

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of the Request for  
Copayment Assistance of:

CLAIMANT

and

SAN DIEGO REGIONAL CENTER,

Service Agency.

OAH No. 2018040906

DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Carlsbad, California, on June 5, 2018.

Neil Kramer, M.S., Fair Hearing Manager, San Diego Regional Center (SDRC), represented SDRC.

Claimant's mother and father represented claimant.

On June 5, 2018, the matter was submitted.

ISSUE

Is SDRC required to fund claimant's request for copayment assistance incurred for claimant's occupational, physical and speech therapy visits?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. On April 3, 2018, SDRC sent claimant a Notice of Proposed Action, denying claimant's request to pay copayments for occupational, physical and speech therapies.

SDRC stated that it cannot approve services because SDRC is prohibited from funding educational services.

2. On April 10, 2018, claimant's parents filed a request for a fair hearing objecting to SDRC's action. In his hearing request claimant asked that SDRC pay copayments for speech, occupational and physical therapies.

### CLAIMANT'S BACKGROUND, IEP AND IPP

3. Claimant is a four-year-old boy and regional center client with Down Syndrome, Trisomy 21, and developmental expressive, receptive language disorders and global developmental delays. Recently, on May 1, 2018, he was diagnosed with Autism. Claimant has private insurance through Kaiser, he has straight Medi-Cal as supplemental insurance, and he receives 219 hours per month of In Home Supportive Services (IHSS). Claimant is scheduled to receive applied behavior analysis (ABA) therapy through Easter Seals for which SDRC will pay the copayments. Claimant's parents pay for him to attend a preschool day care program two times a week for three hours a day.

Before he became a regional center client, claimant received Early Start Services. To assist claimant and his parents once he became eligible for regional center services when he turned three, an Individualized Family Service Plan Transition Plan (IFSP) dated September 25, 2017 was developed. The Transition Plan included referring claimant to his school district for services, which SDRC did, with his parents' consent.

Individualized Education Program (IEP) meetings were held on January 31, 2018, and February 9, 2018. In addition to claimant's parents, the school psychologist, claimant's SDRC case coordinator, a program manager from SDRC, a speech and language pathologist, occupational therapist, physical therapist, instructional specialist, nurse, an instructional specialist from claimant's day school program, and other individuals attended these meetings.

According to claimant's January 31/February 9, 2018, IEP, claimant qualifies for special education services under the Multiple Disability and Orthopedic Impairment categories. Claimant understands 24 phrases and 113 vocabulary words, makes three animal sounds, and can use 19 signs. His daily living skills were identified in the low range when compared to same-age peers. His gross motor skills were significantly delayed, and he had difficulty navigating uneven surfaces and walking long distances. He was observed to use babble or sounds to try to talk. He showed negative reactions such as anger, refusal, fear or withdrawal, to strangers or to food that he does not like. He was observed to engage with cause and effect toys while sitting on the floor; he engaged with examiners, made eye contact, and remained engaged with a book for four minutes and played on the floor for approximately 21 minutes.

The IEP identified a number of goals and objectives requiring occupational physical and speech therapies. Under the communication and social/communication areas of need, working with an SLP/SLPA and Education Specialist, the District set as a goal that claimant will independently request or protest an object or action using a variety of communication means, signs, pictures and/or word approximations chaining together two signs, gestures, picture icons, four out of five times during the structured activity, across three separate occasions. He will further engage in reciprocal social interaction with peers using a variety of communication means. Under the fine motor skills area of need category, working with an occupational therapist (OT) and education specialist, claimant will complete at least five different fine motor tasks that require coordination of both hands with at least 80 percent accuracy in at least five measured trials over the grading period.

Under the ambulatory balance skills, strength, coordination and safety awareness area of need category, working with a physical therapist (PT) and education specialist,

the District identified as a goal that claimant will improve his independence and safety at school by navigating his indoor/outdoor school environment for 10 minutes.

The identified special education and related services were as follows: 1,440 minutes yearly of language and speech services in the group setting; 360 minutes yearly of individual physical therapy; 510 minutes yearly of group occupational therapy and 450 minutes yearly of individual occupational therapy.

At the IEP, claimant's parents expressed reservation about claimant getting services in the District's Preschool Program and inquired about whether these services could be delivered outside the Preschool Program. Despite their reservation, the District recommended the services for claimant based on his needs. As stated in the IEP, the District believed that the IEP constituted an offer of Free Appropriate Public Education for claimant as required under the law.

For this school year claimant has not received services through the District's Preschool Program as articulated in the IEP. Instead, claimant has been receiving occupational, physical and speech therapies through KIDS Therapy (KIDS). Claimant's parents indicated, however, that starting in August 2018 claimant will receive services under the IEP at the District.

4. Through SDRC, claimant's Individualized Program Plan (IPP) dated February 16, 2018, identified seven desired outcomes for claimant. These outcomes included that he eat independently without supervision, identify body parts, express his needs and wants, increase his muscle tone and have control of his body within his environment.

In the IPP, claimant's parents agreed to "fully utilize generic resources, including Medi-Cal, school district, and IHSS to support claimant's needs and the parents will fully utilize generic resources prior to asking SDRC to fund copayments/deductibles/co-

insurance." By their signatures on February 16, 2018, claimant's parents agreed with the outcomes/services identified in the IPP and implementation of the IPP.

#### CLAIMANT'S PARENTS' ARGUMENTS AND EVIDENCE

5. Claimant's parents are asking for copayment assistance from SDRC because the copayments for his private occupational, physical and speech therapies exceed \$300 a month and are a financial hardship upon them. Claimant's mother stated that she has made efforts to have Medi-Cal pay for these services. The status of this application was unclear.

Claimant's parents argued that even though claimant is able to receive occupational, physical and speech therapies at the District, these services are not directed to address his medical needs as an individual but are directed to address his educational needs, or more specifically, "his group needs." His parents believe that the occupational, physical and speech therapies he is presently receiving from KIDS, address his medical needs.

In essence, claimant's parents do not believe that claimant can safely attend the preschool program at the District because of his developmental delays, including feeding himself. He cannot express himself, he cannot walk and he needs someone to be with him at all times. His mother added that claimant is able to attend the preschool he currently attends twice a week for three hours a day because he has a lot of support in this program.

6. In support of their position that claimant requires the private therapies through KIDS, claimant's parents submitted letters of medical necessity for claimant's occupational, physical and speech therapies.

In the Letter of Medical Necessity for Occupational Therapy Feeding Services dated May 12, 2018, Megan Anderson, MS OTR/L, identified feeding therapy goals to promote claimant's safety, meet his nutritional needs, and advance his oral motor skills.

He requires assistance in obtaining these goals due to his low tone, fine motor delays, poor strength/endurance, decreased attention, limited play/imitations skills, and difficulties with sensory processing. Ms. Anderson recommended weekly outpatient occupational therapy for claimant.

In the Letter of Medical Necessity for Physical Therapy, dated May 12, 2017, Alison Waynick, PT, DPT, stated that claimant has an immature gait pattern and, as a result, is unable to safely navigate uneven or outdoor surfaces or negotiate stairs independently. Ms. Waynick identified the following outpatient physical therapy services to address his ambulation deficiencies: Strengthening, Neuromuscular Education, Balance, Gait Training, Coordination, and Orthotic Management. Ms. Warwick stated that claimant requires orthotic management with possible durable equipment.

In the Letter of Medical Necessity for Speech and Language Therapy, dated May 24, 2018, Noopur Gupta, MS, CCC-SLP, stated that claimant requires outpatient speech and language therapies to address his severe impairments in play skills, attention, and communication skills and to facilitate increased independence and participation in school events. The speech therapist stated that claimant has limited participation in classroom, playground, and home activities unless directly aided and facilitated by an adult. Claimant requires improvement in building appropriate and reciprocal play skills, understanding language concepts and multi-step routines, facilitating communication through alternative and augmentative strategies such as picture symbols, and parent education. He requires improvement in these areas to allow him to safely and independently access resources in his home, school and community. Six specific goals were identified including increasing claimant's functional independence and participation with adults and peers; increasing his ability to follow simple and routine directions containing up to one age-appropriate concept, his initiating and spontaneously using at least 15 to 20 signs, gestures, and/or word approximations;

having claimant select a picture symbol from a field of two choices or a symbol on his device and present it to communication partner with eye contact; and having claimant initiate the pronunciation of simple vowels. Therapist Gupta recommended speech and language therapy twice a week.

7. The occupational, physical and speech claimant receives through KIDS overlap with the proposed therapies the District is offering claimant, for the most part.<sup>1</sup> The District has made available for claimant 510 minutes yearly of occupational and 360 minutes yearly of physical therapies individually for claimant. The District is further making available for claimant 1,440 minutes yearly of language and speech therapy services in the group setting.

#### THE PARTIES' ARGUMENTS

8. SDRC argued that the therapies available to claimant at the District are a generic resource and, as a generic resource available to claimant, SDRC is barred by law from paying for the therapies. At the same time, SDRC did not dispute that the therapies he receives at KIDS are needed to ameliorate and/or alleviate his developmental delays. Regardless, SDRC asserted that the services overlap and commented that if claimant receives therapies at the District it is possible he may not need the same level of therapies services at KIDS.

Claimant argued that SDRC is required to fund the copayments because the District's therapies are designed to further his educational, not medical needs, and the therapies at KIDS are designed to ameliorate and/or alleviate his developmental delays.

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<sup>1</sup> At the hearing SDRC Program Manager Sue Evans testified that the KIDS therapies overlap with therapies the District has proposed claimant receive.

Claimant cited SDRC's duty to provide tailored services to meet his and his family's needs. (Welf. & Inst. Code, § 4648, subd. (a)(2).)

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## 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:<sup>2</sup>

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<sup>2</sup> All references are to the Welfare and Institutions Code unless otherwise stated.



[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 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.*) Regional center funds shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public and is receiving public funding for providing these services. (Welf. & Inst. Code, § 4648, subd. (a)(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 state supplementary program."

#### COPAYMENT ASSISTANCE

8. 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.)

#### REGIONAL CENTER'S ABILITY TO PURCHASE EDUCATIONAL SERVICES

9. 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

10. Claimant has failed to meet his burden to establish he is presently eligible to receive copayment assistance under section 4659.1 for the following reasons.

Regional centers must identify all sources of funding available to their consumers and regional centers are prohibited from funding services that are available from public funds for the general public, including services through school districts. (Welf. & Inst. Code, § 4648, subd. (a)(8).)

Here, claimant's parents have declined to pursue occupational, physical and speech therapies through claimant's school district. There is no evidence that the services are inadequate to meet claimant's needs to ameliorate and/or alleviate his developmental delays. Claimant's parents are concerned, understandably, for his safety at school due to his developmental delays and they are more comfortable, again understandably, having claimant attend a preschool program outside the District.

Without doubt, claimant benefits from the services he receives at KIDS. But, the District is offering, substantially, the same services to meet claimant's needs to ameliorate and/or alleviate his developmental delays and, as noted, the evidence of record does not show that these services are inadequate.

Consistent with claimant's January 31, 2018, IPP, this decision is reached without prejudice to claimant asking SDRC to pay for the copayments for claimant's therapies at KIDS once claimant starts receiving, in August 2018, occupational, physical and speech therapies at the District.

## ORDER

Claimant's appeal is denied. San Diego Regional Center is not required to fund copayments for claimant's occupational, physical and speech therapies at this time.

DATED: June 12, 2018

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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.**