

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2013090651

DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Torrance, California on November 13, 2013. Marianne Bowers-Jesser, Parent Advocate, represented Claimant.¹ GiGi Thompson, Manager Rights Assurance, represented Harbor Regional Center (HRC or service agency).

The matter was submitted for decision on November 13, 2013. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUES

1. Whether HRC should retroactively fund insurance copayments associated with Claimant's Applied Behavioral Analysis (ABA) services provided by ACES before July 1, 2013.
2. Whether HRC should fund insurance copayments associated with Claimant's ABA services provided by ACES after July 1, 2013.

¹ Claimant and his family members are not identified by name to preserve their privacy and to ensure confidentiality.

FACTUAL FINDINGS

1. Claimant is a five-year-old consumer of HRC based on his qualifying diagnosis of Autism. Claimant resides with his parents and sibling.

2. In May 2012, Claimant began receiving one-on-one ABA therapy through ACES to address his deficits in the domains of communication, socialization, daily living skills, and safety and community in addition to his maladaptive behaviors which include elopement and non-compliance. At that time, Claimant received his ABA therapy from ACES in increments of four to five sessions each week. His family was obligated to pay \$20 for each session and the family's health insurer funded the remaining costs.

3. In August 2012, Parent requested financial assistance from HRC to help meet their \$20 copayment obligation, and was advised to provide the service agency with the family's 2011 tax returns, proof of service authorization from Aetna, and a progress report from ACES. At the time of Parent's request for copayment assistance, the service agency had a practice of providing aid to families with a documented gross income not exceeding 400 percent of the federal poverty level.² Parent was unable to provide the requested tax returns in light of the fact that the family had requested an extension for filing taxes and they had not filed their 2011 taxes. In any event, Parent indicated to the service agency that the family's anticipated 2011 gross income is likely to exceed the financial requirements for copayment assistance.

4. When it became apparent that Claimant's family's gross income in fact rendered Claimant ineligible for copayment assistance, the service agency advised Parent that it would, as an alternative, consider evidence of extraordinary circumstances warranting such assistance. Parent, however, did not provide the service agency with any evidence of extraordinary circumstances.

² Welfare and Institutions Code section 4659.1, effective June 27, 2013, is a codification of this practice. See Legal Conclusion 3.

5. Approximately one year later, at a June 25, 2013 Individual/Family Service Plan (IFSP) meeting, Parent provided the service agency with 2011 tax returns showing gross income in excess of 400 percent of the federal poverty level and 2012 tax returns showing gross income not exceeding 400 percent of the federal poverty level. The service agency determined that Claimant was eligible for copayment assistance in connection with his ABA services going forward.

6. Claimant's IFSP dated June 25, 2013, provides for his receipt of "ABA therapy funded by his private insurance of Aetna." The IFSP indicates that "[s]ervice will be provided by ACES. He will receive this service on Monday, Wednesday, and Friday from 8am-11:30am." (Ex. 4.)

7. On July 1, 2013, the service agency completed a Request for Funds form approving "assistance with insurance co-payments" at a rate of two sessions per week starting July 1, 2013 and ending December 31, 2013. (Ex. K.) On July 8 and August 15, 2013, the service agency notified Parent of its funding determination.

8. On behalf of Claimant, Parent filed a September 18, 2013 Fair Hearing Request seeking an order requiring the service agency to provide retroactively funding for copayment expenses incurred between May 2012 and July 1, 2013, and to provide prospective funding for all three of Claimant's ABA sessions as enumerated in the June 25, 2013 IFSP. Thereafter, the hearing in this matter ensued.³

9. The service agency maintains that it denied Claimant's request for the retroactive funding of insurance copayments incurred prior to July 1, 2013 because the 2011 tax returns indicated gross income in excess of the financial requirements for copayment assistance and Parent provided it with no evidence of extraordinary circumstances warranting an exception.

10. Parent contends at the hearing that an unforeseen home repair constitutes

³ No objection regarding the timeliness of Parent's Fair Hearing Request was raised.

an extraordinary circumstance because the family was required to cash out an individual retirement account, which in turn caused an increase in the family's 2011 gross income and concomitant tax liabilities. Even accepting Parent's contention, Parent was obligated to document and provide the service agency with this information when instructed to do so. Parent failed to produce the requested information for the service agency's consideration in a timely manner that would have enabled the service agency to make a funding determination consistent with the competing demands on its limited fiscal resources and its obligation to ensure cost effective expenditures. Parent's contention is therefore rejected.

11. The service agency argues that it approved copayment assistance for only two of Claimant's three ABA sessions because Claimant's needs are effectively met with two ABA sessions. The service agency's argument is unsupported by Claimant's June 25, 2013 IFSP which expressly provides that Claimant's needs require three sessions of ABA services. In addition, a contemporaneous, but undated, ACES ABA Update/Review Questions referencing the progress Claimant achieved as of June 20, 2013 indicates Claimant's continuing need for services and support addressing his maladaptive behaviors of non-compliance and elopement notwithstanding improvements in those areas. The ABA Update/Review Questions notes that services are "authorized at 9 hours per week of direct services, with 4 hours per month of program supervision, 2 hours per month of program development, and 2 hours per month of parent training done in the home, community, and social group settings." (Ex. 5.) The ABA Update/Review Questions expressly queries, "Can hours be reduced or stopped?" and provides the following response:

[Claimant] should continue with the recommended level of service to decrease his maladaptive behaviors when his parents are present, to generalize his ability to comply to his parents demands and utilize his skills, to increase his

replacement behaviors and skill acquisition in targeted developmental levels, and for parents to gain instructional control. (Ex. 5.)

12. The service agency has offered no persuasive evidence establishing that the clinical judgment of Claimant's service providers who have been working with him for more than two years through ACES to achieve his current level of progress is ill-informed or otherwise empirically baseless. No alternate or contrary assessment explicating a need to disregard or abandon the information presented in the ABA Update/Review Questions, including the number of hours or sessions required for effective management of Claimant's behaviors, was offered at the hearing. The service agency's unsupported difference of opinion is no substitute for such evidence. Accordingly, the service agency's argument is rejected.

LEGAL CONCLUSIONS

1. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act. (Welf. & Inst. Code, § 4500 et seq.) The Lanterman Act mandates that an "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream of life in the community." (Welf. & Inst. Code, § 4501.) Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Regional centers are responsible for developing and implementing individualized program plans (IPP) for consumers, for taking into account individual consumer needs and preferences, and for ensuring service cost effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

2. The services and supports to be funded for a consumer are determined by the IPP process, which involves collaboration with the consumer and service agency

representatives. Services and supports for persons with developmental disabilities are defined as "specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives." Services and supports can include those providing behavior training and behavior modification programs. (Welf. & Inst. Code, § 4512, subd. (b).)

3. Regional centers are authorized to fund copayments or coinsurance associated with services and supports provided pursuant to a consumer's IPP under the Lanterman Act or pursuant to an IFSP under the California Early Intervention Service Act.⁴ Welfare and Institution Code section 4659.1 so provides:

- (a) If a service or support provided pursuant to a consumer's individual program plan . . . or individualized family service plan . . . is paid for, in whole or 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 if all of the following conditions are met:
 - (1) The consumer is covered by his or her parent's, guardian's or caregiver's health care service plan or health insurance policy.
 - (2) The family has an annual gross income that does not exceed 400 percent of the federal poverty level.

⁴ Government Code section 95000 et seq.

- (3) There is no other third party liability for the cost of the service or support, as provided in subdivision (a) of Section 4659 and Article 2.6 (commencing with Section 4659.10).

[¶ . . . ¶]

- (c) Notwithstanding paragraph (2) of subdivision (a) . . . , a regional center may pay a copayment or coinsurance associated with the health care service plan or health insurance policy for a service or support provided pursuant to a consumer's individual program plan or individualized family service plan if the family's or consumer's income exceeds 400 percent of the federal poverty level, the service or support is necessary to successfully maintain the child at home or the adult consumer in the least-restrictive setting, and the parents or consumer demonstrate one or more of the following:
- (1) The existence of an extraordinary event that impacts the ability of the parent, guardian, or caregiver to meet the care and supervision needs of the child or impacts the ability of the parent, guardian, or caregiver, or adult consumer with a health care service plan or health insurance policy, to pay the copayment or coinsurance.
 - (2) The existence of catastrophic loss that temporarily limits the ability to pay of the parent, guardian, or caregiver, or adult consumer with a health care service plan or health insurance policy and creates a direct economic impact on the family or adult consumer. For purposes of this paragraph, catastrophic loss may include, but is not limited to, natural disasters and accidents involving major injuries to an immediate family member.
 - (3) Significant reimbursed medical costs associated with the care of the consumer or another child who is also a regional center consumer.
- (d) The parent, guardian, or caregiver of a consumer or an adult consumer with a health care service plan or health insurance policy shall self-certify the family's

- gross annual income to the regional center by providing copies of W-2 Wage Earners Statements, payroll stubs, a copy of the prior year's state income tax return, or other documents and proof of other income.
- (e) The parent, guardian, or caregiver of a consumer or an adult consumer with a health care service plan or health insurance policy is responsible for notifying the regional center when a change in income occurs that would result in a change in eligibility for coverage of the health care service plan or health insurance policy copayments or coinsurance.

4. Claimant, as the party seeking a service or support, bears the burden of proving by a preponderance of evidence his eligibility for copayment assistance associated with his ABA services. (Evid. Code, §§ 115 and 500.)

5. Cause exists pursuant to Factual Findings 2, 3, 4, 9, and 10, and Legal Conclusions 1 through 4, inclusive, to affirm the service agency's determination not to fund retroactively insurance copayments associated with Claimant's ABA services.

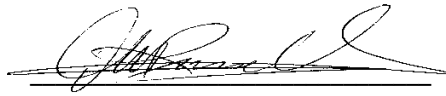
6. Cause exists pursuant to Factual Findings 2 through 7, inclusive, and 11, and Legal Conclusions 1 through 4, inclusive, to overrule the service agency's determination not to fund insurance copayments for all three sessions (nine hours) in which Claimant receives ABA services.

ORDER

1. Harbor Regional Center may decline to fund retroactively insurance copayments associated with Claimant's ABA services provided by ACES before July 1, 2013.

2. Harbor Regional Center shall fund insurance copayments associated with ABA services provided to Claimant on Monday, Wednesday, and Friday as provided for in Claimant's June 25, 2013 IFSP.

Dated: November 27, 2013

A handwritten signature in black ink, appearing to read 'J. Russell', is written over a horizontal line.

JENNIFER M. RUSSELL

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. This decision binds both parties. Either party may appeal this decision to a court of competent jurisdiction within 90 days.