

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2017080901

DECISION

Cindy F. Forman, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on December 5, 2017, in Long Beach, California.<sup>1</sup>

Latrina Fannin, Manager of Rights and Quality Assurance, represented Harbor Regional Center (HRC or Service Agency).

Claimant's mother (Mother) represented claimant. Claimant was not present during the hearing.<sup>2</sup> Mother had the assistance of a Spanish language interpreter and was also assisted by claimant's sister (Sister).

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<sup>1</sup> Because of the similarity of issues and circumstances, this matter was consolidated for hearing purposes with OAH case number 2017051266 involving the claimant's initial request for services, which was first heard on July 10, 2017, and then continued until December 5, 2017 for a second and final day of hearing.

<sup>2</sup> Names are not used in order to protect the privacy of claimant and his family.

Oral and documentary evidence was received at the hearing, and the matter was submitted for decision on December 5, 2017.

## ISSUES

The parties agreed that the issues to be decided are as follows:

- (1) Should HRC be required to fund an assessment for physical therapy (PT) for claimant and also provide PT for claimant?
- (2) Should HRC be required to fund aquatic therapy or swimming lessons for claimant?
- (3) Should HRC be required to pay \$1,800 to allow Mother to complete advocacy training through the Council of Parent Attorneys and Advocates (COPAA)?
- (4) Should HRC be required to pay for an attorney to represent claimant during the fair hearing appeal process?

## FACTUAL FINDINGS

1. Claimant is a 17-year-old male who qualifies for regional center services based on his diagnoses of moderate intellectual disability and autism spectrum disorder.<sup>3</sup>
2. By Notice of Proposed Action and letter dated July 26, 2017 (NOPA), HRC informed claimant it was denying his request for a PT evaluation, aquatic therapy/swimming lessons, funding to complete advocacy training, and funding of an

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<sup>3</sup> Mother asserted during the hearing that claimant also qualified for regional services based on a diagnosis of cerebral palsy. However, no documentation was submitted that reflects that claimant has been diagnosed with cerebral palsy. The doctor's notes submitted by Mother (Exhibit O) states that claimant has "no past medical history of . . . Cerebral palsy."

attorney to represent claimant in the fair hearing appeal process. On August 22, 2017, claimant timely filed a request for a fair hearing appealing HRC's decision.<sup>4</sup> This hearing ensued.

### CLAIMANT'S BACKGROUND

3. Claimant lives at home with Mother. Claimant's parents are divorced. Mother suffers from several serious health problems. Sister, who is several years older than claimant, lives with claimant's father but is very close with claimant. Claimant visits with his father once a week.

4. In addition to his qualifying diagnoses, claimant has been diagnosed with Dandy Walker Syndrome, (a congenital brain malformation with fluid filled spaces around the cerebellum), microcephaly, auditory impairment, with profound hearing loss in one ear, and vision impairment. He is non-verbal and wears leg braces. He uses a wheelchair when he becomes fatigued from walking long periods of time. He has difficulty eating and is on a soft-food diet. Claimant requires constant monitoring and maximum assistance with all daily tasks and self-care needs, including toileting.

5. In the past, claimant has had daily tantrums, which at times have lasted more than an hour. He also has had other maladaptive behaviors, such as aggression towards himself and others, throwing things and loud vocalizations. Claimant's aggression has put his safety and the safety of others at risk and also has severely limited his ability to participate in community settings.

6. As a result of his maladaptive behaviors, Tichenor Clinic for Children (Clinic), a non-profit organization providing rehabilitative and enrichment services to

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<sup>4</sup> Neither the NOPA nor claimant's fair hearing request was admitted into evidence at the hearing. For the purposes of establishing jurisdiction, both documents are admitted on the ALJ's own motion as Exhibits 9 and 10, respectively.

children in Long Beach, California, was forced to discontinue providing speech-language therapy, occupational therapy for feeding, and swimming lessons to claimant in May of 2017. Claimant had been receiving services from the Clinic since he was a toddler. The Clinic reported that it would be happy to resume the therapy and swimming lessons once claimant's behavior control improves.

7. The Medical Therapy Unit of California Children's Services (CCS) also has declined to continue providing PT to claimant because of his maladaptive behaviors.

8. In early July 2017, claimant began receiving Intensive Behavioral Intervention (IBI) therapy through the Center for Autism and Related Disorders (CARD) in order to control his maladaptive behaviors. Mother and Sister both reported that claimant's behaviors have started to improve as a result of CARD's services.

9. Claimant is in the 11th grade. Although HRC documents indicate that claimant attends the Beacon Day School through the Long Beach Unified School District (School District), Mother testified that he has now transferred to a new school. Details of the transfer were not made known at the hearing.

10. Mother is claimant's In Home Supportive Services provider; Sister provides personal assistant and respite services. Claimant also receives Medi-Cal and is eligible for CCS assistance.

11. In the past, Mother has supplied HRC with limited medical records from claimant's service providers and has refused to share recent School District, CCS and other medical and educational records. Mother has also refused to authorize HRC to speak with claimant's service providers, including the School District, CCS, and the Clinic. As a result of its inability to obtain claimant's records, HRC has had difficulty assessing claimant's needs.

12. Less than five days before the hearing, Mother supplied additional records to HRC that she claimed contained medical records sufficient to support her request for

a PT assessment and other services.<sup>5</sup> HRC did not have adequate time to review the records in depth, and stated that it would require several weeks to determine whether a new PT assessment would be needed based on the documents provided or whether HRC required additional records from claimant's service providers.

13. At the hearing, Mother agreed to provide any additional medical records sought by HRC and to authorize HRC staff to speak with claimant's service providers provided she was present during the conversation.

#### REQUEST FOR PT

14. Mother requested a PT assessment to allow claimant to resume receiving PT. In her Fair Hearing Request, she noted that HRC was required to fund claimant's PT because CCS has refused to do so. According to Mother, PT is essential to assist claimant with his daily living skills and to help him participate in the community. She testified that claimant does not receive any PT at school. There was no evidence indicating whether claimant is currently receiving PT services.

15. CCS has historically provided PT to claimant but has declined to do so because of claimant's behavior. It was not made known at the hearing whether claimant's behaviors have improved sufficiently to enable him to resume participation in PT or whether another service provider is available to provide PT services for claimant.

16. HRC recently provided funding for a PT assessment that was completed on May 17, 2017 (May 2017 assessment). HRC contends that the May 2017 assessment is

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<sup>5</sup> At the hearing, HRC objected, pursuant to Welfare and Institutions Code section 4712, subdivision (d), to the admission of any document it received from claimant less than 5 days prior to the date of the hearing. (All further statutory references are to the Welfare and Institutions Code unless otherwise stated.) After having the opportunity to review the documents at the hearing, HRC withdrew its objection.

sufficient, and there is no need for an additional evaluation. HRC indicated, however, it was willing to review whether claimant had any unmet PT needs but to do so needed school and CCS records as well as authorizations from claimant's service providers, all of which Mother had been unwilling to provide.

17. The May 2017 assessment (Exhibit 2) was performed by Northstar Physical and Occupational Consulting Services, P.C., Inc. at HRC's request. Although the assessment was entitled, "Harbor Regional Center Physical Therapy Assessment and Request for Durable Medical Equipment," the May 2017 assessment did not address claimant's PT needs, and made no conclusion as to whether PT would assist claimant in achieving any specific desired outcome as set forth in claimant's Individual Program Plan (IPP). The May 2017 assessment focused exclusively on the adequacy of claimant's physical activities and the modifications that needed to be made to Mother's van to accommodate claimant's wheelchair. The May 2017 assessment did not reflect any physical examination of claimant or any discussion of his PT requirements. Nor did the assessment mention past PT services provided by CCS. No other PT assessment was offered into evidence.

18. Claimant has not provided to HRC claimant's most recent Individual Education Plan (IEP) from the School District, any other School District PT assessments or any information from CCS regarding claimant's PT needs. As set forth in Factual Finding 12, it is unclear whether the documents recently provided by Mother contain the requisite medical records regarding claimant's PT needs. Claimant has also failed to provide HRC with any authorizations allowing HRC to speak with claimant's service providers about claimant's PT needs and the scope of services, if any, provided. In addition, no evidence was provided regarding whether claimant is ready to resume receiving services. It is therefore not known as of the date of this Decision whether the School District, CCS or any other service provider has conducted a recent assessment of

claimant's PT needs or whether claimant's maladaptive behaviors have diminished sufficiently to allow him to restart PT with CCS or another entity.

19. At the hearing, Mother introduced a "Referral Request" for a PT evaluation from Dr. F. Armosilla, claimant's pediatrician, dated June 17, 2017, in support of her request. (Exhibit J.) Mother did not provide any evidence as to the basis for the Referral Request. The Referral Request by itself is an insufficient basis to warrant a PT assessment.

#### AQUATIC THERAPY/SWIMMING LESSONS

20. Mother requested either aquatic therapy or swimming lessons for claimant to ensure claimant's water safety. Claimant's father's residence has a pool, and when claimant visits, Sister and claimant often swim at the pool. The Clinic previously provided swimming lessons to claimant but has discontinued them. Mother submitted a note from claimant's pediatrician acknowledging that she was requesting that claimant learn to swim for life-saving purposes. (Exhibit V.)

21. Sister is a water safety instructor and has volunteered at the Clinic teaching swimming. She testified as to the importance of swim lessons for claimant's safety.

22. Dr. Ahoo Sahba, a pediatrician employed by HRC, testified that swimming lessons were not medically indicated for claimant according to claimant's 2015 medical records, the most recent medical records Mother had provided. According to Dr. Sahba, claimant can never be left alone; therefore, Dr. Sahba concluded there was little danger of him being in the water unaccompanied.

23. Dr. Sahba also testified that participating in swimming lessons was different from obtaining aquatic therapy; aquatic therapy was a component of PT and the suitability of aquatic therapy was determined by the physical therapist. Dr. Sahba further testified that there was no recommendation of aquatic therapy in claimant's

medical records, and Mother had not granted consent for Dr. Sahba to discuss with the Clinic claimant's water activities.

24. Maria Fitzsimons, claimant's Client Services Manager, confirmed Dr. Sahba's testimony. She testified that swimming lessons are considered a social recreation service and there was no recommendation for either swimming lessons or aquatic therapy in claimant's records.

25. Claimant did not establish any medical need for the funding of swimming lessons or that he required swim lessons to ameliorate the physical effects of his developmental disabilities.

#### FUNDING FOR CLIENT ADVOCACY

26. Mother requested funding of \$1,800 from HRC to allow her to complete the remainder of her training through COPAA to be a better advocate for claimant. She has already completed several training modules through COPAA and has taken a number of courses elsewhere. She believes this training is necessary in order for her to obtain the services that claimant requires both at school and elsewhere.

27. HRC denied Mother's request. At the hearing, Ms. Fitzsimons testified that HRC is willing and able to advocate on claimant's behalf with outside entities and that if specialized knowledge is needed, HRC can connect Mother with HRC's specialists. Ms. Fitzsimons pointed to HRC's policy to provide family support and training to allow families to become effective advocates for their children. (Exhibit 5.) HRC also indicated that it has a Family Resource Center that can assist Mother with advocacy and Mother can use organizations such as Disability Rights Advocacy to assist her.

28. Mother did not point to any specific incident where she believed HRC had been an ineffective advocate in seeking services for claimant or had impeded her access to training, legal resources or HRC specialists. Nor did she point to any specific instance



where she believed additional client advocacy training would have made a difference in the services provided to claimant.

#### FUNDING FOR AN ATTORNEY DURING FAIR HEARING APPEAL

29. Mother requested that HRC fund an attorney to represent her in the fair hearing process. She testified that she is ill-equipped to represent claimant and did not know how to prepare for fair hearing. She further testified that the legal advocacy organizations recommended by HRC were not available to represent her.

30. HRC asserted that it does not provide funding for claimant representation at fair hearings unless ordered to do so. Instead, according to Ms. Fitzsimons, HRC's practice is to direct parents to OAH and HRC publications and publications prepared by other agencies regarding self-representation, refer parents to disability legal rights organizations and provide training to parents. Ms. Fitzsimons further testified that she provided direct assistance to claimant with respect to the fair hearing process of this matter. She reviewed the NOPA with claimant and the applicable dates of appeal and hearing and also explained to claimant how to prepare for a fair hearing.

31. Ms. Antoinette Perez, HRC's Director of Children's Services, testified that HRC lacks any statutory authority to fund an attorney for claimant in the fair hearing appeal process. She also testified that nonprofit disability advocacy organizations are not required to take on every case and that each case is evaluated on the basis of merit.

#### LEGAL CONCLUSIONS

1. Disputes about the rights of disabled persons to receive services and supports under the Lanterman Developmental Disabilities Act (§ 4500 et seq.) (Lanterman Act or Act) are decided under the fair hearing and appeal procedures in the Act. (§ 4706, subd. (a).) Under the Lanterman Act, regional centers are charged with providing developmentally disabled persons with "access to the facilities and services

best suited to them throughout their lifetime” and with determining “the manner in which those services are to be rendered.” (§ 4620.)

2. The Lanterman Act defines the kinds of services and supports to be provided by the regional center. According to the Act, “‘Services and supports for persons with developmental disabilities’ means 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 the achievement and maintenance of independent, productive, and normal lives.” (§ 4512, subd. (b).) The determination of claimant’s services and supports is to “be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer’s family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option.” (*Ibid.*)

3. Claimant has the burden of proving HRC should fund the disputed services (see *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161), and must do so by a preponderance of the evidence. (Evid. Code, § 115 [preponderance of evidence standard applies unless another law or statute provides otherwise].) A preponderance of the evidence means “‘evidence that has more convincing force than that opposed to it.’ [Citation.]” (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

#### PT ASSESSMENT

4. Claimant has not met his burden of proving that HRC should fund a PT assessment at this time. The IPP process requires HRC to conduct assessments to determine the “life goals, capabilities and strengths, preferences, barriers, and concerns

or problems of the person with developmental disabilities.” (§ 4646.5, subd. (a)(1).) Assessments must be conducted by qualified individuals and performed in natural environments whenever possible. Information must be obtained from the consumer, the consumer’s parents and other family members, friends, advocates, any providers of services and supports, and any other interested agencies. (*Ibid.*)

5. A regional center, such as HRC, cannot discharge its duty pursuant to section 4646.5, if it does not have the right to obtain information, and the power to obtain that information. At the same time, a person who seeks benefits from a regional center must bear the burden of providing information, submitting to reasonable exams and assessments, and cooperating in the planning process. (See Civ. Code § 3521 [“He who takes the benefit must bear the burden.”].) Of course, parents can refuse to do anything that they feel works to the detriment of their children. However, if the exercise of that right interferes with the implementation of the Lanterman Act, then a regional center may have no choice but to refuse to render services, as the failure of cooperation may negate the authority to compel the regional center to fund services and supports.

6. Further, a consumer’s request for services essentially waives objection to the regional center and its staff and consultants having access to otherwise private information when such access/information is needed to assess the need for services and/or the effectiveness of those services. That does not mean, however, the information can otherwise be disseminated for any other purpose. Thus, a consumer must cooperate with reasonable requests for assessments and evaluations, to assist the regional center in discharging its responsibility. Concomitantly, the regional center must be responsible in its use of the information.

7. As set forth in Factual Finding 17, the May 2017 assessment does not include an assessment of claimant’s PT needs. However, to determine whether claimant requires another PT assessment, HRC has to consult with and review reports by

claimant's other service providers, including claimant's physicians, CCS and the School District.

8. While the referral of claimant's pediatrician and claimant's prior receipt of PT point to the need for PT, Mother has precluded HRC from obtaining information to determine claimant's continuing need for this service. As of the date of the hearing, it was unclear whether Mother had provided all of the information necessary to determine the following: (i) whether an additional PT assessment is needed; (ii) whether claimant has any unmet PT needs; and, (iii) whether claimant's behaviors have improved sufficiently to allow him to resume PT with CCS or any other service provider. HRC cannot make any of these determinations until Mother provides the requested information and authorizes HRC staff to discuss claimant's needs and services with the School District, the Clinic, CCS, claimant's doctors and CARD. (Factual Finding 18.)

9. Claimant's request for a PT evaluation therefore is denied at this time. Once claimant provides the requested information and authorizations, the parties can meet to discuss whether a new PT assessment is required, claimant's readiness to resume PT, what PT needs are unmet, if any, and the appropriate resource to provide any needed PT. It is premature to determine whether HRC is required to fund PT for claimant without first determining claimant's level of need and readiness for PT.

#### SWIMMING LESSONS/AQUATIC THERAPY

10. Claimant has not met his burden of proving that HRC is required to fund aquatic therapy or swimming lessons. With respect to aquatic therapy, claimant has not demonstrated that aquatic therapy is part of his PT regimen or is medically indicated. With respect to swimming lessons, claimant has not demonstrated that swimming lessons are especially needed by claimant because of his developmental disabilities or the lessons are required to alleviate the effects of his disabilities.

11. In determining whether to fund swimming lessons for claimant, HRC must consider "the family's responsibility for providing similar services and supports for a minor child without disabilities." In making this determination, HRC must "take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care." (§ 4646.4, subd. (a)(4).)

12. The sole basis for Mother's request for funding for swimming lessons is to ensure claimant's safety around water, a common goal of families with a minor child without disabilities. (Factual Finding 20.) Swimming lessons are not required medical therapy for claimant's developmental disabilities or specifically related to claimant's disabilities. Because claimant is monitored constantly and thus is unlikely to be in the water unaccompanied, his disabilities do not create an extraordinary need to warrant regional center funding. (Factual Finding 22.)

13. In addition, since July 1, 2009, HRC has been prohibited from purchasing four categories of services: "(1) Camping services and associated travel expenses. (2) Social recreation activities, except for those activities vendored as community-based day programs. (3) Educational services for children three to 17, inclusive, years of age. (4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music." (§ 4648.5, subd. (c).) An exemption may be granted on an individual basis in "extraordinary circumstances . . . when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs." (*Ibid.*)

14. Pursuant to section 4648.5, swimming lessons are considered to be a social recreation activity that cannot be funded by HRC unless claimant can prove he qualifies for an exemption due to "extraordinary circumstances." (§ 4648.5, subd. (c).)

The testimony however presented at the hearing established that swimming lessons were necessary for water safety; no evidence was presented that the swimming lessons would be a critical addition to the behavioral and other services that claimant already receives, or a primary source of therapy for him. Nor was it demonstrated that swimming lessons were required to enable claimant to remain at home. (Factual Findings 20 through 25.)

15. Based on the totality of evidence, claimant is not entitled to funding from HRC for swimming lessons or aquatic therapy. (Factual Findings 20 through 25; Legal Conclusions 1 through 3, 10 through 14.)

#### ADVOCACY TRAINING

16. Claimant has not met his burden of proving that HRC is required to fund \$1,800 for advocacy training for Mother. Pursuant to section 4648, subdivision (b)(1), the regional center is charged with "[a]dvocacy for, and protection of, the civil, legal, and service rights of persons with developmental disabilities." (See also § 4902, subd. (a)(2).) When such advocacy proves "ineffective, the regional center or the person with developmental disabilities or his or her parents, legal guardian, or other representative may request the area board to initiate action under the provisions defining area board advocacy functions established in this division." (§ 4648, subd. (b)(2).)

17. Advocacy is not defined in the Lanterman Act. The regulations enacted pursuant to the Lanterman Act provide some insight. In a subchapter addressing client's rights, California Code of Regulations, title 17, section 50510, subdivision (a)<sup>6</sup> states, as an "access right," that every person with a developmental disability has "(10) A right to advocacy services, as provided by law, to protect and assert the civil, legal, and service

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<sup>6</sup> Further references to the California Code of Regulations are to title 17, and noted as "Regulation."

rights to which any person with a developmental disability is entitled.” Under Regulation 54505, regional center operations include various activities, including case management “and consumer advocacy and protection.”

18. Mother has not demonstrated that HRC has been ineffective in advocating for claimant or has impeded her access to advocacy resources. Nor has she demonstrated that the avenues for advocacy assistance suggested by HRC are insufficient or inadequate. (Factual Finding 28.)

19. Accordingly, Mother is not entitled to \$1,800 in funding to complete her advocacy training. (Factual Findings 26 through 28; Legal Conclusions 1 through 3, 16 through 18.)

#### FUNDING AN ATTORNEY FOR FAIR HEARING APPEAL PROCESS

20. Claimant has not met his burden of proving that HRC is required to pay for an attorney to represent him during the fair hearing appeal process. Nothing in the Lanterman Act requires the appointment of an attorney to represent claimant or the regional center at a fair hearing. HRC is only responsible for notifying claimant of “[i]nformation on availability of advocacy assistance, including referral to the developmental center or regional center clients’ rights advocate, the State Council on Developmental Disabilities, publicly funded legal services corporations, and other publicly or privately funded advocacy organizations, including the protection and advocacy system required under federal Public Law 95-602, the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C.A. Sec. 6000 et seq.).” (§ 4701, subd. (g).)

21. In addition, the fair hearing process contemplates that a claimant need not be represented by an attorney in the appeal procedure. For example, the State Council on Development Disabilities can appoint a person who is not a lawyer to represent a claimant who has not authorized a representative and whose rights and interests have

not been properly protected. (§ 4705, subd. (e).) In addition, fair hearings are conducted in a manner conducive to self-representation or non-legal representation, i.e., technical rules of evidence and those related to witnesses do not apply, all relevant evidence is admissible and no formal authentication of any document is required. (§ 4712, subd. (i).)

22. Accordingly, HRC is not required to fund an attorney for claimant during the fair hearing appeal process. (Factual Findings 29 through 31; Legal Conclusions 1 through 3, 20 and 21.)

## ORDER

1. Claimant's appeal of Harbor Regional Center's decision to not provide a PT assessment at this time is denied. After Service Agency's review of the information submitted by Mother, the parties may further discuss, in the context of the IPP process, claimant's need for an assessment or additional PT services.

2. Claimant's appeal of Harbor Regional Center's decision to not fund swimming lessons or aquatic therapy is denied.

3. Claimant's appeal of Harbor Regional Center's decision to not provide \$1800 to allow claimant's mother to complete advocacy training through the Council of Parent Attorneys and Advocates is denied.

4. Claimant's appeal of Harbor Regional Center's decision to not fund an attorney to represent claimant during the fair hearing process is denied.

DATE:

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CINDY F. FORMAN

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.