

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

In the Matter of:

CLAIMANT,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH Nos. 2021080293(Primary) and

2021100543 (Secondary)

DECISION

Administrative Law Judge Deena R. Ghaly, Office of Administrative Hearings (OAH), State of California, heard these consolidated matters by videoconference on January 27, 2022 and March 14 through 16, 2022. Latrina Fannin, Manager of Rights and Quality Assurance, represented Harbor Regional Center (HRC). Claimant's mother (Mother) represented Claimant. (The names of Claimant and Mother are omitted to protect their privacy.)

After receiving testimony and documents into evidence, this administrative law judge ordered the record kept open until March 22, 2022 for the parties to submit

closing briefs and until March 29, 2022 for the parties to submit any responding argument to each other's initial submissions. Both parties timely submitted closing briefs and submissions responding to each other's briefs. HRC's post-hearing submissions were marked 17 and 18 and Claimant's post-hearing submissions were marked UUUUU and VVVVV. These exhibits were admitted into the record and considered in the course of deciding this matter.

On March 31, 2022, and again on April 5, 2022, OAH received additional documents from Mother. There is no indication Mother served either of these documents to HRC. On April 6, 2022, this administrative law judge issued a post-hearing order entitled Notice of Ex Parte Communications and Order Re-Opening the Record. Under the terms of the April 6 Order, the record was reopened for the sole purpose of giving HRC the opportunity to review Claimant's late submissions and, if it deemed necessary, submit responses. The April 6 Order directed that any such response was due by April 12, 2022. HRC did not submit a response pursuant to the April 6 Order. On April 12, 2022, the record was re-closed, and the matter submitted.

ISSUES

1. Should HRC be required to continue to fund 30 hours of remotely provided skilled respite care through Behavior Respite in Action (BRIA), a vendored provider or another provider?
2. Should HRC be required to fund private transitional services through Jazz Hands and Easter Seals, both endorsed providers?

EVIDENCE

The documentary evidence considered in this case was: HRC exhibits 2 through 9 and 11 through 18 and Claimant's exhibits A (subparts 4-6 only), B-D, G, H-Z, EE, FF, HH, HHH, JJJ, WWW, XXX, YYY, CCCC1, DDDD, HHHH, LLLL, PPPP, VVVV (subparts 2,3 and 5 only), WWWW, XXXX, YYYY (subparts 1, 2, 4, 5, 7, 9, and 10 only), AAAAA-GGGGG, JJJJJ, LLLLL, MMMMM-QQQQQ, and TTTT-VVVVV.

The testimonial evidence considered in this case was that of: HRC Client Services Manager Patricia Piceno; Mother, and Claimant.

FACTUAL FINDINGS

Background

1. Claimant is 18 years old. He is eligible for regional center services due to a diagnosis of Autism Spectrum Disorder. Claimant is ambulatory, able to navigate his environment, and uses single words or short phrases to communicate. He requires assistance and prompting with self-care needs such as bathing, dressing, and toileting and continuous supervision because he has no safety awareness and is prone to eloping.

2. Mother is Claimant's sole caretaker and his in-home supportive services (IHSS) worker. Since he became an adult, Mother holds a limited conservancy to make medical and education decisions for him.

3. Medi-Cal and Anthem Blue Cross are Claimant's insurance providers. Anthem Blue Cross authorized behavioral services for Claimant. At the time of the

hearing, HRC funded 90 hours per calendar quarter of respite care through BRIA and an additional 30 hours per week of respite services, also provided by BRIA, as part of special services provided in response to the COVID-19 pandemic.

HRC's Position Regarding COVID-19 Respite and Private Transitional Services

REMOTE RESPITE SERVICES

4. In a letter dated June 30, 2021, HRC Service Coordinator Sandra Paulino informed Claimant and Mother the additional 30 hours per week of respite care would end on August 31, 2021. The letter stated the decision was based on changing circumstances at the time, when schools and day programs were beginning to reopen thus lessening the need for in-home respite. In her letter, Ms. Paulino also stated that continuing COVID-related respite could be funded but only when continued need is established through individual assessments:

Primarily, we authorized extra supports for your family because on-campus school attendance was not available for [Claimant]. As we continue to see the number of COVID-19 cases declining, and the school districts in our area either have begun to return students to on-campus learning or will begin to do so in the Fall, the overall need for COVID-19 supports for many clients and families have significantly changes. And, as we enter the summer period during which school access typically decreases irrespective of the pandemic, it is time to reassess your family's need for COVID-19 supports. . . .Unfortunately, we have been unable

to speak in order to gather information or conduct a formal assessment.

(Exh. 3, pp.1-2.)

5. Ms. Paulino's letter cited HRC's General Standards and Welfare and Institutions Code section 4646, subdivision (d), in support of HRC's position that it could not continue to fund COVID-19 respite hours without an assessment.

Relevant portions of HRC's General Standards provide that HRC will strive to:

prevent the person's dislocation from family and community; . . .promote service and support options that are designed to assure physical health and safety, development of skills for independent living and productivity, independence, support networks, and integration into general community life, with access to the full range of assistive technology; [and] to promote service and support options that are accountable, accessible and culturally appropriate; that identify each individual's strengths and needs; that promote client and family empowerment; that respect the choices and rights of participants; and that involve individuals with developmental disabilities and their families in all aspects of development, implementation, monitoring and evaluation of their services. . . .

(Exh. 11, p. 1 of 2) (Page number references are to internal pagination of individual exhibits.)

The Guidelines further provide “continuation or renewal of service . . . shall be contingent upon client/family satisfaction and upon reasonable progress in having achieved the desired outcome as identified in the Individual/Service Plan.” (*Id.* at 2/2.)

Welfare and Institution Code section 4646, subdivision (d) provides:

Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer’s goals, objectives, and services and supports that will be included in the consumer’s individual program plan and purchased by the regional center or obtained from generic agencies shall be made by agreement between the regional center representatives and the consumer or, when appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting.

6. At the hearing, Client Service Manager Patricia Piceno stated HRC determined not to continue COVID-19 respite services because Mother did not respond to HRC’s efforts to obtain information about Claimant’s ongoing need for the service and because the vendor providing the remote respite service, BRIA, was unable or unwilling to staff respite remote assignments. As Ms. Piceno explained, BRIA may have been able to provide in-person respite workers and may still; however, it cannot find staff to care for Claimant remotely.

Ms. Piceno also stated BRIA had reported technical and logistical difficulties in providing remote respite care, including inconsistent internet connection and freezing, Claimant turning off the camera, inability to redirect Claimant when he became distracted, and HRC’s understanding that, because remote respite did not

allow Mother to leave the home or even the room where Claimant engaged with the remote respite worker, it did not provide Mother with a break from her caretaking responsibilities, which is the intended purpose of respite.

TRANSITIONAL PROGRAMS

7. In a letter dated August 26, 2021, Ms. Paulino addressed Mother's request for HRC to fund the Jazz Hands and Easter Seals transitional programs, which Mother had raised during individual program plan (IPP) annual meetings held in June and again on August 17, 2021. Ms. Paulino's letter stated, pursuant to its HRC guidelines and relevant portions of applicable law, HRC would not pay for private transitional services if such services were available from a consumer's local school district as HRC believed was the case for Claimant; however, exceptions could be granted under limited circumstances:

[Welfare and Institutions Code] section 4646.5, subdivision (a)(1) of the Lanterman Act states that the planning process for the individual program plan described in Section 4646 shall include . . . "Gathering information and conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities." HRC must first gain a better understanding of the services offered through the school district and generic resources must be fully explored and accessed by the client/family (including HRC helping with advocacy with the school district), prior to consideration of funding for a program to address transition/vocational needs when those needs are typically

addressed through school district services (between the ages of 18 and 22 years of age).

You have not provided HRC with pertinent records for review that would allow us to assess for any unmet needs related to transition/vocational services. As such, we must conduct our assessment based on the limited information available while considering the sources of funding we believe you would qualify for. With limited information available to us, HRC does not see any extenuating circumstances at this time that would warrant an exceptionTherefore, because you are eligible for an adult transition program via the school district and we are unable to assess for an exception, HRC is denying your request to purchase vocational/transition services at this time.

(Exh. 5, p. 2 of 3.)

8. At the hearing, Ms. Piceno stated there were similar communication problems between Mother and HRC staff regarding transitional programs as there were regarding remote respite services. HRC staff could not ascertain whether Claimant was still in school and, based on the limited information it had, believed that, even if Claimant had completed the school district's high school program, he could participate in his school district's transitional program, a free generic source. Client ID notes introduced by HRC reflect its ongoing efforts to determine whether Mother had sought or considered alternate transitional programs offered by the school district in which Claimant lived. For instance, a note dated October 8, 2021 provides in part:

. . .parent has not shared status regarding whether she agreed with the district offer or the outcome regarding her request for an alternate program via the [school] district. As a result, there is limited information to support an exception for the request to replace vocational/transition services being offered by the district.

(Exh. 9, p. 53 of 57.)

Current Status of Services

9. HRC has maintained funding COVID-related respite pending resolution of Claimant's appeal (aid paid pending); however, because of BRIA's staffing difficulties, no remote respite has been provided for over a year. HRC has not funded and Claimant has not yet started attending a transitional program.

Mother's Position Regarding COVID-19 Respite and Private Transitional Services

10. Mother believes health conditions remain dangerous and will only agree to remote services, whether for respite or transitional programs. She disagrees remote respite is no respite at all, stating that she can concentrate on her own work and take care of personal and household tasks if there are sufficiently skilled remote respite workers to keep Claimant constructively occupied. Mother additionally asserted Claimant needs the kind of skilled respite workers BRIA provides because those vendors who provide workers without special skills cannot cope with Claimant's maladaptive behaviors and seek out assistance from Mother so frequently that she cannot turn her attention to her own needs. Mother cited regional centers' duty and

capacity to find appropriate respite providers as an additional basis for the appropriateness of her request.

11. Letters from Mother introduced into evidence demonstrate her ongoing need for respite care and her ongoing communication of those needs to HRC. (See, e.g. Exh. L [Mother's letter to Service Coordinator stating in part, "I continue to assist my son without family support even [until] dawn in different areas while attending to other things, continuing studies, etc. He kept going to my work area also and grabs my pen, pencils, calls me to assist him even at 2 a.m."].) Excerpts from contemporaneous notes taken by less skilled respite workers reflect Claimant slept for hours during their shift and they were unable to rouse him to keep him on track with his established routine. (See Exh. WWWW1 [contemporaneous notes from a non-skilled care provider reflect she left Claimant to remain in his bed until noon]) and Exh. YYYY1 [contemporaneous notes from a BRIA care provider reflect Claimant participating in a structured exercise program during a remote respite session]). Assessments completed by HRC in 2019 and 2021 (Exhs. D and PPPP) reflect Claimant's need for highly skilled respite workers.

12. Mother further stated conditions related to the pandemic remain unpredictable and dangerous. She presented evidence of fluctuating and surging virus counts in the months since HRC announced its intent to discontinue remote respite services including a December 2021 public order signed by Los Angeles City Mayor Eric Garcetti stating COVID transmission increased from low to high in the six-month period since June 2021 and that mask mandates would remain in effect (Exh. OOOOO) and a New York Times article from January 2022 reporting COVID cases had once again surged in Los Angeles (Exh. PPPPP).

13. Regarding transition programs, Mother introduced Claimant's certificate of completion from his high school. (Exh. DDDD.) Mother stated the transitional program in Claimant's school district is substandard and not a proper fit for Claimant, describing it as a place special education students get "dumped." Mother introduced a pamphlet from the transitional program reflecting it provided a range of vocational and transitional programs including auto detailing, building and grounds, and culinary arts but no music programs. (Exh. TTTT.)

14. Mother also favors Jazz Hands and the Easter Seal programs because both offer remote learning and Jazz Hands could help develop Claimant's musical interests and talent. Mother provided evidence of Claimant's involvement in music: trophies and ribbons from Claimant's participation in music performances (Exh. BBBB), a letter from a former piano teacher, stating he taught Claimant piano for a few years and highly recommends him for a music program (Exh. GGGG), and a letter from the Autism Society of America and the Embassy of Qatar stating the organizations were jointly launching a "call for talent." (Exh. A, p. 16/49.) Mother provided limited information regarding why she chose the Easter Seals program, except that it also provides remote learning, noting only that it specializes in training participants in "soft skills" related to career development.

15. Mother disputed HRC's assertions about communications problems. Mother stated she and Claimant have many appointments, but she makes herself available to HRC as much as possible. Mother's assertions are called into question not just by HRC witness statements to the contrary, but by the numerous entries in HRC client ID notes documenting its unanswered phone messages to Mother, Mother's constantly changing directions and limitations regarding how she can be reached,

including refusing email and postal mail and insistence on communicating by facsimile only, and other restrictions. (See Exh. 9.)

Claimant's Latest IPP

16. Annual IPP meetings were held most recently on July 29, 2021, and August 17, 2021. The resulting IPP provides in relevant part:

Mother . . . shared that [Claimant] loves to learn, engage, and has participated in different activities. Mother describes [Claimant] as very talented and having many gifts and reports he graduated with honors with her assistance. He enjoys being part of activities that involve music and dance. He enjoys singing and playing musical instruments with others. [Mother] shared that [Claimant] enjoys performing. He likes hands-on activities related to science, math, robotics, and other areas. [Claimant] also likes reading, spelling and computation. [Mother] states that [Claimant] requires assistance to participate in all of his activities of interest.

(Exh. XXX, p. 2.)

Regarding respite, the IPP provides HRC will fund 90 hours per quarter through BRIA from July 1, 2021 through August 31, 2022 and 30 hours per week of COVID-19 respite pending Mother's appeal of HRC's decision to terminate that service as set out in Ms. Paulino's June 2021 letter. "The service is in place while schools [remain] closed and [Claimant] [needs] supervision while Mother is working. This service is currently re-authorized from 9/1/21-10/31/21, as aid paid pending OAH decision." (*Id.* at p. 5.)

17. Under a section entitled School/Program/Employer, the IPP provides as follows:

[Claimant] is eligible for special education services via the School district until the age of 22. He participated in distance learning during the pandemic and [M]other reports that with her assistance he graduated [*s/c*] from [Claimant's] high school with honors. Prior to the school closure as a result of the pandemic, [Claimant] participated in vocation related activities in the classroom and on campus. He participated in cooking simple recipes, classroom chores, and building social/life skills through mock activities and classroom staff. . . During the meeting, [Mother] did not provide specific details pertaining to [Claimant's] current educational program.

(Exh. XXX, p. 12.)

The IPP goes on to note Mother had not provided HRC a copy of Claimant's latest Individualized Education Plan (IEP) as requested several months earlier, and that Mother stated she would try to obtain a copy. The IPP also states, according to an earlier IEP dated February 28, 2020, an individual transition plan created for Claimant anticipated he would be suited to participate in a "structured vocational training experience." (*Ibid.*)

Citing its inability to assess Claimant for specialized transitional programs, HRC rejected Mother's request to include funding the Jazz Hands and Easter Seals transitional programs. Instead, under a section entitled Desired Outcome, the IPP

stated “[Claimant] will have the appropriate supports and services to help him comprehend, complete assignments. [Claimant] will continue to receive an appropriate educational program with supports through [his local school district].”

18. Mother did not sign the 2021 IPP. She submitted a letter outlining her position and requesting that it be attached to the IPP. In her letter, Mother reiterated she required a skilled respite worker who could work remotely and her request that HRC fund the Jazz Hands and the Easter Seals transitional programs. (See Exh. YYY.)

LEGAL CONCLUSION

General Provisions of the Lanterman Act

1. The Lanterman Developmental Disabilities Services (Lanterman) Act (Welf. & Inst. Code § 4500 et seq.) (further statutory cites are to the Welfare and Institutions Code) governs this case.

2. Pursuant to the Lanterman Act, a service agency is required to ensure the provision of services and supports to consumers that meet their needs, preferences, and goals as identified in their IPP. (§§ 4501, 4512, subd. (b), 4646, subd. (a).) When providing these services, the service agency shall, among other things, assess the claimant’s “need for extraordinary care, services, supports and supervision, and the need for timely access to this care.” (§ 4640.4, subd. (a)(4).)

3. In securing services for its consumers, in addition to consumers’ preferences, a service agency must consider the cost-effectiveness of service options, including considering utilizing any available and appropriate generic services and supports. (§§ 4646, subd. (a), 4512, subd. (b).)

4. "Services and supports" includes personal care, daycare, and respite. (§ 4512, subd. (b).) For adult consumers, services and supports may also include independent living skills and transitional services to help prepare consumers for employment. Establishing which service to provide starts with developing a statement of goals during the IPP process followed by assessments "conducted by qualified individuals" (§ 4646.5, subd. (a).)

Fair Hearing Process and Burdens of Proof

5. Consumers are entitled to have service agency decisions reviewed through the fair hearing process. (§§ 4710-4714.) The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Bd. of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) The standard of proof in this matter is a preponderance of the evidence because no other law or statute, including the Lanterman Act, requires otherwise. (Evid. Code, § 115.) A preponderance of the evidence requires the trier of fact to determine that the existence of a fact is more probable than its nonexistence. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

Analysis

6. In this proceeding, each party is affirmatively asserting a claim. HRC asserts that it is entitled to terminate a currently provided service, remote respite and Claimant asserts a right to a new service, HRC-funded private transitional and vocational services through the Jazz Hands and Easter Seals programs.

7. During the hearing, HRC cited several reasons for why it seeks to end remote respite: Mother has not been responsive to its requests to assess Claimant and to keep HRC updated regarding his school status and schedule; the one skilled remote

respite provider can no longer provide services; and providing respite remotely undermines the purposes of respite.

HRC did not meet its burden to provide sufficient evidence justifying terminating funding for the existing remote respite. Mother has communicated both her need and preference for remote respite. Since it is intended to provide relief for her, as Claimant's main care provider, her stated preferences are more persuasive than HRC's perspective on this issue. Regarding HRC's opportunity for ongoing assessments, as noted in Legal Conclusion 7 below, this is an important ongoing obligation Mother has not been meeting; however, it is not pertinent to this issue. Claimant has been regularly assessed pursuant to HRC's criteria for level of respite care and there is no indication that his need for skilled care is changing. Finally, HRC's challenges to finding remote respite providers is real and may well limit the amount of respite it will be able to arrange; however, it is incumbent on HRC to continue to try to find appropriate providers and keep Mother apprised of its efforts.

8. Claimant, through Mother, bears the burden to establish his right to HRC-funded private transitional and vocational services. Mother presented limited evidence of Claimant's interest and involvement in music, which is different and far less than what would be necessary to demonstrate he could be trained to become a professional musician. That issue, however, is premature. Before Mother can resort to the fair hearing process to challenge HRC's decision, she must allow Claimant to avail himself of its assessment process. 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 § 4646.5, subd. (a)(1) [needs assessment requires information from family]; Civ. Code § 3521 ["He who takes the benefit must bear the burden."].) A failure of cooperation may

negate the authority to compel HRC to fund services and supports. As Claimant's fiduciary, Mother has an affirmative duty to be cooperative so available benefits for him can be maximized.

ORDER

Claimant's appeals are granted in part and denied in part. Claimant's appeal of HRC's decision to discontinue COVID-19-related remote respite services at the rate of 30 hours a week is granted. HRC is ordered to continue to search for appropriately trained remote respite providers and, to the extent providers are available, fund up to 30 hours of remote respite per week.

Claimant's appeal of HRC's decision not to fund private transition services through the Jazz Hands and Easter Seals programs is denied at this time. Claimant must cooperate with HRC's assessment efforts and await its final determination regarding whether his specific circumstances, including his skills, justify private transition and vocational programs.

DATE:

DENNA R. GHALY

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.