

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2014030095

DECISION

Howard W. Cohen, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on April 18, 2014, in Torrance.

Claimant was not present for the hearing; he was represented by his mother and father.¹

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

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on April 18, 2014.

ISSUE

Whether the Service Agency must fund five days per week of insurance copayments for claimant's ABA program.

EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1-11; claimant's exhibits A-I.

Testimony: Patricia Piceno; Stephanie Kim; claimant's father; claimant's mother.

¹ Party and family titles are used to protect the privacy of claimant and his family.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is six years old. He has been diagnosed with autism and is therefore eligible for regional center services and supports.

2. Claimant has received applied behavior analysis (ABA) services at home from Behavior Frontiers since August 2013, for five hours per day, five days per week, funded by claimant's private insurance. Copayments are \$40. The insurance carrier was, until April 1, 2014, Aetna, which had an annual copayment maximum of \$3,000. Since April 1, 2014, the carrier has been Blue Shield, which has an annual copayment maximum of \$1,000.

3. Beginning in July 2013, claimant's mother requested on various occasions that HRC fund claimant's copayments. HRC, claimant's parents, and Behavior Frontiers variously met and corresponded regarding the copayment issue through mid-February 2014.

4. By a Notice of Proposed Action (NOPA) letter dated February 19, 2014, HRC denied claimant's parents' request for copayments funding, on the grounds that claimant's ABA program "should be focusing solely on the areas of non-compliance, aggression, and self-injurious behavior;" that some goals in claimant's ABA program were related to skills that should be addressed through the Individualized Education Program (IEP) at claimant's school district; and that claimant's ABA program is inadequate because it does not include a "focused parent training component." (Ex. 3.) Citing Welfare and Institutions Code section 4659.1,² HRC wrote that the Lanterman Developmental Disabilities Services Act (Lanterman Act)

requires first and foremost that when a regional center considers a family's request for co-payment assistance that it meets the goals identified in the client's IFSP/IPP. [Claimant's] current ABA program through his private insurance does not meet the requirements identified by law in order for regional center to be allowed to utilize public funds in order to provide co-payment assistance. It is recommended that you review [claimant's] current private insurance program with Behavior Frontiers and modified [*sic*] to include a stronger parent training component than is currently set up.

(*Id.*)

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² All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

5. In the NOPA letter, HRC offered, as a supplement to the Behavior Frontier services funded by Aetna, “a child/parent training program through Family Behavioral Services” to teach claimant’s parents “the techniques and strategies that will allow you to maintain a consistent environment for [claimant] even when a therapist is not in your home.” (Ex. 3.) HRC wrote that “[i]f you are successful in gaining a stronger parent/child program with appropriate goals, please bring this back for further consideration. . . . In the event that Behavior Frontiers should add parent training goals, HRC may be able [to] re-review the request.” (*Id.*)

6. On February 27, 2014, claimant’s mother filed a Fair Hearing Request on claimant’s behalf with the Service Agency, appealing HRC’s decision.^{3, 4}

Background Information

7. Claimant lives at home with his parents, two brothers, ages 17 and 8, and two younger sisters, ages 4 and 18 months. The three boys, including claimant, have special needs.

8. Claimant is currently attending school in his local school district, where he receives speech therapy, behavior intervention services, and occupational therapy under an IEP.

Insurance Copayment Assistance

9. No signed version of any Individual/Family Service Plan (IFSP)⁵ for claimant was placed in evidence. Although claimant has been a consumer of HRC services for some

³ The NOPA letter also referred to a request from claimant’s parents for speech services. Neither HRC nor claimant’s parents wished to address that issue at this hearing. Both parties stipulated that claimant’s right to challenge HRC’s denial of the request has not been waived.

⁴ In her Fair Hearing Request, claimant’s mother wrote that “[n]o Notice of Proposed Action was provided.” (Ex. 2.) That is incorrect. The February 19, 2014, letter constitutes a NOPA. It provides all the information required for a NOPA under the Lanterman Act, including the action the Service Agency proposed to take, the reasons for that action, the law relied on to support the action, and the consumer’s right to request a hearing. (Welf. & Inst. Code, § 4701.) The statute does not impose any format requirements for NOPAs.

⁵ For each regional center client, the Lanterman Act requires an “individual program plan,” or “IPP.” (Welf. & Inst. Code, § 4646.) HRC, rather than using those Lanterman Act terms, refers to an “Individual/Family Service Plan” or “IFSP,” terms derived from the federal Early Intervention Program for Infants and Toddlers with Disabilities, which is known in California as the “Early Start Program” and which applies only to infants and toddlers under the age of three (Cal. Code Regs., tit. 17, § 52100 et seq.). For purposes of this matter, “IFSP” is deemed to be synonymous with “IPP.”

years, the only IFSP introduced at hearing was created after a December 19, 2013, IFSP meeting.

10. HRC created three versions of that IFSP; two were placed in evidence. A draft version, not in evidence, was sent to claimant's parents on January 17, 2014. Claimant's mother made comments on the draft and returned it to HRC for finalizing. The nature of those comments was not established by the evidence. The next version of the IFSP was sent to claimant's parents on February 12, 2014 (Ex. C); Norma Salazar, claimant's counselor at HRC, informed claimant's parents that this version was not final and would be updated to reflect information derived from her observation of one of claimant's ABA sessions. A third version of the IFSP (Ex. 4), with Salazar's addenda dated February 25, was sent to claimant's parents on February 26. Salazar spoke to and received correspondence from Behavior Frontiers after her observation of the January 21 ABA session. She and HRC Program Manager Patricia Piceno spoke by telephone with claimant's mother on February 11 to inform her that HRC had decided to deny the request for copayment funding. Claimant's mother objected to the decision. HRC issued the third version of IFSP on February 26, with Salazar's February 25 addenda. None of the three versions of the IFSP was signed by claimant's parents.

11. HRC issued its NOPA on February 19, a week before the issuing the third version of the IFSP.

12. The history of HRC payment for claimant's ABA services, and then for copayments for insurance-company-funded ABA services, was determined from testimony and documents in evidence, including uncontested portions of the unsigned versions of the December 19, 2013, IFSP.

13. Claimant's mother testified that prior to July 2012 claimant received six hours per week of ABA services funded by HRC, as well as 30 hours per week of ABA services through his school district. When the law changed to require consumers to obtain funding for ABA from their insurance carriers, HRC and the school district stopped funding ABA services for claimant, and he regressed significantly.

14. After several months, claimant's parents were able to obtain insurance coverage for an ABA program, provided by First Steps for Kids, from their private carrier, Aetna.

15. HRC funded the insurance copayments for the two sessions per week of ABA services from First Steps for Kids, until March 15, 2013, when claimant's parents decided to terminate those services and find another provider.

16. Behavior Frontiers became claimant's ABA provider two months later, in May 2013. Aetna approved 15 hours of ABA per week, for three hours per day, five days per week. The first authorization period was from May to November 2013.

17. In July 2013, by telephone, claimant's mother first notified Salazar at HRC that Behavior Frontiers was claimant's new ABA provider, and requested that HRC fund the insurance copayments.

18. By letter dated August 23, 2013, claimant's mother again notified HRC that Behavior Frontiers was currently the ABA services provider and requested copayment funding.

19. HRC then contacted Stephanie Kim, Behavior Supervisor at Behavior Frontiers, and requested the most recent report about claimant. Kim explained that no report had yet been prepared, that the twice-yearly report required by Aetna was not due to be sent to the carrier until October, and that she would send a copy to HRC once the report was submitted to Aetna. In that progress report, dated September 23, 2013, a copy of which Kim sent to HRC in October, Behavior Frontiers wrote that claimant presents with such behavioral challenges as biting, hitting, kicking, and pushing, and that he destroys property, pulls hair, bangs his head, and pushes his face into the floor.

20. Claimant was due to have his annual IFSP meeting at the end of October 2013. On October 5, claimant's parents faxed HRC their tax information in order to establish eligibility for copayment funding. On October 31, HRC contacted claimant's mother to schedule claimant's IFSP meeting and to request additional documentation. Claimant's parents immediately provided financial documentation to HRC.

21. In December 2013, HRC asked Behavior Frontiers for additional documents. Behavior Frontiers sent HRC an Explanation of Benefits from Aetna and Aetna's updated insurance authorization for services beginning on November 14, 2013, as well as another copy of the progress report that had been sent to HRC in October.

22. Around that time, Salazar went on vacation and Britney Irvine, counselor with HRC's Children's Central Team, temporarily assumed her duties. Irvine asked claimant's mother for documentation; claimant's mother had already provided some or all of that documentation to Salazar. Claimant's mother wrote to Irvine on November 29, providing her with the case background and the documentation history.

23. Claimant's IFSP meeting ultimately took place on December 19, 2013. On January 6, 2014, claimant's mother delivered to HRC claimant's most recent IEP, at HRC's request. Claimant's mother received a draft of the IFSP on January 17, one month after the IFSP meeting.

24. HRC does not dispute that claimant requires behavioral intervention services. The "Behavioral Health" section of the unsigned December 19, 2013, IFSP states that claimant "is dependent on parents for all daily living skills." (Ex. C.) He has difficulty using utensils when eating, eats inedible objects, requires physical prompts to change behaviors, tantrums when parents assist him with difficult tasks, cannot shower or bathe alone, cannot dress

independently, and disrobes whenever he uses the toilet, whether at home or at school. Claimant tantrums daily for up to an hour or more, at home and at school; during tantrums he “throws himself on the floor, screams, throws objects and hits those around him. [Claimant] also kicks (others, objects) and bites others and himself and will hit himself in the head, face and body with open hands and fists.” (*Id.*) He bites his nails and cuticles, causing infections and open sores. “He also has silent tantrums in which he becomes mute and completely withdrawn, curling himself into a ball. . . . He jumps on furniture, opens doors, runs into the street . . . and will attempt to elope from the back yard. . . . He needs to be monitored at all time[s] to prevent self-injury and harm to others. His younger sisters are usually a victim [sic] to his aggressive behaviors.” (*Id.*) Claimant’s parents reported that claimant had regressed and that his behaviors had recently spiked.

25. The “Behavioral Health” section of the unsigned IFSP also states that the “Desired Outcome” of claimant’s behavior intervention program is that claimant “will increase his safety skills and decrease his maladaptive behaviors as described above. [He] will decrease self-injurious behaviors.” The “Plans” for achieving that outcome read: “Parents will redirect any negative behavior and use praise and positive reinforcement for [claimant’s] attempts and successes.” (Ex. C.)

26. In this unsigned version of the IFSP, Salazar wrote that Behavior Frontiers had been slow in sending HRC necessary documentation to process the copayment funding request, and that Salazar “must also observe [claimant] and observe the ABA program. Mother scheduled ABA program observation for Tuesday, January 21, 2014.” (Ex. C.)

27. As it happens, for the January 21 session claimant’s parents were instructed by Behavior Frontiers not to participate, which was contrary to their practice. Claimant had had a spike in maladaptive behaviors, and on January 14 Behavior Frontiers decided to implement, temporarily, a different approach with claimant. Because claimant was quickly switching from task avoidance to attention-seeking behaviors in the presence of his parents, Behavior Frontiers decided that the behavior interventionists and a supervisor would provide services without parent participation for two weeks, gain a better understanding of the antecedents to claimant’s behaviors, and then fade the parents back into the program to implement the program themselves, in the presence of the behaviorist.

28. Kim spoke about the session with Salazar on January 29, 2014. Salazar asked whether the session had been typical; Kim explained that it had not been typical, and detailed the temporary approach taken by Behavior Frontier to address claimant’s behaviors without the participation of claimant’s parents. Though informed that the session was not typical, neither Salazar nor any other representative of HRC chose to observe another, more typical, session.

29. On February 10, 2014, claimant’s mother emailed Salazar to state that all documents had been provided to HRC and that she was still awaiting a decision on her request for copayment funding. The same day, Salazar and HRC’s interdisciplinary team met and

decided not to grant claimant's parents' request. The grounds for denying the request were that the ABA program should be focused on three areas only (non-compliance, aggression, and self-injurious behavior), and that the program does not "have any focus on building parent skills" (Ex. 4), required for regional center funding for any ABA program.

30. On February 11, 2014, claimant's HRC counselor and program manager spoke to claimant's mother and denied her request for HRC to fund the copayments for ABA services for claimant. They told claimant's mother that HRC would fund a parent training program through Family Behavioral Services, and would reconsider copayment assistance if Behavior Frontiers focuses claimant's goals "on the self-injurious and aggressive behaviors and includes a stronger parent participation component." (Ex. 4.) Claimant's mother disagreed with HRC's position and asked Salazar by email for a written copy of the denial of services and the IFSP.

31. Salazar emailed claimant's mother that the IFSP would be provided, but that it required updating to include information pertaining to Salazar's January 21 ABA session observation and claimant's mother's February 11 comments.

32. Claimant's mother received the IFSP, without Salazar's addenda, on February 12, 2014. Claimant's mother received the updated IFSP, with Salazar's February 25 addenda, on February 26, one week after the NOPA letter was sent. The addenda described in detail the ABA session that Salazar had observed on January 21.

33. Patricia Piceno, HRC Program Manager, testified that HRC does not dispute that claimant needs a behavioral intervention program, but that she believes claimant's needs are not being addressed appropriately. She testified that HRC determines whether to fund copayments based on HRC's review of the consumer's program and based on HRC's assessment of the consumer's needs, citing as authority section 4659.1, subdivision (a), which governs regional center funding of insurance copayments for "a service or support provided pursuant to a consumer's [IFSP]."

34. HRC contends that Behavior Frontiers should be focusing solely on goals in three areas—non-compliance, aggression, and self-injurious behavior—and that there should be more of a focus on parent training. Piceno testified that she was concerned about the apparent lack of progress in some of claimant's self-injurious behaviors and that, if this were a program that HRC was funding, HRC would want to explore the reasons for that lack of progress, and would initiate a meeting with the parents and the provider to discuss barriers to progress and perhaps make changes to the program.

35. Piceno also testified that schools are a generic resource, that regional centers cannot duplicate school goals, and that some of the goals described in Behavior Frontiers' progress report target language and conversational skills, which should be addressed in school. Functional communication skills, however, are necessary for use across all domains, including at home and in the community, and cannot be said to be appropriate only as academic goals.

HRC did not establish that the goals set by Behavior Frontiers are strictly academic goals and do not overlap with goals appropriate for regional center-funded ABA services. HRC has a special education consultant to help families of consumers advocate for their children at IEP meetings. The IEP in evidence in this matter, dated June 10, 2013, reflects that no one from HRC attended the IEP meeting. The evidence does not establish whether claimant's parents asked someone from HRC to attend.

36. Kim identified multiple goals in claimant's September 23, 2013, progress report that were designed for claimant's parents to participate in implementing or to implement themselves, in such areas as social behavior, peer engagement, interactive play, and impulse control. The progress report specifically targets as goals a decrease in non-compliance, aggression, self-injurious behaviors, and self-stimulatory behaviors, the areas HRC believes Behavior Frontiers should target. Kim testified that the Behavior Frontiers program for claimant includes a significant parent participation element. That is not fully reflected in claimant's progress reports because the insurance carrier does not require that parent participation or training goals be stated in claimant's progress reports. The carrier's reporting requirements, both as to content and as to frequency, differ from those of HRC's reporting requirements for vendors that HRC funds. At hearing, HRC questioned whether Behavior Frontiers was using aversive therapy techniques, which are not accepted under guidelines issued by the Behavior Analyst Certification Board (BACB). Kim explained that Behavior Frontiers was not employing such techniques, but used physical prompting accepted under BACB guidelines.

37. HRC did not establish on this record that Behavior Frontiers has been using improper behavioral intervention techniques in working with claimant, or that, after less than one year, the program can be deemed ineffective.

38. Claimant's father testified that claimant has benefitted greatly from his current ABA program, showing especially dramatic improvements in his speech. Claimant's parents are very involved in claimant's ABA program on a daily basis, and participate in claimant's ABA sessions. They work alternate nights so there is always one parent in the home with the children and available to care for claimant. Claimant's father testified that he has been trained by Behavior Frontiers' behaviorists and has been given many tools for strategizing and addressing claimant's behaviors.

39. HRC does not dispute that claimant's family meets the statutory financial criteria for copayment assistance by the Service Agency. Claimant's mother testified that she and her husband have to pay many copayments for various services for their children, that another child is about to start receiving ABA services, and that if HRC does not fund claimant's copayments, they will no longer be able to afford ABA services for claimant. Behavior Frontiers has agreed to defer collecting copayments owed since August 2013 until a Decision is issued in this matter.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Act governs this case. (§ 4500 et seq.) An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a regional center decision. (§§ 4700-4716.) Claimant requested a hearing and, therefore, jurisdiction for this appeal was established. (Factual Findings 1-6.)

2. The burden of proof is on the party seeking government benefits or services. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) In this case, claimant bears the burden of proof because he is seeking funding for copayments that HRC has not previously provided. (Factual Findings 1-6.) Claimant must prove that he is entitled to the funding by a preponderance of the evidence, because no law or statute requires otherwise. (Evid. Code, § 115.)

Insurance Copayment Assistance by Regional Centers

3. Claimant established by a preponderance of the evidence that cause exists to order HRC to fund claimant's family's insurance copayment for five days per week of claimant's ABA program provided by Behavior Frontiers, beginning with copayments incurred in August 2013. (Factual Findings 1-39.)

4. Before July 1, 2012, regional centers in California funded behavior therapy services for many autistic children and their families. The Legislature passed Insurance Code section 10144.51, obligating insurers to fund behavioral therapy for children with autism, effective July 1, 2012. In complying with this mandate, insurers generally impose copayment obligations on their insureds. Many families that had received full funding of behavior therapy services through regional centers before July 2012 became responsible for partially paying for those services. Families began asking their regional centers to pay the insurance copayments.

5. In response, the Legislature enacted section 4659.1, effective June 27, 2013. Section 4659.1, subdivision (a), provides that if "a service or support provided pursuant to a consumer's individualized program plan under this division . . . is paid for in whole or in part by the consumer's parents' private insurance, when necessary to ensure that the consumer receives the service or support, the regional center may pay any applicable copayment associated with the service or support," under specified conditions. Absent exceptional circumstances, a regional center may fund insurance copayments if the family's annual gross income is less than 400 percent of the federal poverty level. (§ 4659.1, subd. (a)(2).)

6. ABA services are "a service or support provided pursuant to" claimant's most recent IFSP and, apparently, under earlier IFSPs. (Factual Findings 9-25.) "Services and supports" are defined under the Lanterman Act to include "speech therapy . . . , behavior

training and behavior modification programs . . . [and] training for parents of children with developmental disabilities.” (§§ 4512, subd. (b); see also 4685, subd. (c)(1).)” There is no dispute that claimant needs ABA services. (Factual Findings 24, 33.) And the parties agree that claimant’s family meets the criteria for copayment assistance set forth in section 4659.1. (Factual Finding 39.) Moreover, copayment assistance is “necessary to ensure that the consumer receives the service or support.” (Factual Finding 39.)

7. The regional center must fund services and supports determined to be necessary for their consumers when generic sources of funding are not available. (See, e.g., § 4659.) In this case, an insurance company is providing the funding for the necessary services and supports, except for a \$40 daily copayment. (Factual Finding 2.) HRC urges that, even though claimant’s insurance carrier is funding Behavior Frontiers, a proper reading of section 4659.1, subdivision (a), should incorporate not just the defined categories of “a service and support provided pursuant to a consumer’s” IFSP (see Legal Conclusion 6), but other requirements that the Lanterman Act imposes when a regional center is the source of funding of services and supports. Those encompass requirements that ABA services be evidence-based and incorporate parent participation (see § 4686.2, subd. (b)), and more general requirements that services be both cost-effective and effective, with appropriate goals that reflect those set forth in the IPP, with vendor reporting on the consumer’s progress that can be monitored by the regional center (see, e.g., §§ 4512, 4646, 4646.5, 4647, 4648, & 4685).

8. The Lanterman Act does not specify to what degree the full panoply of its programming requirements applies in cases such as this, where claimant’s insurance company is funding the service and the regional center has been asked to fund only the copayment. Given that the regional center is providing some funding, in the form of the copayment, there may be instances where the regional center must and should be entitled to act to protect the consumer’s interests, such as where an ABA provider funded by an insurance carrier is incapable of providing services that meet the needs of a regional center consumer as described in the IFSP.

9. HRC has not established that such is the case here. The concerns raised by HRC regarding which goals to focus on, the level of parent participation, and goals that might be academic goals, were not sufficiently supported by the evidence and were convincingly addressed by claimant’s parents and the service provider. (Factual Findings 24-38.)

10. It is consistent with the plain language of section 4659.1 to place on the consumer the burden of establishing only that the service funded by the carrier is one defined in section 4512 and provided for in the IPP, and to then shift to the regional center the burden of establishing both that the service is not adequate as measured by certain requirements for regional center-funded programs and that those particular requirements should apply.⁶ It is also

⁶ Which requirements for regional center-funded providers should reasonably be applied to insurance-funded programs in these cases is unclear. It may not be reasonable, for instance, for a regional center to deny copayment funding on the ground that the insurance carrier does

consistent with the Lanterman Act to place on the regional center the burden of demonstrating that its concerns about the service provider have been addressed collaboratively in the IPP process. (See, e.g., § 4512, subd. (b).)

11. Finally, claimant's local school district is a generic resource that has a responsibility to provide appropriate services to meet claimant's needs, as outlined in his IEP, to allow him to access a free and appropriate education. (20 U.S.C. § 1437 (a)(8).) A school district must also meet its responsibility for providing needed services, even when another agency, such as a regional center, is also responsible for the student. (See Ed. Code, § 56520, subd. (b)(2).) In this case, it was not established that claimant's current ABA program contains goals that should fall solely within the purview of his local school district. (Factual Finding 35.) Moreover, the ALJ is aware of no provision in federal or state special education law that mandates or allows school districts to reimburse families for insurance copayments. If HRC believes claimant's local school district is not providing sufficient services, HRC may assist claimant's family in the IEP process.

ORDER

Claimant's appeal is granted. The Service Agency shall fund five days per week of copayments for claimant's ABA program provided by Behavior Frontiers, commencing with copayments incurred in August 2013 and continuing until such time as changed circumstances warrant otherwise, as determined through the IFSP process.

DATED: April 25, 2014

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.

not require the provider to submit progress reports as frequently as the regional center requires of providers it funds.