

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

HARBOR REGIONAL CENTER,

Service Agency.

OAH Case No. 2016090423

DECISION

David B. Rosenman, Administrative Law Judge (ALJ), Office of Administrative Hearings, heard this matter on November 1, 2016, in Torrance, California.

Claimant,¹ who was not present, was represented by his grandmother (grandmother), who is his legal guardian and caretaker. Gigi Thompson, Fair Hearing Coordinator, represented the Harbor Regional Center (HRC or Service Agency).

Evidence was presented, argument was heard, the record was closed and the matter was submitted for decision on November 1, 2016.

ISSUES AND EVIDENCE RELIED UPON

Issue 1: Is Claimant entitled to childcare services and 1:1 assistance for the summers of 2014, 2015 and 2016?

Issue 2: May Claimant transfer from Harbor Regional Center to Westside Regional

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

Center?

Issue 3: May Claimant change his respite provider from Cambrian to another vendor?

Evidence: Service Agency's exhibits 1-6; testimony from Antoinette Perez; testimony from grandmother.

FACTUAL FINDINGS

1. Claimant is a seven-year-old HRC consumer based on his diagnosis of autism spectrum disorder. He also has encephalopathy. He lives with grandmother, who is his caretaker and attends to his daily living, educational, and health needs. He also lives with his grandfather and uncle, who are grandmother's husband and son. 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 receives various services from HRC, listed in his Individual Program Plan (IPP), referred to by HRC as an Individual Family Service Plan, exhibit 4. The IPP followed a meeting on April 28, 2016. The last page is an addendum dated October 6, 2016. Relevant services include respite and personal assistance, in the form of a 1:1 childcare aide. Personal assistance was approved for Claimant's home, from July 21 to 31, 2016, in the amount of 70 hours. Personal assistance was approved for Claimant at a summer camp program from August 1 to 31, 2016, in the amount of 216.5 hours.

3. Grandmother's contentions are largely focused on difficulties she has experienced in arranging for proper supervision of Claimant during summers. Generally, she testified that in summers past she requested childcare services, was told to meet certain requirements and, when she had done so, was told there were other or different requirements. As noted more specifically below, for the summer of 2016, she was able to identify particular issues and delays in the process.

4. Although Issue 1 above refers to childcare services and 1:1 assistance separately, the evidence established that, for the summer of 2016, Claimant was seeking a 1:1 assistant for his home care when he was not in camp and his grandmother was at work, and later to accompany him to a summer camp program.

5. For the summers of 2014 and 2015, grandmother did not produce evidence of when she made her requests for childcare services, what requirements she was told to meet, what she did to meet those requirements, and what if any additional requirements were imposed. There was no evidence that grandmother made a specific request for services, that HRC determined not to provide the services, and that HRC issued a written denial. Grandmother explained that she does not like to complain but is also insistent that appropriate services be provided without unnecessary delay or administrative requirements.

6. Grandmother also stated that her husband needs knee surgery, which would be best for her to schedule in the summer. However, the surgery could not be scheduled until grandmother had a commitment from HRC for 1:1 childcare for Claimant for a period including the surgery and some recovery time, when grandmother's attention would be primarily on her husband. However, grandmother stated that HRC would not consider that request until there was a definitive time for the scheduled surgery and recovery. Thus there is an element of Catch-22 here – no childcare until surgery is scheduled, no surgery until childcare is approved. Grandmother would like to work this out so that childcare and surgery can be arranged for the summer of 2017.

7. Grandmother asked Claimant's service coordinator, Jocelyn Rincon, in February 2016 to start the process of requesting 1:1 assistance for the summer of 2016. Grandmother testified generally to contrary communications from Rincon, related to whether the family had to pay for the camp fees and/or for the difference in the cost of childcare for a normally developing child and the cost of childcare for Claimant. As noted in more detail below, a family of a child who is a consumer of a regional center may be

required to provide a co-pay equivalent to the cost of childcare for a normally developing child.

8. Antoinette Perez has worked for HRC in various capacities for 11 years. Approximately one year ago she became the Deputy Director of Children's Services, in which capacity she oversees service coordinators and their managers regarding services to children. She learned of Claimant and some issues relating to services when grandmother submitted a complaint to HRC in January 2016 under Welfare and Institutions Code section 4731 (4731 complaint). Perez assisted in the preparation of HRC's response to the 4731 complaint. The 4731 complaint in January 2016 was not submitted in evidence.

9. Certain interactions and information gathered relating to HRC consumers and their services are documented in Consumer Transaction notes, also referred to as ID notes. ID notes in evidence (exhibit 5) are from July 6 through October 3, 2016. Perez testified about some of the events depicted in these ID notes.

10. Due to Claimant experiencing a seizure during respite care, a note for July 6, 2016 (all of the notes were dated in 2016) indicates consideration of the need for a licensed vocational nurse (LVN) for respite. The note also includes a plan to confer with grandmother to "further evaluate [the] family situation and offer childcare as needed." (Ex. 5, p. 1.) On July 8, Rincon spoke with grandmother, including about her schedule and the end of Claimant's summer school on July 20 or 21, and HRC's offer of a 1:1 assistant for the home or a local summer program. Rincon told grandmother the family was responsible for the cost of a summer program, and for the share of cost (co-pay) of \$6.37 per hour for any 1:1 assistant. Also discussed was a decision letter from HRC terminating behavioral services, which resulted in a separate fair hearing procedure. Grandmother informed Rincon that she would be sending a DDS rights complaint letter. The evidence established that grandmother did send a 4731 complaint in July 2016, which was not submitted in evidence. (*Ibid.* at p. 2.)

11. A note indicated that the IPP was emailed to grandmother on July 11. Grandmother testified she never received the IPP until it was sent to her a few days before the hearing in the packet of evidence to be used by HRC at the fair hearing.

12. On July 14 the YMCA summer camp was identified as a possible program for Claimant to attend in August 2016. If so, grandmother agreed that she would pay the camp fees and the co-pay for the 1:1 assistant, for service at home for the end of July and later at the camp. Rincon also contacted Cambrian to see if it could provide the 1:1 assistant. Cambrian responded on July 15 that it could provide staff. Rincon also discussed with Cambrian that regular respite could be used for care for the end of July. The evidence established that this reference to use of respite care was problematic, as Cambrian followed the instruction and therefore exhausted available respite before the end of July. (*Ibid.* at pp. 5-8.)

13. On July 18 Rincon submitted requests for 1:1 assistance at the family home between July 21 and July 29, and at camp from August 1 to 31. Cambrian indicated it might not have staff for July 21. There were continuing notes relating to the co-pay by the family. There are also notes relating to whether the correct service codes were being used at HRC for its internal processing of services. On July 20 Cambrian reported it could not staff for July 21, at Claimant's home, and that the YMCA required the 1:1 assistant to undergo a background check. (*Ibid.* at pp. 9-13.) Grandmother testified at hearing that she had contacted a possible 1:1 assistant who worked at Cambrian and had received Livescan clearance,² but grandmother did not know what happened after she suggested this person to HRC.

14. ID notes on July 22 and 25 depict some confusion over co-pay responsibility. Rincon purports to clear up grandmother's confusion by providing information that the family must make the co-pay for the 1:1 assistant services both at

² Livescan is a background clearance service utilized by many state agencies.

the home and at the camp. Grandmother stated she could not afford this. (*Ibid.* at pp. 14-16.) At the hearing, Perez testified that Rincon was incorrect. According to Perez, the family was responsible to pay the YMCA camp fee; HRC would pay the full cost of the 1:1 assistant while Claimant was at camp; and the family would pay a co-pay for 1:1 assistant services at home in July. The logic is that when the family pays the camp fee, that is the cost of care for a child with normal development, and the 1:1 assistant is necessary due to the developmental disability. When Claimant is cared for at home, the family would be responsible for the co-pay, as any child requires supervision when not in school.

15. HRC did not internally resolve the confusion, including service codes and co-pay, until Thursday July 28, when it notified grandmother. (*Ibid.* at pp 17-19.) ID notes also show that respite care was increased to the LVN level. A note from Wednesday, August 3 includes that voicemails were exchanged between grandmother and Rincon, then grandmother emailed that she had left three messages Friday July 29 with no reply. Apparently Claimant was not yet signed up for camp. There was confusion over getting the application submitted. On August 5 HRC made an attempt to set up an informal meeting. An ID note on Tuesday August 9 indicates Cambrian did not have the address of the YMCA camp and the 1:1 assistant had not yet been fingerprint cleared. (*Ibid.* at pp 21-24.)

16. An ID note dated August 12 included that Claimant would attend another summer program for the last two weeks of August and a 1:1 assistant was needed and funding was approved. Apparently there was phone contact between grandmother and Rincon's supervisor, Tonantzin Martinez, who wrote the note. Grandmother informed Martinez that HRC had not provided childcare for the last three years (apparently a reference to the summers of 2014, 2015 and 2016) and that confusing information had been given. (*Ibid.* at p 26.) A later ID note indicated that there was additional confusion over the amount of 1:1 assistant and respite care available in August, as an authorization approved 50 hours per month, not per week, and that HRC was mistaken in the manner

the services were documented. The mistakes were corrected. (*Ibid.* at pp 29-30.) Apparently there was further confusion: grandmother believed she could get additional 1:1 assistance for September because not all authorized hours were used in August. Additional hours were not available. Grandmother filed a 4731 complaint in September about childcare. (*Ibid.* at pp. 32-33.)

17. Grandmother testified to two problems with 1:1 assistants and camp. One assistant was late when she was pulled over and issued a traffic ticket. Another assistant learned that the camp program was going to the beach that day and stated he would not go.

18. Perez stated that in response to one of grandmother's 4731 complaints, HRC agreed to fund childcare for the school year 2016-17, extended school year, and respite services from August 2016 through February 2017. (See IPP amendment, exhibit 4, page 10. The reference to respite through "2/28/16" is an error and should be 2/28/17. See the correct information on page 7 of the IPP.)

19. Perez was not aware of ID notes or service requests, if any, related to the summers of 2014 and 2015 and was not aware of any HRC decision to deny a service request by the family related to the summers of 2014 and 2015. She had not yet become the Deputy Director of Children's Services at those times, and only reviewed the notes related to more recent services when she became aware of the family's 4731 complaint in January 2016. Based on her experience, the number of problems and issues experienced by Claimant and grandmother related to the 1:1 assistant and respite during the summer of 2016 was unusual. This in part resulted in HRC's agreement in resolution of a 4731 complaint to fund childcare through the school year 2016-17.

20. Perez left messages for grandmother, that were not returned, in an effort to resolve the 4731 complaint from January 2016. Perez worked on the HRC response to a 4731 complaint in which HRC agreed to help grandmother find another respite provider. Grandmother stated she had not received this response, and arrangements

were made at the hearing for that response to be provided to grandmother after the hearing finished.

21. Grandmother did not get information about the amount of 1:1 assistant services approved for home childcare and childcare at the summer program in 2016, either from Rincon or any document sent to her. She did not receive the IPP amendment that reported these services, or see authorizations for them, until she received the hearing exhibits a few days before the hearing.

22. Due to misinformation about availability of childcare services, grandmother took off from work during the summer more than she expected. In one instance she paid another person \$75 for childcare services during the last week of August 2016, for five days of care from 9 a.m. to 5 p.m.

23. Grandmother would like to transfer responsibility for Claimant's services to the Westside Regional Center. Grandmother has not contacted the Westside Regional Center or gathered information about the requirements for transfer.

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. (See Factual Findings 1-3.)

THE STANDARD AND BURDEN OF PROOF

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

4. 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.

5. Under Welfare and Institutions Code sections 4646.5 and 4647, planning for an IPP can include gathering information from the consumer and family, creating goals and scheduling services. A service coordinator should consider all options to meet

IPP objectives and should monitor implementation of the IPP. Under Welfare and Institutions Code section 4648, subdivision (a), to achieve the objectives of an IPP, the regional center shall secure needed services and supports.

6. The aforementioned sections of the Welfare and Institutions Code, and others, stress the importance of the IPP process, including the contributions made by family members and Service Agency staff, the collaborative process to make decisions relating to services, and the communication necessary to make it all work. The evidentiary record in this matter indicates breakdowns in these processes. There was no evidence of any intent by HRC or grandmother to impede or delay the process. However, mistakes were made with the result that Claimant did not receive services at times. There are no available remedies for these mistakes in the fair hearing setting.

7. The share of costs, or co-pay, for childcare is found in two sections of the Welfare and Institutions Code. Section 4685 contains cost-sharing requirements concerning day care. Subdivision (c)(6) provides that a regional center may pay only the cost of day care services that exceed the cost of providing day care services to a child without disabilities. Section 4646.4 was added in 2008 and covers, among other things, a family's responsibility to provide services for a minor child and requires a regional center to have "an internal process" to ensure "[c]onsideration of the family's responsibility for providing similar services and supports for a minor child without disabilities" Section 4646.4 provides, also, "In this determination, regional centers shall take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care." As applied to Claimant, the cost of a regular summer camp program is something that every parent of a minor child would pay. However, Claimant's extraordinary needs justify the Service Agency's responsibility to fund for a 1:1 assistant while Claimant attends camp.

8. Claimant did not meet his burden of establishing by a preponderance of the evidence that cause exists to order HRC to take any action with respect to services

for the summers of 2014 and 2015. There was insufficient evidence of the type and time periods of any services requested and any subsequent communications or actions by Grandmother or HRC on which to base any order as a result of this hearing.

9. Claimant did not meet his burden of establishing by a preponderance of the evidence that cause exists to order HRC to take any action with respect to services for the summer of 2016. Grandmother was certainly inconvenienced by the lack of proper information and lack of communication at certain times. The outcome is that grandmother was required to take extra time off from work and pay for one week of care. The Lanterman Act does not specifically authorize retroactive reimbursement of service 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 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 at the Service Agency's expense. With respect to her time off, there is no manner to compensate her. With respect to the \$75 paid for one week of childcare, California Code of Regulations, title 17, section 50612, dictates that a purchase of service authorization shall be obtained by the regional center for all services purchased from its funds. "The authorization shall be in advance of the provision of services," with few exceptions. Specific reference is made to allow for a retroactive reimbursement "for emergency services if services are rendered by a vendored service provider." However, the service provider or parent must notify the regional center "within five working days following the provision of service." There was no evidence in this matter that grandmother paid a vendor for childcare or that HRC was notified of this within five days. The requirements for any retroactive reimbursement to grandmother have not been met.

10. The ALJ cannot order the transfer of responsibility for Claimant's services to the Westside Regional Center under the facts of this case. First, the Westside Regional

Center was not made a party to these proceedings and there is no jurisdiction over it. Further, its position cannot be ascertained and grandmother could not demonstrate that the Westside Regional Center was aware of the transfer request or that Claimant meets any possible requirements for a transfer.

11. Claimant did not meet his burden of establishing by a preponderance of the evidence that cause exists to order HRC to take any further action with respect to a transfer of respite services from Cambrian to another provider. HRC has already agreed to do so, and notified grandmother in a response to a 4731 complaint. Grandmother had not received the response, and HRC agreed to provide it after the hearing finished.

12. It is clear that there was a breakdown in communication and unfortunately some incorrect information was given. The parties would benefit from engaging further in the IPP process. However, there is no jurisdiction to order such a process, as all of the issues have been determined.

ORDER

Claimant's appeal is denied.

Dated: November 8, 2016

DAVID B. ROSENMAN
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.