

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

**In the Matter of the Fair Hearing Request of:**

**CLAIMANT,**

**vs.**

**WESTSIDE REGIONAL CENTER, Service Agency.**

**OAH No. 2022020643**

**DECISION**

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter remotely by video and teleconference on April 22, 2022.

Candace Hein, Fair Hearing Supervisor, represented Westside Regional Center (WRC or Service Agency). Claimant's mother and authorized representative represented claimant, who was not present. Family titles are used to protect the privacy of claimant and her family.

Testimony and documents were received in evidence. The record was closed, and the matter was submitted for decision on April 22, 2022.

## **ISSUE**

Is the Service Agency required under the Lanterman Developmental Disabilities Services Act (Lanterman Act) to fund a physical therapy evaluation of claimant and to fund copayments for claimant's insured physical therapy sessions?

## **EVIDENCE RELIED UPON**

Documents: Service Agency's exhibits 1-9; claimant's exhibits A-E.

Testimony: Claimant's mother.

## **FACTUAL FINDINGS**

### **Parties and Jurisdiction**

1. Claimant is a four-year, three-month-old girl. She is an eligible consumer of WRC based on her diagnosis of Autism Spectrum Disorder (ASD) in a February 2021 assessment. She lives at home with her parents, both of whom are employed, and a six-year-old brother who is also a consumer of WRC services.

2. Claimant's initial Individual Program Plan (IPP) dated March 25, 2021, states claimant is able to engage in conversation and presents inconsistent eye contact. She does not demonstrate repetitive behavior but occasionally presents repetitive speech and exaggerated emotional reactions. Claimant demonstrates difficulty adjusting to changes in her routine and rigid thinking and behaviors. She presents hyposensitivity to loud sounds and sometimes speaks loudly. "Overall, [she] demonstrates repetitive behaviors, social-emotional, communication, and sensory-

seeking behaviors that are consistent with her diagnosis.” (Ex. 6, p. A31.) Claimant has “not had any opportunity to interact with same-aged peers due to COVID-19 restrictions.” (*Id.* at p. A32.) She attended PALS special day program for the 2020-2021 academic school year and participated in distanced learning through Zoom due to COVID-19. Claimant was reported to be in good general health and to have Medi-Cal and private family insurance, an Anthem Blue Cross PPO. Claimant’s family “agreed to access appropriate generic resources.” (*Id.* at p. A35.)

3. Claimant’s next and most recent IPP annual progress report, after a meeting on February 15, 2022, provides that WRC will fund 35 hours per month of respite, 27 hours per month of Specialized Supervision with 24Hr Homecare, and five sessions per month of social skills training with Leaps N Boundz. (Ex. 7, pp. A43-A44.) The IPP notes that claimant’s mother “did not agree with the school district placement and decided to enroll [claimant] at a private preschool. There are some concerns reported from the preschool. [Claimant] is not well-regulated and demonstrates impulse control behavior. She does not follow directions as well. Sometimes she does not focus or pay attention. Her placement is unknown at this time for the next school year.” (*Id.* at p. A45.)

4. Relevant to this matter, under the heading “Outcome #2,” pertaining to education and supports necessary to achieve the goals as written on her school district’s Individual[ized] Education Program (IEP), the IPP recites:

According to mother’s report, [claimant] has inward toeing which means that when she walks or runs, her feet turn inward instead of pointing straight ahead. It is commonly referred to as being “pigeon-toed.” The school district will not fund for Physical Therapy (PT) since [claimant] is

attending a private preschool. Mother tried to access PT through insurance but has not found anyone on the list that provides in-person sessions. Parent does not want telehealth PT for [claimant]. Therefore, mother requested for WRC to fund for PT evaluation and co-pays. Appeal process is underway.

(Ex. 7, p. A45.) The IPP notes that claimant sees a pediatrician, Dr. Sharon Kaminker.

5. By a Notice of Proposed Action (NOPA) and letter dated February 1, 2022, the Service Agency notified claimant's mother it was denying claimant's request because regional centers may not "purchase a service that would otherwise be available from generic resources which include private insurance, and/or if any of the therapies are available as educational services," under Welfare and Institutions Code sections 4659, subdivisions (a) and (c), and 4648.5, subdivision (a)(3). (Ex. 2, pp. A14-A16.) (Except where noted, further statutory references are to the Welfare and Institutions Code.)

6. By letter dated February 23, 2022, after an informal meeting with claimant's mother, Candace J. Hein, WRC's Fair Hearing Specialist, wrote to claimant's mother to confirm the denial of her request for funding for the reasons stated in the NOPA. Ms. Hein wrote that claimant's school district is not funding claimant's PT as a "designated instructional service," that claimant is attending a private preschool at claimant's parents' expense, and that claimant's parents are funding private PT two times per week at OT 4 Kids, where each session costs \$85. She wrote,

You said that you are waiting for an authorization for PT from your private insurance company; the current provider

is out-of-network for your insurance. At this time you do not know the cost of potential co-pays. You feel that [claimant] does not benefit from virtual PT sessions and that some vendors refuse to provide the service in person.

(Ex. 3, p. A18.)

7. Ms. Hein wrote that school districts and private insurance are generic funding resources that must be used, when appropriate, before a regional center may fund a requested service, citing sections 4646.4 and 4659. She wrote WRC education advocates could help pursue school district funding for PT services, and suggested asking the family's insurer for in-network providers to work with claimant. Ms. Hein acknowledged receiving documentation of claimant's family's income for purposes of determining whether WRC could fund PT co-payments. She wrote that a condition of regional center funding is that the family's annual gross income not exceed 400 percent of the federal poverty level, factoring in the size of the household, citing section 4659.1, subdivision (a)(2). Ms. Hein continued:

WRC considered the fact that [claimant] has a sibling who is also a client of the regional center as well, however, that did not lower the family's annual gross income level to the necessary threshold. After speaking with you and reviewing the facts, I find that Westside Regional Center's denials of the requests, (1) to fund a PT evaluation and (2) to fund therapy co-pays for [claimant], were correct and are upheld.

(Ex. 3, pp. A18-A19.)

8. After the informal meeting, claimant's mother filed a fair hearing request to appeal the Service Agency's determination regarding funding a PT evaluation and insurance copayments for claimant. This hearing ensued.

## **School District Services**

9. Claimant's mother asked claimant's school district to fund school-based physical therapy. Claimant's mother provided the school district with letters from claimant's healthcare providers stating claimant requires PT services.

10. In December 2021, the school district performed a school physical therapy assessment. In the assessment report, the results were summarized:

[Claimant] is currently able to access and participate in her school environment safely and independently via walking, and running. She demonstrates the ability to access the playground and playground equipment safely and enjoys playing on various play structures. [Claimant] has all the underlying physical skills to access her school environment.

Student's areas of need: [Claimant] demonstrates mild bilateral hip internal rotation and emerging bilateral motor coordination (running, jumping and ball skills) which are better addressed through adapted physical education.

Impact of student's disability on academic and overall performance: At this time [claimant's] gross motor skills do not impact her ability to access and progress in the general

education curriculum. Eligibility for Special Education and potential impact to be discussed at IEP.

(Ex. D, p. B11.)

11. Shortly before this hearing, claimant's mother asked the school district for an Independent Educational Evaluation (IEE). She testified the process may take 60 days. She has not provided the school district with documentation of other PT assessments performed at UCLA. Claimant's mother did not inform WRC of the IEE prior to this hearing and did not ask WRC for assistance with the process of appealing the district's assessment findings. Her request for an IEE was made by way of a written notation at the end of claimant's IEP. It is not clear on this record whether such a request is effective.

### **Funding for PT from Anthem Blue Cross**

12. The evidence demonstrates that claimant is covered by her family's health insurance policy and that the family has an annual gross income that exceeds 400 percent of the federal poverty level.

13. Claimant's family's insurer, Anthem Blue Cross, has provided claimant's mother with a vendor list of PT providers in the PPO network. Claimant's mother testified, however, that the vendors on the list are not currently available, or are not available when claimant is available (i.e., on weekends and evenings), or are not located near claimant's home. She testified the list is out of date; many of the vendors are not seeing new patients, or do not accept Anthem Blue Cross anymore, or closed because of the pandemic. Others have long waiting lists and no availability.

14. Claimant's parents are, therefore, themselves paying for PT. They would prefer to have PT provided in a clinic setting rather than in the home. They are pursuing a single case agreement with a clinic, OT 4 Kids, which is not in the Anthem Blue Cross PPO network, though it is vendored with WRC. They hope to enter into the agreement and demand the insurance company cover the service because the carrier's vendor list is not useful. OT 4 Kids would bill \$200 per session to the insurance company. Claimant's mother does not yet know what the copayment would be.

### **Additional Evidence**

15. Claimant's mother testified services were unavailable for both her developmentally disabled children for months because of the pandemic, and she is trying to obtain services to help both children recover from that delay, develop age-appropriately, and integrate into their community.

16. Dr. Kaminker, in an April 12, 2022, letter, wrote claimant requires PT as a medical necessity. She wrote that claimant:

has internal tibial torsion which is leading to increased bilateral knee valgus and intoeing with excess forefoot adduction and ankle inversion during standing, gait, running and stair navigation. She has decreased core and gluteal strength which impacts her upright posturing. She has been prescribed bilateral prefab foot orthotics - DAFO chipmunks. She needs intensive clinic based physical therapy to work on gluteal and hip external rotator strengthening to improve overall lower extremity alignment to decrease fall frequency.



(Ex. A; see also ex. E.)

17. Rolanda Gott, M.D., a developmental pediatrician who has followed claimant at the UCLA Developmental Behavior Pediatrics clinic, wrote in an April 20, 2022 letter that claimant has been diagnosed with internal tibial torsion (ITT), which causes her to fall frequently and limits her activities. She wrote, "I highly recommend intensive clinic based physical therapy to work on gluteal and hip external rotator strengthening to improve overall lower extremity alignment and to decrease fall frequency." (Ex. C.)

18. Claimant's mother testified claimant's preschool teachers have seen claimant fall when trying to run; she hurts herself, scraping her chin when she falls.

19. Carolyn M. McNitt, MS, PT, claimant's home-based pediatric PT provider, wrote that claimant "is in need of a clinic at this point in her gross motor development for higher level equipment, specifically gross motor challenges involving climbing to increase her strength/tone, especially her hip extensors and external rotators. [¶] Safety (in terms of falls) is a primary concern at this point for [claimant] to participate with her peers in a school/playground setting. Importantly, the clinic would provide strengthening and thus would increase her balance and stability and decrease future falls." (Ex. B.)

20. Claimant's mother believes PT should be provided to claimant in a clinic that has the proper equipment and resources to address claimant's needs.

21. Claimant's mother acknowledged there is no danger that claimant will not be able to continue to live in the family home if the requested funding is not provided, and there has been no catastrophic event or loss.

## DISCUSSION

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.) An administrative “fair hearing” to determine the respective rights and obligations of the consumer and the regional center is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal the Service Agency’s denial of her request for a PT assessment and funding for insurance copayments for PT services. Jurisdiction in this case was thus established. (Factual Findings 1-8.)

2. Because claimant seeks benefits or services, she bears the burden of proving she is entitled to the services requested. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9; *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) Claimant must prove her case by a preponderance of the evidence. (Evid. Code, § 115.)

3. The Lanterman Act acknowledges the state’s responsibility to provide services and supports for developmentally disabled individuals and their families. (§ 4501.) The state agency charged with implementing the Lanterman Act, the Department of Developmental Services (DDS), is authorized to contract with regional centers to provide developmentally disabled individuals with access to the services and supports best suited to them throughout their lifetime. (§ 4520.)

4. Regional centers are responsible for conducting a planning process that results in an IPP. Among other things, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services based upon the client’s developmental needs and the effectiveness of the services selected to assist the consumer in achieving the agreed-upon goals, contain a statement of time-limited objectives for improving the client’s situation, and reflect the client’s particular desires

and preferences. (§§ 4646, subd. (a)(1), (2), and (4), 4646.5, subd. (a), 4512, subd. (b), 4648, subd. (a)(6)(E).)

5. Although regional centers are mandated to provide a wide range of services to facilitate implementation of the IPP, they must do so in a cost-effective manner. (§§ 4640.7, subd. (b), 4646, subd. (a).) A regional center is not required to provide all of the services that a client may require but is required to “find innovative and economical methods of achieving the objectives” of the IPP. (§ 4651.)

6. Regional centers are specifically directed not to fund duplicate services that are available through another publicly funded agency or other “generic resource.” Regional centers are required to “identify and pursue all possible sources of funding[.]” (§ 4659, subd. (a).) The IPP process “shall ensure . . . [u]tilization of generic services and supports when appropriate.” (§ 4646.4, subd. (a)(2).) But if no generic agency will fund a service specified in a client’s IPP, the regional center must itself fund the service in order to meet the goals set forth in the IPP; thus, regional centers are considered payers of last resort. (§ 4648, subd. (a)(1); see also, e.g., § 4659.)

7. The Lanterman Act defines “services and supports” to include physical therapy. (§ 4512, subd. (b).)

8. There is no dispute that claimant needs PT services. The Service Agency argues, in part, that PT is an educational service and regional centers are not generally obligated to fund educational services (See § 4648.5, subd. (c).) The Service Agency’s position is overly simplistic. Section 4648.5 does not define what services constitute “educational services.” Whether PT is solely or primarily an educational service will vary from case to case. In some instances, as here, PT may serve a rehabilitative or medical

purpose in addition to an educational purpose, and a regional center may be responsible for funding all or some of those services.

9. The regional center has, however, identified another possible alternative source of funding besides claimant's school district, i.e., claimant's private insurance carrier. (§ 4659, subd. (a)(1) & (2).) "[R]egional centers shall not purchase any service that would otherwise be available from . . . 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. (§ 4659, subd. (c).).

10. In this case, claimant's parents have not enlisted WRC's assistance in procuring covered PT services from her private insurance carrier. Claimant did not meet her burden of demonstrating that that generic source of funding has been fully accessed and exhausted.

11. While claimant's parents pursue insurance coverage for their preferred PT clinic provider, WRC is not obligated to fund a PT assessment or PT insurance copayments because claimant's family's income exceeds 400 percent of the federal poverty level. (§ 4659.1, subd. (a).) No exception applies. (§ 4659.1, subd. (d).) (See Factual Findings 12 & 21.)

12. Claimant failed to establish that the Lanterman Act requires WRC to fund a PT assessment and PT copayments.

## **LEGAL CONCLUSION**

Claimant did not establish by a preponderance of the evidence that the Service Agency is required under the Lanterman Act to fund a PT assessment and to fund insurance copayments for PT services.

## **ORDER**

Claimant's appeal is denied.

DATE:

HOWARD W. COHEN

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.