

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

OAH No. 2014030676

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

DECISION

This matter was heard by Laurie R. Pearlman, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on May 9, 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 her father.¹

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

ISSUE

Shall the Service Agency be responsible for funding insurance copayments, after the deductible is paid, for occupational therapy and speech/language therapy provided to Claimant through her parents' private insurance, Kaiser Permanente (Kaiser)?

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

EVIDENCE RELIED UPON

In making this Decision, the ALJ relied upon exhibits 2-13 submitted by the Service Agency, exhibits A-O submitted by Claimant, and the testimony of Dr. Iris Mencias, HRC Medical Consultant; Barbara Maeser, HRC Program Manager; Melissa Greener, HRC Speech/Language Pathologist and Claimant's father. HRC's position paper (Exhibit 1) was read, but it is not considered to be evidence.

FACTUAL FINDINGS

1. Claimant is a six-year-old girl who is eligible for regional center services under a diagnosis of Intellectual Disability. She lives at home with her parents and two older brothers, who attend elementary school. Claimant has medical diagnoses which include Congenital Multiple Renal Cysts; Body Dysmorphic Disorder; Congenital Malformation of Face and Neck; Chromosomal Abnormality; Infantile Idiopathic Scoliosis; and Neuromuscular Scoliosis. As a result of these medical conditions, Claimant requires feeding through a gastrostomy tube, although she is now able to get up to 25% of her daily caloric needs from four small meals of pureed food. She is dependent on others for all self-care needs. Claimant is non-ambulatory and uses a wheelchair.

2. Claimant is currently receiving services through California Children's Services (medical equipment and diapers), Kaiser (health insurance) and Medi-Cal. Bellflower Unified School District (District) provides her with physical therapy, occupational therapy, speech/language services, health care services and a behavioral aide, in order to assist her in accessing a free and appropriate public education (FAPE.) Through the District, Claimant receives speech/language therapy four times per week for 30 minutes per session and occupational therapy for 30 minutes, three times per week. Claimant has also been authorized to receive occupational therapy for two

sessions per week and speech/language therapy for one session per week through Kaiser.

3. The goal of occupational therapy services authorized by Kaiser is to assist Claimant with motor skills to support exploration and interaction with her environment, improve fine motor skills and promote her ability to participate in oral feedings. Kaiser completed an occupational therapy re-evaluation of Claimant on March 20, 2014, and concluded that she “qualifies for occupational therapy services under guidelines for children with developmental delays. It is necessary and highly recommended that [Claimant] receives occupational therapy through an outside agency in addition to current occupational therapy services provided through the [District] in order to improve her overall fine motor control and strength as well as improving her tolerance to food textures.” (Exhibit I.)

4. Claimant has significant speech/language delays, as part of a global developmental delay. Her hearing is normal. She communicates by using facial expressions, by patting things, and by using some vocalizations and word approximations. She is learning to sign. Based upon a pediatric speech/language evaluation performed by Kaiser on March 27, 2014, Claimant’s expressive communication is at the level of a six to nine-month-old and her language comprehension is that of a nine to twelve-month-old. She has shown progress, based upon the previous speech/language evaluation performed by Kaiser one year ago. Kaiser concluded that she qualifies for speech/language therapy services under guidelines for children with developmental delays. Based on the March 2014 evaluation, Kaiser “highly recommended” that Claimant receive speech/language therapy, in addition to the current speech/language therapy services provided to her through the District, in order to improve her comprehension and oral speech communication skills, as well as her swallow function. (Exhibits C and D, page 4.) Speech/language therapy

services from Kaiser will address receptive and expressive language development and assist Claimant to communicate using both an augmentative device and oral speech.

5. During Claimant's Individual Family Service Plan² (IFSP) meeting on February 19, 2014, her Mother provided copies of the Kaiser treatment plans for occupational therapy and speech/language therapy, dated March 2013. Kaiser has authorized occupational therapy twice per week and speech/language therapy once per week. At that time, Mother informed HRC that the family was in the process of locating a pediatric therapy clinic to provide the occupational and speech/language therapies for Claimant. The family requested co-payment assistance for Claimant's occupational therapy and speech/language therapy from HRC.

6. The February 19, 2014 IFSP indicates that Kaiser has authorized occupational therapy twice weekly and speech/language therapy once per week. Claimant's IFSP goals state that "private insurance may continue to provide for OT, PT and ST services to address [Claimant's] developmental needs per private insurance policy guidelines. Parents to continue to follow through with therapy recommendations as suggested by therapeutic staff with the school district and private insurance." The role of the HRC Clinical Team is to review Claimant's developmental needs and provide clinical feedback and recommendations for therapy. (Exhibit 4, pg. 5.)

7. Following Claimant's IFSP meeting, HRC's clinical team, including Pam Hellman, a registered occupational therapist, and Melissa Greener, a speech and language pathologist, reviewed Kaiser's authorizations for speech/language therapy and occupational therapy. After this review, HRC's clinical and case management team met and discussed Claimant's request for copayment assistance. Although they did not

² HRC uses the designation IFSP instead of Individualized Program Plan (IPP), to which the Lanterman Act refers. However, any references to IPPs apply to HRC's IFSPs.

conduct their own direct assessment of Claimant, HRC made the determination that the current services being provided through the District were appropriate to meet Claimant's clinical needs and that no additional services were required. HRC asserted that if it had determined that Claimant had a need for additional speech/language and occupational therapy services, it would have worked with the family to advocate for additional services to be provided through the school District, which it deems to be the appropriate funding source.

8. HRC sent a Notice of Proposed Action dated March 3, 2014, stating that it was denying Claimant's request for copayment assistance of \$30 per session for twice weekly occupational therapy and once weekly speech/language therapy sessions being funded through Kaiser. The basis for HRC's denial was its determination that the occupational and speech/language therapy services provided by the District are adequate to meet Claimant's needs, as identified in her current IFSP. Claimant's parents filed a timely Fair Hearing Request dated March 17, 2014.

9. On May 1, 2014, South Coast Therapies (which provides occupational therapy and speech/language therapy funded by Kaiser) informed HRC that Claimant began receiving occupational therapy that week for one session per week. HRC was also informed that Claimant is on a waiting list to begin speech/language therapy, which has been authorized by Kaiser for one session per week. No other occupational therapy or speech/language therapy services were provided through Kaiser to Claimant in 2014.

10. HRC contends that many of the speech/language and occupational therapy goals of the therapy Kaiser would provide are mirrored in Claimant's individualized education program (IEP) at school, and therefore should be the District's responsibility. HRC also asserts that Claimant's occupational therapy program with both the District and Kaiser focuses on feeding, and addresses her severe oral sensitivities to textures, tastes and smells of foods, which interfere with her oral feeding. Claimant's

Father testified credibly that oral feeding is the focus of the District's occupational therapy program, which does not address motor skills to support exploration and interaction with her environment. While in many respects the therapy goals in question may contain substantial overlap (i.e., the goals relate to both school activities and those engaged in the home and the community), HRC has not established that Claimant's speech/language therapy and occupational therapy contain goals which fall solely within the purview of her local school District.

11. Iris Mencias, M.D., a medical consultant for HRC, testified credibly on behalf of the Service Agency. She stated that as part of the multi-disciplinary team for Claimant, her role includes bridging the gap between Kaiser and HRC. On March 16, 2014, she spoke with Dr. Marvin Tan, the doctor at Kaiser who oversees Claimant's care. He informed Dr. Mencias that the occupational therapy and speech/language therapy authorized by Kaiser are "medically necessary." (Exhibit 11, page 4.)

12. 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 Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.³) 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 and 8.)

³ All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

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 she is seeking co-payment assistance that HRC has not before agreed to provide. (Factual Findings 5- 8.)

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 an individual with autism 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 their regional centers to pay these insurance copayments.

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 them cost-effectively, to utilize generic resources, etc. 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 her IEP, so as to allow her to access a FAPE. (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. A preponderance of the evidence establishes that the occupational therapy and speech/language therapy that Kaiser has authorized for Claimant is medically necessary. Kaiser "highly recommended" that Claimant receive speech/language therapy, in addition to the current speech/language therapy services provided to her through the District, in order to improve her comprehension and oral speech communication skills, as well as her swallow function. Kaiser deemed it medically necessary and highly recommended that Claimant receive occupational therapy in addition to the occupational therapy services provided through the District in order to improve her overall fine motor control and strength, as well as improving her tolerance of food textures. HRC failed to establish that the occupational therapy and

speech/language therapy being provided through the District were appropriate to meet Claimant's clinical needs and that no additional services were required. Claimant and HRC have sought out cost-effective funding and utilized a generic resource by seeking occupational therapy and speech/language therapy 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, occupational therapy and speech/language therapy.

10. It was not proven that Claimant's current occupational therapy and speech/language therapy contains goals solely within the purview of her 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 copayment incurred by Claimant's parents for occupational therapy and speech/language therapy provided by Kaiser. (Factual Findings 1-12 & Legal Conclusions 1-10.)

ORDER

Claimant's appeal is granted. The Service Agency shall be responsible for funding copayments for her occupational therapy and speech/language therapy provided by Kaiser Permanente, effective April 28, 2014.

DATE: May 21, 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.