

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of: CLAIMANT, vs. HARBOR REGIONAL CENTER, Service Agency.	OAH No. 2014050757
---	--------------------

DECISION

This matter was heard by Laurie R. Pearlman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on July 1, 2014, in Torrance.

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

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

The record was kept open until July 15, 2014, to enable Claimant's mother to submit copies of billing statements covering the period from February 27, 2014, to the present. The billing statements were timely submitted, were marked as Exhibit C for identification, and were admitted into evidence. The record was closed, and the matter was submitted for decision on July 15, 2014.

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

ISSUE

Shall HRC be responsible for funding insurance copayments, incurred on and after February 27, 2014, for Applied Behavior Analysis (ABA) services provided to Claimant by Easter Seals, through his parents' private insurance, Kaiser Permanente (Kaiser)?

EVIDENCE RELIED UPON

In making this Decision, the ALJ relied upon exhibits 2-11 submitted by HRC, exhibits A-C submitted by Claimant, and the testimony of Patricia Piceno, HRC Program Manager, and Claimant's mother. HRC's position paper (Exhibit 1) was read, but it was not considered to be evidence.

FACTUAL FINDINGS

1. Claimant will be ten years old in September. He is eligible for regional center services, under a diagnosis of Autism. Claimant lives at home with his parents and two sisters. The family is currently assessed as needing respite services, but Claimant's parents do not appear to be receiving such services from HRC at this time.

2. Claimant currently is authorized by Kaiser to receive seven hours a week of intensive ABA services, which are delivered by Easter Seals in three weekly sessions. The family's copayment is \$20 per session. Easter Seals billed Claimant's family for copayments for ABA services totaling \$155.85 for the period from February 27, 2014 through June 6, 2014. (Exhibit C.) Medi-Cal funds copayments for Claimant's Occupational Therapy and Speech Therapy, but it will not fund copayments for his ABA services.

3. Claimant's mother first requested assistance with copayments from HRC for her son's ABA services on February 27, 2014.² On April 8, 2014, Mother submitted information requested by HRC and a meeting was held on April 14, 2014 to review the documentation with HRC's Behavioral Assessment Team. At that time, HRC determined that Claimant's needs and that of his family would best be met by a short-term parent training program offered through Family Behavioral Services. HRC asserts that Claimant's needs do not require an intensive 1:1 ABA program, offered three times per week, such as the one that Easter Seals is providing to him.

4. On April 28, 2014, HRC sent a Notice of Proposed Action stating that it would not provide copayment assistance for Claimant's ABA program. Mother filed a timely Fair Hearing Request, which HRC received on May 16, 2014. This appeal followed.

5. Claimant's needs are delineated in his Individual Family Service Plan (IFSP).³ His needs include dealing with tantrums and occasional non-compliance during Claimant's morning routines, when he is unable to effectively communicate. He also requires supervision in the community, due to his limited safety awareness. Although Claimant is toilet-trained, he requires assistance with bowel movements (particularly in the home setting.) The IFSP notes that Claimant "continues to have delays in the area of adaptive living skills. He requires prompts and modeling in order to complete daily living skills." (Exhibit 4.) Some of Claimant's current IFSP goals include being able to use

² At the hearing, the parties agreed that the issue to be addressed was reimbursement for copayment assistance, effective February 27, 2014.

³ HRC uses the designation IFSP instead of Individualized Program Plan (IPP), to which the Developmental Disabilities Services Act (Lanterman Act) refers. However, any statutory references to IPPs are applicable to HRC's IFSPs.

descriptive words, requesting breaks when needed, decreasing non-compliance, expressing emotions, and appropriately initiating play with peers. The Behavioral Health section of the IFSP states that "Easter Seals will continue to provide [Claimant] with behavioral intervention services as approved by his private insurance (Kaiser.)"

6. Claimant's most recent Easter Seals Report, dated January 1, 2014, identifies 26 goals that were the focus of Claimant's ABA services during the previous six-month reporting period. Five of these 26 goals have been met; 21 goals remain. HRC contends that 14 of these remaining 21 goals are contained in Claimant's individualized education program (IEP) at school and in amendments to his IEP⁴, and therefore these goals should be the district's responsibility. These 14 goals include four goals which address enabling Claimant to ask for things, such as help, attention, or items; four goals which address assisting Claimant to identify things, such as days of the week, adjective/noun combinations and prepositions; and six goals which address recalling daily events and placing items into categories and in sequence.

7. Of the remaining Easter Seal goals, several address peer interaction, such as taking turns, praising peers, and initiating play. Because peers must be present in order to work on each of these goals, they are worked on in school. One of the goals addressed as part of Claimant's ABA services is to have Claimant remove his hat when he comes indoors. HRC asserts that such a goal focuses on social etiquette. HRC contends that its focus is enabling Claimant to function within the community. Therefore, HRC asserts that teaching Claimant to remove his hat indoors is not a behavioral goal that a regional center would address. HRC contends that the majority of goals addressed by Easter Seals are school goals, set out in Claimant's IEP. The regional

⁴ Claimant's most recent full IEP is dated April 30, 2013. IEP Amendments are dated June 11, 2013 and September 24, 2013.

center acknowledges that four of these goals would be appropriate for HRC to support: reduction of whistling, enabling Claimant to wash his hands independently, learning to ask for something ("mand" for attention, breaks, help, and items), and learning to identify objects, sounds, scents, days of the week, monetary units, familiar people, emotions, and occupations ("tact"). These four goals are being addressed at school, but also need to be addressed at home. HRC asserts that these four goals could be addressed in one weekly session. For this reason, the regional center has offered to fund the copay for one ABA session per week.

8. Patricia Piceno, an HRC Program Manager, testified credibly at the hearing. When copay assistance is requested, the Service Agency looks at the child's needs, the goals currently being worked on, progress reports from providers, the needs assessment, what is already provided by his school (a generic resource), and the family's financial situation. Ms. Piceno also consults with the Behavioral Assessment Team regarding the request for copay assistance. The services sought must be pursuant to the IFSP. Claimant's IFSP, dated October 18, 2013, provides that Claimant needs prompting and modeling for skills of daily living. The goals that HRC would fund include care-giver education, decreasing Claimant's whistling, and assisting Claimant with hand-washing, identifying safety signs, and social play skills. Ms. Piceno stated that it is not uncommon for a Claimant to need assistance at home with activities he would also perform in a school setting.

9. Claimant's mother testified credibly at the hearing. She stated that her son has difficulty with generalization (learning a skill in one setting and then exhibiting that skill in other settings and with other people.) Claimant is unable to learn a skill in school and then apply it in a home or community setting. He requires prompting and does not make requests independently for his needs, such as asking for food or water. Claimant often whistles (making a high-pitched sound that can be heard from five feet away or

more). He may engage in behaviors that disrupt social interaction, and is working on improving appropriate social interaction skills through his Easter Seals program. Her son is making good progress toward his goals, and has shown improvement with the ABA training that Kaiser has provided to him.

10. HRC contends that much of the ABA therapy provided by Easter Seals is mirrored in Claimant's IEP at school, and therefore should be the school district's responsibility. While in many respects the therapy goals in question may overlap (i.e., the goals relate to both school activities and those engaged in the home and in the community), the parties agree that Claimant's ABA therapy goals do not fall solely within the purview of his local school district.

11. The parties agree that the annual gross income of Claimant's family meets the criteria for copayment assistance by HRC. (Welf. & Inst. Code, § 4659.1, subd. (a).)

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.⁵) An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a contrary regional center decision. (§§ 4700-4716.) Claimant requested a hearing and therefore jurisdiction for this appeal was established. (Factual Finding 4.)

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.)

3. When one seeks government benefits or services, the burden of proof is on him. (*See, e.g., Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161

⁵ All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

(disability benefits.) In this case, Claimant bears the burden of proof because he is seeking copayment assistance that HRC has not before agreed to provide. (Factual Findings 3 and 4.)

4. Prior to July 1, 2012, regional centers in California funded professional services and treatment programs for many autistic children and their families, with the goal of developing the functioning of autistic children to the maximum extent practicable. The Legislature passed Insurance Code section 10144.51, which obligated insurers to fund therapy for children with autism, effective July 1, 2012.

5. In complying with this mandate, insurers have generally imposed copayment obligations on their insureds. Therefore, many families who had received full funding of therapy services through regional centers prior to July 1, 2012, became responsible for partially paying for these services. Families began requesting that regional centers pay the insurance copayments incurred.

6. In response, the Legislature enacted section 4659.1, which became effective June 27, 2013. Section 4659.1, subdivision (a), provides that if "a service or support provided pursuant to a consumer's individualized program plan under this division . . . is paid for in whole or in part by the consumer's parents' private insurance, when necessary to ensure that the consumer receives the service or support, the regional center may pay any applicable copayment associated with the service or support," under specified conditions. Absent exceptional circumstances, a regional center may fund insurance copayments if the family's annual gross income is less than 400 percent of the federal poverty level. (§ 4659.1, subd. (a)(2).) In this case, the parties agree that Claimant's family meets the financial criteria for copayment assistance.

7. Section 4659.1 does not void other provisions of the Lanterman Act, such as sections 4646, 4646.4, 4646.5, 4647, and 4648, which require regional centers to provide services only when necessary, to provide services in a cost-effective manner,

and to utilize generic resources. Section 4659.1, subdivision (a)(3), states that copayment assistance may be provided only when “[t]here is no third party having liability for the cost of the service or support, as provided in subdivision (a) of Section 4659. . . .” In turn, section 4659, subdivision (a), requires regional centers to identify and pursue all other funding sources, such as Medi-Cal, school districts and private insurance.

8. Claimant’s local school district is a generic resource that has a responsibility to provide appropriate services to meet Claimant’s needs, as outlined in his IEP, in order to allow him to access a free and appropriate public education. (20 U.S.C. § 1437 (a)(8).) A school district must also meet its responsibility for providing needed services, even when the student also falls under the responsibility of another agency, such as a regional center.

9. The aforementioned provisions do not allow HRC to deny copayment assistance to Claimant’s family. HRC failed to establish that only one weekly session of ABA services provided by Kaiser through Easter Seals would be sufficient to meet Claimant’s clinical needs, as set out in his IFSP, and that no additional ABA sessions are required. The goals addressed by Easter Seals include Claimant’s current IFSP goals, which include being able to use descriptive words, requesting breaks when needed, decreasing non-compliance, expressing emotions, and appropriately initiating play with peers. Claimant and HRC have sought out cost-effective funding and are utilizing a generic resource by seeking ABA services through Kaiser, Claimant’s private insurer. Claimant’s family meets the criteria for financial assistance provided by section 4659.1. Pursuant to that statute, copayment assistance is “necessary to ensure that the consumer receives the service or support,” namely, ABA therapy.

10. The goals addressed by Claimant’s current ABA therapy do not fall solely within the purview of his local school district. The goals in question have substantial overlap between learning goals, usually funded by a school district, and those related to

home and community, which are traditionally the responsibility of a regional center. Moreover, the ALJ is aware of no provision in federal or state special education law which mandates or allows school districts to reimburse families for insurance copayments.

11. Claimant established by a preponderance of the evidence that cause exists to order HRC to reimburse the copayments incurred by Claimant's parents for the ABA services provided by Kaiser through Easter Seals. (Factual Findings 1-11 & Legal Conclusions 1-10.)

ORDER

Claimant's appeal is granted. The Service Agency shall fund copayments for the ABA services provided to Claimant by Kaiser Permanente through Easter Seals, effective February 27, 2014. HRC shall cover the copayments for ABA services billed to Claimant's family by Easter Seals in the amount of \$155.85 for the period from February 27, 2014 through June 6, 2014, as well as any subsequently incurred copayments for the ABA services provided to Claimant by Easter Seals.

DATE: July 29, 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.