3. Claimant's request for reimbursement for two daily round-trips from claimant's home to Dungarvin is granted, in the amount of \$2.75 each way or \$5.50 for each round-trip, in an amount not to exceed \$11 daily.
4. Reimbursement is retroactive to August 6, 2015.
5. Within 60 days of this Decision, the HRC shall reimburse claimant's parents for a total of two daily round-trips to Dungarvin, from August 6, 2015, based upon claimant's days of attendance at Dungarvin. The HRC may reduce the amount of reimbursement by claimant's trips with Roundtrip, if any.

6. HRC shall continue to reimburse claimant's parents for PDT for two daily round-trips to Dungarvin, until the parties reach an alternative transportation agreement, or until August 31, 2016, whichever event occurs first.

DATED: March 3, 2016

EILEEN COHN

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Judicial review of this decision may be sought in a court of competent jurisdiction within ninety (90) days.