

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No.2016081116

DECISION

Irina Tentser, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), heard this matter on December 13, 2016, in Torrance, California.

Matthew M. Pope, Attorney, represented Claimant,¹ who was not present. Claimant's mother and father² are his conservators and were present at the hearing.

Gigi Thompson, Manager Rights Assurance, represented Harbor Regional Center (HRC or Service Agency.)

Oral and documentary evidence was received at the hearing. At the conclusion of the hearing, the ALJ ordered the parties to submit legal briefs based on issues presented at hearing. The briefing schedule required HRC and Claimant to submit briefs no later than December 27, 2016. Opposing briefs were due no later than January 17,

¹ The identities of claimant and his relatives are not disclosed to preserve their confidentiality.

² Claimant's father was present for a portion of the hearing. Claimant's mother was present the duration of the hearing and provided testimony.

2017.

HRC filed and served its closing brief on December 22, 2016, which was marked as Exhibit 12. The closing brief referenced attachments not included with the brief nor otherwise admitted in evidence. Claimant filed his closing brief on December 27, 2016, which was marked as Exhibit C. HRC subsequently filed a closing brief on December 27, 2016, which included the attachments that were referenced, but not attached to Exhibit 12, marked as Exhibit 13. Claimant filed his response to HRC's closing brief on January 17, 2017, which was marked as Exhibit D.

ISSUE

Whether the Service Agency shall be ordered to increase the current rate paid to Claimant's parents under Parent-Vendored Transportation by \$5.30 a day; from the vendored rate of \$5.50 a day to \$10.80 a day.

FACTUAL FINDINGS

1. Claimant is a 23 year-old HRC consumer based on his diagnosis of autism and intellectual disability. He resides with his parents.

A. PROCEDURAL HISTORY

2. On August 25, 2016,³ Claimant filed a fair hearing request (FHR) stating that HRC should provide a full day community based social program with vocational and behavior component; additional support necessary to ensure a reintegration plan to ensure Claimant's success; and requested that the program include transportation. (Exh. 2.)

3. On August 16, at the Individual Person-Centered Plan (IPP) meeting, the family agreed to HRC funding for Dungarvin Day Program (Dungarvin) in Long Beach

³ All references are to the year 2016, unless otherwise noted.

beginning on October 1, 2016 and for Participant-Directed Transportation – Family Member (Parent-Vendored Transportation) to be funded beginning on the same date. On October 3, Claimant began attending Dungarvin Day Program and HRC began funding his transportation. (Exh. 6.) Claimant’s transportation to/from his day program, by agreement of the parties, is provided by Claimant’s parents.

4. On October 6, Claimant filed a request to continue the hearing through his attorney based, in part, on the family’s concern that Claimant may be terminated from the program. Claimant requested additional time for issues of the day program, including a potential decrease in in-home behavior program hours and transportation reimbursement, to be resolved.

5. HRC did not file an objection to Claimant’s continuance request based on its understanding that if the current day program and transportation as agreed to in the IPP, as well as increase in in-home behavioral program continued, the hearing would not be required as the outstanding issues would be resolved.

6. On November 28, HRC sent Claimant’s attorney an email to confirm that there were no further issues since the 30 day meeting that was held at Dungarvin; to confirm Claimant was doing well in the program; that transportation was in place; that Claimant was doing well with transportation in the program; and to confirm that, per the IPP, in-home behavioral services were in place until January 31, 2017. (Exh. 11.)

7. On November 29, Claimant’s attorney responded via email that “. . . I talked to [Claimant’s mother] before the 30 day meeting. [November 14.] We were concerned about the plan to terminate or reduce the home behavior program and [Claimant’s mother] wanted to look at increasing her compensation for driving [Claimant] to Dungarvin.” (Exh. 11.)

8. On December 5, HRC wrote Claimant’s attorney an email regarding the impending December 7 evidence exchange and inquiring if a hearing was still necessary to resolve the issues.

9. On December 6, HRC filed a Motion to Dismiss the FHR on the grounds

that the issue of the day program had been resolved and the remaining dispute regarding reimbursement for transportation and in-home behavioral services was not an issue included in the original hearing request. Service Agency contended that the dispute should more appropriately be resolved through the IPP process. (Exh. 4.)

10. Claimant opposed the motion on the ground that the issue, if not part of the original request, by implication and agreement, was made part of the hearing request by the unopposed motion to continue the hearing, and the Order of Continuance. Claimant further maintained there was no opportunity to resolve the issue through the IPP process.

11. On December 8, OAH denied without prejudice HRC's Motion to Dismiss. In denying the motion, an administrative law judge found that transportation was part of the issues to be resolved at hearing.

12. On December 9, Claimant's attorney provided his evidence packet to HRC. While distances related to transportation were discussed, no specific request for transportation reimbursement was included in the FHR.

13. On December 12, the family's request for transportation reimbursement was emailed to HRC by Claimant's attorney. (Exh. 9.) Claimant's specific request for an increase in transportation of an additional \$5.30 a day was not made until the hearing on December 13.

14. At hearing, HRC again made a motion to dismiss Claimant's FHR, arguing that Claimant had not made his transportation reimbursement increase request in accordance with the Lanterman Act guidelines in that the IPP process was the proper avenue to resolve any dispute regarding transportation.

15. HRC's motion to dismiss is denied. An increase in transportation reimbursement expenses to Claimant's parents, though not specified by Claimant until hearing, was clearly discussed in communication between Claimant and HRC leading up

to the hearing.⁴

B. CLAIMANT'S TRANSPORTATION REIMBURSEMENT

16. HRC presented evidence at hearing it could not pay Claimant's family at a higher rate for transportation because the rate for Parent-Vendored Transportation, Service Code 470, was set by the Department of Developmental Services (DDS) and has not been increased to date. As a result, HRC was already paying Claimant's parents the maximum of \$5.50 roundtrip.

17. Claimant argued that his parents were entitled to additional transportation reimbursement because the current rate did not account for the distance Claimant's parents travelled and, therefore, additional payment was necessary to reimburse parents for the expense they incurred in transporting Claimant to/from his day program. He further argued, without citing specific evidence or legal authority to support its argument, that HRC could reimburse Claimant's parents at the higher rate for transporting Claimant.

18. The ALJ requested HRC, in its closing briefs, to address the basis of Service Agency's position it is unable to reimburse the Parent-Vendored Transportation, Service Code 470, at a rate higher than the current rate of \$2.75 one way or \$5.50 per roundtrip. Claimant was requested to provide authority under the Lanterman Act to increase transportation reimbursement.

19. HRC's closing brief supported its hearing evidence and argument that it was following DDS' established Parent-Vendored Transportation rate. Specifically, HRC provided the most recent (June 24) letter regarding New Provider Rates Effective July 1, which indicated the rate had not been increased. (Exh. 13, Attachment I.)

20. Claimant, in his closing brief, argued that without full reimbursement, the

⁴ The issue of in-home behavioral programming was dismissed by the parties because it was resolved prior to hearing.

cost of transportation for Claimant's family amounts to a constructive parental copay, citing the case of *Clemente v. Amundson*, 60 Cal.App. 4th 1095; that HRC may request a Health and Safety Waiver to increase the payment to Claimant's family for transportation, citing OAH case number 2016010851 as an instance when a higher rate of transportation was authorized by an ALJ when DDS had rejected such rate in favor of a lower rate; and that California Code of Regulations (CCR), title 17, section 58540, subdivision (b), authorizes HRC to negotiate with a family for a rate other than that set by DDS.

21. Claimant's also requested, for the first time, in his closing brief that the transportation reimbursement be retroactively applied to October 1 "and into the future until such time that [Claimant] is able to be transported in a van with his fellow clients." (Exh. C.)

22. Claimant's arguments are unconvincing and not ripe for resolution. First, the argument that the cost of transportation for Claimant's family amounts to a constructive parental copay is unsupported by relevant evidence. The case of *Clemente v. Amundson* is factually inapplicable to this matter because it concerns respite services and makes no mention of reimbursement for transportation expenses.

23. Second, OAH case number 2016010851 involved different issues and facts than this matter. The basis for the Regional Center's request for waiver was that the only transportation vendor available who could ensure the health and safety of the claimant in that case charged a higher rate than authorized by DDS, not financial reimbursement beyond an established DDS rate for Claimant's parents.

24. In this matter, Claimant made a request to increase transportation reimbursement expenses to Claimant's family and have the increase apply retroactively without presenting the request to HRC as a health and safety issue. The first time such an argument was asserted was in Claimant's closing brief. Accordingly, the issues of whether a health and safety waiver is justified in this matter and should be requested by HRC of DDS and the issue of retroactive application of the reimbursement expense are

outside the scope of Claimant's FHR and not ripe for resolution in this decision.

25. Third, Claimant's reliance on CCR, title 17, section 58540, subdivision (b), is incorrect since that section does not apply to Parent-Vendored Transportation under Service Code 470.⁵

26. HRC's closing brief briefly and vaguely referred to the Self-Directed Services Program (SDS Program)⁶ as an avenue for Claimant's family to receive additional transportation reimbursement. However, the SDS Program is contingent upon approval of a federal waiver and no evidence has been presented that the parties had addressed the program through the IPP process.

LEGAL CONCLUSIONS

1. Cause does not exist to grant Claimant's request for HRC to increase the current rate paid to Claimant's parents for transportation by \$5.30 to \$10.80 per day from the current reimbursement of \$5.50 per day for taking Claimant to/from his day program. (Factual Findings 1 through 26.)

2. The standard of proof in this case is preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) The standard of proof in this case requires proof to a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute (including the Lanterman Act) requires otherwise. "Preponderance of the evidence" means evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it. (BAJI No. 2.6 (8th ed. 1994).)

3. When a party seeks government benefits or services, he bears the burden of proof. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161

⁵ CCR, title 17, section 58540, refers to Service Codes 875, 880, and 883.

⁶ See Welfare and Institutions Code sections 4685.7 through 4685. All future references are to the Welfare and Institutions Code unless otherwise noted.

[disability benefits].) Specifically, in a case where a party is seeking funding not previously provided or approved by a regional center, that party bears the burden of proof. In this case, Claimant made a new request for HRC to increase transportation reimbursement to Claimant's parents by \$5.30 per day from the current \$5.50 per day to \$10.80 per day. Therefore, Claimant bears the burden of proof. He has failed to meet this burden. (Factual Findings 1 through 26.)

4. Section 4690 states:

"The Director of Developmental Services shall establish, maintain, and revise, as necessary, an equitable process for setting rates of state payment for non-residential services purchased by regional centers, and may promulgate regulations establishing program standards, or the process to be used for setting these rates, or both, in order to assure that regional centers may secure high-quality services for developmentally disabled persons from individuals or agencies vendored to provide these services. In developing the rates pursuant to regulation, the director may require vendors to submit program, cost, or other information, as necessary. The director shall take into account the rates paid by other agencies and jurisdictions for comparable services in order to assure that regional center rates are at competitive levels. In no event shall rates established pursuant to this article be any less than those established for comparable services under the Medi-Cal Program."

5. The Lanterman Act acknowledges DDS's authority to establish and authorize rates. (Welf. & Inst. Code, § 4648.4, subd. (b).)

6. Here, HRC is reimbursing Claimant's parents for transporting Claimant to his day program based on the established DDS rate for Parent-Vendored Transportation. (Factual Findings 16 and 19.)

7. Claimant has provided no convincing legal basis to increase the rate of transportation reimbursement to Claimant's parents. (Factual Findings 1 through 26; Legal Conclusions 1 through 6.)

8. Further, while an increase in transportation reimbursement to Claimant's

parents was addressed in Claimant's communications with HRC, Claimant's attempt to seek retroactive reimbursement of the transportation expenses to October 1 and argument the request was related to Claimant's health and safety were not previously addressed in Claimant's FHR or the parties' communications related to Claimant's FHR. (Factual Finding 24.) The Lanterman Act requires HRC be provided with the "reason for the request." (Welf. & Inst. Code, § 4702.6.) Claimant's closing briefs assert arguments that are outside the scope of his FHR and preclude HRC's ability to effectively address Claimant's additional transportation related reimbursement concerns. Accordingly, the issues are not ripe for resolution in this decision and should properly be further addressed by the parties through the IPP process. (Welf. & Inst. Code, § 4646.)

ORDER

Claimant's request is denied.

DATED: January 27, 2017

IRINA TENTSER

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.