

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

D.K.,

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2013090406

DECISION

This matter was heard by Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings, State of California, on October 28, 2013, in Torrance.

Claimant was represented by his mother.¹ Claimant's mother was assisted during the hearing by a Korean interpreter.

Gigi Thompson, Manager Rights Assurance, represented Harbor Regional Center (Service Agency or HRC).

The documentary and testimonial evidence described below was received, and argument was heard. The record was closed and the matter was submitted for decision on October 28, 2013.

ISSUES

(1) Should HRC provide 30 hours per week of behavioral services rather than the five hours per week of behavioral services currently being funded?

(2) Should HRC fund for insurance co-payment assistance for claimant's behavioral services retroactively to cover the period January to June 2013?

¹ Claimant and his mother are identified by initials or title to maintain confidentiality.

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1-10; claimant's exhibit A.

Testimonial: Audrey Clurfeld, HRC program manager; Xerez Orzame, HRC behaviorist/BCBA; and claimant's mother.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a six and one-half year old boy. He is a consumer of the Service Agency on the basis of his diagnosis of autism.
2. By letter dated August 21, 2013, the Service Agency notified claimant's parents of its decision to provide claimant with five hours per week of behavioral services, and to provide assistance with insurance copayments for behavioral services up to five hours per week but only retroactive to July 1, 2013, which is the start of the Service Agency's fiscal year. (Exh. 3)
3. On September 6, 2013, claimant's mother filed fair hearing requests to appeal the Service Agency's decisions to provide only five hours per week of behavioral services and to provide insurance copayment assistance retroactive only to July 1, 2013. (Exh. 2.) Claimant's mother contends the Service Agency should provide 30 hours per week of behavioral services and provide insurance copayment assistance for claimant's behavioral services retroactive to the period January 2013 to June 2013.

Claimant's Background

4. Claimant lives at home with his mother, father, and brother (age 16). Claimant's father works outside the home as a manager for a freight forward transportation company. Claimant's mother completed graduate school and majored in linguistics. She is currently claimant's IHSS worker.
5. Claimant attends elementary school and is in kindergarten. He receives special education services from the school district based on the eligibility category of autism. Claimant's special education services, funded by the school district, include specialized academic instruction, language and speech, occupational therapy, and behavior intervention services. Claimant is assisted at school by a one-to-one aide. Claimant attends classes for a total of 22 hours per week and then attends an extended day program, during afterschool hours, with a behaviorist for a total of six hours per week. In addition, the school district funds in-home behavior intervention services

for claimant for a total of six hours per week. Claimant's current school program, including direct and imbedded behavioral services, totals 34 hours per week.

6. Claimant's most recent individual/family service plan (IFSP) was developed during a planning meeting on April 10, 2013, and revised on May 28, 2013. (Exh. 5.) The Service Agency does not dispute that claimant has a need for behavioral services. According to his IFSP, Claimant requires adult supervision due to maladaptive behaviors and deficiencies in self-help skills and safety awareness. Claimant uses aggressive behaviors such as biting, hitting, and tantrums, when he is unable to communicate his wants and needs, when demands are requested of him, and during transitions to non-preferred activities. He elopes at any opportunity he gets and wanders away in the community. He eats non-edible items and climbs on furniture. His social skills are delayed. He does not initiate play with other peers or adults. He needs to be prompted to get him to engage in a social activity.

Behavioral Services

7. HRC began funding behavioral services for claimant through Autism Spectrum Therapies (AST) in May 2010, at a rate of 6.5 hours per week. Claimant received behavioral services from AST, funded by HRC, from May 2010 until March 2012, at which time the family accessed their private insurance. In March 2012, claimant began receiving behavior services from Centers for Autism Related Disorders (CARD), funded by the family's private insurance, at a rate of approximately 32 hours per week. The family's private insurance funded claimant's behavioral services (32 hours per week) until the COBRA coverage ran out and terminated on September 30, 2013.

8. Prior to the termination of insurance coverage for claimant's behavioral services on September 30, 2013, HRC referred claimant to Behavior and Education Inc. (BAE) for a functional behavior assessment (FBA). The purpose of the FBA was to determine claimant's behavior deficits and recommended services. The FBA was completed on August 1, 2013. (Exh. 6.) HRC wanted the FBA completed before the family's insurance coverage ran out to avoid a gap in claimant's behavioral services. HRC would use the FBA to determine the amount of behavioral services it would provide for claimant when the insurance coverage terminated on September 30, 2013. Following the completion of the FBA, HRC's clinical staff reviewed claimant's case and recommended that five hours per week was the appropriate level of behavior services HRC should provide for claimant.

9. HRC notified claimant's family of its determination in a letter dated August 21, 2013. (Exh. 3.) The letter stated in pertinent part: "According to the recent FBA, [claimant] is still demonstrating issues with safety awareness, temper tantrums, pica behavior, mouthing and physical stereotypy. These behaviors are also being observed and targeted in [claimant's] school program. The 35 hour per week school program and 5 hours per week behavior services recommended by HRC will be a comprehensive and intensive 40 hour per week program. Based on clinical

recommendations, HRC is therefore unable to support a behavior program that is higher than 5 hours per week at this time."

10. Xerez Orzame (Orzame) is HRC's Board Certified Behavior Analyst (BCBA). Orzame has a master's degree in psychology, with an emphasis in Applied Behavior Analysis. She has been a BCBA since 2008. Orzame is familiar with claimant's case. She recently observed claimant at home during one of his sessions with his CARD provider. She also reviewed video clips of claimant's sessions provided by claimant's mother. Orzame also reviewed documents in claimant's file, including a CARD progress report, the FBA completed by BAE, claimant's individualized education program (IEP) from his school district, and psychological reports.

11. Orzame's opinion is that HRC's five hour per week behavioral program is clinically appropriate for claimant. Orzame testified that, under the guidelines of the Behavior Analyst Certification Board (BACB), behavior services for a child who is seven years old should be between 30 to 40 hours per week. Claimant's school program provides him with approximately 35 hours per week of services at school and at his home. Orzame's opinion is that claimant's behavior services should not exceed 40 hours per week. She further opined that a parent-focus model is appropriate for the behavior services provided by HRC. Because of claimant's comprehensive school program, HRC's services should support claimant's school program through parent training so that interventions are generalized across settings.

12. Although claimant's insurance authorized 30 hours per week of behavior services for claimant, due to his availability and scheduling, CARD was able to provide only 15 hours per week of behavior services to claimant.

13. Claimant's mother disagrees that five hours per week of behavior services funded by HRC is sufficient to meet her son's needs and address the goals set forth in the FBA. In the fair hearing request, she requested that HRC fund "close to 30 hours of ABA a week." However, at this hearing, claimant's mother clarified that she is not insisting on 30 hours per week from HRC but feels that five hours per week is not sufficient. Claimant's mother estimates that 15 hours per week is the amount of behavior services HRC should provide. This was the amount of direct behavior services claimant was receiving from CARD. She admitted she did not have a doctor's report or prescription or assessment report that recommends 15 hours per week of services for claimant.

Insurance Copayments

14. In or about June 2012, claimant's parents requested assistance from HRC with paying the insurance copayments for claimant's behavioral services through CARD funded by their private insurance. At that time, the private insurance was funding approximately 32 hours per week of behavioral services.

15. (A) By letter dated June 28, 2012, HRC notified claimant's parents of its decision to provide co-pay assistance for behavioral services up to 6.5 hours per week for claimant, due to financial hardship. HRC's decision was "pursuant to and conditional upon the explanation" provided in the letter. (Exh. 4.)

(B) The letter first noted that "neither the Lanterman Act nor the enabling regulations which govern regional center purchase of services for our clients specify any circumstances under which regional centers may be permitted to assist families with insurance co-pay," and that "the Department of Developmental Services, which contracts with regional centers on behalf of the state, has been asked for direction and to date has not provided guidance in this matter."

(C) The letter then stated: "Harbor Regional Center believes that financial hardship should not prevent a family from accessing needed treatment for their family members with a disability. Accordingly, in the absence of guidance from lawmakers and oversight agencies, we have determined that such assistance may be provided under the following circumstances:

"1. Harbor Regional Center would have provided the service if the family did not have insurance; and

"2. The co-pay assistance HRC will provide will be limited to the co-pay required for the type, amount and duration of treatment which HRC would provide if the family did not have access to insurance (which may vary from the type, amount and duration of treatment which is authorized by the insurer); and

"3. The family has submitted evidence that required insurance copayments will constitute a financial hardship such that their family member may be prevented from receiving the needed treatment; and

"4. The family has submitted documentation from their insurer which identifies the amount of their required co-pay."

(D) Under these criteria, HRC agreed to provide co-pay assistance for behavioral services up to 6.5 hours per week. The letter explained: "After reviewing [claimant's] assessments and reports HRC has determined that a home program of 6.5 hours per week focused on parent education would be an appropriate program to supplement his school program at this time. This is the amount of intervention that HRC would provide at this time if your family did not have access to insurance. A re-

assessment of need will be required in the future to assess any need for continuation of assistance. [¶] As to the evidence of income and determination of hardship caused by the cost of insurance copay, our review was based on your current financial hardship resulting from head of household becoming unemployed. Consequently, your request for hardship assistance with your insurance co-pay has been approved. HRC will be able to provide for the \$25 co-pay per session up to 6.5 hours per week. . . . The co-pay maximum for your family is \$3000. Therefore, HRC assistance with co-pay will end once you have reached this \$3000 maximum."

16. Audrey Clurfeld (Clurfeld) is a program manager at HRC. At all relevant times, as program manager, she supervised and provided supports for claimant's HRC counselor, Ilena Hernandez.

17. In January 2013, claimant's mother requested that HRC provide assistance with the insurance co-payments for claimant's behavioral services funded by the family's private insurance. Clurfeld testified that claimant's counselor, Ilena Hernandez, had conversations with claimant's mother that HRC needed information and documents so that her request for co-payment assistance could go through HRC's approval process. HRC did not receive the requested documents from claimant's mother until August 2, 2013. By that time, claimant's mother was requesting that HRC provide for insurance co-payments for claimant's behavioral services retroactive to the period January 2013 to June 2013.

18. By letter dated August 21, 2013, HRC notified claimant's mother of its decision to approve co-payment assistance for claimant's behavior services up to five hours per week² but only retroactive to July 1, 2013. The letter stated: "You requested assistance with your co-payments for behavior services in January 2013. At the time of your request we discussed what information HRC would need in order to consider your request. All of the necessary documentation which included the authorization for behavior services from your insurance company, a copy of your tax returns and the progress report from CARD was received on August 2, 2013. At that time your request was assessed and HRC made an exception to provide co-payment assistance back to the beginning of the regional center fiscal year which is July 1, 2013, and through to September 31, [sic] 2013. HRC co-payment assistance will end on September 30, 2013 due to your Cobra insurance expiring." (Exh. 3.)

19. At this hearing, claimant's mother testified that she did not provide documents to HRC until August 2013 because it took time to gather the requested documents. Claimant's mother testified that, based on her experience with HRC, she knows that HRC requires documentation. She testified it took her three months to

² In 2012, HRC provided co-pay assistance for behavioral services up to 6.5 hours per week. As of August 21, 2013, following the completion of the FBA, HRC's clinicians determined that HRC's behavior program for claimant should be five hours per week. (Factual Findings 8-11.)

contact and get information from her insurance company, and her husband changed companies and had to get their taxes done. She testified there were difficulties in completing their tax returns. The tax returns were not completed until July 2013. Claimant's mother testified that she continually informed claimant's counselor, Ilena Hernandez, that the documents she requested were delayed. Claimant's mother testified she was never told by HRC that there was a due date for providing the documents or that retroactive payment could be affected. Claimant's mother contends that co-payment assistance retroactive only to July 1, 2013 is not helpful. Since the family met the \$3000 copayment maximum in June 2013, no co-payments were required for claimant's behavioral services provided in July 2013.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)³ A state level fair hearing to determine the rights and obligations of the parties, if any, is referred to as an appeal of the service agency's decision. Claimant properly and timely requested a fair hearing and therefore jurisdiction for this case was established. (Factual Findings 1-3.)

2. A regional center is required to secure the services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan (IPP). (§ 4646, subd. (a)(1).) The determination of which services and supports are necessary for each consumer shall be made through the IPP process. (§ 4512, subd. (b).) 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 IPP, and the cost-effectiveness of each option. (§ 4512, subd. (b).)

3. The Lanterman Act contemplates that the provision of services shall be a mutual effort by and between regional centers and the consumer and/or the consumer's family. The foundation of this mutual effort is the formulation of a consumer's IPP. A consumer's IPP "shall be reviewed and modified by the planning team . . . as necessary, in response to the person's achievement or changing needs." (§ 4646.5, subd. (b).) The creation of an IPP is a collaborative process. (§ 4646.) The IPP is created after a conference consisting of the consumer, the consumer's representatives, regional center representatives, and other appropriate participants. (§§ 4646 and 4648.)

³ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

4. The planning process relative to an IPP shall include “[g]athering information and conducting assessments to determine the . . . concerns or problems of the person with developmental disabilities. For children with developmental disabilities, this process should include a review of the strengths, preferences, and needs of the child and the family unit as a whole. Assessments shall be conducted by qualified individuals and performed in natural environments whenever possible.” (§ 4646.5, subd. (a)(1).)

5. Under section 4646.4, subdivision (a), when purchasing services and supports, regional centers must ensure conformance with its purchase of service policies, utilization of generic services and supports when appropriate, utilization of other sources of funding as contained in section 4659, and consideration of a family's responsibility for providing similar services and supports for a minor child without disabilities, taking into account a consumer's need for extraordinary care, services, supports and supervision. Section 4659 requires regional centers to "identify and pursue all possible sources of funding for consumers receiving regional center services," including but not limited to governmental programs such as Medi-Cal and "[p]rivate entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer."

6. When a person seeks to establish eligibility for government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) As no other statute or law specifically applies to the Lanterman Act, the standard of proof in this case is preponderance of the evidence. (See Evid. Code, §§ 115, 500.) Thus, claimant has the burden in this case of proving by a preponderance of the evidence that the Service Agency is required, by the Lanterman Act, to provide the services and supports he is requesting.

Issue 1 - Behavioral Services

7. In this case, claimant has not met his burden of proving the Service Agency should be required to provide more than five hours per week of behavioral services. Claimant's mother feels that a program of 15 hours per week, funded by the Service Agency, is appropriate. However, she offered no assessment or doctor's report to support her request. The Service Agency's behaviorist, Xerez Orzame, testified credibly to her opinion, as a BCBA, that the HRC program of five hours per week is clinically appropriate to meet claimant's needs and to support the comprehensive program claimant's school is providing at school and at his home. Claimant's appeal shall be denied as to this issue. The Service Agency shall not be required to provide behavior services at a rate of 15 to 30 hours per week as requested by claimant's mother.

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Issue 2 - Co-Pay Assistance

8. The Service Agency contends that it can provide co-pay assistance retroactive only to July 1, 2013, because, although claimant's mother requested the assistance in January 2013, she did not provide requested documents to the Service Agency until August 2013. The Service Agency also contends that retroactive co-pay assistance is limited to July 1, 2013, because that is the start of the Service Agency's new fiscal year.

9. The passage of seven months between the time of the original service request (January 2013) to the time documents were submitted to the Service Agency (August 2013) should not preclude the Service Agency from providing co-pay assistance for claimant's behavioral services during the period January to June 30, 2013. The Service Agency does not dispute claimant's need for the behavioral services. The Service Agency provided co-pay assistance due to financial hardship for the family the previous year in 2012. Claimant's mother requested the same assistance at the start of 2013. Claimant's mother admitted she is aware, based on her experience, that HRC requires documentation from consumers. The seven-month delay in submitting documents to HRC does not appear to be due to a lack of diligence on the part of claimant's mother to obtain documents.

10. Under these circumstances, general principles of equity require HRC to provide co-pay assistance retroactive to January 2013 in order to fulfill the purposes and intent of the Lanterman Act. (See *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) Claimant's appeal shall be granted as to this issue. The Service Agency shall fund for co-pay assistance for claimant's behavioral services, up to 6.5 hours per week, retroactive to January 2013 through June 30, 2013.⁴ The Service Agency shall not be required to fund for co-pay assistance for claimant's behavioral services provided after the date the \$3000 copayment maximum limit was reached in 2013.

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⁴ The Service Agency's behavior program for claimant did not change to five hours per week until August 21, 2013. Prior to that date, the Service Agency determined that its behavior program for claimant should be 6.5 hours per week.

ORDER

Claimant's appeal is granted in part as follows: HRC shall fund for co-pay assistance for claimant's behavioral services, up to 6.5 hours per week, retroactive to January 2013 through June 30, 2013. HRC shall not be required to fund for co-pay assistance for claimant's behavioral services provided after the date the \$3000 copayment maximum limit was reached in 2013.

In all other respects, claimant's appeal is denied.

DATED: November 12, 2013



ERLINDA G. SHRENGER
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.