BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

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| In the Matter of the Fair Hearing Request of:<br>CLAIMANT,<br>and<br>HARBOR REGIONAL CENTER,<br>Service Agency. | OAH No. 2013051177 |

# DECISION

This matter came on regularly for hearing on February 24 and April 15, 2014, at Torrance, California before David B. Rosenman, Administrative Law Judge, Office of Administrative Hearings, State of California. Claimant was represented by James M. Lloyd, Attorney at Law. (Titles are used to protect Claimant's confidentiality.) Harbor Regional Center (HRC) was represented by Michelman & Robinson, by Robin James, Attorney at Law.

Oral and documentary evidence was presented. The record was held open for filing of closing statements. The schedule for closing statements was modified by agreement of the parties. The closing statements were received and marked as follows: Closing Statement on Behalf of Claimant, May 15, 2014, Exhibit C-17 (as both parties pre-numbered their exhibits, the prefix "C" was assigned to Claimant's exhibits); Service Agency Harbor Regional Center's Response to Claimant's Closing Statement, June 5, 2014, Exhibit 24; and Claimant's Reply, June 13, 2014, Exhibit C-18.

The record was closed and the matter was submitted for decision on June 13, 2014.

## ISSUE

The parties agreed on the following statement of the issue.

Autism Spectrum Therapies (AST) provides applied behavior analysis (ABA) services to Claimant comprised of direct services and supervision. Should HRC pay the separate copayment charged to Claimant's parents by AST as required by Claimant's health insurance company for supervision relating to those ABA services?

## FACTUAL FINDINGS

The Administrative Law Judge finds the following facts:

1. Claimant is six years old and was found eligible for services from HRC.

2. In March 2013, Claimant's mother met with Claimant's service coordinator from HRC to discuss her request that HRC pay for the copay required by the health insurance covering Claimant, for the supervision hours by AST as part of its ABA services to Claimant. When no agreement was reached, the service coordinator sent a letter dated April 22, 2013, indicating HRC would not pay of the copayment for supervision.

3. Claimant's mother filed a Fair Hearing Request dated May 20, 2013, establishing jurisdiction for this matter to proceed to a hearing. As part of a motion to continue the hearing date, Claimant's representative signed a waiver of the time set by law for the hearing to take place and for a decision to be issued.

4. Claimant has been covered by health insurance through Anthem Blue Cross (Anthem) since birth, purchased by his parents. (Although the parents are now divorced, one or the other has paid the premiums for the insurance.) The insurance terms have changed over time. At one point the insured was required to pay coinsurance, which is a percentage of the total charge for a service covered under the policy. At another point the insured was required to pay a copayment (copay), which is a flat fee that is a portion of the total charge for a service covered under the policy. For purposes of

this Decision, it is not always necessary to make a distinction between the two, and all such payments required from the insured will usually be referred to as copay, unless the distinction is significant.

5. Claimant's initial ABA services were funded through HRC. Subsequently, in the relevant time period, Claimant's ABA services have been funded through Anthem.[1] AST is an approved vendor for HRC.

6. The ABA services have two components of significance to the issue in this case. Services are provided to Claimant by therapists by virtue of their direct interaction with Claimant, which are referred to as "direct services." There is a level of "supervision" that may include, among other things, gathering information from the therapists, modification of the direct services plan for the therapists to implement with Claimant, and observation of the provision of direct services. The person providing supervision is required, by statute, to hold high qualifications.

7. Anthem's health insurance policy requires separate billing for the copays for direct services and supervision, and Anthem bills Claimant's mother for these two separate copays.

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[1] ABA services by AST for Claimant began in June 2012, funded by HRC. In July 2012, new laws required health insurance companies to pay for ABA services. The evidence is inconsistent as to when Anthem began funding for the ABA services. (Contrast, for example, Ex. 7, an AST report which indicates Anthem paid from the start of ABA services in June 2012, with Ex. 5, Claimant's Individual/Family Service Plan (IFSP), which indicates HRC funded the services from June to August 2012, when funding transitioned to Anthem.) As the laws were not effective until July 2012, it is presumed that the IFSP is more accurate.

8. HRC has authorized payment for Claimant's copay for direct services, but will not authorize payment of the copay for supervision.

9. When services were provided under HRC authorization, AST was paid a rate that had been negotiated with HRC. Initially, in 2003, that rate was per month, depending on the number of therapy sessions per week and the length of the sessions. Later, in 2007, the rate was changed to the hourly rate of $75. This is considered a blended rate, as the number of hours of ABA services authorized per month included both direct services and supervision, under a single service code.

10. Colleen Mock (Mock) has worked for HRC since 1979 and, since 1996, has been its Director of Community Services. As discussed in more detail below, health insurance companies became responsible to cover ABA services by law as of July 2012. Sometime thereafter, but at a time not established by her testimony, Mock was involved in a conference call with representatives of other regional centers and with "Julia," last name not recalled, a representative of the Department of Developmental Services (DDS). Mock cannot recall the other regional centers or their representatives involved in the conference call. According to Mock, Julia instructed those on the call that supervision for ABA services was included in the hours for direct services, and that regional centers should not be paying separately for supervision. The regional centers were not consistent in the way this issue was handled, and Julia suggested there should be consistency. Mock was not aware of any written instructions from DDS or any regulations on this subject. After insurance companies became responsible for covering ABA services, DDS instructed regional centers to use two new subcodes, one for insurance copays and another for coinsurance.

11. Mock also testified about another vendor (First Steps for Kids), however this evidence is not relevant and need not be discussed in any detail. Several of the contentions of the parties, discussed in more detail in the Legal Conclusions, rely upon facts

in the record or requests for official notice. However, as those contentions are found to be either irrelevant or unconvincing, it is not necessary to set forth those facts or discuss the items of which official notice was taken.

12. Mock stated that DDS will audit regional centers and, if it determines that a vendor has been overpaid, DDS will require the regional center to recoup the over-payment from the vendor.

13. Two IFSP's are in evidence. Exhibit 6 followed an IFSP meeting on January 24, 2012, and was updated December 10, 2012, and January 14, 2013.[2] The section titled "Home" references several of Claimant's challenging behaviors and the need for him to receive behavioral services. Although it is less than clear on the subject, the IFSP indicates that HRC had funded ABA services, that Anthem had approved coverage and started funding for ABA services, and that HRC would fund "for ABA Insurance Co-pay 3 Sessions per week Start Date 2/1/13-5/31/13." (Ex. 6, pp. 3-4.) The second IFSP, Exhibit 7, followed a meeting on March 25, 2013. The "Home" section, pages 2-4, indicates HRC will continue to fund copays; due to the family's financial constraints for ongoing premiums and copays, they request HRC assistance; the family disagrees with HRC's decision not to fund copays for supervision hours; and the family considered cancelling Claimant's insurance due to these financial concerns.

[2] HRC designates the plan as an IFSP; however, throughout the applicable law it is referred to as an Individual Program Plan (IPP).

14. Claimant's family qualifies for funding of copays under Welfare and Institutions Code section 4659.1, subdivision (a)[3], discussed in more detail below. Specifically, requirements of that section are met, including that the services are included in Claimant's IFSP, the family's annual gross income does not exceed 400 percent of the federal poverty level, and there is no other third party with liability for the cost of the services. In the alternative, Claimant contends that the family also meets the financial means test under Code section 4659.1, subdivision (c). In its brief, HRC concedes that Claimant's family qualifies for regional center funding of his coinsurance, without reference to a particular Code section or subdivision. (Ex. 24, p. 3, l. 5.) It is therefore unnecessary to determine which subdivision applies.

15. AST has submitted bills to Claimant's mother for the unpaid copays for supervision. The amount was estimated as $2,000 as of December 29, 2013. AST has agreed to forego its usual policy of ceasing services if all fees are not paid, while Claimant's mother seeks resolution of the issue in this hearing.

## LEGAL CONCLUSIONS AND DISCUSSION

Based upon the foregoing factual findings, the Administrative Law Judges makes the following legal conclusions:

1. Proper jurisdiction was established by virtue of HRC's denial of the request for funding and the Fair Hearing Request on behalf of Claimant. (Factual Findings 2 and 3.)

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[3] All statutory references are to the Welfare & Institutions Code, except where otherwise noted. Section 4700 et seq. is known as the Lanterman Developmental Disabilities Services Act; Lanterman Act for short.

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.) The burden of proof is on the person whose request for government benefits or services has been denied. (*See,* e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) Claimant has the burden of proof in this matter.

3. ABA services are defined by law in Code section 4686.2, subdivision (d). As of July 1, 2012, insurance companies were required to provide coverage for ABA services such as those provided to Claimant, under Health and Safety Code section 1374.73, which also discusses the two levels of service discussed above as direct services and supervision, while not using those phrases. More specifically, Health and Safety Code section 1374.73 requires the service providers to supervise qualified service professionals or paraprofessionals who actually administer the treatment. Virtually identical language is found in Insurance Code section 10144.51. Both of these code sections describe some of the tasks to be performed that fall within the level of supervision, such as design, review and modification of the treatment plan to be implemented by providing direct services to the insured consumer. Copayments are allowed under subdivision (f) of both sections. Under subdivision (a)(3) of both sections, the statutes "will not affect services for which an individual is eligible pursuant to" the Lanterman Act.

4. Regional centers are required to explore other sources for funding or provision of services, such as school districts, community programs, or generic sources. Under Code section 4659 regarding sources of funding for regional center services, as of July 1, 2009, regional centers were instructed to no longer purchase services that were otherwise available from listed sources such as Medi-Cal and private insurance. If private insurance denied the service, families could appeal the denial and the regional center could pay for the service under certain conditions. The statute was clearly designed to

identify and pursue alternative funding sources for services that were previously funded by regional centers. However, subdivision (e) provides added protection for families; it states: "This section shall not be construed to impose any additional liability on the parents of children with developmental disabilities, or to restrict eligibility for, or deny services to, any individual who qualifies for regional center services but is unable to pay."

5. Another legislative enactment is specific to copays. Code section 4659.1 was effective June 27, 2013. Under subdivision (a), when a service is provided under an IPP or IFSP, and "is paid for, in whole or in part, by the health care service plan or health insurance policy of the consumer's parent, guardian, or caregiver, the regional center may, when necessary to ensure that the consumer receives the service or support, pay any applicable copayment or coinsurance associated with the service or support for which the parent, guardian, or caregiver is responsible," under certain conditions. As noted in Factual Finding 14, Claimant's family meets these conditions.

6. Among other things, Claimant contends that consideration should be given to a recent, unsuccessful attempt to amend Code section 4659.1 to include stronger language requiring regional centers to fund for copays, and that consideration should also be given to a different bill presently working its way through the legislature. These contentions are irrelevant and unconvincing. The present statutes provide sufficient authority to decide the issue under the facts of this case.

7. Among other things, Claimant contends that other OAH decisions provide guidance in favor of ordering HRC to pay both copays. HRC is correct that these other decisions are not binding. However, to the extent they include reasoning and logic that is sound, they can prove useful. However, the other OAH decisions cited by Claimant are not particularly useful. For example, *Elliot E. v. San Andreas Regional Center* (2012, OAH case number 2012080352) did not address the different copays for supervision and direct services. Therefore, its statement that the regional center must fund the copay is of

no help in determining the issue in this case. Similarly, *Trenton N. v. Harbor Regional Center* (2013, OAH case number 2013040148) examined the issue of deductibles and considered the additional authority in Code section 4659.1, subdivision (g), that regional centers shall not pay deductibles. Although the ALJ in *Trenton N.* discussed legislative history as it related to copays, that discussion was not necessary to the determination of the issues before him and was therefore dicta. Reference to other OAH Decisions is not needed to determine the issue in this case.

8. Claimant also contends that a basic cost-benefit analysis should be used to order HRC to pay, as it is less expensive for HRC to pay both copays than it would be for HRC to pay for full ABA services if Claimant were to cancel the health insurance. Again, resort to using a cost-benefit analysis is neither relevant nor necessary to determine the issue.

9. Claimant seeks payment of reasonable attorney's fees. There is no authority to grant this request.

10. HRC contends that it may not pay the supervision copay because it can only pay for direct services, citing the following language from California Code of Regulations, title 17, section 54326, subdivision (a)(10): "All vendors shall . . . Bill only for services which are actually provided to consumers and which have been authorized by the referring regional center." HRC argues this means that only direct services can be funded, not supervision. This argument is not supported by the regulation's language. Supervision is actually provided to the consumer, in the form of the monitoring, modification and implementation of the treatment plan. It would torture the language of this regulation to interpret it to eliminate regional center funding for any charges related to supervision.

11. Further, before the effect of the new legislation regarding insurance coverage and copays, HRC routinely paid for both direct services and supervision of ABA, as

evidenced by the rates it negotiated with AST. It is disingenuous for HRC to have negotiated and made those payments then, yet now argue that, in essence, it is not liable to fund for the supervisory portion of ABA services. The regulation applied then, as it does now, and does not operate in the manner urged by HRC.

12. HRC contends that, if the supervisor is observing the provision of direct services, somehow the billing by insurance for supervision and direct services constitutes a double payment, relying on the same regulation. This argument is not supported by the regulation's language, which makes no distinction between direct services and supervision. The regulation merely limits a vendor to bill for services actually provided. The evidence establishes that direct services and supervision were actually provided to Claimant by AST.

13. HRC contends that it cannot pay separate copays to AST because the blended rate it negotiated with AST includes both direct services and supervision. The present situation, however, is not the same as when the rate was negotiated between HRC and AST. AST is providing ABA services to Claimant under its contract with the Anthem, the insurance company, not under its contract with HRC. Under that insurance policy, there are separate copays. The HRC-AST contract with the blended rate structure no longer applies. It says nothing about copays. Further, the copay is owed by Claimant's parents. These factors distinguish the present situation from that which existed when services were provided, and paid for, under the terms of the HRC-AST contract. As noted above and below, the present payment obligation for HRC is provided by statute, not contract.

14. HRC contends that its experience in the First Step for Kids matter is instructive and includes insight from DDS about the distinction between direct services and supervision. The scenario with First Steps for Kids occurred in 2005, and related directly to the contract between HRC and the vendor. It had no issue of insurance and co-

pays, and predated the significant legislation that deals directly and conclusively with the issue in this case. The First Step for Kids evidence is irrelevant and is not considered.

15. HRC contends that there are no separate service codes or prefixes to differentiate between copays for direct services and copays for supervision. Even so, the absence of subcodes has no effect on the determination of the issue in this matter, which is governed by statute.

16. HRC also argues that it disregards directives from DDS at its own peril. To characterize the discussion between Mock from HRC and Julia from DDS (see Factual Finding 10) as a clear directive from DDS would require overreaching. The testimony from Mock was so nonspecific as to entitle it to little weight. She did not recall Julia's last name; she did not testify to a date of the call; she did not recall the other regional centers involved in the call. There was no written follow up. This last detail is significant. Under Government Code section 11342.600, every rule, regulation, order, or standard of general application adopted by a state agency to govern its procedure must be adopted as a regulation and filed with the Secretary of State. An agency rule of general application that does not comply with this procedure is referred to as an underground regulation, and is unenforceable under Government Code section 11340.5. (See also *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 387.) Without factual weight and lacking regulatory authority, it is generous to refer to the information from Julia as being a DDS directive. It bears no weight in the determination of the issue in this case. Payment of the copays is authorized by statute. An administrative agency has no authority to enact rules or regulations which alter or enlarge the terms of legislative enactments. (*California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal.3d 139, 143 -144.)

17. Claimant's ABA services are now being paid for by Anthem, which charges separate copays for direct services and supervision under the terms of its insurance policy. Claimant's family qualifies for assistance under the statute that provides for HRC to

pay insurance copays. (Factual Finding 14 and Legal Conclusion 5.) HRC makes a distinction between copays for direct services, which it pays, and copays for supervision, which it refuses to pay. That distinction is not supported by the law. Supervision is a required part of the services, and must be provided by all insurance companies. (Legal Conclusion 3.) Anthem is permitted by statute to charge copays. (Legal Conclusion 3.) That Anthem bills for separate copays has no effect on HRC's statutory obligation to provide financial assistance in the form of paying the copays. Under Code section 4659, subdivision (e), HRC cannot use the existence of insurance to impose any additional liability for services to those who qualify for the service but cannot pay. (Legal Conclusion 4.) HRC is not prevented from paying the supervision copay by its negotiated contract rate with AST (Legal Conclusion 13), any directive from DDS (Legal Conclusion 16), any regulation (Legal Conclusions 10 and 12), or any position by DDS in another, irrelevant matter (Legal Conclusion 14). HRC shall pay the separate copay for supervision of ABA services provided to Claimant by AST within a reasonable time after Claimant's mother has submitted documentation of the amounts billed to her for the supervision copay.

## ORDER

HRC's decision to deny funding for copayments for supervision is overruled. HRC shall pay the separate copay for supervision of ABA services provided to Claimant by AST within a reasonable time after Claimant's mother has submitted documentation of the amounts billed to her for the supervision copay.

DATED: June 17, 2014

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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.