BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Matter of:<br><br>Claimant,<br><br>v.<br><br>HARBOR<br>REGIONAL CENTER,<br><br>Service Agency. | OAH Case No. 2016070443 |

# DECISION

John E. DeCure, Administrative Law Judge, Office of Administrative Hearings, heard this matter on September 27, 2016, in Torrance, California.

Claimant,[1] who was not present, was represented by her mother (mother). Claimant's father (father) was also present.

Gigi Thompson, Fair Hearing Coordinator (FHC Thompson), represented the Harbor Regional Center (HRC, or service agency).

Evidence was presented and argument was heard. The matter was submitted for decision on September 27, 2016.

[1] Claimant's and her parents' identities are not disclosed to preserve their confidentiality.

## ISSUES

Should HRC be required to continue funding for physical therapy services because claimant, now a service agency client, has exhausted all other generic resources that can provide those services?

## FACTUAL FINDINGS

1. Claimant is a three-year-old female and HRC consumer based on her diagnosis of intellectual disability, unspecified. Claimant suffers from a brain abnormality called dysgenesis of the corpus callosum,[2] a rare condition caused by a gene mutation. There is no cure or targeted treatment. Claimant has no siblings and lives at home with her parents. An in-home nanny cares for claimant while mother and father are at work. English is the primary language in the home but the nanny exposes claimant to some Spanish language. The family lives in a small home that has few open spaces for claimant to explore. The house also has a sunken living area situated two steps below the kitchen and eating areas. Claimant does not yet walk unassisted. At home she crawls and sometimes pulls herself up to a sitting position beside furniture or other stationary supports. She can stand unassisted for three to five seconds at a time. Claimant has received one hour per week of in-home individual physical therapy, paid for by the

[2] The corpus callosum is the largest of the commissural fibers, linking the cerebral cortex of the left and right cerebral hemisphere. It is the largest fiber pathway in the brain. Dysgenesis refers to defective development of the corpus callosum as a rare birth defect (congenital disorder) in which there is a partial or complete (agenesis) absence of the corpus callosum. It occurs when the corpus callosum, the band of white matter connecting the two hemispheres in the brain, fails to develop normally, typically during pregnancy.

service agency, from therapist Trisha Fe Sanchez, whom mother believes is very effective with the treatment she provides to claimant. Mother's primary goal in continuing in-home physical therapy services for claimant is to help claimant develop full mobility in the home.

2. Claimant falls within the Manhattan Beach Unified School District (MBUSD). Claimant is enrolled in a special education class and is eligible for Free and Appropriate Public Education[3] services during the regular school year including: specialized academic instruction (1,140 minutes per week), group, including social skills group; specialized academic instruction (450 minutes per week), group, general education class; other special education/related services (1,590 minutes per week), individual, learning center and general education class; speech language (60 minutes per week), individual, and (30 minutes per week) group; occupational therapy (2 times at 30 minutes per week), individual; and physical therapy (60 minutes per week), individual.[4]

3(a). HRC's Client Services Manager, Maria Rivas, testified that the service agency agrees claimant needs physical therapy services to increase her mobility, but now that claimant is no longer eligible for Early Start services due to her age,[5] she must

[3] Under Section 504 of the Rehabilitation Act of 1973, all qualified persons with disabilities within the jurisdiction of a school district are entitled to a free appropriate public education.

[4] Claimant is eligible for similar services during the summer (extended year) months.

[5] Early Start is California's program for disabled infants and toddlers in need of early intervention services. Pursuant to Government Code section 95014, subdivision (a), the State Department of Developmental Services and regional centers are responsible

utilize generic resources to access the physical therapy services she needs. The service agency has identified four generic resources available to claimant for funding claimant's physical therapy services: MBUSD, claimant's mother's and father's private health insurance plans, and Medi-Cal.

3(b). Mother contends she has attempted to secure in-home physical therapy services from MBUSD, her health insurance, father's health insurance, and Medi-Cal, without success. Mother feels she has exhausted all reasonable possibilities to obtain services from these providers and asserts that the service agency therefore must fund the services.

3(c). What follows is an analysis of the evidence presented regarding each potential service provider.

SCHOOL DISTRICT SERVICES

4. MBUSD met with claimant's parents and evaluated claimant in June 2016 to determine claimant's eligibility for services (see Factual Finding 2). Claimant's strength and mobility were assessed, and she was found to have gross motor skills in the 6-8 month range. Claimant could sit up but would periodically fall back. She could move forward on her belly but was unable to get up on her hands and knees. MBUSD recommended a gross motor program which would include ambulation with an assisted device, and the use of assorted other equipment to assist claimant's stability in various

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for the provision of appropriate early intervention services that are required for California's participation in Part C of the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1431 et seq.) Eligibility for Early Start services terminates when the child reaches age three.

postures. The plain-stated goal was to increase claimant's mobility so she could maneuver throughout the school environment. (Exhibit 9.)

5. Three treating professionals submitted letters on claimant's behalf. Jenna Roberts, M.D., F.A.A.P., claimant's pediatrician, recommended that claimant continue to receive in-home physical therapy designed specifically to teach her how to access and maneuver around her home environment. Elliott Scherr, M.D., Ph.D., claimant's neurologist and an expert in disorders of neurodevelopment, believes claimant will learn to walk but only with hard work and many hours of productive therapy. He recommended claimant continue to have in-home physical therapy. Ms. Sanchez believes claimant is making progress but needs continued physical therapy in the home. Ms. Sanchez noted the value of her being able to educate claimant's nanny and parents so that claimant can benefit from additional opportunities for practice throughout the day. Ms. Sanchez believes that because this education component is not part of claimant's physical therapy at school, it makes in-home even more valuable. (Exhibit K.)

6. The service agency contended the physical therapy services claimant receives in her school setting should help her develop skills transferable to claimant's home environment. While this could possibly be true, the service agency provided no direct evidence to support this claim.

PRIVATE INSURANCE

7. Mother has attempted to secure physical therapy through her private health insurer, Anthem Blue Cross (Anthem). Anthem has a list of 20 providers in claimant's general geographical area, and mother called each provider. None were suitable, as they either did not work with pediatric patients, were not available, did not work with patients with neurological conditions, had gone out of business, or were located too many miles away from claimant to be readily accessible. Mother credibly described her search process, during which kept notes and detailed the results of her

inquiries. (Exhibits C, D.) HRC has asked its benefits specialist, Cori Reifman, to assist mother in finding a suitable provider. Ms. Reifman spoke with Anthem and recommended to mother that she call Anthem's Member Services Department and request assistance via its medical case management or care management departments. She also noted that the family has the right to file a grievance. (Exhibit H.) By then, mother had spent months vigorously advocating to compel Anthem to provide claimant with better options for services, so she considered Ms. Reifman's suggestions to be of limited practical value.

8. Father's health care plan, PERSCare, does not provide for physical therapy in an in-home setting unless the patient suffers from an "acute condition," which is defined as "care provided in the course of treating an illness, injury or condition marked by a sudden onset or change of status requiring prompt attention, which may include hospitalization, but which is of limited duration and not expected to last indefinitely." (Exhibit E.) Claimant has suffered from a brain abnormality since birth. Thus, she does not have an acute condition as defined by PERSCare. As a result, claimant is not eligible for in-home physical therapy services under its health care plan.

9. At claimant's parents' behest, Ms. Sanchez has applied to become a service provider within Anthem's therapy-provider network. On August 24, 2016, Anthem informed Ms. Sanchez that it had declined her request to join their network. (Exhibit F.)

MEDI-CAL SERVICES

10. Mother testified that she has asked Medi-Cal for a list of its physical therapy providers, and Medi-Cal has told her they do not directly refer claimants to such providers. Instead, Medi-Cal covers physical therapy services when ordered on the written prescription of a physician and rendered by a Medi-Cal provider. Medi-Cal instructed mother to take claimant to a physician who could evaluate claimant and then make a medical referral to a physical therapist. Medi-Cal has a list of participating

primary care providers, four of whom are in claimant's home town of Manhattan Beach. (Exhibit J.) Mother telephoned three of those physicians' offices and asked the doctors' staffs if they made referrals to physical therapists. None of the doctors' offices she called said they made such referrals. Mother felt it was pointless to set up a medical appointment for claimant, and attend the appointment, only to meet with a doctor who does not make referrals to a physical therapist. Mother saw no utility in putting herself and claimant through this process since the sole objective of attaining such a referral was not possible. Mother candidly admitted she had not made any actual appointments for claimant to be evaluated by a Medi-Cal-approved physician, nor did she speak with any physicians directly regarding the evaluation-and-referral process.

## LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. and Inst. Code, § 4500 et seq.) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (Welf. and Inst. Code, §§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established.

### THE STANDARD AND BURDEN OF PROOF

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

2(b). When one seeks government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) In this case, because Claimant seeks service-funding through HRC, she bears the burden of proof by a preponderance of the evidence that she is entitled to the funding. (Evid. Code, §§ 500, 115.) Claimant has not met her burden of proof.

APPLICABLE STATUTORY LAW AND ANALYSIS

3(a). Welfare and Institutions Code section 4646 states 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.
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> (b) The individual program plan is developed through a process of individualized needs determination. The individual with developmental disabilities and, where appropriate, his or her parents . . . shall have the opportunity to actively participate in the development of the plan.
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> [¶] . . . [¶]
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> (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 . . . at the program plan meeting.

3(b). Welfare and Institutions Code section 4646.4 states in part:

(a) Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5 . . . the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following: [¶] . . . [¶]

(c) Final decisions regarding the consumer's individual program plan shall be made pursuant to Section 4646.

3(c). Welfare and Institutions Code section 4646.5 states in part:

(a) Except as otherwise provided in subdivision (b) or (e), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.

(2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer. [¶] . . . [¶]

3(d). Welfare and Institutions Code section 4501 states in part:

Services and supports should be available to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age…. In providing these services, consumers and their families, when appropriate, should participate in decisions affecting their own lives, including, but not limited to, where and with whom they live, their relationships with people in their community, the way in which they spend their time, including education, employment, and leisure, the pursuit of their own personal future, and program planning and implementation. . [¶] . . . [¶]

3(e). Welfare and Institutions Code section 4659 states in part:

(a) Except as otherwise provided in subdivision (b) or (e), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program. [¶] . . . [¶]

c) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional centers shall not purchase any service that would otherwise be available from Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, In-Home Support Services, California Children's Services, private insurance, or a health care service plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage. If, on July 1, 2009, a regional center is purchasing that service as part of a consumer's individual program plan (IPP), the prohibition shall take effect on October 1, 2009. [¶] . . . [¶]

3(f). Welfare and Institutions Code section 4648, subdivision (a)(8), states:

> In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities, including, but not limited to, all of the following:
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> (a) Securing needed services and supports.
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> (8) Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.

4. Claimant did not meet her burden of establishing by a preponderance of the evidence that cause exists to order HRC to provide prospective funding for claimant for physical therapy services, as set forth in Factual Findings 1-10. Although claimant did meet her burden of showing that MBUSD, Anthem, and PERSCare were not viable funding sources for claimant's in-home physical therapy, the evidence failed to establish that Medi-Cal was not a viable funding source for these services. These findings are explained in further detail below.

5. It is undisputed that claimant needs in-home physical therapy services. MBUSD does not provide such in-home services. Instead, the school district's focus is upon providing physical therapy services which will help claimant navigate her school environment. There was no evidence that MBUSD's in-school physical therapy services have any connection with serving claimant's needs related to in-home physical therapy.

6. Despite mother's diligent efforts to obtain physical therapy services from Anthem, it has not made such services available to claimant. (Factual Finding 7.) Similarly, the evidence showed father's health insurer, PERSCare, is not

a viable source of these services. PERSCare requires a patient to suffer from an "acute condition" in order to receive in-home physical therapy, yet claimant does not qualify as having an acute condition pursuant to PERSCare's definition.

7(a). Pursuant to Welfare and Institutions Code section 4659, subdivision (a)(1), HRC has identified Medi-Cal as a funding source for in-home physical therapy services. As set forth above, Welfare and Institutions Code section 4648, subdivision (a)(8), requires regional centers to secure needed services and supports while not using regional center funds to supplant the budget of another agency which is legally responsible for providing services. Medi-Cal is just such a responsible provider.

7(b). However, claimant has not yet exhausted the possibility of utilizing Medi-Cal as a potential provider of these services. Although mother's frustration with attempting to secure in-home physical therapy services with no success thus far is understandable, Medi-Cal presented a different procedure to be followed. Mother was instructed to make an appointment with a physician, ask for an evaluation of claimant, and subsequent to the evaluation, have the evaluating physician issue a written prescription for claimant to receive physical therapy. Once mother received a written prescription, the next step would be to locate a Medi-Cal provider to render the services.

7(c). In this case, mother is very adept at articulating claimant's challenges, and claimant's need for in-home physical therapy is carefully outlined by claimant's personal physician, her neurologist, and her current physical therapist. There is little doubt that in a medical-evaluation setting, mother could effectively set forth claimant's history, claimant's need for mobility in the family home, and the recommendations of the other professionals currently treating claimant regarding the necessity of in-home physical therapy. Yet, when mother

chose not to make an appointment with a physician after calling medical offices and hearing discouraging information from medical office staff, she effectively failed to pursue in-home physical therapy services through Medi-Cal, a legally-responsible service provider, to a point of completion. Thus, the evidence did not show that Medi-Cal is unable to provide claimant with the services claimant requires. As a result, claimant cannot prove she has been denied the funding for these services.

7(d). This is surely a frustrating result for claimant's parents, as they did show that three other funding sources were unable to meet claimant's needs. Mother's concern that Medi-Cal's evaluation-and-prescription process is pointless may well be proven true, should Medi-Cal fail to cover the services claimant needs. But the process must be given the chance to succeed or fail, and it is incumbent upon claimant to participate fully until an outcome is evident. Should claimant do so and Medi-Cal then fails to deliver the necessary services, claimant will have exhausted all generic resources.

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## ORDER

Claimant's appeal is denied.

Dated: October 6, 2016

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JOHN E. DeCURE

Administrative Law Judge

Office of Administrative Hearings

## NOTICE

This is the final administrative decision. This Decision binds both parties. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.