

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2018070116

DECISION

David Rosenman, Administrative Law Judge (ALJ) with the Office of Administrative Hearings, heard this matter on August 15, 2018, in Torrance, California, and on August 28, 2018, in Long Beach, California.

Claimant was represented by his mother who acted as his authorized representative.<sup>1</sup> Claimant was present for the second day of hearing. Harbor Regional Center (Service Agency or HRC) was represented by its Manager of Rights and Quality Assurance, Latrina Fannin. Spanish interpretation for mother was provided by Janina Gaxiola Moe (day 1) and Lilly Lucas (day 2).

Oral and documentary evidence was received. The matter was submitted for decision on August 28, 2018.

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<sup>1</sup> Names are omitted in this Decision to protect the privacy of Claimant and his family.

## ISSUES

1. Should the Service Agency provide occupational therapy for Claimant?
2. Should the Service Agency provide a speech evaluation for Claimant?

## EVIDENCE

Documents: Service Agency exhibits 1-18; Claimant exhibit A.

Testimony: Patricia Piceno, HRC Client Service Manager; Kelly Carmichael, HRC Client Services Manager; and Claimant's mother.

### HRC MOTION TO DISMISS

Ms. Fannin wrote a letter, dated August 1, 2018 (exhibit 17), to the ALJ with a request to dismiss Issue 2 (speech evaluation) based on a prior Decision dated January 8, 2018, in OAH case number 2017070792 (January 2018 Decision; exhibit 4), authored by ALJ Irina Tentser. The letter was translated into Spanish and sent to mother. HRC noted that the January 2018 Decision upheld HRC's prior denial of a speech evaluation because mother had not provided requested information or authorized HRC staff to discuss Claimant's needs and services with his school district, health insurance carrier, Medi-Cal, or other providers or potential providers. HRC contends that, after the January 2018 Decision was issued, mother has still not provided that information or authorization. At the hearing, the ALJ indicated that it was necessary to hear evidence about whether the information or authorization had been provided, and that the motion to dismiss would be considered and ruled upon as part of this Decision.

## FACTUAL FINDINGS

### PARTIES AND JURISDICTION

1. Claimant is a 14-year-old male client of HRC who qualifies for regional center services based upon a diagnosis of Autism Spectrum Disorder (ASD) and Intellectual Disability. He resides at home with his mother and older sister.

2. At a meeting on June 4, 2018, mother requested that HRC provide occupational therapy for Claimant and provide a speech evaluation for Claimant.

3. On June 12, 2018, HRC sent a letter to mother denying the requests for occupational therapy and a speech evaluation for Claimant.

4. On June 28, 2018, mother signed a Fair Hearing Request (FHR). The stated reasons for the FHR were requests for occupational therapy (OT) and a speech evaluation for Claimant

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### BACKGROUND INFORMATION

5. Claimant has limited language skills (one word or short phrases) and uses a communication application on his iPad to communicate. Claimant is dependent on others for assistance with his self-care needs. Claimant requires constant care and supervision to ensure his safety.

6. Long Beach Unified School District provides funding for Claimant to attend a Non-Public School (NPS), Port View Preparatory, in Yorba Linda. He attends school five days a week for six hours per day. He has an Individualized Education Plan (IEP) of special education goals and services. Claimant receives both OT and speech therapy (ST) services through his school district. Mother has

not provided HRC with information regarding the nature and extent of the OT and ST services provided to Claimant through his school district.

7. HRC provides Claimant with monthly respite services and personal care assistance. Claimant also receives Medi-Cal benefits and receives hours of In Home Supportive Services (IHSS), which provides personal care services such as dressing, eating, toileting, bathing, grooming and protective supervision. Mother chose to not provide information to HRC on the amount of hours of IHSS services received by Claimant.

8. A meeting was held on April 12, 2018, to develop Claimant's Individualized Program Plan (IPP; exhibit 5), including discussion of services provided by HRC and requests for additional services. Mother requested an increase in respite services. The IPP also indicates that HRC was limited in its ability to assess the needs and demands placed on the family, in part due to then lack of information on the number of IHSS hours being received. Mother also requested personal care assistance during the school break. HRC asked to conduct a personal care needs assessment and for access to the IHSS letter awarding specified hours of services. HRC informed mother that without this information it could not satisfy its obligations to gather information and assess Claimant's needs under Welfare and Institutions Code section 4646.5, discussed in the Legal Conclusions below. The IPP noted that part of the assessment process included gathering information from other providers and other agencies such as the school. Mother declined to provide such information at that time.

9. The IPP also addressed an OT evaluation ordered in the January 2018 Decision.<sup>2</sup> The evaluation was performed by Step By Step Pediatric Therapy,

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<sup>2</sup> In Legal Conclusion 3 of the January 2018 Decision, ALJ Tentser wrote that HRC had agreed to fund an OT evaluation. Based on the agreement, the

Inc., on February 2, 2018. The report (exhibit 8) was reviewed by HRC and discussed with mother at the IPP meeting. HRC's position at that time was that the report identified areas that could be addressed by the school district in an IEP. HRC requested that mother provide documentation from the school district including the most recent IEP, any reports indicating Claimant's progress towards goals, and assessments relating to the OT provided at school. HRC explained that this information "will facilitate the needs assessment process and avoid duplication of services, as well as advocating for additional services from the school district if needed." (Exhibit 8, p.5.)

10. Mother provided to HRC Claimant's IEP, dated May 3, 2018 (exhibit 7). The IEP addresses Claimant's academic goals, both by its content as well as the last page/signature page (*id.*, p. 16) which requests the parent to check boxes indicating whether "these academic goals" are approved, not approved, or approved with modifications. This IEP document makes no reference to OT or ST assessments, goals, services, or progress regarding Claimant.

11. It is highly unlikely that the school district would provide OT and ST to Claimant without assessments or a section of his IEP that addresses his OT and ST goals, services, and progress. The IEP in exhibit 7 is likely incomplete.

12. At the hearing on August 15, 2018, mother presented an authorization (exhibit A) dated September 25, 2017, from The Children's Clinic for a speech language evaluation for Claimant. Mother testified that this is under Claimant's Medi-Cal coverage, that Claimant is on a nine-month wait list, and that mother met with Claimant's service coordinator on August 7 or 8, 2018, to

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January 2018 Decision included in the Order that HRC's denial of funding for an OT evaluation was reversed. (Ex. 4, pp. 19 and 26.)

contact Medi-Cal to obtain more information. However, HRC was not aware of the authorization until mother presented it on the first day of the hearing, almost 11 months after mother received the authorization.

13. Kelly Carmichael, HRC Client Services Manager, testified about a further IPP meeting held on July 31, 2018. Although the meeting was after mother filed the FHR, testimony about the meeting was elicited from Ms. Carmichael from both Ms. Fannin and mother. According to Ms. Carmichael, at the July 31 meeting mother again requested a speech evaluation. HRC requested consent to contact the school district and Medi-Cal to receive and send relevant information. Mother gave oral consent. HRC requested that mother sign written consents, but mother did not sign the written consents. Without the signed consents, HRC is limited in its ability to obtain information from, or send information to, Claimant's school district and Medi-Cal relating to OT or ST.

14. HRC has two service policies that it contends are relevant to its request to obtain further information about OT and ST from mother and/or other resources, such as the school district or Medi-Cal. The General Standards (exhibit 12) include that HRC will strive to select services and supports which most effectively meet a client's needs while making the most efficient use of funds. The service may be purchased only under the following circumstances: "(4) after public resources which are available to implement and or coordinate the services identified by the interdisciplinary team, as well as other sources of funding available to the client, have been used to the fullest extent possible; (5) when the service is not otherwise available through Medi-Cal, . . . In Home Support Services, . . . private insurance or a health care service plan." (Exhibit 12, p. 2.)

15. HRC's Service Policy on Therapy Services (exhibit 13) states, in pertinent part, that HRC may purchase therapy services for a client only if certain

criteria are met, including: "2) When the client is of public school age, the desired outcome is not related to their educational plan; and [¶] 4) The client has been denied or is not eligible for Medi-Cal, California Children's Services, private insurance or another third party payer coverage . . . ."

16. Mother explained that she previously paid for speech therapy provided by California State University, Long Beach (CSULB). She described Claimant's lack of language development at the time as severe. Services from CSULB helped, however the family's financial situation worsened and mother was no longer able to afford services from CSULB. Mother testified that, from the time those services ceased, Claimant's language development has regressed.

#### REQUEST FOR SPEECH EVALUATION AND THE JANUARY 2018 DECISION

17. The January 2018 Decision listed eight issues to be determined, including whether the Service Agency was required to fund the following services for Claimant: "(4) HRC-funded evaluation for Speech therapy (ST) and Occupational Therapy (OT)." (Ex. 4, p. 2.) As noted in footnote 3, HRC agreed to provide the OT evaluation and it was ordered to do so (discussed in Factual Finding 9 above).

18. Legal Conclusions 6 through 9 in the January 2018 Decision address the issue of a speech therapy evaluation and are quoted in full.

6. Claimant has not met his burden of proving that HRC should fund a ST evaluation 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." (Welf. & Inst. Code § 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.*)

7. HRC cannot satisfy its obligations pursuant to Welfare and Institutions Code section 4646.5, if it does not have the right to obtain information, and the power to obtain that information. A person who seeks benefits from a regional center must bear the burden of providing information, submitting to reasonable examinations and assessments, and cooperating in the planning process. (See Civ. Code § 3521 ["He who takes the benefit must bear the burden."].) Claimant's mother can refuse to do anything that she feels does not benefit her child. However, if the exercise of that right interferes with the implementation of the Lanterman [Developmental Disabilities Services] Act, then a regional center may have no choice but to refuse to render services, since the failure to cooperate may negate the authority to compel the regional center to fund services and supports.
8. In addition, when a consumer requests services, they are essentially waiving objection to the regional center and its staff and consultants having access to otherwise private information when such access/information is necessary to assess the need for services and/or the effectiveness of those services. As noted during the hearing, however, the request for service does not mean the information can be or is disseminated for any other purpose. Accordingly, a consumer must cooperate with reasonable requests for assessments and evaluations, to assist the regional center in discharging its

responsibility. At the same time, the regional center must be responsible in its use of the information.

9. HRC must first gain a better understanding of services and supports provided through Claimant's school and other sources, and assist the family with accessing additional support through Medi-Cal, if appropriate. (Welf. & Inst. Code § 4659, subdivision (a)(1), (2).) To determine whether Claimant requires a ST evaluation, HRC has to consult with and review reports by Claimant's other service providers, including Claimant's physicians, school district, SELPA, and CSULB. Mother has precluded HRC from obtaining information to determine Claimant's need for this service. As of the date of the hearing, mother has refused to provide HRC with the necessary information. Until mother provides the requested information and authorizes HRC staff to discuss Claimant's needs and services with the District, Claimant's insurance, SELPA, CSULB, and Claimant's doctors, HRC cannot grant mother's request for a ST evaluation. (Factual Findings 6, 7, 9, 10, 15-17.) If Claimant provides the requested information and authorizations, the parties can meet to discuss whether an ST evaluation funded by HRC is required.

19. Although the facts set forth in Factual Findings 8 through 13 contain information that was not considered in the January 2018 Decision, those facts do not provide any further substantive information about the school district's ST evaluations of Claimant, or ST services to Claimant. Nor do these facts provide any substantive information about a speech language evaluation funded by Medi-Cal, other than it has been authorized but has not yet occurred.

20. Under California Code of Regulations, title 17, section 50966, subdivision (a), discussed in more detail in the legal Conclusions below, HRC's motion to dismiss Claimant's request for HRC to provide a speech evaluation for Claimant is granted.

#### OTHER RELEVANT EVIDENCE

21. a. Mother raised several contentions at the hearing, some of which are worthy of note. Mother often questioned whether the witnesses had college or graduate degrees or educational specialties relating to OT or ST, inferring that Ms. Piceno and Ms. Carmichael were not qualified to determine that Claimant requires OT or a speech evaluation. Ms. Piceno and Ms. Carmichael both replied that HRC has qualified specialists who would review information gathered about Claimant's OT and ST needs to assist in determining if OT or a speech evaluation was needed.

b. Mother contends that the HRC service team is not productive because the services she wants are not being provided. Mother did not demonstrate an understanding, despite numerous efforts by HRC personnel and the reasoning of the January 2018 Decision, that it is necessary for HRC to gather all relevant information about Claimant's current OT and ST services from the school district to determine if the school district is meeting Claimant's educational needs. If the school district is not meeting Claimant's educational needs, HRC can assist mother in the process to request and obtain needed services. HRC is required to do so, by law, before it can provide the services itself. Similarly, it is necessary for HRC to gather all relevant information about Claimant's speech evaluation from Medi-Cal to determine if Medi-Cal is meeting Claimant's needs, as the law requires these steps before HRC can provide the service itself.

c. Mother questioned Ms. Carmichael about "disparity" funding which apparently related to extra funds provided by the state to regional centers to address the disparity in funding services for Caucasian clients as opposed to Hispanic and other minority clients. This subject is not relevant to the Issues to be decided in this matter.

22. HRC explained that since mother has not provided Claimant's updated information, it is currently impossible for HRC to be able to evaluate Claimant's need for services OT or a speech evaluation. As noted, mother has refused to provide school district records, and only provided information about the Medi-Cal authorization for a speech evaluation on the first day of the hearing. Under the Lanterman Act, HRC is a payor of last resort and is required to explore all options, including generic resources, prior to considering using public funds to pay for services. As it stands, HRC cannot assess Claimant's needs because of the lack of access to Claimant's records.

23. Access to current records of OT and ST services, goals and progress from Claimant's school district is necessary before HRC can determine what additional needs, if any, are not being met and may be the responsibility of HRC to provide. HRC is unable to fund a speech evaluation at this time because HRC must first gain a better understanding of services and supports provided through the school and assist the family with accessing additional support through Medi-Cal, if appropriate.

## LEGAL CONCLUSIONS

1. Claimant's appeal is dismissed as to HRC's denial of funding for a speech therapy evaluation. (Factual Findings 1 through 23; Legal Conclusions 3 through 14.)

2. Claimant's appeal is granted as to HRC's denial of funding for an OT services. (Factual Findings 1 through 23; Legal Conclusions 3 through 14.)

3. An administrative hearing to determine the rights and obligations of the parties, if any, is available by an appeal of a regional center decision to deny a service. (Welf. & Inst. Code, §§ 4710-4714.) Claimant timely requested a hearing following the HRC's denial of requested services, and therefore, jurisdiction for this appeal was established.

4. When a party seeks government benefits or services, she bears the burden of proof. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) In a case where a party is seeking funding for services not previously provided or approved by a regional center, that party bears the burden of proof. The standard of proof in this case is the preponderance of the evidence, because no law or statute requires otherwise. (See Evid. Code, § 115.) In seeking funding for a speech evaluation and OT services, Claimant bears the burden of proving by a preponderance of the evidence that the funding is necessary. Claimant has failed to meet his burden, as more fully described below.

5. Assessment and services, as relevant to Claimant's requests, are governed by various sections of the Welfare and Institutions Code, some of which are cited below. Together, these laws establish basic principles that support HRC's denials of the requested services. These basic principles are:

- a. HRC, Claimant, his mother and others shall participate in the IPP process to determine the services needed by Claimant.
- b. Before a service can be provided, HRC must assess the need for that service. The assessment includes, among other things, gathering information from other sources, such as Claimant's school district and

Medi-Cal. HRC is required by law to consider the obligations of these other sources, sometimes referred to as generic resources or agencies, and sometimes named specifically in the law, as part of the assessment process.

- c. If another source, such as a school district or Medi-Cal is legally required to provide a service and it is either not providing the service or is not providing enough services, HRC is available to assist Claimant to get more services from these other sources before HRC is required to fund for the services.

6. Welfare and Institutions Code section 4512, subdivision (b), provides, in part:

[T]he 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.

7. Under Welfare and Institutions Code section 4646, the IPP is to take into account the individual needs of the client, through a process to determine

those needs. The IPP may include services “purchased by the regional center or obtained from generic agencies. (Welf. & Inst. Code, § 4646, subd. (d).)

8. Welfare and Institutions Code section 4646.4 provides, in part, that regional centers shall have a process to “(a) [E]nsure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following: [¶] (1) Conformance with the regional center’s purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434. [¶] (2) Utilization of generic services and supports when appropriate.”

9. Under Welfare and Institutions Code section 4646.5, the planning process shall include, among other things, gathering information and conducting assessments, including information from service providers (subd. (a)(1)), and “A schedule of the type and amount of services and supports to be purchased by the regional center or obtained from generic agencies or other resources in order to achieve the individual program plan goals and objectives, and identification of the provider or providers of service responsible for attaining each objective, including, but not limited to, vendors, contracted providers, generic service agencies, and natural supports.” (Subd. (a)(4).)

10. Welfare and Institutions Code section 4647, subdivision (a), describes the service coordination process to benefit clients, and includes “assurance that the planning team considers all appropriate options for meeting each individual program plan objective; securing, through purchasing or by obtaining from generic agencies or other resources, services and supports specified in the person’s individual program plan; coordination of service and support programs; collection and dissemination of information; and monitoring

implementation of the plan to ascertain that objectives have been fulfilled and to assist in revising the plan as necessary.”

11. The regional center may not provide a service that another agency is required to provide by law. As stated in Welfare and Institutions Code section 4648, subdivision (a)(8): “Regional center 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.”

12. Under Welfare and Institutions Code section 4659, subdivision (a), the regional center is required to “identify and pursue all possible sources of funding for consumers receiving regional center services,” including Medi-Cal and school districts (subd. (a)(1)).

13. If, after gathering all information from sources and performing a proper assessment, there is a determination that a service is needed but the need has not been met by a generic resource, the regional center must provide the service as the payor of last resort, and the regional center is authorized to pursue reimbursement from the generic resource, under California Code of Regulations, title 17, section 52109, subdivision (b), and Welfare and Institutions Code sections 4659 and 4659.10.

14. Under California Code of Regulations, title 17, section 50966, subdivision (b), a motion to dismiss a fair hearing request is authorized when “a fair hearing request raises issues not appropriately addressed” in the fair hearing process or “does not comply with statutory requirements.”

15. Under the circumstances established by the evidence, HRC has been obstructed in its obligation to obtain relevant information so that it can make the assessment, required by law, of whether it should provide OT services or a speech evaluation to Claimant. That obstruction is in the form of mother’s

unwillingness to allow HRC to gather information from, and provide information to, resources such as Medi-Cal and Claimant's school district. Without mother's cooperation in giving consent to the exchange of information, HRC cannot comply with its legal obligations, and will not be ordered to do so.

## ORDER

1. HRC's denial of funding for occupational therapy for Claimant is upheld.
2. Claimant's request for HRC to fund for a speech evaluation is dismissed.

DATED:

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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.