

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2013080779

DECISION

Administrative Law Judge (ALJ) Laurie R. Pearlman, State of California, Office of Administrative Hearings, heard this matter on March 19, 2014, in Torrance, California.

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

Claimant's mother and Claimant's co-conservator represented Claimant¹ who was not present.

Testimony and documentary evidence was received. The record was left open until April 4, 2014, to allow Claimant to submit proof of payment for Independent Living Skills (ILS) services and to allow HRC to submit a response. Their submissions were timely received. Claimant's submission was marked as Exhibit G for identification and admitted into evidence. HRC's response was marked as Exhibit 14 for identification and admitted into evidence. The record was closed and the matter was submitted for decision on April 4, 2014.

HRC's Motion to Dismiss

On March 5, 2014, HRC filed a Motion to Dismiss, contending that Claimant's appeal is effectively barred by the decision issued on November 25, 2013, in OAH Case Number 2013080779 (prior Decision.) In that case, the ALJ granted Claimant's appeal and ruled that HRC "shall provide Claimant with three hours per week of ILS services." (Exhibit 7.) In the current appeal, Claimant seeks reimbursement for the ILS services Claimant's parents self-financed from July 2013 to mid-December 2013, before the services ordered in the prior decision went into effect. HRC argued that the prior Decision failed to recognize retroactive

¹ Titles are used to protect the family's privacy. Claimant's mother and Claimant's co-conservator will be collectively referred to as Claimant's parents.

payment for services purchased by the family as an issue, even though the parents presented evidence that they had paid for the services. HRC also asserted that Claimant's request for retroactive payment is untimely, and that this appeal is barred because Claimant should have pursued an appeal from the prior decision, in favor of Claimant.

Claimant opposed HRC's Motion to Dismiss, arguing that his parents were not notified that they specifically needed to request retroactive payments. The parents suggest that HRC delayed its initial denial of Claimant's request for continued funding of ILS services in order to avoid any obligation to fund services pending the earlier appeal.

HRC's motion to dismiss was denied without prejudice prior to the hearing on the grounds that the current appeal is not clearly barred in that neither the pleadings nor the prior Decision identified as an issue in the case any request to reimburse Claimant for services funded by his parents prior to the effective date of the Decision. (Exhibit 6.)

At the commencement of the hearing, HRC renewed its Motion to Dismiss. HRC's motion is denied on the grounds that HRC failed to introduce evidence sufficient to establish that this matter is barred by the prior decision or on any other grounds.

ISSUE

The question in this matter is whether the Service Agency must reimburse the cost of three hours per week of ILS services from July 2013 through mid-December 2013, which were paid for by Claimant's parents prior to the November 25, 2013 fair hearing decision in favor of Claimant, by which HRC was ordered to provide three hours per week of ILS services for Claimant in his home.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-14; Claimant's exhibits A-G.

Testimonial: Brooke Nakagawa, HRC Program Manager; Gigi Thompson, HRC Assurance Rights Manager; Claimant's mother and Claimant's co-conservator.

FACTUAL FINDINGS

1. Claimant is a 30-year-old male who qualifies for regional center services, based on a diagnosis of mild mental retardation and Down syndrome. Claimant's Individual Family Service Plan (IFSP)², dated March 5, 2013, noted that he still requires adult supervision, although he desires to be independent. "Desired Outcomes" included learning to complete his own self-care and to manage money independently.

² HRC uses the designation IFSP instead of Individualized Program Plan (IPP), to which the Lanterman Act refers. However, any references to IPPs apply to HRC's IFSPs.

2. During the 2012-2013 school year, Claimant attended the one-year Generation NeXt program of Pathways through UCLA Extension, which ended in June 2013. While Claimant attended this program, HRC provided payments for ILS services to vendor Creative Support.

3. On May 6, 2013, Claimant's mother telephoned Lisa Donald, HRC's Adolescent West Counselor to request that HRC continue to fund ILS services through Creative Support when he moved back home in June 2013, to attend the Adult Transition Program at the Torrance Triangle. Claimant's mother reiterated this request to Ms. Donald the following day when they both attended Claimant's May 7, 2013 Individualized Education Plan (IEP) meeting.

4. On May 20, 2013, Ms. Donald informed Claimant's mother that HRC would be terminating ILS services when Claimant completed the UCLA program and returned home in June 2013.

5. Claimant moved back home and began summer school at the Triangle in July, 2013, at which time Claimant's parents began self-funding three hours per week of ILS services through Creative Support in their home. On July 16, 2013, Claimant's mother telephoned Ms. Donald and again requested continued funding of the ILS services. Ms. Donald again stated that HRC would not fund the ILS services sought. When Claimant's mother asked whether there was a way to appeal this denial, Ms. Donald stated that she would look into the appeal process and let Claimant's mother know.

6. By letter dated August 9, 2013, HRC sent its Notice of Proposed Action (NOPA) denying Claimant's request for ILS services. The stated reason for the decision was that HRC considered ILS to be a duplication of services, because Claimant was attending a school transition program. HRC also noted that it was required to seek all supports that are available and appropriate to meet Claimant's needs before it purchased services, and cited Welfare and Institutions Code section 4648.55. This letter, which Claimant's parents received on August 12, 2013, explained Claimant's right to a fair hearing and included a copy of the Fair Hearing Request form. It explained the right to aid paid pending, stating that "if your request for a fair hearing is postmarked or received by us no later than 10 days after you receive this letter, [Claimant] may continue to receive the disputed services during the appeal process."

7. Claimant's parents disagreed with HRC's decision and filed a fair hearing request, postmarked August 21, 2013. This fell within ten days of their receipt of the NOPA.

8. A fair hearing was held on November 12, 2013. Claimant's appeal was granted. In a Decision issued on November 25, 2013, HRC was ordered to provide Claimant with three hours per week of ILS services. The ALJ found that the evidence supported granting an exemption under Section 4648.55, subdivision (d), because it established that Claimant needed more independent living skills training than was being provided through the school district, which was not appropriate to meet his needs. The prior Decision noted that Claimant's family was paying out-of-pocket for him to receive three hours per week of ILS,

he was learning important skills which are not duplicated in school, and he had shown great progress with the parent-funded ILS. Neither the pleadings nor the prior Decision identified as an issue in the case any request to reimburse Claimant for services funded by his parents prior to the effective date of the Decision.

9. In compliance with the Order, HRC began funding ILS services from December 15, 2013, through the present.

10. When Claimant's mother received the prior decision, she telephoned Ms. Donald on December 13, 2013, to determine when she could expect to receive reimbursement from HRC for the cost of the ILS services Claimant's parents had self-funded, from July 2013 through mid-December, 2013. HRC sent a NOPA dated December 19, 2013, informing Claimant's mother that Claimant's request for retroactive payment for ILS services was denied. This appeal followed.

11. Claimant's co-conservator testified credibly at the hearing. As early as May 6, 2013, Claimant's parents had requested that ILS services be continued when Claimant left UCLA and returned home in June 2013. On May 7, 2013, Ms. Donald told Claimant's mother verbally that HRC would not continue to fund ILS services once Claimant returned home, and that she would "get back to them" with information on how to proceed with an appeal. On July 16, 2013, Claimant's mother again told Ms. Donald that they wanted Claimant's ILS services to continue and that they would like to appeal the termination of those services. However, Claimant's parents did not receive a written NOPA until August 12, 2013, after ILS services had already been terminated by HRC. Claimant was not notified of HRC's denial of ILS services by certified mail thirty days prior to the termination of ILS services, as required by the Lanterman Act. HRC did not send information regarding the appeal process until August 2013. Once it was sent, Claimant's parents appealed within ten days.

12. Claimant's mother also testified credibly at the hearing. When she received the prior OAH decision on November 25, 2013, she spoke with Ms. Donald, who told her that HRC would begin funding ILS services beginning on December 15, 2013. When Claimant's mother asked when HRC would send reimbursement for the money that Claimant's parents had paid to Creative Services for ILS Services beginning in July 2013, Ms. Donald told her that HRC would not pay retroactively for the ILS services that had been funded by Claimant's parents. From July 2013, through mid-December 2013, Claimant's parents paid Creative Support for three hours of ILS services per week at a rate of \$37.50 per hour, in an amount totaling \$1,912.50.

13. Brooke Nakagawa, HRC Program Manager, testified credibly at the hearing. She stated that there are very few circumstances under which a Service Agency will retroactively fund services and she contended that none of these are applicable here. Ms. Nakagawa testified that when a service is initiated outside of the scope of the IFSP, the Service Agency will only fund that service prospectively from the time the service has been approved. According to Ms. Nakagawa, aid paid pending would not be applicable here, as it applies to current services already in place. She explained that HRC had agreed to fund ILS

services during the 2012-2013 school year while Claimant attended UCLA, because HRC wanted to ensure Claimant's success, and the school district was not able to provide additional supports. Ms. Nakagawa stated that if a family were to appeal HRC's decision within the time frame specified in the NOPA, a Claimant would maintain the current service which had been funded by HRC at the time the NOPA was sent out.

14. Gigi Thompson, HRC Rights Assurance Manager, testified credibly at the hearing. She stated that retroactive funding of services is not automatic and is "very rare." She contended that aid paid pending is not applicable here because Claimant's ILS services were directly tied to his participation in the residential program at UCLA and the request for ILS services in-home constituted a new request for services. However, HRC failed to present sufficient evidence to establish that the IFSP or any other documents tied Claimant's ILS services to the UCLA program or provided a specified end date for his ILS services. Ms. Thompson contended that Claimant's parents should have specifically raised the funding issue at the November 12, 2013 hearing, or should have filed an appeal of that prior decision, in order to properly raise the issue of retroactive funding.

LEGAL CONCLUSIONS

1. Cause exists to grant Claimant's appeal and reverse HRC's decision to deny retroactive payment for the ILS services which were paid to Creative Support by Claimant's parents from July 2013 through mid-December, 2013, as set forth in Factual Findings 1 through 12, and Legal Conclusions 2 through 7.

2. The Lanterman Act, incorporated under Welfare and Institutions Code section 4500 et seq., acknowledged the state's responsibility to provide services and supports for developmentally disabled individuals. It also recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (Welf. & Inst. Code, § 4501.)

3. The Lanterman Act also provides that "[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." (Welf. & Inst. Code, § 4512, subd. (b).)

4. Welfare and Institutions Code section 4710 provides, in relevant part:

(a) Adequate notice shall be sent to the applicant or recipient and the authorized representative, if any, by certified mail at least 30 days prior to any of the following actions:

(1) The agency makes a decision without the mutual consent of the service recipient or authorized representative to reduce, terminate, or change services set forth in an individual program plan.

5. Welfare and Institutions Code section 4715 provides, in relevant part:

(a) Except as otherwise provided in this section, if a request for a hearing is postmarked or received by the service agency no later than 10 days after receipt of the notice of the proposed action mailed pursuant to subdivision (a) of Section 4710, services that are being provided pursuant to a recipient's individual program plan shall be continued during the appeal procedure...

6. With regard to reimbursement, the Lanterman Act does not specifically authorize retroactive reimbursement of service costs to families in the fair hearing context. Nevertheless, general equity principles may require reimbursement in particular cases in order to fulfill the purposes and intent of the Lanterman Act. (See *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal. 3d 384.)

7. As set forth in Factual Findings 1 through 12, equitable considerations require that HRC reimburse Claimant's parents the \$1,912.50 they expended to privately fund ILS services for Claimant through Creative Support from July 2013 through mid-December, 2013. When HRC terminated Claimant's ILS services upon his return home from UCLA in June 2013, it did so without the mutual consent of Claimant's parents. Therefore, HRC was required to notify Claimant's parents of its decision by certified mail thirty days prior to terminating services, and should have included information regarding appeal rights and aid paid pending. Despite the fact that Claimant's mother made it clear in May 2013 that she disagreed with HRC's decision to terminate ILS services and wished to appeal, HRC inexplicably delayed sending Claimant a NOPA with appeal rights until August 2013. Claimant's parents sent a notice of appeal within ten days, which ordinarily would have triggered Claimant's right to a continuance of ILS services and to aid paid pending. As set forth in Factual Finding 13, Ms. Nakagawa testified that if a family appealed a Service Agency's decision within the ten-day time frame as specified in the NOPA, a Claimant would maintain the current service which had been funded by HRC at the time the NOPA was sent out. However, due to HRC's own delay in sending out the NOPA, the ILS services were no longer being funded by HRC in August 2013. When Claimant's parents received the prior Decision which was in their favor, and which found that the ILS services were necessary to meet Claimant's needs even after conclusion of the UCLA program, they reasonably assumed that HRC would reimburse them for the money they had expended for Claimant's ILS services during the time period in question. It would be grossly inequitable to allow HRC to benefit from its own delay in sending out the NOPA after unilaterally terminating Claimant's ILS services without his parents' consent. HRC delayed its initial denial of Claimant's request for continued funding of ILS services. That delay should not be grounds for HRC to avoid its obligation to fund services pending the prior appeal. Equity dictates that HRC must reimburse Claimant's parents for the money they expended for ILS services, while they awaited the prior Decision.

ORDER

Claimant W.B.'s appeal is granted. Harbor Regional Center shall reimburse Claimant's parents in the amount of \$1,912.50 for the ILS services provided to Claimant by Creative Support from July 2013 to mid-December 2013.

DATED: April 17, 2014

LAURIE R. PEARLMAN
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.