

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT,

vs.

HARBOR REGIONAL CENTER, Service Agency.

OAH No. 2019081066

DECISION

Carmen D. Snuggs, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on October 16, 2019, in Torrance, California.

Karine Paulan, Manager of Rights & Quality Assurance, represented the Service Agency, Harbor Regional Center (HRC or Service Agency).

Claimant, who was not present, was represented by his mother.¹

¹ Initials and family titles are used to protect the privacy of Claimant and his family.

Mariana Rudy, an interpreter, was present at the request of Claimant's mother and provided Spanish-language interpretation services.

The record was closed and the matter was submitted for decision on October 16, 2019.

ISSUE

Shall HRC be responsible for funding personal assistant services for Claimant?²

EVIDENCE RELIED ON

In making this Decision, the ALJ relied upon exhibits 1 through 4 submitted by the Service Agency, exhibits A through P submitted by Claimant's mother, and the testimony of Client Services Manager Jessica Guzman, Rubi Saldana, Cindy Topete, and Claimant's mother.

² HRC's July 24, 2019 letter to Claimant's mother denying Claimant's funding request refers to personal assistance services, which is used interchangeably with personal care services. In addition, the parties stipulated that the issue to be decided involved personal assistance services. Personal assistance services are those services provided to assist a client with activities of daily living. However, it was clear from Claimant's mother testimony that Claimant seeks personal assistant services – an individual to manage claimant's maladaptive behaviors and facilitate Claimant's socialization and integration into the community.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a 25-year old consumer of HRC based on his qualifying diagnosis of moderate intellectual disability. He also suffers from unspecified post-traumatic stress disorder, and he has had an episode of major depression in 2014.

2. By no later than July 2019, Claimant's mother requested that HRC provide funding for personal assistance services for Claimant.

3. Following a meeting on July 15, 2019, and correspondence between the parties, the Service Agency sent a letter to Claimant's mother on July 24, 2019, indicating that it denied Claimant's request for the Service Agency to fund personal care services.

4. On August 27, 2019, a Fair Hearing Request on Claimant's behalf was submitted to the Service Agency, which appealed the denial of the funding request.

5. On September 11, 2019, the parties participated in an Informal Conference to discuss the matter. At that meeting, Claimant's mother clarified that she was requesting that HRC fund 30 hours per week of personal care hours "for physical assistance" during Claimant's ABA therapy sessions in order to ensure Claimant's safety. (Ex. O, p. 1.) HRC upheld its decision to deny funding.

Funding Request

6. Claimant lives with this mother, who is his limited conservator, and his brothers aged 13 and 10 years old. Claimant's 23-year-old brother lives in the home behind Claimant's residence. Claimant's father is not involved in his life.

7. According to Claimant's most recent Individualized Program Plan (IPP), dated April 9, 2019, Claimant's maladaptive behaviors include elopement, resistance, and aggression. He requires constant supervision at home and in the community because he lacks social and safety awareness.

8. Under the category "Behavioral Health," Claimant's IPP states that he began ABA therapy on April 8, 2019 to address his tantrums, physical aggression toward objects, and lack of safety awareness. The following progress, desired outcomes, and plans are listed for Claimant:

Progress

[Claimant] continues to display behaviors in and out of the home.

Desired Outcome

[Claimant] will continue to improve on his behaviors. He will work on communicating his feelings.

Plans

PLAN FOR CLIENT/FAMILY

[Claimant] will engage in positive behaviors and communicate his feelings. Mother will provide [Claimant] with positive reinforcement to redirect his outbursts and provide him with appropriate supports.

PLAN FOR COMMUNITY SUPPORTS

The community will provide positive life and learning experiences for [Claimant].

(Exh. 4 at pp. 9 & 10.)

9. Until June 26, 2019, HRC funded in-home behavior intervention through ABA Works at a rate of 30 hours per month with a Board Certified Behavior Analyst (BCBA), and 15 hours per month with a Behavior Management Assistant. Claimant's mother requested that the services be terminated due to an incident that occurred on May 3, 2019. On that date, Claimant's mother informed the provider that Claimant engaged in maladaptive behaviors when he travels in the car. At the provider's suggestion, Claimant, his mother, the ABA provider, and the ABA assistant drove to McDonalds. Claimant cursed at people and played music at an unreasonable volume. When the ABA provider instructed Claimant's mother to close the vehicle's windows, Claimant became angry and began striking the car. The provider then instructed Claimant's mother to pull over, and Claimant began hitting Claimant's mother in the arm. Once the vehicle was parked, Claimant exited the vehicle and began hitting the vehicle and yelling at a man who was in the vicinity. Claimant got back into the vehicle but then exited and ran into the busy street. The ABA provider chased Claimant and Claimant's mother followed in the car. Claimant only re-entered the vehicle when his mother threatened to call law enforcement. Following the incident, the ABA provider agreed that ABA therapy would only take place in Claimant's home.

10. Under the category "Social, Recreational, Community," Claimant's IPP states that it is difficult for Claimant to transition between activities. It was reported that Claimant disrupts family outings, he does not look before crossing the street, and he must be closely monitored when he is out in the community. The following progress, desired outcomes, and plans are listed for Claimant:

Progress

[Claimant] continues to engage in the home and out in the community, but trips out in the community may sometimes be cut short due to his behaviors. [Claimant] has been going out a lot with his day program.

Desired Outcome

[Claimant] will participate in more social/recreational activities in the community in hopes of gaining meaningful friendships.

Plans

PLAN FOR CLIENT/FAMILY

[Claimant] will continue to attend PALS day program [PALS] in hopes of making more friends. Mother will continue to engage [Claimant] in and out of the home to increase his social activities. She will provide him with social opportunities and encourage him to interact with others.

PLAN FOR COMMUNITY SUPPORTS

[PALS] will continue to engage [Claimant] in community activities. Parks, beaches and community recreational activities will remain an option for [Claimant].

(Exh. 4 at p. 13.)

11. A. Claimant currently attends PALS in Downey California, for six hours per day, Monday through Friday. PALS is a behavior management day program with a behavior consultant on its staff. The program incorporates community activities such as lunch outings and trips to the movies. HRC funds Claimant's transportation to and from PALS.

B. According to Claimant's IPP, through PALS, he is working toward behavior goals related to boundaries, elopement, and non-compliance. Although PALS typically employs a staff-to-client ratio of 1:3, PALS employs a 1:2 ratio with Claimant due to his maladaptive behaviors. PALS' program manager, Ed Ramirez, reported that Claimant had been aggressive toward other clients and community members, including hitting a client with a closed fist.

C. On May 7, 2019, Claimant refused to transition from a PALS staff member's vehicle to the PALS facility after Claimant was picked-up from his home. Claimant pretended to be asleep and ignored requests to exit the vehicle. After two hours and a threat to call an ambulance, Claimant exited the vehicle. Although Claimant has a history of refusing to comply with directives, staff had previously been able to re-direct Claimant's behavior in less time. Mr. Ramirez notified HRC of the incident on May 8, 2019.

D. On May 15, 2019, Mr. Ramirez notified HRC that Claimant attempted to engage in fights with community members on several occasions while out in the community. PALS staff were able to successfully re-direct Claimant, but clients were re-assigned to other staff members so that Claimant could work one-on-one with a PALS staff member for the remainder of the day. Mr. Ramirez requested that HRC fund a one-on-one program at PALS so that Claimant would be more successful in the program. Miguel Flores, HRC's Behaviorist, recommended that he

observe Claimant at PALS to determine whether Claimant's maladaptive behaviors were being adequately addressed. Claimant's service coordinator's notes indicate that she contacted PALS on May 16, 2019, to schedule an observation date. The record did not establish whether the observation occurred. However, on July 18, 2019, Claimant's service coordinator provided Claimant's mother with a referral to the Easter Seals day program.

12. Jessica Guzman, HRC's Client Services Manager testified on behalf of the Service Agency. She noted that HRC funds self-directed respite services at the rate of 40 hours per month in addition to the transportation, ABA and day program services described above. Ms. Guzman also noted that HRC has offered to fund Claimant's participation in the PEERS program for the provision of socialization services. HRC has also provided Claimant's mother with referrals to Autism Spectrum Therapy and Creative Solutions for Hope for the provision of ABA therapy.

13. Ms. Guzman explained that Claimant receives In-Home Supportive Services (IHSS) through the California Department of Social Services. Those services can be authorized up to 283 hours per month and may include protective supervision services.³ On June 4, 2009, Claimant was authorized to receive 268 IHSS hours, including protective supervision hours. However, the weekly or monthly amount of protective supervision hours authorized was not established by the record.

³ IHSS protective supervision services are described as "observing the behavior of a non-self-directing, confused, mentally impaired or mentally ill recipient and intervening as appropriate to safeguard the recipient against injury, hazard or accident." (Ex. N, p. 2.)

14. Ms. Guzman's testimony established that HRC is a payor of last resort and that under HRC's General Standards Policy, Claimant would have to first exhaust the funding of personal assistance services by generic resources, such as IHSS. She explained that in order to approve Claimant's request for personal assistance services, HRC would first have to conduct nursing and IHSS assessments to determine Claimant's personal care and IHSS needs. If, following the assessments, HRC determined that Claimant needed personal care services and was entitled to an increase in IHSS services, Claimant would be required to request authorization for additional IHSS hours before HRC would consider funding personal care services. Ms. Guzman defined personal assistance services as assistance with activities of daily living activities such as bathing, dressing, taking medication, etc.

15. Upon questioning, Ms. Guzman acknowledged that IHSS protective supervision hours are limited to community outings related to activities of daily living such as attending medical appointments. Moreover, the Assessment of Need for Protective Supervision for In-Home Supportive Services Program form advises that protective supervision services are not available for social activities or to prevent or control antisocial or aggressive recipient behavior. (Ex. G, p. 4.) Thus, IHSS Protective supervision services are not intended for, and cannot be used to facilitate community integration.

16. Ms. Guzman is aware of the May 3, 2019 incident that occurred with Claimant while the ABA provider was present, as well as recent incidents where Claimant engaged in maladaptive behaviors that could have resulted in injury to Claimant and others.

17. Claimant's mother testified that Claimant has had behavioral issues for as long as she can remember. She contended that when she requested ABA services for

Claimant in the past, HRC denied those requests. Claimant's IPPs for the years 2000, 2015, 2016, and 2018 all state that Claimant can be resistive and aggressive, and the IPPs document numerous incidents where Claimant engaged in maladaptive behavior while in the community. Claimant's mother stated that she does not know the proper name of the services Claimant needs, but pointed to her December 13, 2018 e-mail to HRC when she reported that:

Every day [Claimant] has outbursts, he acts up and yells at people outside the house[.] [W]e try to get him inside the house and keep him. We have to be in his room when he acts up because he throws stuff and hits his head with his hand very hard when he's mad. We tried taking him to Disneyland today and just an hour in he began crying, yelling, and pointing at people at the park.

(Ex. E, p. 3.)

18. Claimant's mother contended that Claimant's maladaptive behavior prevents her from attending to her minor children's needs. One of Claimant's brothers has a learning disability and Claimant's mother stated that she is not able to help him with his homework when she needs to because she is attending to Claimant's behavioral incidents. Both of her minor sons are falling behind in school. Claimant's youngest brother is a promising soccer player. Claimant's mother has had to take him out of a game and return home due to Claimant's behavior.

19. In support of the funding request, Claimant's mother offered letters from three neighbors who, over the years, have witnessed Claimant's tantrums and aggressive behavior toward objects. They described incidents where, among other

things, Claimant yelled profanities at them and other neighbors, intentionally bumped into people, refused to get into the car when Claimant's mother needed to take Claimant's brother to soccer practice or to a game, yelled at passersby, and kicked a mailbox. One neighbor observed Claimant's mother chase Claimant in order to get him to return home, and they all noted the inordinate amount of time it takes for Claimant to comply with directions after he has eloped or engaged in an emotional outburst. Joe Gonzalez, Claimant's brother's coach, wrote a letter describing an incident where Claimant used foul language when speaking to another parent. Coach Gonzalez also noted that Claimant's brother missed or was late to practice and games on several occasions, and attributed it to Claimant's behavior. These letters are given weight and support Claimant's mother's testimony regarding the extent and history of Claimant's behavior.

20. Claimant's mother clarified that she is Claimant's IHSS provider and she does not need another individual to assist Claimant with his activities of daily living. She explained that her request for funding was for an assistant to help Claimant access the community and redirect him when he exhibits maladaptive behavior. Claimant's mother asserted that she requested that ABA services through ABA Works be terminated because she believed the provider put Claimant in a high-risk, dangerous situation. She has not called the ABA providers referred by Claimant's service coordinator on July 18, 2019, because she does not believe the services would be effective without a personal assistant present. Claimant's mother also has not contacted the PEERS socialization program because she does not believe Claimant would be accepted due to his behavior.

21. Claimant's engagement in maladaptive behaviors when community integration is attempted by Claimant's family and his day program vendor are well-

documented and acknowledged by HRC. While the provision of ABA services may help address Claimant's behavior, the provision of ABA therapy in the community has proven to be dangerous, as demonstrated by the May 3, 2019 incident with ABA works. Claimant's IPP provides that Claimant will increase his participation in social and recreational activities in the community. On this record, it is clear that Claimant needs a personal assistant to assist with Claimant's community integration, and while ABA services are provided in the community. Accordingly, as set forth in more detail below, Claimant's appeal shall be granted.

LEGAL CONCLUSIONS

1. This case is governed by the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code section 4500 et. seq., referred to as the Lanterman Act Lanterman Act).⁴ Under the Lanterman Act, an administrative "fair hearing" is available to determine the rights and obligations of the parties. (§ 4710.5.) Claimant requested a fair hearing to appeal the Service Agency's proposed denial of funding for services for Claimant. Jurisdiction in this case was thus established.

2. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Claimant is requesting that the Service Agency fund a previously unfunded service. Under these circumstances, Claimant bears the burden of proof.

3. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act mandates that an "array of

⁴ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community.” (§ 4501.) These services and supports are provided by the state’s regional centers. (§ 4620, subd. (a).)

4. The California Legislature enacted the Lanterman Act “to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community . . . and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community.” (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

5. Regional centers must develop and implement IPPs, which shall identify services and supports “on the basis of the needs and preferences of the consumer, or where appropriate, the consumer’s family, and shall include consideration of . . . the cost-effectiveness of each option” (§ 4512, subd. (b); see also §§ 4646, 4646.5, 4647, and 4648.) The Lanterman Act assigns a priority to services that will maximize the consumer’s participation in the community. (§§ 4646.5, subd. (a)(2); 4648, subd. (a)(1), (2).)

6. Regional centers have a duty to ensure that a consumer utilizes generic services and supports, and to consider the family’s responsibility for providing similar supports and services for a minor child without disabilities, taking 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)(2), (a)(4).) Regional centers are also mandated to identify and pursue all possible sources of funding for consumers receiving regional center services, including governmental or other entities or programs required to provide or pay the cost of providing services. (§ 4659, subd. (a).)

In addition, beginning July 1, 2009, regional centers shall not purchase IHSS where a consumer or a family meets the criteria for services but chooses not to pursue that service. ((§ 4659, subd. (c).) HRC's General Standards policy is consistent with the foregoing statutes in that HRC is prohibited from purchasing services unless all public resources and well as other resources of funding available to the client have been used to the fullest extent possible.

7. Claimant has met his burden of proving that HRC should fund personal assistant services. Claimant's IPP lists Claimant's development of social skills and increased participation in community activities as desired outcomes. (Factual Finding 10.) Claimant has been participating in social activities to facilitate his integration into his community, but his participation is interrupted or terminated due to his maladaptive behaviors that put his safety and the safety of others at risk. Claimant's day program provider, trained in behavior management, has requested funding for one-on-one services due to Claimant's behavior in the community. Thus, Claimant established by a preponderance of evidence that a personal assistant is necessary. Specifically, Claimant established the need for a personal assistant that is highly trained and experienced in providing ABA services. Although HRC contended that Claimant could access IHSS protective supervision hours, those services cannot be used for community integration. (Factual Finding 15.) There is no evidence in the record that personal assistant services are available through a generic resource, including IHSS.

8. Claimant's mother requests no funding from HRC for Claimant's participation in his leisure and social activities as such a request would be in contravention of section 4648.5, subdivision (a)(1), which suspends the Service Agency's authority to fund social recreational services. Rather, Claimant's mother's

request is for a personal assistant to facilitate Claimant's participation in activities in order to achieve Claimant's integration into the community. Claimant's mother's request is consistent with the Lanterman Act's mandate for community integration of developmentally disabled individuals and Claimant's IPP. Without the requested HRC-funded personal assistant, Claimant is isolated from his peers and excluded from participation in activities to foster community integration.

9. For the foregoing reasons, Claimant's appeal is granted.

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ORDER

1. Claimant's appeal is granted.
2. Harbor Regional Center shall fund a personal assistant for Claimant, at a rate of 30 hours per week to facilitate Claimant's integration into the community, and to be present during the provision of ABA services, until it has been determined through the individualized program planning process that such services are neither necessary, appropriate, or effective to meet Claimant's needs.

DATE:

CARMEN D. SNUGGS

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.