

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

N.Q. and E.Q.,

Claimants,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH Nos. 2013060531
2013060534

DECISION

Administrative Law Judge Amy Yerkey, State of California, Office of Administrative Hearings, heard this matter on October 18, 2013, in Torrance, California.

Gigi Thompson represented the Harbor Regional Center (HRC or regional center or Service Agency).

Marianne Jesser, Parent Advocate, represented N.Q. and E.Q. Claimant's mother, A.L.-Q., was present throughout the hearing.¹

The matter was submitted on October 18, 2013.

ISSUE

The question in this matter is whether the Service Agency may deny funding of Claimants' co-payments for behavioral services, which are funded through private insurance.

¹ Initials have been used to protect the family's privacy.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-4, 6-11, 13-22, and 24; Claimants' exhibits A-T.

Testimonial: Antoinette Perez, HRC Program Manager; Jenna Mattingly, HRC Behaviorist; Katherine Karpinski Maurino, Easter Seals Clinical Supervisor; and Claimants' mother, A. L.-Q.

FACTUAL FINDINGS

1. Claimant N.Q. is a 15-year-old male who qualifies for regional center services based on an autism diagnosis. Claimant E.Q. is a 13-year-old male who qualifies for regional center services based on an autism diagnosis. They are siblings who reside at home with their parents.

2. HRC agreed to fund co-payments for Claimants' behavioral services provided by Easter Seals, which are funded through private insurance, since November 2012, for six months. Claimants' parents then requested continued assistance with funding of co-payments through September 2013. By letter dated May 30, 2013, HRC denied Claimants' parents request to fund co-payments. The stated reason for the decision was that Claimants were no longer progressing from the intensive direct intervention services, and had maximized the benefit of those services. In addition, HRC thought that more parental involvement was needed, and the Easter Seals program did not sufficiently include a parent-training component. HRC stated that it "is unable to provide copayment assistance for [Claimants'] current A[pplied] B[ehavioral] A[nalysis] program, as Harbor Regional Center would not have provided this program if you had not successfully obtained it through your private insurance." (Ex.4.) HRC also noted that Claimants' challenges regarding their ability to interact with peers and initial play should be addressed through the behavior services provided at school.

3. Claimant's parents disagreed with HRC's decision and timely filed the instant fair hearing request. The co-payments continued to be funded pending the outcome of this appeal.

4. Claimant N.Q.'s most recent Individual Family Service Plan (IFSP), held on July 28, 2013, states the following under the section entitled "Home":

[Claimant N.Q.] is currently receiving 15 hours of Behavioral Services through Easter Seals funded by Kaiser. [N.Q.] also receives 10 hours a week of I[n]tensive B[ehavioral] I[n]tervention Services from STAR through T[errance] U[nified] S[chool] D[istrict]. Tantrum behaviors have reportedly decreased overall this year. [N.Q.] has continued to jump up and down to show that he is excited or walks in circles but this has significantly decreased

since working with Easter Seals. [N.Q.] also has episodes of gazing and appearing to have blank expressions. [N.Q.] does not hit others but he will hit his own head when he is upset. He grabs his genitals much less when in public and is redirected to go to his room when at home. Mrs. [Q.] reports that she is very pleased with the work STAR and Easter Seals has done with [N.Q.] thus far.

(Ex. 6). N.Q.'s IFSP contains the following desired outcomes: "1. [N.Q.] will increase his self-help skills and consistency; 2. [N.Q.] will participate in making his own snacks by taking out the requested items; 3. [N.Q.] will help prepare the table prior to eating; 4. [N.Q.] will successfully wipe himself one out of three bowel movements with minimal assistance; 5. [N.Q.] will work on sweeping the house; and 6. [N.Q.] will work on using a fork." (*Id.* at p. 3.) Under the section entitled "Plan for the Client/Family," the IFSP states that "Family will work with Easter Seals and learn to implement skills while working with [N.Q.] to increase desired behaviors and decrease inappropriate behaviors." Under the section entitled "Plan for HRC Supports," the IFSP states that "HRC Counselor will provide ongoing case management. HRC is available to provide support, information, and choices upon request." (*Id.*)

5. Claimant E. Q.'s most recent Individual Family Service Plan (IFSP), held on July 28, 2013, states the following under the section entitled "Home":

[E.Q.] receives 12 hours of ABA services through Easter Seals funded by Kaiser. [E.Q.] also receives 10 hours per week of behavior services funded by TUSD ASSIST in school. Currently, his program focuses on play skills, decreasing self-stimulatory behaviors, increasing adaptive skills and generalization of these skills to the parents and caretakers. Reports indicate that [E.Q.] has been slowly making progress with reducing target behaviors.

(Ex. 17.) E.Q.'s IFSP contains the following desired outcomes: "1. [E.Q.] will complete cleaning after a bowel movement 1 out of 6 tries; 2. [E.Q.] will decrease self-stimulatory behaviors; 3. [E.Q.] will increase independence with continued practice in self-help areas such as putting on his shoes and putting away his own dishes without prompting; 4. [E.Q.] will decrease rigidity and increase compliance with assistance of techniques by ABA service provider; and 5. [E.Q.] will increase his level of communication with his parents while at school." (*Id.* at p. 3.) Under the section entitled "Plan for the Client/Family," the IFSP states that "Family will work with Easter Seals and learn to implement skills while working with [E.Q.] to increase desired behaviors and decrease inappropriate behaviors." Under the section entitled "Plan for HRC Supports," the IFSP states that "HRC counselor will provide ongoing case management. HRC is available to provide support, information, and choices upon request." (*Id.*)

6. Antoinette Perez (Perez), HRC Program Manager for the Adolescent East Team, testified at the hearing. Perez was the temporary supervisor over Claimants' cases. She explained that at the time that HRC denied the request to fund for Claimants' co-

payments, in May 2013, there were no laws which specifically addressed regional center responsibility regarding co-payments. Since then, in June 2013, the Legislature enacted Welfare and Institutions Code 4659.1, which specifically addressed the issue. According to Perez, when a co-payment is requested, HRC is required to assess the need for the underlying program, although on cross-examination she conceded that Section 4659.1 does not indicate that HRC must assess need. She opined that the programs for Claimants were not appropriate, and that their total number of program hours per week was excessive and not supported by the Lanterman Act. Perez did not participate in the decision to deny funding for co-payments. She had never personally observed Claimants. Considering the foregoing, her opinion is given little weight.

7. Jenna Mattingly (Mattingly), HRC Behaviorist, testified at the hearing. Mattingly is a Board Certified Behavior Analyst. She observed Claimant E.Q. approximately eight to ten times in his home. Claimant N.Q. was present during all of her observations, so although she was not there specifically to observe him, she had the opportunity to review his behaviors as well. Mattingly's most recent observation occurred in March 2013. She noted that Claimant E.Q.'s behaviors at home were markedly different than those in school, based in part on her review of his Individualized Education Plan (IEP). For example, at school, E.Q. required little prompting and was more independent overall. At home, E.Q. displayed more problem behaviors and required a lot of prompting and redirection. At school, E.Q. has better communication than he does at home. Mattingly was surprised to learn about all of the skills E.Q. had at school, because she did not observe them in his home setting. When questioned about the difference in behavior between home and school, Mattingly opined that it is not a skill deficit issue, but rather a behavioral issue. At home, the cue for E.Q. to respond is the prompt. She has observed the behavioral therapists at home overprompt E.Q., and even when they reduce the prompts, they jump in too soon. At school, E.Q. is given visual cues and more time to respond. Mattingly opined that E.Q. needs more opportunities for independence at home. She thinks that his current high level of intensive behavior therapy is not doing him any favor, instead it is inhibiting his progress. Mattingly reviewed the goals set forth in Easter Seals' progress reports, and she noted that there is a duplication of goals between Easter Seals and in E.Q.'s IEP. Mattingly reiterated that E.Q. is getting overprompted at home, and that is why he is not meeting his independence goals at home. If he could work on these goals naturally with his family, then his goals could be met and maintained. Mattingly thinks that the behavior therapist at home is a barrier to having E.Q. meet his goals.

8. Mattingly had similar opinions with regard to N.Q. Although she had not observed N.Q. in school, based on her review of his IEP, she noted an overlap of goals between school and home behavior programs. In addition, she noted that different methods were being used at home and school, which can cause confusion and ultimately lead to unmet goals. For example, at school, N.Q. primarily communicates using his iPad device. At home, he uses both words and his iPad. The most efficient approach is to teach him one method of communication. She opined that he is not meeting his goals at home because he doesn't have the opportunity to use the iPad at home. Mattingly also noted that many of N.Q.'s goals set by Easter Seals were not age-appropriate, and that his independent play goals

were not appropriate or meaningful. For example, he was popping bubble wrap and coloring. Mattingly thinks Easter Seals should be teaching N.Q. to communicate his wants and needs in order to replace problem behaviors. She thinks he needs to learn meaningful, functional skills which will ultimately prepare him to transition from school when he reaches 22 years of age. Regarding both Claimants, Mattingly thought that the total level of programming hours per week was high, and that they were showing signs of burnout. She thinks with less programming that Claimants would show a reduction in behaviors.

9. Kathryn Karpinski Maurino (Maurino), Easter Seals Clinical Supervisor, testified at the hearing. Maurino is a Board Certified Behavioral Analyst since 2012. At Easter Seals, she oversees program managers and provides clinical oversight. Maurino explained that when she first began handling Claimants' cases in July 2013, she saw a lack of parent training and recommended more. Since August 2013, Easter Seals has increased the level of parent training to at least two hours per week. She noted that while some at-home goals are similar to those at school, they are needed in the home setting. For example, the verbal exchange goals at home are more advanced and practical than what are set forth in Claimants' IEPs. Maurino noted that it is common to see stark behavioral contrasts between school and home for several reasons. First, schools have trained professionals, and at home, the parents do not possess the same level of training. In addition, in school, adolescents have a more rigorous behavior standard that they must comply with, and they tend to be more relaxed at home. As established by her testimony, the services provided by Easter Seals are designed to meet Claimants' IFSP goals. Maurino opined that the current levels of at-home behavior therapy for Claimants are appropriate. Although their progress is slow, both Claimants are showing improvement.

10. Claimants' mother, A. L.-Q., testified at the hearing. She is pleased with the Easter Seals program and the progress that she has observed in both of her sons. She thinks that Easter Seals is preparing her sons to be more functional in the future. Claimants' mother currently devotes about five hours per week for parent training, which includes community outings. She expressed concern that if they did not have a behavior therapist with them when they were out in the community, she would be unsure how to handle Claimants' maladaptive behaviors. Claimants' family would not be able to afford the co-payments, which total approximately \$1,000 per month, for Easter Seals if HRC does not fund them, and they would be forced to stop receiving ABA therapy from Easter Seals. Claimants' family has demonstrated the requisite financial hardship to qualify for funding of co-payments from HRC.

LEGAL CONCLUSIONS

1. HRC has the burden to prove, by a preponderance of the evidence, that its denial of Claimants' request to fund co-payments for the behavioral services in their IFSPs was appropriate and consistent with the Lanterman Act. (Evid. Code §§ 115, 500.)

2. Cause exists to grant Claimant's appeal and reverse HRC's decision to deny funding for co-payments for behavioral services which are funded by private insurance, as set forth in Factual Findings 1 through 10, and Legal Conclusions 3 through 9.

3. The Lanterman Act, incorporated under Welfare and Institutions Code² section 4500 et seq., acknowledged the state's responsibility to provide services and supports for developmentally disabled individuals. It also recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (Welf. & Inst. Code, § 4501.)

4. HRC argued that it is responsible for assessing the necessity of the services it provides, including the co-payments which support a service not funded by HRC. Section 4501 provides guidance on the regional center's responsibility:

The Legislature finds that the mere existence or the delivery of services and supports is, in itself, insufficient evidence of program effectiveness. It is the intent of the Legislature that agencies serving persons with developmental disabilities shall produce evidence that their services have resulted in consumer or family empowerment and in more independent, productive, and normal lives for the persons served. It is further the intent of the Legislature that the Department of Developmental Services, through appropriate and regular monitoring activities, ensure that regional centers meet their statutory, regulatory, and contractual obligations in providing services to persons with developmental disabilities.

5. Section 4512 describes the process by which the determination of services must occur:

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.

6. The process for determination of services is again stated in Section 4646, under regional center responsibilities:

(a) It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of

² All further references are to the Welfare and Institutions Code, unless noted.

the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

(b) The individual program plan is developed through a process of individualized needs determination. The individual with developmental disabilities and, where appropriate, his or her parents, legal guardian or conservator, or authorized representative, shall have the opportunity to actively participate in the development of the plan.

7. In June 2013, the Legislature enacted Section 4659.1, entitled “Payment of copayment or coinsurance by regional center; conditions,” which provides, in relevant part:

(a) If a service or support provided pursuant to a consumer's individual program plan under this division or individualized family service plan pursuant to the California Early Intervention Services Act (Title 14 (commencing with Section 95000) of the Government Code) 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 or coinsurance 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 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, as provided in subdivision (a) of Section 4659 and Article 2.6 (commencing with Section 4659.10).

Claimants correctly argued that there is no mention in this section of the regional center's responsibility to assess the necessity of the program in determining whether to fund a copayment. The only consideration that the regional center must give is to the consumer's financial situation. That is because the time to consider the necessity or appropriateness of the service is during the planning process. This is reflected in the first line of section 4659.1, subdivision (a), which states that “[i]f a service or support is provided pursuant to a consumer's individual program plan under this division”

8. Given the foregoing, Claimants' appeal must be granted. The Lanterman Act makes clear that the time to determine whether Claimants' should receive at home intensive behavioral services, whether funded by the regional center in full or in part, was during Claimant's IFSP. Here, both Claimants' IFSP provide for at home intensive behavior services from Easter Seals as part of their plan to achieve their goals. There is no indication in either Claimants' IFSP that HRC disagrees with the services provided by Easter Seals. Section 4646, subdivision (f) sets forth the protocol if the parties disagree about the services and supports to be provided in the program plan, and those provisions were not followed here. While HRC expressed its disapproval about paying co-payments in its letter dated May 2013, it failed to discuss its rationale for not supporting the Easter Seals services during the July 2013 planning meetings, which would have been the appropriate time to assess the necessity of the programs. Moreover, the IFSPs show a need for services and the evidence showed that the Easter Seals programs meet the goals set forth in the IFSPs. HRC did not meet its burden of establishing that its denial of funding co-payments for services provided for in Claimants' IFSPs was consistent with the Lanterman Act.

9. Service Agency's contention that the ABA services Claimants currently receive are excessive under Welfare and Institutions Code section 4686.2, subdivision (d)(2), must also be rejected. Welfare and Institutions Code section 4686.2, subdivision (d)(2), defines "intensive behavioral intervention" as "applied behavioral analysis that is comprehensive, designed to address all domains of functioning, and provided in multiple settings for no more than 40 hours per week, across all settings, depending on the individual's needs and progress." Service Agency's argument that Claimants receive more than 40 hours per week of intensive behavioral intervention is premised on its incorrect assumption that the hours Claimants spend in school constitute intensive behavioral intervention—a conclusion not supported by the evidence.

ORDER

Claimant E.Q. and N.Q.'s appeals are granted. Harbor Regional Center may not deny funding for co-payments of behavioral services which are funded through Claimants' family's private insurance.

DATED: October 28, 2013

AMY YERKEY
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.