

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

Claimant,

v.

HARBOR  
REGIONAL CENTER,

Service Agency.

OAH Case No. 2016080032

DECISION

John E. DeCure, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard this matter on September 19, 2016, in Torrance, California.

Claimant,<sup>1</sup> who was not present, was represented by his grandmother (grandmother), who is his legal guardian and caretaker.

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

Evidence was presented and argument was heard. The record was held open for claimant to provide additional evidence by September 26, 2016. HRC was given until October 3, 2016, to lodge any objections. On September 26, 2016, claimant submitted a document containing copies of email exchanges between grandmother and Behavior and Education, Inc. (BAE), claimant's service provider for her behavioral services. That

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<sup>1</sup> The identities of claimant and his parents and relatives are not disclosed to preserve their confidentiality.

document was marked as claimant's Exhibit B. The service agency responded by a letter dated September 28, 2016, in which it noted Exhibit B's alleged lack of completeness regarding BAE's provision of services to claimant, and argued that the compensatory services claimant seeks cannot be awarded pursuant to the Lanterman Act. The ALJ viewed these arguments collectively as HRC's objection to Exhibit B on relevance grounds. That objection was overruled and Exhibit B was received in evidence. The record was closed and the matter was submitted for decision on October 3, 2016.

## ISSUES

Should HRC be required to continue funding for Applied Behavior Analysis<sup>2</sup> (ABA) therapy services if these services are available through claimant's health insurance?

Should HRC be required to award compensatory service for ABA services approved but not previously delivered by the service provider?

## FACTUAL FINDINGS

1. Claimant is a seven-year-old HRC consumer based on his diagnosis of autism spectrum disorder and encephalopathy.<sup>3</sup> He lives with grandmother, who is his caretaker and attends to his daily living, educational, and health needs. He also lives

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<sup>2</sup> Applied Behavior Analysis is a scientific discipline involving the systematic application of interventions based upon the principles of learning theory in order to improve socially significant behaviors to a meaningful degree, and to demonstrate that the interventions employed are responsible for the improvement in behavior.

<sup>3</sup> Encephalopathy is broad term used to describe any disease that alters the brain's function or structure.

with his grandfather and uncle, who are grandmother's husband and son. His parents are no longer together and both live in Texas. Claimant is ambulatory and can walk, run, and climb. He is non-verbal and extremely physically active, requiring constant assistance and supervision. He is dependent on others for his personal and self-care skills, and he has yet to become toilet-trained.

2. Claimant has been authorized to receive 10 hours per week of HRC-funded ABA therapy through BAE since January 2015, but at times BAE has had problems with consistently delivering services to claimant. Weekday evenings from 6:00 p.m. until 8:00 p.m. has always been the most opportune time for grandmother to facilitate a visit from the BAE service provider to see claimant for in-home therapy. However, the provider has missed some sessions due to sickness, scheduling conflicts, personal emergencies, and for other various reasons. (Exhibit A.) Grandmother made monthly estimates of the service hours not provided, and the estimates vary widely from month to month. For example, in the month of January of 2015 claimant received all but two hours of the 40 hours of ABA therapy scheduled, while in November 2014, he did not receive 31.25 hours of the 40 hours of ABA therapy scheduled. (Exhibit B.) Claimant responds well to his ABA therapist and is benefiting from the ABA therapy he does receive.

3(a). The Department of Health Care Services (DHCS) submitted State Plan Amendment 14-026 to the Centers for Medicare & Medicaid Services on September 30, 2014, to seek the necessary approval to include Behavioral Health Treatment as a covered Medi-Cal service for individuals under 21 years of age, pursuant to Section 14132.56 of the Welfare and Institutions Code.

3(b). On January 21, 2016, legislation was enacted to enable Medi-Cal to provide benefits for behavior health services for children with autism spectrum disorder who are under 21 years of age. Beginning on February 1, 2016, the authorization and

payment of behavior health services, including ABA therapy, to Medi-Cal beneficiaries transitioned from regional centers to Medi-Cal over an estimated six-month period.

4. The service agency agrees that claimant requires 10 hours per week of ABA therapy services.

5. On May 2, 2016, the service agency wrote a letter to grandmother acknowledging the problems she had reported regarding BAE's lack of consistency in providing ABA therapy services. HRC also discussed the recent change in the law regarding funding for ABA services which were now available to claimant through Medi-Cal, and they offered to facilitate claimant's transition to Medi-Cal as a funding source. Regarding the problem with BAE, HRC offered to help claimant change his service-provider once it confirmed which providers would be offered by Medi-Cal through claimant's Medi-Cal managed care plan. On July 19, 2016, HRC wrote a letter to grandmother reiterating these points.

6. Grandmother requested a fair hearing because she did not want a gap in services to occur between HRC's funding of ABA services and Medi-Cal's funding of services. She wants HRC to identify and secure a new ABA service provider who will consistently deliver 10 hours per week of ABA services. (Exhibit 2.) She is pleased with the ABA services BAE has provided, but is critical of their inconsistency in keeping appointments as described above. Grandmother was undecided as to whether she wanted to terminate BAE as a service provider and find a replacement. The service agency's approach is not to select a particular provider without the input and approval of claimant or his guardian.

7. In order to facilitate claimant's transition to Medi-Cal-funded ABA services, the service agency advised grandmother that it needed her to sign a consent form authorizing them to contact Medi-Cal on claimant's behalf. Grandmother has not provided HRC with a consent form.

8. On August 24, 2016, the service agency contacted BAE to ask for a progress report and for a schedule of hours currently being staffed in support of claimant. On the same day, BAE responded, informing the service agency that claimant's funding for services had transitioned to Medi-Cal on April 1, 2016. No gap in services at a rate of 10 hours per week was reported. BAE also reported that claimant's progress with receiving ABA services was proceeding very well. (Exhibit 4.) The service agency learned from BAE that grandmother had been in contact with Medi-Cal prior to the transition and was aware that Medi-Cal would be providing the funding for claimant's ABA services.

9. Grandmother's primary concern at the administrative hearing was that claimant had not received the all of the service hours for ABA therapy to which he had been entitled, and that as a result, the service agency should award additional, compensatory hours to claimant for those services. She also wanted HRC to be more vigilant in compelling BAE to more consistently deliver the ABA services to claimant, or help her find another more suitable provider.

## 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 ABA service-funding through HRC, he bears the burden of proof by a preponderance of the evidence that he is entitled to the funding. (Evid. Code, §§ 500, 115.) Claimant has not met his 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.

(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.

[¶] . . . [¶]

(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:

(a) Securing needed services and supports.

(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 his burden of establishing by a preponderance of the evidence that cause exists to order HRC to provide funding for claimant's ABA services, as set forth in Factual Findings 1-8. The evidence failed to establish that Medi-Cal was not a viable funding source for these services. Pursuant to Welfare and Institutions Code section 4659, subdivision (a)(1), HRC has identified Medi-Cal as a funding source for ABA services. In addition, grandmother has transitioned claimant's ABA services to Medi-Cal. 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.

5(a). Claimant did not meet his burden of establishing by a preponderance of the evidence that cause exists to order HRC to be required to award compensatory service for ABA services not previously delivered by the service provider, as set forth in Factual Findings 1-8. While Welfare and Institutions Code section 4648, subdivision (3)(B), provides for reimbursement to an individual or agency pursuant to an emergency vendorization or contract with the regional center, this is a narrow exception not applicable to the facts of this case. The Lanterman Act contains no other provision authorizing the regional center to provide reimbursement, particularly in the form of compensatory services.

5(b). Claimant persuasively established BAE's history of inconsistency in providing services to claimant, yet the services BAE has provided to claimant have been effective. The service agency was responsive by offering to assist grandmother in transitioning to another service provider. This is in keeping with a regional center's responsibility, pursuant to Welfare and Institutions Code section 4646, subdivision (a), to take into account the needs and preferences of the individual and the family. Thus, it will be up to grandmother to determine whether another service provider should be sought, and to give approval of a new provider when a suitable replacement is found.

## ORDER

Claimant's appeal is denied.

Dated: October 13, 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.