

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of Claimant's Request for
Copayment Assistance for:

CLAIMANT

and

SAN DIEGO REGIONAL CENTER,

Service Agency.

OAH No. 2017090782

DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Carlsbad, California, on November 7, 2017.

Ronald R. House, Attorney at Law, San Diego Regional Center (SDRC), represented SDRC.

Claimant's mother represented claimant.

The record was left open until November 15, 2017, for the parties to submit additional evidence regarding claimant's health coverage. SDRC and claimant timely submitted documents in this regard, which were marked next in order and admitted. On November 15, 2017, the record was closed and the matter submitted.

ISSUE

Should IRC fund claimant's request for copayment assistance incurred for claimant's speech therapy visits?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On September 7, 2017, SDRC sent claimant a Notice of Proposed Action, denying claimant's request to pay copayments for speech therapy. SDRC stated that it cannot approve services because claimant is eligible for speech therapy at school, and has private insurance and Medi-Cal. As the legal basis for its action SDRC cited Welfare and Institution Code sections "4659(1)" and "4648.8."¹

2. On September 18, 2017, claimant's mother filed a request for a fair hearing objecting to SDRC's action. In her hearing request she asked that SDRC pay copayments twice a week at \$15 per session. She identified the financial hardship of these payments as the reason for the request.

CLAIMANT'S BACKGROUND, IPP AND AMENDED IEP

3. Claimant is a 4-year-old boy with Down Syndrome, Trisomy 21, who is eligible for regional center services. Claimant is Medi-Cal eligible and has private insurance through Kaiser.

Claimant has developmental expressive and receptive language delay. As an outcome/service relating to his need for speech therapy, his Individual Program Plan (IPP) dated December 14, 2016, stated as follows: "(Claimant) will pronounce each word in its entirety to increase clarity through 10/2017." His long term goals, according to claimant's Pediatric Therapy Plan of Care dated June 21, 2017, were identified as follows:

¹ The correct citation for Welfare and Institutions Code section "4648.8" appears to be Welfare and Institutions Code section 4648, subdivision (a)(8).

- Claimant will respond to questions;
- Claimant will acquire an expressive vocabulary of 50 plus words (or signs);
- Claimant will ask for objects/food/drink with gesture, point, vocalization, eye contact;
- Claimant will request actions (favorite activity, end of activity, help, more);
- Claimant will imitate action/gesture/sounds/words on request 8 out of 10 opportunities across three consecutive sessions;
- Claimant will improve speech intelligibility.

Claimant's treating doctor at Kaiser, Patricia Anne Tsung, M.D. referred claimant for speech therapy at Kirsch Therapy (Kirsch). Before making this referral, Dr. Tsung consulted with Remyanne Hilchey, MA, CCP-SLP. In a report dated June 27, 2017, Ms. Hilchey recommended speech therapy for claimant at Kirsch twice a week for up to 60 minutes per session. Kaiser referred claimant to Kirsch because Kaiser does not offer speech therapy near claimant. Kirsch does not accept Medi-Cal. On October 17, 2017, Kaiser authorized the service.

In an Amended Individual Education Plan (IEP), dated August 28, 2017, claimant's parents expressed their concern that claimant was regressing in his communication skills. They suspected the possibility that claimant has verbal apraxia. The Speech Language Pathologist discussed strategies for children with sound production and sequencing challenges and provided a list of targeted words/phrases. The IEP team agreed to add individual speech therapy services at 30 minutes per week to claimant's

IPP. Effective October 20, 2016, claimant receives 2,100 minutes per year of group language and speech therapy at the school.

EVIDENCE SUBMITTED AT HEARING

4. Claimant's mother testified that claimant has a severe speech delay and needs intensive speech therapy. She supplemented her testimony with a detailed narrative she submitted at the hearing. Claimant can only say one word at a time, only has a couple of two-word combinations, and he cannot express his needs. She suspects that he may have verbal apraxia but he has not been diagnosed with this condition. Through Kaiser, claimant receives individual speech therapy for an hour twice a week at Kirsch. The copayments are \$15 per session and he receives this therapy twice a week. With other services the family pays relating to claimant's needs, the monthly copayment for speech therapy is a financial hardship. Claimant's mother included invoices for services claimant receives. These services included horse therapy at "Reins" totaling \$1,125; the cost of appointments for medical services at the Pierson Center for Children in Portland Oregon, totaling \$2,100; thyroid medication in the amount of approximately \$120; and a urine analysis statement for a lab in Kansas in the amount of approximately \$250.² Claimant's mother did not explain how the services provided related to claimant's developmental disability.

² The costs are approximations because the expenses claimant's family has incurred are not factors in reaching the decision on claimant's appeal. These expenses may be relevant to SDRC's ultimate assessment whether claimant is eligible for copayment assistance under section 4659.1.

At school claimant receives group language and speech therapy, individual speech and language therapy and physical therapy. Claimant spends four days a week at school for three hours a day. He receives extended services at school in the summer.

Claimant's mother challenged both of the reasons SDRC cited for denying her request for copayment assistance. Regarding SDRC's assertion that he can receive more one-on-one speech therapy at school, she disagreed with SDRC's position. At his most recent IEP meeting in October, she asked the school district about converting his group therapy to more one-on-one therapy. The district told her that if this were to be done he would need to spend more time in the unstructured general education setting, as opposed to the structured classroom setting. She believes this is not in claimant's best interest.

Claimant's mother explained that claimant now spends 58 percent of his time with his peers at school and he is pulled out 42 percent of time for speech and occupational therapies. She emphasized that claimant's integration in the classroom setting is important as he approaches kindergarten. He benefits from being with his peers in the structured general classroom setting because he learns how to model his behavior from peers and he sees how children in the structured general education classroom behave. Claimant's mother does not want him pulled out of the classroom with his peers for more therapy and does not want his school experience to be a "dumping ground" for therapies.

Regarding SDRC's decision to deny his claim because he can receive Medi-Cal with no copayments, she pointedly disagreed with SDRC's position. In order to get Medi-Cal for speech therapy claimant needs to go through Rady Children's Hospital (Rady), which has a Medi-Cal contract with Kaiser. Rady has a six-month waiting list for speech therapy and given his age and his developmental needs, it is not in his best

interest to wait six months. SDRC did not dispute that Rady has a six-month waiting list for claimant to receive speech therapy.

To complicate the matter of the referral to Rady, Kaiser told claimant that Kaiser cannot refer claimant to Rady because Kaiser already referred claimant to Kirsch for therapy. Claimant's mother called Kaiser's Outside Referral Line on October 14, 2017, and a Kaiser representative named Gabby told her that it is not possible for Kaiser to send the same referral for the same service to another provider. At the hearing claimant submitted a text message she received from Ms. Hilchey, claimant's speech therapist, shortly before the hearing on November 7, 2017, at 8:22 a.m. confirming this assertion. Ms. Hilchey sent the following text message to claimant's mother:

I forwarded the info to my supervisor, hopefully she has gotten in contact with you. I know she did say that we cannot send out 2 referrals. So it would not be possible to send out a referral while (claimant) is at (Kirsch).

Claimant's mother, at 9:22 a.m. responded as follows:

Thank you Remy!! This is perfect to have it in writing. I ended up calling Kaiser's outside referral line yesterday afternoon and they gave me the same answer. I appreciate your help!!

5. SDRC disagreed that Kaiser's policy prevents it from making a second referral for claimant. In support of its position, post-hearing SDRC submitted an email dated November 8, 2017, from Kathy Karins, R.N., Director of Clinical/Intake Services at SDRC, captioned "Kaiser follow up." Ms. Karins wrote the following:

I spoke with Kristina Reinhold-Smith, supervisor at Kaiser Speech Therapy. She indicated that some vendors want a

referral in the system before proceeding. If the vendor has a wait list, then it may result in a lapse in service. This [*sic*] able to be worked around if she is aware of the situation.

If the family wants to change vendors, Kristina is able to contact the vendor and will work with them to place the family without a referral. The vendor then contacts her about 2 weeks prior to starting of service and she will place the referral. Have the family contact her at [number not included] and she will work with them and the new vendor to ensure a smooth transition.

In her November 13, 2017, post-hearing response claimant's mother disputed Ms. Reinhold-Smith's conversation with Ms. Karins, as Ms. Karins reported it. She said she called Ms. Reinhold-Smith after she received Ms. Karin's email and Ms. Reinhold-Smith told her she did not discuss a wait list with Ms. Karins and Ms. Reinhold-Smith denied to claimant's mother that there is a way to "work around" the Kaiser referral policy. Ms. Reinhold-Smith told claimant that Kaiser per its policy cannot send out two referrals. Claimant's mother included the following email dated November 13, 2017, from Ms. Reinhold-Smith that confirmed claimant's mother's characterization of her conversation with Ms. Reinhold-Smith:

. . . Since (claimant) is at Kirsch and has an active 6 month referral I unfortunately cannot place another referral at Rady's to get him on the waiting list. They [*sic*] Kaiser system only allows one external referral to be placed at the same time for a multitude of reasons. . . .

6. A preponderance of the evidence showed that Kaiser has a policy that it will not make two external referrals for the same service. As a result, Kaiser will not refer claimant for speech therapy at Rady until he stops receiving speech therapy at Kirsch. Rady, in turn, has a six-month waiting list for speech therapy.

7. As a separate concern, claimant's parents expressed frustration that SDRC has not sent them a package to assess their financial eligibility for copayment assistance despite their request. Gabriella Ohmstede, Regional Manager at SDRC, responded that because SDRC has entirely denied claimant's request for copayment assistance SDRC did not provide claimant's parents with this form.

Claimant's parents also expressed concern that claimant's IPP has not timely been scheduled. Ms. Ohmstede testified that the IPP will soon be scheduled.

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish by a preponderance of the evidence that SDRC should fund the requested service. (Evid. Code, §§ 115, 500; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.)

THE LANTERMAN ACT

2. The Legislature enacted the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of

the same age and to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.) Welfare and Institutions Code section 4501 outlines the state's responsibility for persons with developmental disabilities and the state's duty to establish services for those individuals.

3. Section 4512, subdivision (b), defines "services and supports" as:³

[S]pecialized 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. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option . . . Nothing in this subdivision is intended to expand or authorize a new or different service or

³ All references are to the Welfare and Institutions Code unless otherwise stated.

support for any consumer unless that service or support is contained in his or her individual program plan.

SERVICES, SUPPORTS, GENERIC RESOURCES, AND THE DEVELOPMENT OF IPPS

4. A regional center is required to secure the services and supports that meet the needs of the consumer, as determined in the consumer's IPP. (Welf. & Inst. Code, §§ 4646, subd. (a) and 4648, subd. (a)(1).) A regional center must secure services that are effective in meeting the consumer's IPP goals and are cost-effective, and to the extent possible, reflect the preferences of the consumer and his or her family. (Welf. & Inst. Code, §§ 4512, subd. (b) and 4646.)

5. The regional center is also required to consider generic resources and the family's responsibility for providing services and supports when considering the purchase of regional center supports and services for its consumers. (Welf. & Inst. Code, § 4646.4.)

6. 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."

7. In implementing Individual Program Plans, regional centers are required to first consider services and supports in natural community, home, work, and recreational settings. (Welf. & Inst. Code, § 4648, subd. (a)(2).) Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family. (*Ibid.*)

8. Section 4659 requires regional centers to "identify and pursue all possible sources of funding for consumers receiving services." Subdivision (a)(1) of section 4659 identifies such sources as including "[g]overnmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare,

the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the states supplementary program.”

Subdivision (c) provides that regional centers “shall not purchase any service that would otherwise be available from Medi-Cal . . . or a health care service plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage.”

Subdivision (d)(1) provides that “a regional center shall not purchase medical or dental services for a consumer three years of age or older unless the regional center is provided with documentation of a Medi-Cal, private insurance, or a health care service plan denial and the regional center determines that an appeal by the consumer or family of the denial does not have merit.”

COPAYMENT ASSISTANCE

9. A regional center may pay a copayment, coinsurance, or deductible 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 does not exceed 400 percent of the federal poverty level, and there is “no other third party having liability for the cost of the service.” (Welf. & Inst. Code, § 4659.1.) Subdivision (c)(1) of Section 4659.1 contains an exception to the prohibition, but this exception does not apply here.

REGIONAL CENTER’S ABILITY TO PURCHASE EDUCATIONAL SERVICES

10. Effective July 28, 2009, section 4648.5 modified section 4512 and suspended a regional center’s authority to purchase certain services, including educational services for children ages three to 17. (Welf. & Inst. Code, § 4648.5, subd. (a)(3).) Subdivision (c) of section 4685.5 provides that an exemption may be granted “when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer’s

developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs."

EVALUATION

11. Claimant has met his burden to establish he is eligible to receive copayment assistance under section 4659.1, as otherwise financially eligible. In reaching this conclusion a number of determinations are made concerning whether speech therapy is a critical means to ameliorate the physical, cognitive, or psychosocial effects of the claimant's developmental disability; whether Medi-Cal is "liable" to provide claimant with speech therapy; whether claimant elected to not pursue Medi-Cal coverage; and whether claimant is required to obtain individual speech therapy at his school as a generic resource.

First, there is no dispute that claimant has severe speech delay and requires intensive one-on-one speech therapy. Claimant cannot express his needs and uses only a couple of two-word combinations. Thus, speech therapy is a critical educational service to ameliorate his developmental disability under section 4685.5.⁴

Next, a preponderance of the evidence did not establish that, as required by section 4659.1, Medi-Cal is presently "liable" to provide claimant with speech therapy. Medi-Cal is liable to provide services for claimant once Kaiser refers claimant to Rady, which accepts Medi-Cal. Kaiser has not made such a referral and by its policy Kaiser will not do so until claimant ends his speech therapy treatment at Kirsch. Even if the referral is made, Rady has a six month waiting list for services. Considering his need to develop language skills before he enters kindergarten, a delay of six months of any individual

⁴ It is not entirely clear from the record whether speech therapy is an "educational" service, but this finding is made considering he receives this service, in part, through his school.

speech therapy is contrary to the alleviation of his developmental disability, and contrary to his social, personal, physical, habilitation and rehabilitation and his ability to live a normal life. (Welf. & Inst. Code, § 4512.)

For a similar reason, it cannot be found that as required by section 4659 claimant has elected not to pursue Medi-Cal coverage for his speech therapy. As the evidence showed, claimant did not choose to not pursue Medi-Cal coverage. Claimant's mother stated at the hearing that she attempted to pursue Medi-Cal coverage through Rady for claimant. Presently, claimant is *unable* to pursue Medi-Cal coverage because Kaiser requires claimant to stop his speech therapy treatment before it will refer him to Rady, and stopping his speech therapy at Kirsch will require claimant to go without speech therapy for six months due to the wait list at Rady. Stopping any speech therapy is inconsistent with the Lanterman Act's purpose to make services and supports available to claimant to alleviate his developmental disability and further his social, personal, habilitation and rehabilitation. (*Id.*)

Finally, claimant is not required to obtain more individual speech therapy at his school as an available generic resource. The evidence showed that claimant benefits from his integration in the structured general classroom setting where he has the chance to learn from his peers how to behave in the classroom. Removing him from the classroom setting, at this time, for more individual speech therapy at the school, is contrary to the alleviation of his development disability, and contrary to his social, personal, physical, habilitation and rehabilitation and his ability to live a normal life. (Welf. & Inst. Code, § 4512.)

Accordingly, SDRC shall fund copayments for claimant's speech therapy at Kirsch if claimant otherwise meets the financial eligibility requirements for copayment assistance under section 4659.1.

ORDER

Claimant's appeal is granted. San Diego Regional Center shall authorize payment of copayments for claimant's speech therapy at Kirsch Therapy as otherwise eligible.

DATED: November 29, 2017

ABRAHAM M. LEVY

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 ninety days.