

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2021040688

DECISION

Julie Cabos-Owen, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on June 11, 2021.

Candace Hein, Fair Hearing Specialist, represented Westside Regional Center (WRC or Service Agency). Claimant was represented by her mother.

Testimony and documentary evidence were received, and argument was heard. The record closed and the matter was submitted for decision on June 11, 2021.

ISSUE

Should WRC be required to assist in funding in-person occupational therapy for Claimant?

EVIDENCE

Documentary: Service Agency exhibits 1 through 8.

Testimonial: Claimant's mother.

FACTUAL FINDINGS

1. Claimant is a three-year-old female client of WRC. She qualifies for regional center services under a diagnosis of Autism Spectrum Disorder (ASD).
2. Claimant had previously been a client of the Service Agency under the Early Start Program.¹

¹ "Early Start" is the California name for a federal program for children under age three at risk for certain disabilities. Early Start is governed by the Individuals with Disabilities Education Act (20 U.S.C. §§ 1431-1445) and applicable federal regulations (Title 34, C.F.R., section 303, et seq.). A state may receive federal funds for providing services to eligible children. California chose to participate and passed the California Early Intervention Services Act (Gov. Code, § 95000, et seq.) and regulations to implement the statutory scheme (Cal. Code Regs., tit. 17, §§ 52000-52175.).

3. Claimant currently lives in a home with her mother, father, and older brother. Claimant's family has health insurance coverage through Anthem Blue Cross PPO (Anthem).

4. Claimant attends a special day program through her school district (district). She is currently participating in the program through distance learning due to COVID-19 restrictions.

5. Claimant is eligible to receive speech therapy services through her district. However, Claimant's mother chooses to privately fund speech therapy because she prefers in-person services for Claimant rather than the virtual platform currently offered by the district. Claimant's mother is also self-funding Claimant's in-person physical therapy. Claimant's mother has declined district funding for these interventions because she is "seeking to do more than the district offering," and she does not want Claimant to regress.

6. During the time Claimant was in Early Start, she received occupational therapy (OT) funded by WRC. Prior to March 2020, Claimant received in-person OT. However, after March 2020, due to the COVID-19 pandemic, the occupational therapist provided services via telehealth which mainly consisted of parent coaching rather than working directly with Claimant. Claimant's mother recalled verbally asking Claimant's service coordinator to change the OT provider. However, Claimant's mother never made that request in writing.

7A. On December 7, 2020, when Claimant was two years, nine months old, Billy Stimson, a pediatric occupational therapist with The Starting Block, Inc., conducted an evaluation of Claimant. The same day, he issued an Occupational Therapy and Developmental Evaluation report.

7B. The evaluation was conducted via telehealth with Claimant's mother present. Mr. Stimson observed Claimant engaging in a variety of actions, and his evaluation included an assessment of Claimant's gross motor and fine motor skills, her range of motion and muscle tone, and her reflexes and equilibrium reactions. In his report, Mr. Stimson concluded Claimant "would benefit from school-based occupational therapy, physical therapy, and speech therapy evaluations to determine her need for therapeutic services in an educational setting." (Exhibit 8.)

8A. Claimant's district has not yet conducted an in-person OT evaluation for Claimant due to the COVID-19 pandemic. Instead, the district's OT evaluation was conducted by telehealth which consisted of a parent interview. Based on that evaluation, the district found that Claimant required OT services. The district offered Claimant an OT program via videoconference, but not in person.

9. Claimant recently began receiving weekly in-person OT services from OT4Kids, funded by Anthem and Claimant's parents. Each session costs \$200. Since OT4Kids is an out-of-network provider, Anthem will not cover the entire cost. According to Claimant's mother, Anthem has informed her that she must pay \$147.75 until Claimant meets her \$500 deductible. Thereafter, each session will cost Claimant \$92.50. Claimant's mother has submitted claims to Anthem for payment of OT4Kids sessions but has not yet received a written statement indicating what Anthem will cover and what portion Claimant is responsible for.

10A. Just prior to April 2021, Claimant's mother requested that WRC assist in funding in-person OT services for Claimant through OT4Kids.

10B. On April 6, 2021, the Service Agency issued a Notice of Proposed Action, denying Claimant's mother's request for OT funding. The stated reason for the action

was that “the Regional Center shall not purchase service that would be otherwise available from generic resources which include private insurance, and/or if any of the therapies are available as educational services. (Exhibit 2.)

10C. Claimant’s mother filed a Fair Hearing Request appealing the Service Agency’s denial of her request for funding assistance.

11. Claimant’s mother is having Claimant attend in-person OT services, partially funded by Anthem with self-funded co-payments, because she wants “more than Claimant’s district is offering.”

12A. Claimant’s mother is unsure whether videoconference OT sessions offered by the district will be discontinued, and in-person OT will commence, when school resumes in-person attendance in the Fall. The district informed her that the format of the OT sessions will depend on the provider’s preference. Claimant’s OT provider through the district has declined in-person sessions thus far.

12B. Claimant’s mother is unsure whether Claimant will be eligible for an extended school year (i.e., summer school), and if so, whether Claimant will be offered an OT program for the summer and in what format.

13. Claimant’s mother would like WRC to cover the co-payment portion of the costs for OT4Kids not covered by Anthem. That specific portion is yet unknown since she has not yet received a written statement from Anthem.

14. Claimant’s mother testified that her family is bearing a heavy financial burden by funding the interventions for Claimant, the interventions for her son (also a WRC consumer), and the additional cost of caring for an elderly relative. Claimant’s mother understands that if she requests financial assistance with co-payments for

therapy covered by insurance, she must demonstrate financial hardship. According to Claimant's mother, she has already submitted some documentation to WRC, but she believes that submission may have been for her son's interventions and not for Claimant's.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Developmental Disabilities Services Act (Lanterman Act) to appeal a regional center decision. (Welf. & Inst. Code, §§ 4700-4716.) Claimant timely requested a hearing following the Service Agency's denial of funding, and therefore, jurisdiction for these appeals was established.

2A. When a party seeks government benefits or services, she bears the burden of proof. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) Where a change in services is sought, the party seeking the change bears the burden of proving that a change in services is necessary. (See Evid. Code, § 500.) The standard of proof in this case is a preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (See Evid. Code, § 115.)

2B. In seeking funding assistance for Claimant's in-person OT services, Claimant bears the burden of proving by a preponderance of the evidence that the funding is required. Claimant has failed to meet her burden of proving she is entitled to the payments she seeks.

General Provisions of the Lanterman Act

3. A service agency is required to ensure the provision of services and supports to consumers that meet their individual needs, preferences, and goals as identified in their individual program plan. (Welf. & Inst. Code, §§ 4501; 4512, subd. (b); 4646, subd. (a).)

4. In securing services for its consumers, a service agency must consider the cost-effectiveness of service options. (Welf. & Inst. Code, §§ 4646, subd. (a); 4512, subd. (b).)

5. Additionally, when purchasing services and supports, service agencies are required to ensure the "utilization of generic services and supports when appropriate." (Welf. & Inst. Code, § 4646.4, subd. (a)(2).)

6. Welfare and Institutions Code section 4646.4 specifically provides, in pertinent part:

(a) Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5. . . , the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

(1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.

(2) Utilization of generic services and supports when appropriate. . . .

(3) Utilization of other services and sources of funding as contained in Section 4659.

7. Welfare and Institutions Code section 4648, subdivision (a)(8), provides: "In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities, including, but not limited to, all of the following: (a) Securing needed services and supports. [¶] . . . [¶] (8) Regional center funds shall not be used to supplant the budget of an agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services."

Service Agency's Cited Bases for Denial

8A. Welfare and Institutions Code section 4659, subdivisions (a) and (c), provide:

(a) Except as otherwise provided in subdivision (b) or (e), the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental 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 state supplementary program.

(2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer. [1]

(c) Effective July 1, 2009, notwithstanding any other law or regulation, regional centers shall not purchase any service that would otherwise be available from Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, In-Home Support Services, California Children's Services, private insurance, 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. If, on July 1, 2009, a regional center is purchasing that service as part of a consumer's individual program plan (IPP), the prohibition shall take effect on October 1, 2009.

8B. Welfare and Institutions Code section 4659.1 provides, in pertinent part:

(a) If a service or support provided pursuant to a consumer's individual program plan under this division is paid for, in whole or in part, by the health care service plan

or health insurance policy of the consumer's parent, guardian, or caregiver, the regional center may, when necessary to ensure that the consumer receives the service or support, pay any applicable copayment, coinsurance, or deductible associated with the service or support for which the parent, guardian, or caregiver is responsible if all of the following conditions are met:

(1) The consumer is covered by their 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, as provided in subdivision (a) of Section 4659 and Article 2.6 (commencing with Section 4659.10).

[¶] . . . [¶]

(d) Notwithstanding paragraph (2) of subdivision (a) . . . , 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 if the family's or consumer's income exceeds 400 percent of the federal poverty level, the service or support is necessary to

successfully maintain the child at home or the adult consumer in the least-restrictive setting, and the parents or consumer demonstrate one or more of the following:

(1) The existence of an extraordinary event that impacts the ability of the parent, guardian, or caregiver to meet the care and supervision needs of the child or impacts the ability of the parent, guardian, or caregiver, or adult consumer with a health care service plan or health insurance policy, to pay the copayment, coinsurance, or deductible.

(2) The existence of catastrophic loss that temporarily limits the ability to pay of the parent, guardian, or caregiver, or adult consumer with a health care service plan or health insurance policy and creates a direct economic impact on the family or adult consumer. For purposes of this paragraph, catastrophic loss may include, but is not limited to, natural disasters and accidents involving major injuries to an immediate family member.

(3) Significant unreimbursed medical costs associated with the care of the consumer or another child who is also a regional center consumer.

(e) The parent, guardian, or caregiver of a consumer or an adult consumer with a health care service plan or health insurance policy shall self-certify the family's gross annual income to the regional center by providing copies of W-2

Wage Earners Statements, payroll stubs, a copy of the prior year's state income tax return, or other documents and proof of other income.

8C. Welfare and Institutions Code section 4648.5, subdivisions (a)(3) and (c), provide

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers' authority to purchase the following services shall be suspended pending implementation of the Individual Choice Budget and certification by the Director of Developmental Services that the Individual Choice Budget has been implemented and will result in state budget savings sufficient to offset the costs of providing the following services: [¶] . . . [¶]

(3) Educational services for children three to 17, inclusive, years of age. [¶] . . . [¶]

(c) An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) 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.

9A. Pursuant to Welfare and Institutions Code sections 4646.4, 4648, subdivision (a)(8), 4659, and 4659.1, the Service Agency is not allowed to fund OT services if funding is available from a generic resource such as a school district or medical insurance. In this case, the district is offering to fund Claimant OT, but not in Claimant's preferred format. It is unclear whether Claimant's preferred format will be offered via a summer program or when the district resumes in-person attendance in the Fall.

9B. Additionally, even if the Service Agency could assist in funding Claimant's co-payments for in-person OT, Claimant has provided insufficient information at this time to determine whether she meets the statutory requirements for that co-payment assistance. Claimant provided no evidence to establish whether the family's income equals or is below 400 percent of the federal poverty level or (if it exceeds that level) whether she meets any of the statutory exemptions which would allow WRC to help fund insurance co-payments for Claimant's in-person OT services. Consequently, the Service Agency is currently left with no statutory authority under which to help fund Claimant's co-payments.

9C. Given the foregoing, WRC's denial of assistance in funding Claimant's in-person OT services was appropriate.

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ORDER

Claimant's appeal is denied. Westside Regional Center's denial of assistance in funding Claimant's in-person occupational therapy is upheld.

DATE:

JULIE CABOS-OWEN

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.