

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2014041240

Casey S.,

Claimant,

vs.

SAN GABRIEL POMONA REGIONAL
CENTER,

Service Agency.

DECISION

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on June 3, 2014, in Pomona, California.

Casey S. (Claimant) was represented by his mother, Elizabeth S. (mother).¹ Claimant did not attend the hearing.

Daniela Santana, Fair Hearing Manager, represented San Gabriel Pomona Regional Center (SGPRC or Service Agency).

ISSUE

Must the Service Agency fund the insurance co-payment for Claimant's Applied Behavior Analysis (ABA) services?

¹ Claimant and his mother are identified by their first name and last initial to protect their privacy.

FACTUAL FINDINGS

Jurisdictional Facts

1. Claimant is a fourteen-year-old boy who resides with his parents and his younger brother. Claimant's parents also provide emotional and some financial support for an adult "foster" daughter. Claimant is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.) on the basis of autism.²

2. On April 10, 2014, Service Agency issued a Notice of Proposed Action denying Claimant's request to fund Claimant's insurance co-payment for his ABA services. On April 20, 2014 Claimant's mother filed a Fair Hearing Request (FHR) on behalf of Claimant. Jurisdiction was established and this hearing ensued.

Background

3. Claimant is described as in good overall health. He takes medication for Attention Deficit Hyperactive Disorder (ADHD). He is slightly small for his size but his physician is not concerned at this time. Claimant attends middle school. He is mainstreamed for math and science and receives Resource Specialist Support (RSP) support for English and social studies. He also receives speech therapy weekly. He has a limited vocabulary and according to mother, Claimant can be difficult to understand. He requires supervision for personal safety. Claimant is able to attend to most activities of daily living, with some reminders. Claimant can be physically and verbally aggressive and have temper tantrums. He bites his nails, pick at scabs and will zip and button his clothing to the very top. Mother describes Claimant as a follower who likes to be on a schedule. Claimant has difficulty maintain social relationships.

4. Claimant's 2013 Individual Program Plan (IPP) was developed on September 30, 2013. Claimant's IPP includes long and short terms goals and desired outcomes. Desired outcomes are generally stated as objectives for the consumer and include services and supports needed to achieve those outcomes. Several of Claimant's goals address increasing appropriate behavior, including effectively communicating his needs and wants, appropriately interacting with peers, and reducing inappropriate behaviors in the mornings and late evenings when he is off of his ADHD medications. Supports intended to assist in achieving these objectives include educational services provided by his school district, parental support for participation in social and recreational activities in the community, and ABA services which were being funded by Claimant's health plan.

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

5. Claimant receives ABA services through the Easter Seals Disability Society (Easter Seals). ABA services are provided three times per week. Claimant receives ABA for two hours per week at home, and two hours on Saturday when he goes bowling, a favorite activity. In addition, the ABA therapists observe Claimant at school, but do not interact with him in the school environment. Claimant also receives ABA services that are provided by his school district.

6. Claimant's Easter Seals ABA services are funded by Claimant's health insurer, Kaiser Permanente (Kaiser). Kaiser requires a \$20 per visit co-payment. Claimant's father carries the Kaiser insurance through his employment. Claimant's mother is individually covered by Kaiser through her employment. Father has been notified by his employer that he will be terminated from employment effective June 2014. When father loses his job, Claimant will be covered by mother's insurance. The cost of insurance will increase at that time. In addition to being a covered dependent under his father's plan and in the future, under mother's plan, Claimant is also covered by Medi-Cal. Medi-Cal pays Claimant's insurance co-payment for his medical visits and prescription medication, but not for his ABA services. Easter Seals suggested to mother that she contact Medi-Cal to see if they would fund the co-payment. Mother has not done so, apparently thinking that asking Service Agency to fund the co-payment was the same as asking Medi-Cal to fund the co-payment.

7. Effective July 1, 2013, the legislature prohibited Service Agency from funding insurance co-payments, subject to certain specified exemptions. (§ 4659.1) Apparently in response to Service Agency's implementation of section 4659.1, Claimant's parents submitted their 2012 W-2 forms in support of their request that Service Agency continue funding Claimant's ABA co-payments. At the time, Father reported earnings on his W-2 form of \$105,525 in wages, tips and other compensation. Mother reported earnings of \$105,788 in wages, tips and other compensation, for a combined total of \$211,313 in earnings for 2012. Service Agency considered parents' income in light of the 2013 tables showing 400 percent of the Federal Poverty Level (FPL). Service Agency incorrectly considered the table for a family of three rather than a family of four.³ The 2013 cutoff of a family of three was \$78,120; the cutoff for a family of four was \$94,200.⁴ On October 1, 2013, Service Agency sent parents a letter informing them that their combined income exceeded 400% of the FPL and that as a result Claimant was not eligible for funding of his ABA co-payment because his parents' combined income exceeded 400 percent of the FPL.

³ Mother also contends that the foster daughter they assist should be considered a member of the family, making five rather than four the correct family size. The foster daughter is unrelated to the family and is largely self supporting, receiving funds from the State of California for her college expenses. Parents give her \$100 to \$150 per month in spending money and she resides with them on holidays, weekends, and school breaks.

⁴ Official notice is taken that for 2014, 400 percent of the FPL for a family of four is \$95,400.

Claimant did not appeal Service Agency determination to terminate his insurance co-payments.

8. Parents' subsequently renewed their request for Service Agency to fund Claimant's insurance co-payment. Service Agency reviewed parent's request and in a Notice of Proposed Action (NPA) dated April 10, 2014, again informed parents that they were not eligible for co-payment funding. Service Agency relied on parents' 2012 income information and again used the 2013 FPL tables for a family of three.

9. After issuing its 2014 NPA and receiving Claimant's FHR, Daniela Santana Service Agency Fair Hearing Manager (Santana), met with mother to consider whether an exemption under section 4659.1 applied. Mother informed Santana that father would lose his job effective the end of June 2014. This would cut the family income in half. The family carries a first and second mortgage that is approximately \$5800 per month. Other expenses include a \$30,000 student loan, taken out so that father could complete his doctoral degree in 2015. Father is currently seeking a position at the same or equivalent level as his current position, but has been unsuccessful to date. During the hearing, mother testified that she has been informed that her job may terminate effective June 2015 and that she is currently looking for other employment. Mother contends that the family will be unable to continue to pay for Claimant's ABA co-payment and that mother is fearful that they will lose their home if father does not find a new position.

10. Santana testified that she considered the expected loss in income and nonetheless concluded that Claimant was not eligible for insurance co-payment under one of the exceptions specified in section 4659.1. She noted that despite parents' loss of income, their income still exceeded 400 percent of the FPL. She also testified that she had not been made aware that mother might lose her job in 2015, but that was a long time off and would not impact her opinion that Claimant does not come within one of the exceptions allowing for funding for his insurance co-payment. She noted that parents could reapply for funding if their financial situation changes again.

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a regional center decision. (§§ 4700-4716.)

2. The standard of proof in this case is a preponderance of the evidence, because no applicable law or statute (including the Lanterman Act) requires otherwise. (Evid. Code § 115.) Because Claimant is requesting a new service, he bears the burden of proof. In seeking government benefits, the burden of proof is on the person asking for the benefits. (See, *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).)

3. The Lanterman Act sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. (See §§ 4640 et seq.) As the California Supreme Court explained in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, the purpose of the Lanterman Act 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." In addition to assisting consumer's and their families "in securing those services and supports which maximize opportunities and choices for living, working, learning, and recreating in the community. . . [e]ach regional center design shall reflect the maximum cost-effectiveness possible and shall be based on a service coordination model." (§ 4640.7.)

4. Under the Lanterman Act, a consumer's needs and the services and supports required to achieve the consumer's goals are identified as part of the individual program planning process. (§4646 et seq.)

5. The IPP and the provision of supports and services is intended to be "centered on the individual and family[,] . . . take into account the needs and preferences of the individual and family, where appropriate[,] . . . 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." (§§ 4646, subd. (a), 4646.5.) The IPP "is developed through a process of individual needs determination," should involve the consumer and his parents, and should be prepared jointly by the planning team. (§ 4646 subd. (b).) "Decisions concerning the consumer's goals, objectives, and services and supports that will be included in the consumer's individual program plan and purchased by the regional center or obtained from generic agencies shall be made by agreement between the regional center and the consumer . . . at the program plan meeting." (§ 4646, subd. (d); see also §§ 4646.7, 4648.) The program planning team may meet again if an agreement is not reached. (§ 4646, subd. (d).) If the parties are unable to reach an agreement, the consumer or his authorized representative may request a fair hearing. (§§ 4700 et seq.)

6. While a consumer and his parents' preferences and desires regarding goals and objectives and services and supports are to be given consideration in the planning process, regional centers are not authorized to purchase any and all services a consumer or his family may desire. (See §§ 4640.7, 4646, 4646.4, 4646.5, 4659, 4686.2.) Regional center design must "reflect the maximum cost-effectiveness possible" (§ 4640.7, subd. (b).)

7. When purchasing services pursuant to an IPP, regional centers must ensure:

(1) Conformance with the regional center's purchase of service policies, as approved by the department [of developmental services] pursuant to subdivision (d) of Section 4434.

(2) Utilization of other sources of services and funding as contained in Section 4659.

(3) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities

(§ 4646.4, subd. (a).)

8. Regional Centers are also required to "identify and pursue all possible sources of funding" from governmental entities such as Medi-Cal, and private entities such as insurers. (§ 4659, subd. (a).) Except in certain circumstances not applicable in this case, section 4659 provides that:

(c) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional centers shall not purchase any service that would otherwise be available from Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, In-Home Support Services, California Children's Services, private insurance, or a health care service plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage. . . .

(d)(1) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, a regional center shall not purchase medical or dental services for a consumer three years of age or older unless the regional center is provided with documentation of a Medi-Cal, private insurance, or a health care service plan denial and the regional center determines that an appeal by the consumer or family of the denial does not have merit.

9. In pertinent part, section 4659.1 provides that effective July 1, 2013, regional centers may fund insurance co-payments only when 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).

10. Section 4656.1, subdivision (c) contains several exemptions to the prohibition against funding insurance co-payments for a service identified in the consumers IPP, where the family's or consumer's income exceeds 400 percent of the federal poverty level, the service is necessary to successfully maintain the consumer at home, and the parents demonstrate one or more of the following:

- (1) The existence of an extraordinary event that impacts the ability of the parent, guardian, or caregiver to meet the care and supervision needs of the child or impacts the ability of the parent, guardian, or caregiver, or adult consumer with a health care service plan or health insurance policy, to pay the copayment or coinsurance.
- (2) The existence of catastrophic loss that temporarily limits the ability to pay of the parent, guardian, or caregiver, or adult consumer with a health care service plan or health insurance policy and creates a direct economic impact on the family or adult consumer. For purposes of this paragraph, catastrophic loss may include, but is not limited to, natural disasters and accidents involving major injuries to an immediate family member.
- (3) Significant unreimbursed medical costs associated with the care of the consumer or another child who is also a regional center consumer.

11. In light of Factual Findings 1 through 10 and Legal Conclusions 1 through 10, Claimant has failed to meet his burden of demonstrating that he qualifies for an exemption that would permit the Service Agency to fund his insurance co-payments. There is no evidence that Claimant's ABA service "is necessary to successfully maintain the consumer at home." Mother testified that the service is beneficial to Claimant. Service Agency does not dispute this. However, nothing in the record indicates that Claimant would not be able to continue to live at home if his ABA service are reduced or eliminated due to financial hardship. In fact, Claimant receives four of his six hours of weekly ABA services in settings other than his home, and those hours appear to be related primarily to improving his social relationships. He also receives ABA services through his school district.

12. Moreover, to find an "extraordinary event" sufficient to establish an exemption under Section 4659.1, subdivision (c)(1), there must be an unusual or remarkable occurrence that affects the family's ability to care for a child or make the co-payment. While it is not necessary that a family's income fall below 400 percent of the FPL in order to qualify for an exemption under subdivision (c)(1), the potential loss of father's income is not "an extraordinary event that impacts the ability of the parent, . . . to meet the care and supervision needs of the child or impacts the ability of the parent, to pay the copayment." Even without father's income, the family income will continue to exceed 400 percent of the FPL. There is insufficient evidence to show that the family will experience an "extraordinary event" that would require the Service Agency to pay Claimant's insurance co-payment.

13a. Finally, for purposes of applying the FPL tables, there is no evidence that Claimant is a member of a family of five rather than a family of four. Mother contends that the young adult "foster" daughter whom the family has offered emotional support and some financial assistance is a member of the family for purposes of applying the FPL tables.

Neither federal law or state law or regulations define the term “family” as that term is used in establishing the FPL or its application to Section 4659.1. In order to ascertain the meaning of family as that term applies to the FPL tables, consideration is given to the definition of related terms found in federal and state laws and regulations. For example, federal law defines the term dependent for purposes of calculating federal taxes. A dependent may include a foster child when that child “is placed with the taxpayer by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction.” (26 U.S. Code § 152, subd. (f)(1)(C)). Here there is no evidence that the young woman was placed by one of the specified agencies and thus she does not appear to meet the federal definition of dependent under the Internal Revenue Code.

13b. Moreover, she does not appear to be a member of the family or household as those terms are used in the family cost participation (§ 4783), and the parental fee for service (§§ 4782, 4784) programs, both established by the legislature to establish fees and costs for parents of minor children receiving regional center funding for certain programs and services. For instance, under California’s family cost participation program which establishes a fee schedule for respite, day care, or and camping services, a “person living in the family home is any person who depends on the gross annual income of the parents for more than one-half of his/her support.” (Cal. Code of Reg. tit. 17, § 50253, subd. (a).)⁵

13c. Similarly, under California’s parental fee program, which establishes fees for the residential placement of minor children, an eligible dependent is defined as: “Any person who depends on the gross family income for more than one-half of his or her support shall be considered an eligible dependent provided such person’s income, other than the earned income of a minor child living at home, is reported and included in the gross family income. Provided however, that a child with developmental disabilities who is living in a community placement or residing in a state hospital shall be considered an eligible dependent regardless of the extent of his dependency on gross family income. Provided further, that a parent who has remarried and the stepparent shall be considered as one eligible dependent, and not two, for the purpose of computing the parental fee.” (CCR § 50209). In Claimant’s case, the young woman attends college full time. Claimant’s family provides \$100 to \$150 per month in spending money and supports the woman when she is home from college. Otherwise, the woman is supported by state scholarships and/or grants. There is insufficient evidence to find that she is member of Claimant’s family for purposed of calculating Claimant’s parents’ income under the FPL tables.

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⁵ All further references to the California Code of Regulation, title 17, are to CCR.

ORDER

Claimant's appeal from Service Agency decision to deny funding for Claimant's insurance co-payment for ABA therapy is denied.

Dated: June 15, 2014

DEBORAH M. GMEINER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

UNDER THE LANTERMAN DEVELOPMENTAL DISABILITIES SERVICES ACT, THIS IS A 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.