BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of: ISHAAN R. Claimant, vs. FRANK D. LANTERMAN REGIONAL CENTER, Service Agency.	OAH No. 2014020410

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on March 27, 2014, in Los Angeles. 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 parents.[1]

Marc Baca, Appeals Coordinator, represented the Frank D. Lanterman Regional Center (Service Agency).

ISSUE

Shall the Service Agency reimburse Claimant's parents for the payments they made to Autism Partnership for applied behavior analysis services provided to Claimant from October through December 15, 2013?

[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 1-7 submitted by the Service Agency, and exhibits A, A1, B-F and I, submitted by Claimant. The ALJ took official notice of Claimant's exhibits G and H. The ALJ also relied on the testimony of Service Coordinator Dana Sunderland, Regional Manager Sonia Garibay, and Claimant's parents.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is almost six years old. He is a consumer of the Service Agency through his eligible diagnosis of autism.

2. On January 8, 2014, Claimant's parents contacted the Service Agency and asked for retroactive reimbursement for 10 hours per month of applied behavior analysis (ABA) services provided to Claimant by Autism Partnership (AP) from October through December 15, 2013.

3. By a letter dated January 21, 2014, Claimant's parents were advised that the Service Agency had denied their request.

4. On February 12, 2014, a Fair Hearing Request on Claimant's behalf was submitted to the Service Agency, which appealed the Service Agency's denial.

CLAIMANT'S BACKGROUND INFORMATION

5. Claimant lives at home with his parents.

6. In addition to autism, Claimant has also received treatment for Obsessive Compulsive Disorder (OCD), Anxiety, ADHD and Impulse Control. He has significant speech and language impairments and social delays.

7. Claimant previously received special education services from his local school district, including ABA. His parents became dissatisfied with those services and felt Claimant had regressed, so they removed him from school and admitted him to the UCLA

Early Childhood Partial Hospitalization Program (UCLA program). Claimant was in the UCLA program from October 19, 2012, through April 19, 2013, when he was discharged.

8. Claimant currently attends the UCLA program's Explorer classroom in lieu of special education services provided by his local school district. Since the family has moved, his parents plan to re-enroll Claimant into his new local school district next school year.

CLAIMANT'S ABA NEEDS

9. Upon Claimant's discharge from the UCLA program, Dr. Robert Suddath recommended that Claimant receive 40 hours per month of ABA services, with 30 hours per week in a very small structured clinical setting and 10 hours per week at home.

10. Claimant began receiving 30 hours per week of clinical ABA services from AP in April 2013. Those services were funded by Claimant's parents' healthcare insurer, Cigna Health and Life Insurance Company (Cigna).

11. In April 2013, Claimant began receiving an additional 10 hours per week of ABA services from another provider, Innovative Behavior Therapies (IBT). Claimant's parents funded those services.

12. The Service Agency initially funded the copayments to Cigna for the ABA services provided by AP. In July 2013, the Service Agency advised Claimant's parents that, due to a recent change in the law, their family income was above the applicable threshold and that it would no longer fund the copayments.

13. In July 2013, AP recommended that Claimant receive 35 hours per week of clinical ABA. Following up on AP's recommendation, in August 2013 Claimant's parents requested Cigna to authorize 36 hours per month of ABA provided by AP. Cigna denied the request and Claimant's parents initiated an internal appeal with Cigna.

14. By September 2, 2013, Claimant's parents terminated the IBT program. The reason was not established. For example, in an e-mail Claimant's mother sent to the Service Agency in late November 2013 (discussed below), she stated the termination was due to "lack of quality services and consistency of staff." However, during the hearing,

Claimant's mother testified that the family had moved to another county to be closer to the AP program and that the IBT program "could not carry over." In any event, in September 2013, Claimant received only the 30 hours per week of ABA provided by AP.

15. In its report of October 2013, AP documented that Claimant's negative behaviors had increased after the 10 hours per week of additional ABA had been terminated.

16. In October 2013, Claimant's parents began personally funding an additional 6- 10 hours per week of ABA services from AP to address the increase of negative behaviors.

17. By a letter dated October 25, 2013, Cigna denied Claimant's parents' Level 1 appeal and refused to increase its funding of Claimant's AP program from 30 to 36 hours per week. Claimant's parents proceeded to a Level 2 appeal.

18. In a letter dated November 20, 2013, Dr. Mark De Antonio of UCLA opined that Claimant's negative behaviors had worsened and that 40 hours per week of ABA services was a medical necessity.

19. Claimant's parents first approached the Service Agency about this situation by an e-mail sent on November 26, 2013, in which Claimant's mother advised the Service Agency that they had stopped the IBT funding and that Cigna had refused to increase the number of hours provided by AP. Claimant's mother wrote that the family was personally funding eight hours per week of ABA from AP and she requested the Service Agency to fund that amount until the appeal with Cigna had resolved. Claimant's mother attached to the e- mail Dr. De Antonio's November 2013 letter, as well as AP's October 2013 report.

20. On December 2, 2013, the Service Agency began its internal service request review process. By December 6, 2013, the Service Agency approved the funding request and a purchase of service document was drafted. On December 11, 2013, the Service Agency and Claimant's parents executed an amendment to Claimant's individual program plan (IPP) to fund an additional 10 hours per week of ABA services by AP, effective

December 16, 2013, through June 29, 2014. The Service Agency now provides that funding.

21. By a letter dated December 4, 2013, Cigna denied Claimant's parents' Level 2 appeal. The current status of the appeal was not established.

22. Claimant's father testified that the family has spent out-of-pocket $1,300 in October 2013, $900 in November 2013, and $325 in December 2013 for Claimant's additional ABA services through AP.

23. Claimant's parents testified that they did not sooner contact the Service Agency about funding the additional 10 hours per week of ABA services provided by AP because they were first trying to get their insurance to provide it. Claimant's parents also testified that, after receiving the Service Agency's letter in July 2013 advising them that it would no longer fund Cigna's copayments for the ABA services, they no longer believed the Service Agency would fund any part of Claimant's ABA program. Finally, Claimant's parents complained that the Service Agency has not advised them about available services and resources, including ABA. Whether or not that complaint generally has merit, it does not concerning ABA. Claimant began receiving ABA services well before he was enrolled in the UCLA program; some of those services were funded by his local school district and some by the Service Agency. In fact, the Service Agency provided funding for Claimant's parents to access a legal advocate during their dispute with the school district.

LEGAL CONCLUSIONS

JURISDICTION AND BURDEN OF PROOF

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.[2]) An administrative hearing to

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

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.

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 [disability benefits].) In this case, Claimant bears the burden of proof because he is seeking funding that the Service Agency has not before agreed to provide, i.e., reimbursement for payments the family has made to AP for additional ABA services before they were authorized by the Service Agency.

REIMBURSEMENT

4. A consumer's IPP "shall be reviewed and modified by the planning team . . . as necessary, in response to the person's achievement or changing needs, . . ." (§ 4646.5, subd. (b).) The planning process relative to an IPP shall include, among other things, "[g]athering information and conducting assessments to determine the. . . concerns or problems of the person with developmental disabilities." (§ 4646.5, subd. (a).)

5. The process of creating an IPP, by nature, is collaborative. (§ 4646.) The IPP is created after a conference consisting of the consumer and/or his family, service agency representatives and other appropriate participants. (§§ 4646, 4648.) If the parties cannot agree on the provision of a service after the IPP process has concluded, the consumer is notified of his or her fair hearing rights, and thereafter a hearing officer shall make the decision after a hearing.

6. The issue of reimbursement must be carefully considered to avoid the circumvention of the IPP process, which is one of the cornerstones of the Lanterman Act. A

regional center is required and legally obligated to participate in the decision-making process before a service is implemented or expenses for it incurred. Where the parties disagree, the hearing process will resolve the dispute.

7. The Lanterman Act does not specifically authorize retroactive service payments in the fair hearing context. Regulations suggest that retroactive funding is only available when either the service has been preauthorized or in limited emergency situations before such authorization can be obtained. (See, Cal.Code Regs, tit. 17, § 50612, subds. (a), (b) & (c).) In this case, the Service Agency did not preauthorize the service in question, nor was an emergency situation proven to exist.

8. Yet, the lack of specific statutory or regulatory authorization is not necessarily controlling. In the fair hearing context, an ALJ is empowered by statute to resolve "all issues concerning the rights of persons with developmental disabilities to receive services under [the Lanterman Act] . . ." (§ 4706, subd. (a).) That statutory provision may be broad enough to encompass the right to retroactive benefits. However, pursuant to the general principles articulated in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, if the Lanterman Act is to be applied as the Legislature intended, reimbursement should only be available when the purposes of the Lanterman Act would be thwarted if not applied. Otherwise, the general requirements that services should be funded through the process of developing a consumer's IPP (§§ 4646, 4646.5, and 4648), and the above-described regulatory restriction on unilateral funding, would be superfluous. Thus, prior Fair Hearing decisions have included orders for reimbursement only when the equities weighed in favor of the consumer, or when the purposes of the Lanterman Act would be thwarted if not granted.[3]

9. In this case, Claimant's parents unilaterally decided to increase AP's ABA program in October 2013 without consulting the Service Agency. While their intentions

[3] Prior OAH decisions are only advisory, not binding.

may have been good to first attempt to obtain funding through Cigna, this is exactly the type of decision that should be made by the IPP team, including Service Agency staff. Claimant's parents' argument that they did not first approach the Service Agency because they did not know or believe it would provide the funding is problematic because the Service Agency had previously funded ABA when Claimant attended his local school district, and had previously assisted with copayment funding. In any event, if the family ultimately wanted Service Agency funding for a service, they had to ask the Service Agency before making unilateral decisions. The family did not approach the Service Agency about the additional ABA funding until late November, two months after the family had already begun paying AP. The Service Agency spent a reasonable period of time reviewing the facts and situation, and decided to fund the additional ABA within two weeks of the request. Though Claimant's negative behaviors were increasing, it was not established that this was an emergent situation that jeopardized Claimant's health or ability to reside at home. Under these circumstances, it cannot be concluded that the equities weigh in favor of Claimant's family or that the purposes of the Lanterman Act would be thwarted by denying the family's request for reimbursement. (Factual Findings 1-23.)

10. Claimant's parents cite to the 2012 OAH Decision in *D.N. v. Frank D. Lanterman Regional Center* (case no. 2012021179) by ALJ Amy Yerkey. In that case, the involved family had begun privately funding a social skills program for their child in September 2011, the Service Agency thereafter approved the funding in November 2011, and the family requested retroactive reimbursement in December 2011. ALJ Yerkey found that the social skills program was necessary to meet that consumer's IPP goals and that none of the vendored social skills providers referred by the Service Agency to the parents were compatible. "Having failed to fund for a necessary service, equitable considerations require that [the Service Agency] must now reimburse Claimant's parents." (at p. 7.)

However, ALJ Yerkey limited the reimbursement period to when the parents first requested it, i.e., December 2011, and thereafter.

11. Even in its advisory capacity, the *D.N.* Decision is not helpful to Claimant. In that case, the parents had first consulted with the Service Agency but had not been provided with any fruitful referrals. Here Claimant's parents unilaterally authorized AP to increase its ABA hours without consulting with the Service Agency. In any event, Claimant's parents did not request reimbursement until January 2014, well after the relevant time period. Employing ALJ Yerkey's reasoning of allowing reimbursement only after it was first requested of a regional center would result in nothing for Claimant's family in this case.

ORDER

Claimant Ishaan R.'s appeal is denied. Frank D. Lanterman Regional Center need not reimburse Claimant's parents for the payments they made to Autism Partnership for applied behavior analysis services provided to Claimant from October through December 15, 2013.

DATE: April 3, 2014

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.