

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request
of:

Case No. 2017090511

CLAIMANT,

and

HARBOR REGIONAL CENTER,

Service Agency.

DECISION

Administrative Law Judge (ALJ) David B. Rosenman heard this matter on November 2, 2017, in Torrance, California. Cheri Weeks, Manager of Rights and Quality Assurance, represented Harbor Regional Center (HRC or Service Agency). Claimant was represented by her father. (Titles are used to protect confidentiality.)

Evidence was received and the matter argued. The record was closed and the matter was submitted for decision on November 2, 2017.

ISSUES

The parties agreed that the following issues are to be determined.

1. Whether Service Agency shall provide reimbursement for charges by a special education advocate hired by Claimant's father
2. Whether Service Agency shall provide a special education advocate for Claimant.

EVIDENCE RELIED UPON

Testimony by HRC witnesses Susan Laird and Pablo Ibanez; and Claimant's father. HRC exhibits 1-31; and Claimant's exhibits A-R.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTION

1. Claimant is a 12 year-old female who has a qualifying diagnosis of autism spectrum disorder.¹ She is in the sixth grade at a middle school in the Long Beach Unified School District (LBUSD), and receives special education services under the eligible categories of autism/autistic like behaviors, and speech and language impairment. She has also been diagnosed with other disorders, including anxiety and attention deficit/ hyperactivity disorder, combined type.

2. The present dispute relates to the circumstances surrounding Claimant's special education services, her retention of a special education advocate to obtain needed services, her request for reimbursement of the advocate's charges, and her request for HRC to retain a special education advocate for Claimant's benefit.

3. Due to delays in communication, Claimant received services from HRC prior to her third birthday, under the Early Start Program. HRC determined Claimant at age three did not have a disability that made her eligible for services under the Lanterman Act. When the family made a later request for services, HRC obtained a

¹ Eligibility criteria for services from regional centers are found in the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code section 4500 et seq. Unless otherwise noted, all further statutory references are to the Welfare and Institutions Code.

psychological evaluation and informed Claimant's parents, by letter dated January 28, 2009, of its determination that Claimant did not have an eligible condition.

4. Claimant received special education services, as evidenced by a reference to an initial entry date of November 28, 2007 (ex. 12) and a consent to placement and services signed by Claimant's mother in May 2012. (Ex. E.) Claimant's father contends that special education services under an Individualized Education Plan (IEP) ended in June 2012. Claimant attended a private school for a period, and then re-entered the LBUSD. IEP assessments were conducted in 2016, and an IEP was developed after a meeting on November 14, 2016.

5. A multidisciplinary team at Kaiser Permanente evaluated Claimant on May 12, 2016, and made a diagnosis of autism spectrum disorder-mild (high functioning), under the criteria of DSM-5.²

6. Claimant again requested eligibility for Lanterman Act services. HRC performed a psycho social assessment in February 2017. Armando de Armas, Ph.D., a psychologist, evaluated Claimant in March 2017. Dr. Armas also gave a diagnosis under the DSM-5 of autism spectrum disorder, level 1 (the most mild of three levels), in behavior and social communication, without accompanying language disorder or intellectual disorder.

7. HRC informed Claimant's parents that she was found eligible for Lanterman Act services by letter dated May 4, 2017.

8. A meeting took place on June 15, 2017, to develop Claimant's plan for services, referred to by HRC as an Individual Person-Centered Plan (and referred to in the Lanterman as an Individual Program Plan, or IPP). To prepare, Claimant's father

² DSM-5 is a shorthand reference to the Diagnostic and Statistical Manual, Fifth Edition, which is a recognized and accepted source for information on this diagnosis.

prepared a written list of requested services that includes, among other things, requests to identify gaps in Claimant's IEP, for advocacy against LBUSD, and for reimbursement of payments for advocacy. (Ex. H)

9. The IPP developed from the June 15, 2017 meeting (ex. 6) includes the following pertinent information. Claimant's father requested assistance in having Claimant found eligible to obtain Medi-Cal benefits through "institutional deeming," discussed in more detail below. Father also requested respite services once Claimant had Medi-Cal as secondary insurance. Claimant had some challenging behaviors and was receiving behavior therapy through a program at Easter Seals, five times per week in two-hour sessions. The program was paid by father's insurance. Father requested help with the \$15 copay per session, and HRC agreed to assess the request.

10. The section of the IPP related to school includes father's report that the family was working with an educational advocate (later identified as Amy H. Larsen, M.S.) because they did not think LBUSD was providing adequate services. Father was considering filing a complaint with the Department of Education because LBUSD administered a test to Claimant which it should not have used. The desired outcomes are for Claimant to receive an education in the most appropriate setting that meets her needs. The plans were for LBUSD to provide a free and appropriate education (FAPE),³ for the parents to monitor the academic program to assure it meets Claimant's needs and advocate for those needs, and for Claimant's service coordinator at HRC, Vanessa Madrigal, to provide information and support as needed and to attend IEP meetings when invited.

³ Different statutes and regulations relate to a school district's obligations to provide eligible students with a FAPE. (Individuals with Disabilities Education Act (IDEA), 20 U.S.C section 1400 et seq., and related regulations.)

11. As a follow up to the June 15, 2017 IPP meeting, Ms. Madrigal spoke to father and wrote a letter to parents, dated July 6, 2017 (ex. 3), addressing several requests for services raised during the meeting. (The evidence established that this letter was sent later, but retained the date of July 6, 2017, from an early draft.) In addition to granting respite services, social skills training, and funding for copayments, Ms. Madrigal indicated that HRC would review Claimant's IEP and related assessments by LBUUSD to prepare for "ongoing advocacy regarding any additional services or supports that should be provided by the school [and] a consultation with HRC special education attorney to advise you of your rights and options related to [Claimant's] IEP." (Ex. 3, p. 2.) In response to the request for reimbursement of fees paid to Ms. Larsen, Ms. Madrigal referred to section 4512, subdivision (b), to the effect that the determination of whether a service is necessary is made through the IPP process. She attached HRC's General Standards Policy, stating that it further outlines when a service may be purchased. Ms. Madrigal wrote that HRC supports the parents' desire to ensure FAPE for Claimant, and that Ms. Madrigal was available to provide direct advocacy and that when HRC believes that Claimant has a need that should be addressed by the school but is not in the IEP, HRC was available to assist with educational advocacy. "In circumstances where specialized knowledge is needed your service coordinator can arrange consultation with one of our many specialists and may also refer you to other advocacy organizations, such as Disability Rights California, as indicated by the circumstances. Based on the availability of alternative free or low-cost advocacy assistance through HRC and other advocacy agencies, as well as Lanterman Act and the HRC General Standards policy requirements that services that are purchased are done so prospectively following the development of the Individual Person-Centered Plan, HRC is not able to provide reimbursement for payments made to your educational advocate." (*Id.*, pp. 2-3.)

Claimant's parents were advised of their right to request a fair hearing related to any of the decisions conveyed in the letter.

12. The HRC service policy on general standards (ex. 21), as relevant here, states that services will be purchased only after an eligible developmental disability is found, and when the planning team determines that the service will accomplish a part of an IPP, after public resources have been used to the fullest extent possible, and from a service provider who is an authorized vendor.

13. Father contends that HRC denied advocacy and reimbursement based on an improper, general policy to deny services. The applicable law is discussed below. There was insufficient evidence to support this claim.

14. Parents and HRC met again on August 29, 2017, to discuss some prior service requests and new service requests. The IPP was amended. In the "school" section, it was noted that father requested HRC to fund a special education advocate, that the prior decision letter denied that request, and that a new decision letter would be sent.

15. In her follow up letter dated September 6, 2017, Ms. Madrigal addressed the request to fund for advocacy by attaching her earlier letter, and repeating that the request had been denied and that the plan was to ensure that Claimant receives an appropriate offer of FAPE through LBUSD.

16. Father filed the Fair Hearing Request, dated September 13, 2017.

EDUCATION SERVICES, ADVOCACY AND OTHER RELEVANT EVIDENCE

17. Following the first IPP meeting June 15, 2017, Ms. Madrigal conferred with her manager, Pablo Ibanez, and they determined to review Claimant's IEP for any gaps. Mr. Ibanez determined that there would be no reimbursement for past advocacy services, but present needs could be assessed. Ms. Madrigal contacted father and asked why an advocate was hired. Father replied that LBUSD was not providing necessary services. The only specific, necessary service mentioned by father was speech and

language. Ms. Madrigal offered a consultation with Ben Kim, a special education attorney who consults with HRC. Father declined, unless Mr. Kim would be representing the family with respect to Claimant's education services. Father sent Ms. Madrigal a summary and fees and payments related to Ms. Larsen. (This information was not included in the evidence offered at the hearing, other than testimony that Ms. Larsen charges \$110 per hour.)

18. Ms. Madrigal reviewed the IEP dated November 14, 2016. (Her notes erroneously state the date as 11/14/17; ex. 20, p. 7.) She noted that, in the area of speech and language, Claimant demonstrates age appropriate receptive and expressive language skills voice and fluency, and exhibits a mild lisp for some letter blends (/s/, /z/) that is below the articulation that is expected at her age level.

19. A speech and language evaluation was performed at LBUSD in October and November 2016, in preparation for the IEP meeting. It includes a summary of a speech and language consultation performed by Kaiser Permanente (KP) in May 2016. The KP consultation reported many tests scores within normal limits, but a tongue protrusion for /s/ and /z/ sounds. KP concluded speech and language were within normal limits, with mild reduced articulation function, and social pragmatic difficulties due to the reaction of other's to Claimant's speech. LBUSD conducted numerous tests, and concluded that Claimant met the eligibility requirements for special education services as a student with Speech and/or Language Impairment, under Education Code section 56333. The services were to address articulation problems, specifically tongue placement for /s/, /z/, and /s/ blends.

20. As noted above, the November 14, 2016 IEP includes speech and language impairment as Claimant's secondary disability. The IEP identifies articulation as an area of need, and includes speech and language services, group and direct, four 30-minute sessions per month for the academic year. (Ex. 12, pp. 5, 9.)

21. Father obtained information about Medi-Cal from HRC. He sought and obtained Medi-Cal benefits for Claimant. Father testified that the eligibility was made retroactive to March 2017, although there is no related documentary evidence. Claimant's eligibility was under the Home and Community-Based Services waiver for individuals with developmental disabilities (HCBS-DD). The "waiver" refers to waiver of certain federal Medicaid rules (called Medi-Cal in California), and allows federal and state funds to be used to provide certain services to people with developmental disabilities. Institutional deeming is a special Medi-Cal eligibility rule that, as applied here, allows consideration of Claimant's income and resources without reference to her parents' income and resources, such as their medical insurance. Father contends that, due to the retroactive eligibility as of March 2017, reimbursement for advocacy services should be considered as of that date, if not earlier. Further, father contends that advocacy under HCBS-DD is defined differently than advocacy under the Lanterman Act. These contentions are discussed in more detail below.

22. A further IEP meeting took place on December 16, 2016, and in January 2017 Claimant's parents met with LBUSD on the subject of independent educational evaluations (IEE's) for Claimant, according to Claimant's timeline (ex. B). There was no clear evidence of what occurred at the IEP meeting. According to a letter from LBUSD dated March 9, 2017 (ex. 13), there was an IEP addendum on March 8, 2017 to clarify requests for IEE's. This addendum is not in evidence. The letter granted the request and LBUSD agreed to evaluations in the areas of speech and language and educationally related mental health services. Parents were to choose from a list of assessors.

23. Much evidence was introduced concerning the nature of Claimant's behaviors, the underlying causes or conditions, assessments, the treatment provided, as well as mental health diagnoses and recommendations. Similarly, there was much evidence about the process of assessing Claimant for special education services, and the

various services provided under the IEP. It is not necessary to detail this evidence for purposes of deciding the issues presented in this matter, primarily because the only specific claim made by father about a lack of services from LBUSD related to speech and language (see Finding 15). Father had requested more generally that HRC assist in determining whether there were “gaps” in the IEP. After her review of the IEP, Ms. Madrigal did not note any such gaps. However, parents and HRC were often in communication about these and other issues; numerous meetings or phone conversations occurred, referrals were made and documents were exchanged.

24. The IEE for speech and language was performed by speech-language pathologist Abby Rozenberg on May 20, 2017. Her report (ex. M) reflects her review of several prior relevant assessments and documents, and describes the numerous tests she administered to Claimant. The tests were on subjects of social skills, social language skills, language fundamentals, executive function, problem solving, articulation, voice and fluency. Ms. Rozenberg’s overall impression was that Claimant’s language skills were in the average range, with deficits in the manner in which she engages in social relationships, negotiates social conflicts, and maintains conversations. There was faulty speech production of /s/ and /z/ relating to tongue posture, and she was “stimulable for correct production when her attention was heightened.” (*Id.*) Ms. Rozenberg identified relative weaknesses in auditory attention (difficulty processing strings of auditory information and merging auditory and visual information), and cluttering/abnormal prosody with decreased intelligibility. She identified these deficits: social communication skills (lack of perception of listener’s interest, exaggerated detail, monopolizing conversations), and speech production (/s/ and /z/). Ms. Rozenberg recommended Claimant participate in social skills training one hour per week to focus on the deficits, and small group speech and language therapy 30 minutes per week.

25. Through father's health insurance, Claimant was assessed by Easter Seals and approved to receive applied behavioral analysis services (ABA), a common and often useful program to address autism spectrum disorder. The assessment and recommendation from September 2016 includes recommended treatment in areas of communication that mirror some of the concerns raised by Ms. Rozenberg. Easter Seals issued a six-month progress report in March 2017, according to Claimant's timeline, but the report is not in evidence.

26. The IEE for educationally related mental health services was performed in June 2017, and psychologist Stephen Pines issued a report dated July 25, 2017 (ex. N). Dr. Pines reviewed numerous relevant records and administered various tests. Dr. Pines made diagnoses of Generalized Anxiety Disorder and Attention Deficit/ Hyperactivity Disorder, combined type, and noted the prior diagnosis of autism spectrum disorder. His recommendations include psychotherapy to manage symptoms of anxiety, social skills training to reduce anxiety, behavioral support or coaching or a behavioral aid to help manage symptoms, accommodations at school including mental health services and assistive technology, and nutritional consultation.

27. An IEP meeting with LBUSD took place September 25, 2017. The speech and language IEE was discussed. It is noted in the IEP that the LBUSD speech provider is already addressing Claimant's articulation, and the provider does not feel the deficit impacts Claimant in her educational setting. Other teachers reported positive behaviors. The IEE for educationally related mental health services was also reviewed. It is noted that the family disagrees with this IEE, but the area(s) of disagreement is not noted. As in the November 2016 IEP, speech and language services were provided, group and direct, four 30-minute sessions per month. This exceeds the recommendation of the IEE in speech and language for small group speech and language therapy 30 minutes per week; however, that IEE also recommended one hour per week of social skills training.

There is no offer of social skills training in the September 2017 IEP. On the signature page it is noted that parents “disagree with the recommendation regarding services for social communication skills and prosody.” (Ex. 11, p. 17.) Therefore, as of the September 25, 2017 IEP, Claimant had been assessed as needing social skills training and psychotherapy by LBUSD, but there was no indication these services were offered by LBUSD.

28. In evidence are the following complaints or claims raised for Claimant.

(a) Ms. Larsen filed an undated complaint against LBUSD alleging that an educationally related mental health services IEE was needed and was not performed. (Ex. G.) This complaint primarily addresses the time frame of November 2016 to February 2017. Subsequently, LBUSD had Dr. Pines perform an IEE for educationally related mental health services June 2017. This claim is apparently moot, as an IEE for educationally related mental health services was subsequently performed in June 2017.

(b) Ms. Larsen filed an undated complaint against LBUSD alleging that it took 134 days for the IEE for educationally related mental health services to be performed, which is an unreasonable delay. (Ex. P) The requested relief included implementation of Dr. Pines’ recommendations for psychotherapy and social skills training from LBUSD, and removal of a special education administrator from Claimant’s case. There was no evidence of any response or further action. However, father testified that he had not filed a request for a due process hearing against LBUSD based on the failure to provide FAPE. He is considering filing such a request.

(c) Father filed a complaint with the California Commission on Teacher Credentialing on September 25, 2017, relating to alleged misconduct of the same special education administrator. There was no evidence of further action taken, and this complaint is beyond the issues established for this matter.

29. Father requested funding for a special education advocate from the Office of Clients' Rights Advocacy/Disability Rights California (DRC), which declined the request in a letter dated August 22, 2017 (ex. 19). DRC did not have the resources to provide direct representation. However, it recommended that father ask for an IPP meeting with HRC or send HRC a written request to provide funding for his chosen advocate. DRC analyzed a situation reported by father wherein Claimant had allegedly been improperly terminated from special education services in 2012. Although this issue was subject to evidence at the fair hearing, there was insufficient evidence that father referenced these events in his communications with HRC. DRC also referred to parents' ongoing negotiations with LBUSD as a basis to request the funding from HRC, as the list of possible services in section 4512, subdivision (b), includes legal services, advocacy, and protection of legal rights.⁴ DRC suggested that the Code does not specify details for advocacy or legal services, and that a broad interpretation could apply to Claimant. The letter noted that, if father disagreed with the denial, he could file a grievance with the Office of Clients' Rights Advocacy. There was no evidence of such a grievance being filed. Father contends that the DRC's decision to decline representation exhausts the requirement that Claimant pursue generic resources for this service before seeking funding from HRC.

30. With respect to HRC's denial of reimbursement for charges incurred before Claimant was found eligible for services, one of father's contentions is that, because symptoms of autism spectrum disorder can be present by age four, Claimant should have been found eligible for Lanterman Act services by the end of her services under Early Start at age three. If so, there would be no "retroactive" element to the

⁴ The letter is not completely correct in this regard. Section 4512, subdivision (b) is discussed further below, as well as other statutory references to these services.

request. This contention is not convincing, as there were no assessments that diagnosed Claimant with autism spectrum disorder until the KP evaluation in May 2016. Further, after Early Start services ended, the family expressed concerns about the possibility of autism, and HRC had an evaluation performed by psychologist Twila Berget, Ph.D. in December 2008.⁵ Dr. Berget made observations and obtained test scores that did not support a diagnosis of autism. Dr. Berget made a diagnosis of expressive language disorder.

31. HRC sent a denial of eligibility letter, dated January 28, 2009, based on Dr. Berget's evaluation and input from its interdisciplinary team. The denial was based on the absence of evidence that Claimant suffered from an eligible disability. Father stated that HRC's denial letter was not received because he was mobilized to active military duty and the family relocated. The inference is that the family might have challenged the denial of eligibility. Even so, father presented no diagnosis of an eligible condition until the KP evaluation in May 2016. The transaction notes include references to Mr. Ibanez discussing with father his contention that autism spectrum disorder may have been present earlier than the first diagnosis by KP in 2016. While Mr. Ibanez acknowledged there was some logic to this contention, he explained that a diagnosis is made based on the way the child presents at the time of the assessment, and that HRC staff usually recommended that parents re-apply for services if, in the future, new issues develop or new information is developed.

32. Father contends that the courts have recognized that when a generic agency, such as LBUUSD or HRC, fails to provide a generic service, such as a FAPE or Lanterman Act services, there is a right to reimbursement, citing *Forest Grove School*

⁵ Dr. Berget's report is not in evidence, but it is summarized in the portion of Dr. de Armas' report where he summarized prior records.

Dist. v. T.A. (2009) 557 U.S. 230. This contention is not convincing. First, *Forest Grove School Dist. v. T.A.* deals exclusively with a denial of a FAPE by a school district, and the Court's conclusions were based entirely on federal statutes and case law relating to a school district's obligation to provide a FAPE and, more specifically, the general remedial purpose underlying those laws. There is no reference to the Lanterman Act or a regional center's responsibilities thereunder. Second, although the federal statutes make specific reference to reimbursement, there is no such reference in the Lanterman Act.

33. When asked at the fair hearing what educational services were needed, father responded that Claimant required all services she was entitled to under the IDEA. He gave no more specific answer.

34. The parties raise several contentions, only some of which require comment, both above and below. If a contention is not specifically mentioned herein, it was found to be unconvincing.

LEGAL CONCLUSIONS

1. Section 4501 states the purpose of the Lanterman Act.

"The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. [¶] An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities."

2. a. Several sections of the Lanterman Act are instructive here, relating to services and the process whereby a consumer's IPP is developed and implemented. Section 4512, subdivision (b), defines "services and supports" as:

"[S]pecialized 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, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall 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" Included in the list services and supports are "advocacy assistance, including self-advocacy training, facilitation and peer advocates"

b. Section 4512 does not, as suggested in the DRC letter, include a specific reference to legal services or protection of civil, service and legal rights. Some of these rights are addressed in section 4648, subdivision (b)(1) ("advocacy for, and protection of, the civil, legal, and service rights" of consumers). Although similar rights are also listed in section 4685.7, this section does not apply to Claimant, as discussed below.

3. Section 4646, subdivision (a), provides in part:

"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.”

4. When purchasing services and supports, regional centers must conform to their purchase-of-service guidelines. (Code § 4646.4, subd. (a)(1).) The Lanterman Act requires the Department of Developmental Disability (Department) to review the guidelines “to ensure compliance with statute and regulation.” (Code § 4434, subd. (d).) Reflecting the Department’s interpretation of statutes and regulations, the guidelines are not entitled to the deference given to a regulation but are rather entitled to a degree of deference dependent upon the circumstances in which the agency has exercised its expertise. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-15.)

5. Regional centers cannot deny requested services and supports on the basis of a general policy not to provide such services and supports. (*Williams v. Macomber* (1990) 226 Cal.App.3d 225.) Reliance on an inflexible policy is inconsistent with the Lanterman Act’s stated purpose of providing services “sufficiently complete to meet the needs of each person with developmental disabilities.” (*Id.* at 232, citing § 4501.) The Lanterman Act clearly contemplates that services to be provided each consumer will be selected “on an individual basis.” (*Id.* at 233, citing *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

6. There was insufficient evidence that HRC denied Claimant’s service requests based on a general policy not to provide such services and supports. HRC provided services and referrals related to advocacy.

7. Claimant has the burden of proving by a preponderance of the evidence his eligibility for government benefits or services. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]; *Greatoroex v. Board of Admin.* 91979) 91 Cal.App.3d 54, 54 [retirement benefits]; Evid. Code, §500.)

8. A regional center's responsibilities to its consumers are set forth in sections 4640 through 4659. The processes for identifying the need for services and for providing funding for services by regional centers are generally set forth in sections 4646 and 4648.

9. Several sections of the Lanterman Act address the requirement that regional centers must rely upon generic resources to fund services before the regional center becomes obligated to do so. (See, for example, sections 4659, subdivision (a)(1), 4648, subdivision (a)(8), and 4646.4, subdivision (a)(1).) More specifically, section 4648, subdivision (a)(8) provides that, in securing the services needed to achieve the goals in an IPP, a regional center's "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." As amended in 2009, section 4659, subdivision (a)(1), directs regional centers to "identify and pursue all possible sources of funding," including school districts.

10. Services provided must be cost effective (Code § 4512, subd. (b)), and the Lanterman Act requires the regional centers to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, e.g., Code §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) Under section 4685, a regional center is to provide services in the "most cost-effective and beneficial manner" and any expenditure should be accomplished in the "most cost-effective" way.

11. a. Father contends section 4685.7 supports the request for advocacy. Advocacy services are defined in section 4685.7, subdivision (b)(7), as services "that facilitate the participant in exercising his or her legal, civil and service rights to gain access to generic services and benefits that the participant is entitled to receive. . . ."

b. Note the use of the word "participant." Section 4685.7 relates to the Self-Directed Services Program (SDS program), which is available to regional center

clients. "Self-directed services" is a voluntary delivery system for defined services and supports, including advocacy services, as noted above. A participant in the SDS program, under subdivision (b)(10), is someone eligible for the program and who has voluntarily agreed to participate in the SDS program. Section 4685.7 describes aspects of the program, including the use of a financial management service, development of individual budget amounts and the ability of the participant to direct distribution of the individual budget. Eligibility requirements are included. Generally, the SDS program allows a participant to direct how funding for services will be directed.

c. There was no evidence that Claimant was a participant in the SDS program. The advocacy rights under that program would, therefore, not apply to Claimant.

12. Major aspects of the Medicaid program are found in 42 United States Code section 1396 et seq. The HCBS waiver program (42 U.S.C. section 1396n) permits states to offer services, such as California through the Lanterman Act. Certain requirements for general recipients of Medicaid are waived for purposes of providing these benefits.

The regional centers are paid for some services with federal funds, thereby expanding the funds available for all consumers who receive Lanterman Act services. The funds are not specifically earmarked for consumers who qualify for HCBS-DD.

13. Father contends that Claimant's status as eligible under the HCBS waiver is a separate basis for advocacy services, and that such services should be provided as of the date of Claimant's retroactive eligibility. However, the services generally available under the HCBS waiver are substantially similar, with some exceptions, to services under the Lanterman Act. No specific reference to advocacy under HCBS was offered at the hearing. Nor was there any reference offered for the proposition that the HCBS program would mandate the provision of advocacy services before Claimant was found eligible

for Lanterman Act services. The “institutional deeming” aspect of eligibility offers no additional support for the advocacy services requested by Claimant.

14. Father contends that advocacy services must be provided to Claimant under section 4433. He is correct, to a limited extent. Section 4433 recognizes that there may be a conflict of interest, or the appearance of a conflict of interest, if a regional center provides client’s rights advocacy services. (For example, a conflict might exist if a regional center employee advocated for services not provided by the regional center.) To avoid such conflicts, the Department of Developmental Services (DDS) shall solicit a single statewide contract with a nonprofit agency for client’s rights advocacy services. This provision, however, does not prohibit DDS or a regional center “from advocating for the rights, including the right to generic services, of persons with developmental disabilities.” (*Id.*, subd. (g).)

15. The contracted nonprofit agency is DRC. HRC discharged its responsibilities to Claimant, in part, by providing contact information for DRC to father. Under the circumstances, section 4433 does not create a separate right for advocacy for Claimant.

16. Advocacy is not defined in the Lanterman Act. The regulations enacted pursuant to the Lanterman Act provide some incite. In a subchapter addressing client’s rights, California Code of Regulations, title 17, section 50510⁶ 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 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

⁶ Further references to the California Code of Regulations are to title 17, and noted as “Regulation.”

advocacy and protection.” (Early Start regulations, not now applicable to Claimant, also include the requirement under Regulation 52121, subdivision (a)(10), that the service coordinator “shall inform the parent of advocacy services and procedural safeguards contained in the regulations.”)

17. Reimbursement is not specifically addressed in the Lanterman Act. However, in the past, reimbursement has been granted when the equities require it and the circumstances support it. Here, reimbursement was not agreed to in the IPP process, and it would pre-date HRC’s finding that Claimant was eligible for services. Father has not established that reimbursement is necessary under the totality of the evidence.

18. a. Claimant’s request for advocacy services fails for several reasons. The evidence does not establish a request for a specific educational service other than speech and language services prior to the HRC denial that prompted Claimant’s request for fair hearing, dated September 13, 2017. The initial denial was in July 2017, and repeated in the letter dated September 6, 2017. However, it was not until the IEP with LBUSD on September 25, 2017, that Claimant’s parents expressed disagreement over social skills training, and there was a lack of psychotherapy as recommended. The evidence shows that LBUSD is providing the level of speech and language services recommended in the assessments as necessary to meet Claimant’s needs. However, by not providing the social skills training and psychotherapy, it cannot be concluded that LBUSD, through the IEP, is meeting Claimant’s needs in those areas. These needs were identified after HRC denied father’s request for advocacy.

b. Claimant’s father has not exhausted the avenues for advocacy assistance suggested by HRC. Although DRC declined to provide representation, citing lack of resources, father did not file a grievance to challenge that decision, a right included in the denial letter. Father did not avail himself of the referral to HRC’s attorney with expertise in special education, Ben Kim. Father would not meet with Mr. Kim unless HRC

agreed that Mr. Kim would represent the family in a due process proceeding against LBUSD. The creation of this prerequisite, by father, is not a basis to conclude that the resource suggested by HRC has been exhausted.

c. Ms. Larsen is not vendored by HRC as a provider of services to its consumers.

19. One of the needs identified in the IEP assessment process that is not being met, under the evidence adduced at the hearing, is social skills training. Ms. Madrigal's July 6, 2017 letter references referrals for social skills, so it appears that HRC is attempting to address that need. Therefore, it was not established that advocacy services are necessary to obtain this service.

20. Claimant has not established a right to advocacy services in the nature of having HRC pay for the services of Ms. Larsen. By reason of Factual Findings 1 through 34, inclusive, and Legal Conclusions 1 through 19, inclusive, claimant has not met her burden.

ORDER

The services identified in the fair hearing request and in the Issues section above are denied. The Service Agency is not required to provide reimbursement for charges by a special education advocate hired by Claimant's father, and is not required to provide a special education advocate for Claimant.

DATED:

DAVID B. ROSENMAN

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.