

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

MYLES S.

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2012080055

DECISION GRANTING APPEAL

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on September 12, 2012, in Torrance.

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

Gigi Thompson, Manager of Rights Assurance, represented the Harbor Regional Center (HRC or Service Agency).

The record was closed and the matter was submitted for decision at the conclusion of the hearing.

ISSUE

May the Service Agency terminate funding for Claimant's after school care?

EVIDENCE RELIED ON

In making this Decision, the ALJ relied upon exhibits 1-10 submitted by the Service Agency, as well as the testimony of HRC Associate Director Claudia DeMarco and Claimant's mother.

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

FACTUAL FINDINGS

1. Claimant is an 18-year-old male who is a consumer of HRC based on his qualifying diagnosis of mild mental retardation (Down Syndrome).
2. For more than three years, HRC provided funding for Claimant to receive 50 hours per month of after school care. In 2011, however, HRC agreed to only authorize this funding through June 30, 2012. Claimant's mother subsequently requested that service funding be provided for the 2012-2013 regular school year.
3. By a Notice of Proposed Action dated July 19, 2012, HRC notified Claimant's mother that it had decided to not provide funding for Claimant's after school care during the 2012-2013 regular school year.
4. Claimant's mother timely submitted a Fair Hearing Request to HRC, which appealed HRC's decision to not provide the requested funding.
5. Claimant is an unconserved adult who lives at home with his mother. He has designated his mother to be his authorized representative in this matter. Claimant attends and receives special education services at Carousel School, which is a non-public school, through funding provided by his local school district. Claimant's biological father lives in Orange County. Claimant's older brother lives close by.
6. The after school care is provided by Carousel's sister school, Salvin Learning Center (Salvin). At school district expense, Claimant is transported from home to Carousel, and then from Carousel to Salvin, and then back home. Claimant is picked up at 7:30 a.m. each weekday when there is school. Classes at Carousel go from 8:00 a.m. to 3:00 p.m. Claimant usually attends Salvin from 3:30 to 5:00 p.m., and is usually brought home by 5:30 or 6:00 p.m., depending on traffic. Claimant has a 1:1 aide with him at Carousel and Salvin due to his behavior and supervision challenges.
7. The Service Agency has previously agreed to provide the after school care funding because Claimant's mother is a single parent who works full-time from home. Claimant has serious behavioral problems and needs constant supervision. Claimant's mother cannot work from home and supervise Claimant at the same time.
8. The Service Agency has a service policy (policy) for after school care, which was approved by HRC's Board of Trustees in March of 2012, and by the Department of Developmental Services (DDS) in July of 2012. The policy provides for after school care funding for a single parent engaged in a full-time job, provided the child in question has behavior challenges or supervision needs that require specialized care. Among various restrictions, the policy states no such funding will be provided unless there are "no natural or generic supports available to provide the care and supervision."

9. Claimant's family has received In-Home Supportive Services (IHSS) funding for several years. His IHSS funding currently totals 271.80 hours per month, including 40.37 hours per week of protective supervision. The Service Agency contends that ten hours per week of the protective supervision IHSS funding is available to provide care and supervision for Claimant after school, leaving approximately 30 hours per week of protective supervision to be used by Claimant's mother as she deems appropriate. For that reason, the Service Agency argues there is generic funding available to cover Claimant's after school care needs and that he is no longer eligible for such funding pursuant to the after school care policy. HRC's Associate Director, Ms. DeMarco, testified that the initial decision to provide the after school care funding was a mistake made by staff, who did not understand or realize a generic resource was available.

10. Although Claimant's mother receives the bulk of Claimant's IHSS funding for services she renders, she cannot work at home and care for Claimant at the same time. Claimant's mother testified that Claimant's father is currently ill with cancer and is unable to care for him after school. Claimant's mother also testified that her other adult son, who on occasion has been compensated for IHSS care provided to Claimant, is not available to provide after school care because he has full-time employment and must also care for his two-year-old son. A prior Individual Program Plan (IPP) submitted by HRC indicates that in the past an employee of either Carousel or Salvin has been compensated for IHSS services to Claimant, but that evidence is not clear. Claimant's mother is also occasionally expected to travel out-of-state for her job three or four days each month. When that happens, Claimant's mother uses her IHSS funding, as well as other circles of support to ensure Claimant is supervised in her absence.

DISCUSSION

Jurisdiction and Burden of Proof

The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (Welf. & Inst. Code, §§ 4700-4716.) Claimant timely requested a hearing to appeal the Service Agency's proposed decision to not provide after school care funding for the current regular school year. Jurisdiction in this case was thus established. (Factual Findings 1-5.)

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.) A regional center seeking to terminate or reduce funding provided to a consumer has the burden to demonstrate its decision is correct, because the party asserting a claim or making changes generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.)

In this case, the Service Agency bears the burden of proof regarding its proposed decision to not provide the requested funding, because it has previously provided the funding in question. No proof was submitted indicating that the Service Agency gave notice to Claimant's mother and otherwise advised her of a right to a hearing when it previously decided to stop funding after school care after June 30, 2012. (Welf. & Inst. Code, § 4710, subd. (a)(1).) Therefore, the fact that the Service Agency stopped providing the funding in question a few months ago does not shift its burden to Claimant. (Factual Findings 1-5.)

Funding for After School Care

Welfare and Institutions Code section 4646.4 was added to the Lanterman Act as a cost-containment measure in response to the current state budget crisis. Section 4646.4, subdivision (a), requires regional centers to conform to their service policies, utilize available generic resources, and consider the family's responsibility for providing similar services to a minor child without disabilities.

In this case, HRC's service policy requires it to look for "available" generic resources or supports to provide after school care. HRC established that Claimant receives 40 hours per week of protective supervision funding through the IHSS program. However, it was not established that those hours of protective supervision are actually available to be used for after school care. Claimant's mother provides the bulk of compensated IHSS care. But she cannot be expected to both work from her home and supervise Claimant at the same time. Theoretically, there are protective supervision hours available to compensate another person to care for Claimant from approximately 3:00 p.m to 5:00 p.m. But it is not clear how those protective supervision hours are currently used, or whether using them for after school care will create a gap elsewhere. Those hours are also subject to use when Claimant's mother is required to travel for work out-of-state. Moreover, it was not established that there is one person or a reliable network of people who are available or willing to care for Claimant for two hours in the afternoon during the week. The evidence tends to indicate that Claimant's other family members are not available. The rest of the evidence presented on this issue was murky. HRC has the burden of proof on this issue, and it simply failed to carry its burden. HRC should be required to provide after school care funding for the 2012-2013 regular school year.

However, since it is undisputed that there is a pool of generic funding theoretically available to cover this need, the inquiry should not simply stop here. Claimant's needs and the presence of people potentially available to care for him using IHSS funding is a fluid dynamic subject to change over time. Therefore, HRC shall only be ordered to provide the after school care funding for the current regular school year. The parties are expected to meet and confer regarding subsequent after school care funding needs.

LEGAL CONCLUSION

Cause was not established pursuant to section 4646.4 to terminate funding for Claimant's after school care provided by the Salvin Learning Center for the 2012-2013 regular school year. HRC shall provide funding for Claimant to receive 50 hours per month of after school care at the Salvin Learning Center through June 30, 2013. (Factual Findings 1-10 and Discussion.)

ORDER

Claimant's appeal is granted. The Service Agency forthwith shall provide funding for Claimant's after school care provided by Salvin Learning Center in the amount of 50 hours per month. That funding shall continue through June 30, 2013.

DATE: September 26, 2012

/s/

ERIC SAWYER
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.