

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PETITIONER,

vs.

KERN COUNTY REGIONAL CENTER,

Respondent.

OAH No. 2016020773

DECISION

The hearing in the above-captioned matter was held on March 7, 2016, in Bakersfield, California, by Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH). Petitioner was represented by his mother, V.G.K (Mom).¹ The Respondent, Kern Regional Center (KRC or Respondent) was represented by Mark Edward Meyer, LCSW.

The matter was consolidated for hearing along with a companion case, where the same Petitioner sought relief against KRC, on a different issue, in OAH case number 2016020763.

Evidence was received, the case was argued, and the matter submitted for decision on the hearing date. The factual findings that follow were established by a preponderance of the evidence, and based thereon, the legal conclusions and order that follow are made.

¹ Initials are used in the place of the family surname in the interests of privacy.

ISSUE PRESENTED

The issue is whether KRC should pay the copayments that will arise from the use of insurance coverage to pay for necessary therapies to be provided to Petitioner.

//

FACTUAL FINDINGS

THE PARTIES AND JURISDICTION

1. Petitioner is a two-year-old boy (born February 28, 2014), who receives supports and services from KRC under the California Early Intervention Services Act, Government Code section 90000, et seq. due to the fact he has Down Syndrome. He lives with his parents, and infant sister within KRC's catchment area.

2. On January 29, 2016, KRC issued a Notice of Proposed Action, which informed Petitioner's parents that KRC would not cover any co-payments that Petitioner's parents will have to pay when they turn to their health insurance to provide physical and occupational therapy to Petitioner in the near future. On February 16, 2016, Mom filed a Fair Hearing Request, and this proceeding ensued. (Ex.s A2 and A3.) All jurisdictional requirements have been met.

PETITIONER'S INDIVIDUALIZED FAMILY SERVICE PLAN

3. A review of Petitioner's Individualized Family Service Plan (IFSP) was completed in September 2015, when he was 17 months old.² (Ex. D.) It notes that

² It appears from exhibit D that the initial IFSP was developed in April 2015.

he had been diagnosed with Down Syndrome and Global Delays. The IFSP cataloged Petitioner's development level, which was delayed across the board. Hence, gross motor skills were estimated at six to eight months, and fine motor skills at seven to nine months, or approximately one year delayed. Similar numbers were estimated for cognitive development, communication development, social-emotional development, and adaptive/self-help development. (*Id.*, p. 3.)

4. According to the IFSP, Petitioner was receiving "early intervention" and physical therapy, the former twice per week, one hour per session, and the later twice per week, for 30 minutes per session. (Ex. D, p. 5.)

5. Mom testified, and it was not refuted, that Petitioner receives speech therapy, occupational therapy, and physical therapy at this time, through a vendor called Terrio. The occupational and physical therapies are authorized by KRC until at least the end of April, though Mr. Meyer indicated that physical therapy is authorized until the end of June. However, the parents' health insurance will soon take over the provision of those latter therapies; it will not cover speech therapy.

6. At the time the IFSP was generated, Petitioner was demonstrating limited mobility and agility. He could sit for up to 10 minutes, and sometimes attempted to lift his head in supine, and was "emerging to crawl backward." (Ex. D, p. 3.) He was attempting to learn crawling forward, and was able to get from lying down to sitting. He could transfer a small item from one hand to the other, but it appears he had trouble grasping small objects. (*Id.*, p. 4-5.)

7. There is a significant chance that Petitioner will, after age three, be able to obtain services from KRC under the aegis of the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and

Institutions Code, section 4500 et seq., but that is not due for determination until approximately November 2016.

FINANCIAL ISSUES

8. Petitioner's parents have been informed that their insurance co-payments will be between \$15 and \$45 per visit, and they can count on four or five visits to the therapists, per week. Thus, weekly therapy co-payments could run from \$75 to \$225 per week if five therapy sessions are attended.

9. Petitioner's parents are both employed in white collar professional jobs. Their current yearly gross income exceeds \$150,000.

10. Mr. Meyer provided evidence that the federal poverty level for a household of four, as of 2014, was \$23,850. (Ex. E.) The ALJ takes official notice, from the website of the United States Department of Health and Human Services, that the 2016 poverty threshold for a household of four is \$23,850.³

11. Under the applicable provisions of the Lanterman Act, a regional center such as KRC cannot cover co-payments where the family income is at or exceeds 400 percent of the poverty level. In this case, that amount would be \$95,400. As can be seen from Factual Finding 9, the family income exceeds that amount by over 50 percent.

³ The ALJ gave notice at the hearing that he would attempt to find the current poverty threshold and take notice of it; the parties agreed to that step. The website address where the information was found is <http://aspe.hhs.gov/poverty/index.cfm>; the address was found on page 3 of exhibit E.

12. Petitioner's parents, in their Fair Hearing Request and at the hearing, pointed to other ongoing expenses that flow from the needs of Petitioner. For example, they moved to the Bakersfield area so that Petitioner's grandmother could help care for the boy. They give the grandmother a weekly payment by way of compensation.

13. Petitioner's mother asserted that this case should fall within the exceptions that are set out in the statute. While parents are maintaining Petitioner in the family home, it has not been established that they will not be able to continue doing so without assistance in paying the insurance co-payments. Neither parent has been prevented from working due to some sudden illness, accident, or other crisis.

LEGAL CONCLUSIONS

1. Federal law has established a program for discovering and treating those infants and toddlers who suffer from some disability, or risk of disability. Part C of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. section 1431, et. seq. is the federal statutory enactment, and it provides for funding to those states that choose to participate in the program. California is a participating state, and provides such services under the California Early Intervention Services Act, often referred to as the Early Start Program (Act).

2. The California Legislature designed the Act to provide "appropriate early intervention services individually designed" for infants and toddlers who have disabilities, or are at risk for them, "to enhance their development and minimize the potential for developmental delays." (Gov. Code, § 95001, subd. (a)(1).) The Legislature found that early intervention services maximize the ability of families to better provide for the special needs of their children. (Gov. Code, § 95001, subd. (a)(2).)

3. The Department of Developmental Services and the regional centers are responsible for providing appropriate services for eligible infants and toddlers, except those with solely visual, hearing, or severe orthopedic impairments. (Gov. Code, § 95014, subd. (b)(1).) If an infant or toddler is eligible for services under IDEA, the regional centers are required to provide the services in conformity with the federal law. (*Id.*) The services must be provided by the regional centers as required in the child's IFSP. (Gov. Code, §§ 95014, subd. (b) and 95020, subd. (d)(1).) The services provided shall be provided pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), commencing at section 4500 of the Welfare and Institutions Code. (Gov. Code, § 95004, subd. (a) & (b).)

4. There is no dispute that Petitioner is eligible for services from KRC pursuant to the Act, based on Factual Finding 1 and Legal Conclusions 1 through 3.

5. Jurisdiction exists to conduct the hearing in this matter, and to render a decision thereon, pursuant to California Code of Regulations (CCR), title 17, sections 52172 and 52174,⁴ based on Legal Conclusions 1 through 4 and Factual Finding numbers 1 and 2.

//

6. (A) Title 20 of the United States Code, at section 1432, defines early intervention services generally as those provided under public supervision at no cost (with some exceptions) and designed to meet the developmental needs of disabled toddlers and infants in several possible areas. (20 U.S.C. § 1432 (4)(A) through (4)(C).) The services must be provided by qualified personnel. (20 U.S.C. §

⁴ All further citations to the CCR shall be to title 17 thereof.

1432 (4)(F).) Physical therapy and occupational therapy are recognized early intervention services. (20 U.S.C. § 1432 (E)(iv) and (E)(v).)

7. The Lanterman Act, at Welfare and Institutions Code section 4648, subdivision (a)(8), provides that "Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services." Section 4659 has long provided that the regional centers shall identify and pursue all possible sources of funding for consumers receiving services.

8. Welfare and Institutions Code section 4659 underwent substantial revision in 2009. The statute retained its mandate for the regional centers to pursue sources of funding for their consumers, such as generic resources (school systems, Medi-Cal, etc.). The statute now provides that the regional centers shall not purchase services that could be obtained by the consumer from traditional generic resources, as well as "private insurance, or a health care service plan when a consumer or family meets criteria of this coverage but chooses not to pursue that coverage." (Welf. & Inst. Code, § 4659, subd. (c).)

9. The 2009 changes to the Lanterman Act in many cases limited the scope of services that could be provided, even if the list of services set out in section 4512, subdivision (b), was not specifically modified. Hence, limits on how much respite could generally be provided were put in place. Social recreational services, including camping, were all but eliminated, and restrictions were put in place regarding behavioral therapies. (Welf. & Inst. Code, §§ 4685.5 [limiting respite hours]; 4648.5 [suspending camping and social recreation services]; 4686.2, [behavioral services].)

10. Welfare and Institutions Code section 4659.1 was enacted in 2013, becoming effective late in June of that year. It governs the payment, by regional

centers, of co-payments, co-insurance, and deductibles. Subdivision (a) of the statute provides that a regional center "may, when necessary to ensure that the consumer receives the service [provided by an insurer or health care plan] pay any applicable copayment . . . 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.
- (3) There is no other third party having liability for the cost of the service or support,"

The statute also provides some exceptions, for where a family's income exceeds the 400 percent rule quoted above. That exemption is discussed below.

11. Claimant does not meet the requirements of section 4659.1, subdivision (a), as the family income is in excess of the limit set by the statute. (Factual Findings 9-11.)

12. (A) There is an exception to the aforementioned rule. Welfare and Institutions Code section 4659.1, subdivision (c), provides that a regional center may pay the copayments associated with a health insurance policy, when connected to a service that is needed by a consumer, and where the family income exceeds 400 percent of the federal poverty level. However, there are certain conditions that must be met.

(B) First, subdivision (c) requires that any such payment by the regional center is necessary to successfully maintain the child in the home. That has not been demonstrated in this case.

(C) Even if it is shown that payment by the center is needed to maintain the child successfully in the home, the parents of the consumer must demonstrate either that there has been an extraordinary event that impacts the ability to meet the care and supervision needs of the child or which impacts the parents' ability to pay the copayment, or, that there has been a catastrophic loss that temporarily impacts the ability to pay the copayments, or, that there are significant unreimbursed medical costs associate with the care of the consumer or another child who is also a consumer of regional center services. (Welf. & Inst. Code, §4659.1, subd. (c)(1)-(3).)

(D) Catastrophic losses are defined to include events such as natural disasters and accidents involving major injuries. Claimant's parents have not cited such an event. Nor can they point to large unreimbursed medical expenses for Claimant or his sister, who in any event is not a regional center consumer, and therefore could not bring the family within the exception.

13. Parents might point to the provision allowing payment where there has been an extraordinary event, at subdivision (c)(1). While "extraordinary event" is not itself defined, it must, under the statute, be an event that impacts the ability of the parents to meet the care and supervision requirements of the child, or to make the copayments. That has been demonstrated on this record.

14. Based on all the foregoing, the Petitioner's claim must be denied.

ORDER

The appeal of Petitioner is denied. Kern Regional Center shall not be required to pay insurance co-payments for Petitioner.

March 15, 2016

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings