

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

OAH No. 2013110790

AIDEN M.

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on February 4, 2014, in Torrance. The record was closed and the matter submitted for decision at the conclusion of the hearing.

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

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

ISSUE

Shall the Service Agency be responsible for funding five days per week of insurance copayments for Claimant's ABA program rather than three days per week?

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

EVIDENCE RELIED ON

In making this Decision, the ALJ relied on exhibits 2-10 submitted by the Service Agency, exhibits 1-10 submitted by Claimant, and the testimony of Audrey Clurfeld, HRC Program Manager, and Claimant's mother. HRC's position paper (exhibit 1) was read, but it is not considered to be evidence.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is almost 4 years old. He has an eligible diagnosis of a fifth category condition (PDD-NOS) with the recommendation for another assessment in one year after he has been in school.

2. Claimant is receiving applied behavior analysis (ABA) services funded by his private insurance, Kaiser, through Easter Seals, at the rate of three hours per day, five days per week. His copayments are \$30.00 per day.

3. On or before October 21, 2013, Claimant's parents requested HRC to fund all of the copayments.

4. By a Notice of Proposed Action dated October 29, 2013, Claimant's parents were advised that HRC only agreed to fund copayments for three days per week. HRC argued that approximately 40 percent of the goals in Claimant's ABA program were directly related to learning skills that should be the responsibility of Claimant's local school district.

5. On November 25, 2013, a Fair Hearing Request on Claimant's behalf was submitted to the Service Agency, which appealed HRC's decision to not fund copayments for all five days per week.

BACKGROUND INFORMATION

6. Claimant lives at home with his parents and a new-born infant sibling.

7. Claimant is currently attending a special day class at his local school district. Claimant's pre-school program is three hours per day; the program was recently increased from three to five days per week. Claimant also receives group speech and language and occupational therapy services at school. However, the school is not providing any ABA services to Claimant.

INSURANCE COPAYMENT ASSISTANCE

8. The parties agree that Claimant has a need for his ABA program as currently constituted.

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

10. A recent progress report from Easter Seals notes there are no significant behavioral concerns at this time for Claimant.

11. Claimant's insurance is funding for several goals through the ABA program. HRC contends that many of these goals are mirrored in Claimant's individualized education program (IEP) at school, and therefore should be the school district's responsibility, but that was not proven. In many respects, the goals in question contain substantial overlap, i.e., the goals relate to both school activities and those engaged in the home and the community.

12. It is unusual that Claimant's IEP contains no behavioral services offered in an individualized setting. Many school programs for an autistic child of Claimant's age would include 10 to 15 hours per week of school programming in that regard. HRC has offered to work with Claimant's family in approaching the school district to advocate for

in-home school services to be provided, including a consultation with HRC's Special Education Attorney to review the current IEP and its addendum. HRC either has also offered, or could offer, to have Claimant's Service Coordinator attend the next IEP meeting to assist Claimant's parent in revising Claimant's IEP to include such services.

DISCUSSION

JURISDICTION AND BURDEN OF PROOF

The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.²) 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 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.)

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 (disability benefits).) In this case, Claimant bears the burden of proof because he is seeking funding that HRC has not before agreed to provide. (Factual Findings 1-5.)

INSURANCE COPAYMENT ASSISTANCE BY REGIONAL CENTERS

Prior to July 1, 2012, regional centers in California funded behavior therapy services for many autistic children and their families. The Legislature passed Insurance

² All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

Code section 10144.51, which obligated insurers to fund behavioral therapy for children with autism, effective July 1, 2012.

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

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 criteria for copayment assistance.

HRC correctly argues that 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 them cost-effectively, to utilize generic resources, etc. In fact, HRC's argument is supported by section 4659.1, subdivision (a)(3), which 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.

HRC also correctly argues that 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, so as to allow him to access a free and appropriate education. (20 U.S.C. § 1437 (a)(8).) Education Code sections 56520 and 56523 provide that behavioral interventions should be included in IEPs when necessary, and that in particular situations a behavioral management plan is to be developed and used, to the extent possible, in a consistent manner when the pupil is also the responsibility of another agency for residential care or related services. (Ed. Code, § 56520, subd. (b)(2).) In other words, 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.

However, HRC erroneously argues that the aforementioned provisions allow it to reduce the amount of copayment assistance they may provide Claimant's family. There is no dispute that Claimant needs the ABA program. Claimant and HRC have sought out cost-effective funding and utilized a generic resource by seeking ABA through Claimant's private insurance. Claimant's family meets the criteria for financial assistance provided by section 4659.1. By the very wording of that statute, copayment assistance is "necessary to ensure that the consumer receives the service or support," here the ABA program.

As a factual matter, it was not proven that much, if any, of Claimant's current ABA program contains goals 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. While it is true that Claimant's school district is not

currently providing ABA services to Claimant, that fact alone does not prove that any part of his current ABA program is covering school-related goals. An argument to the contrary could be made. In any event, if HRC is concerned that Claimant's local school district is not providing sufficient services, or should be funding part of Claimant's ABA needs, HRC personnel should assist Claimant's family in those regards.

Finally, the ALJ cannot ignore the observation that, as explained above, regional centers previously funded a consumer's entire ABA program with goals directed at home and community activity. With the advent of private insurance covering such services, and only financially needy families being eligible for copayment assistance, regional centers are now saving significant amounts in this area. To allow regional centers to shoulder a family's copayment costs in those limited circumstances will not run afoul of the dictates of the Lanterman Act requiring regional centers to fund services in a cost-effective manner.

LEGAL CONCLUSION

Pursuant to sections 4659, 4659.1, 4646, 4646.4, 4646.5, 4647, and 4648, Claimant established by a preponderance of the evidence that cause exists to order HRC to reimburse Claimant's family's copayment for all five days of Claimant's ABA program provided by Easter Seals. (Factual Findings 1-12 & Discussion.)

ORDER

Claimant Aiden M.'s appeal is granted. The Service Agency shall be responsible for funding all five days of copayments for his ABA program provided by Easter Seals.

DATE: February 25, 2014

A handwritten signature in black ink, appearing to read 'ES', is positioned above a solid horizontal line.

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.