

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Due Process Request of:

PETITIONER,

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Respondent.

OAH No. 2015110726

California Early Intervention Services
Act (Gov. Code, § 95000 et seq.)

DECISION

Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on December 9, 2015, in Pomona. The record was closed and the matter submitted for decision at the end of the hearing.

Petitioner, who was present, was represented by his parents.¹ Daniela Santana, Program Manager, represented the San Gabriel/Pomona Regional Center (respondent).

ISSUES

1. Shall respondent provide funding for petitioner to receive speech therapy services?

2. Shall respondent reimburse petitioner's parents for insurance deductibles, co-payments or coinsurance expenses required by petitioner's health care plan?

EVIDENCE RELIED UPON

Documentary: Respondent's exhibits 1-6. Petitioner's exhibits 1-15.

Testimonial: Daniela Santana, Program Manager. Petitioner's mother.

¹ The names of petitioner and his family are omitted to protect their privacy.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Petitioner is an adorable 26-month-old boy who is a consumer of respondent's Early Start program² due to hypotonia³ and global developmental delays.

2. A. On October 6, 2015, petitioner's mother requested respondent to provide financial assistance to help the family pay for deductibles, co-payments or coinsurance payments required by the family's health insurance policy that covers petitioner's medical services and therapies.

B. By a notice of proposed action dated October 23, 2015, respondent denied the request, advising petitioner's mother that the family's gross annual income made them ineligible for such assistance and that the information provided did not show that one of the three exceptions to the income limit applied.

3. A. On November 4, 2015, petitioner's mother requested respondent to provide funding for her son to receive speech therapy services.

B. By a notice of proposed action dated November 5, 2015, respondent denied the request, advising petitioner's mother that state law prohibited it from providing the funding because petitioner's family had healthcare insurance that could pay for the requested service.

4. A. On November 19, 2015, petitioner's mother submitted a Due Process Hearing Request to appeal respondent's denial of the two funding requests described above.

B. The Due Process Hearing Request also contained a request for "backpay for all out of pocket costs incurred from the time [petitioner] became a client at SGPRC." At the commencement at the hearing, the ALJ sustained respondent's objection and declined to include this as an issue to be decided in this case for lack of jurisdiction. The family had not requested such reimbursement before submitting the Due Process Hearing Request. (See Welf. & Inst. Code, § 4710, subd. (b); Cal. Code Regs., tit. 17, § 52172, subd. (a)(2).)

² "Early Start" is another name for the California Early Intervention Services Act. (Gov. Code, § 95000 et seq.)

³ Hypotonia is a state of low muscle tone, often involving reduced muscle strength. It is not a specific medical disorder, but a potential manifestation of many different diseases and disorders that affect motor nerve control by the brain or muscle strength.

Petitioner's Insurance Benefits and Expenses

5. Petitioner has experienced delays in his gross motor, fine motor and overall development. As a result, he has required a number of medical and therapeutic services, including visits to several different physicians, genetic and cardiology testing, orthopedic braces for his legs, occupational therapy (OT) and physical therapy (PT).

6. A. Many of petitioner's services and therapies are covered by his family's health insurance plan, which is provided through his mother's employer. However, the family's health insurance plan has a high deductible threshold and also requires various co-payments. The family has had difficulty paying those out-of-pocket costs and must often times use credit cards for payments, especially for charges early in the year before the family deductible threshold is reached.

B. In 2014, the family's out-of-pocket costs associated with petitioner's care were as follows:

i. health insurance premiums	\$ 3,563.76
ii. daycare costs	\$14,400.00
iii. co-payments, deductibles	\$ 5,281.59
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Total	\$23,245.35

C. In 2015, the family's out-of-pocket costs associated with petitioner's care have been as follows:

i. health insurance premiums	\$ 3,562.32
ii. daycare costs	\$14,400.00
iii. co-payments, deductibles	\$ 5,474.13
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Total	\$23,436.76

D. For 2016, petitioner's mother estimates these costs will be similar to those in 2014 and 2015.

7. Both of petitioner's parents work full-time. Nonetheless, they have advised respondent that they struggle financially to make the above-described expenditures, given the weight of petitioner's various needs and services, as well as the co-payments and expenses paid before the high deductible threshold is met each year. They have asked respondent to reimburse them for the annual co-payments, deductibles and coinsurance payments related to petitioner's care and services.

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8. As evidenced by their federal income tax return for 2014, the family's annual gross income is well above 400 percent of the federal poverty level for a family of three. According to the applicable law discussed in more detail below, a family is ineligible for insurance payment financial assistance if their annual income exceeds the threshold limit, barring application of one of three exceptions.

9. During the hearing, petitioner's mother pointed to the family's annual expenses described in Factual Finding 6 and argued that such are significant enough to constitute one of the three exceptions to the annual income eligibility threshold.

Petitioner's Speech Therapy Needs

10. Petitioner began receiving early intervention services from Comprehensive Autism Related Education (CARE) in August 2014. Those services were provided both in-home and at petitioner's daycare facility. In CARE's progress report issued in July 2015, a delay of 50 percent was noted in petitioner's expressive communication skills. Since the family was concerned that petitioner was not yet using words, CARE recommended petitioner be evaluated for speech services.

11. On August 5, 2015, petitioner was evaluated by Speech/Language Pathologist Donna Gerry. In her report from that evaluation, SLP Gerry noted delays in petitioner's language comprehension and language expression. As a result, she recommended that petitioner be provided with speech/language therapy services in an amount to be determined by respondent.

12. On August 13, 2015, the parties met in order to review petitioner's individualized family service plan (IFSP). The resulting IFSP document notes petitioner's speech delays, SLP Gerry's recommendation for speech therapy, and a few goals related to petitioner's ability to use words. Respondent's staff advised the family to pursue insurance funding for speech therapy and that a denial letter from insurance must be provided before respondent would consider providing that funding.

13. As a result of the IFSP review meeting, respondent forwarded SLP Gerry's evaluation report to petitioner's primary care physician, Dr. Maria Gokey, and requested that she help facilitate the family's use of their health insurance benefits for speech therapy. On September 14, 2015, Dr. Gokey issued a written prescription of speech therapy for petitioner to respond to his "delay in language comprehension and language expression."

14. A. On November 18, 2015, petitioner was seen at the UCLA Medical Center by Dr. Jeffrey H. Yang and Resident Physician Taryn Kilmer to determine his need for speech therapy services.

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B. In a report from that evaluation, it was noted that petitioner had a communication delay, which was more significant than his problem-solving deficits. UCLA staff recommended the provision of speech therapy services “as soon as possible.” No frequency of service was recommended.

15. During the hearing, respondent’s representative stipulated that petitioner needs speech therapy services. However, respondent maintains that the law requires that the family’s health insurance must first be tapped to fund such a service, and that the family had not yet utilized available insurance benefits.

16. Petitioner’s mother researched her health insurance carrier’s resources to find speech therapy providers in her local area. From the list of local providers she compiled, none provided speech therapy services to children (one potentially promising provider in Pasadena did not return two messages left by petitioner’s mother). This information was provided to respondent after it issued the notice of proposed action denying the funding request.

17. A. In September and October 2015, petitioner’s mother spoke about this situation with petitioner’s service coordinator (SC), Laura Cozens.

B. Some out-of-network providers were mentioned, such as Expressive Connections and Every Child Achieves. However, it is not certain how much of those services will be paid by insurance, and one of the providers is located in North Hollywood, which is too far from home. Those providers are not feasible options.

C. During one conversation, SC Cozens advised petitioner’s mother that the family’s insurance plan would cover speech therapy services provided by Neurotransition, which is located in Monrovia. Petitioner’s mother advised SC Cozens that Monrovia (the civic center of which is located approximately 10 miles from the civic center of petitioner’s hometown) is “too far.” This conversation is reflected in respondent’s notice of proposed action. During the hearing, petitioner’s mother did not elaborate.

D. During other conversations, SC Cozens advised petitioner’s mother that the family’s insurance plan would cover speech therapy provided by Mi Sueno Speech Therapy, which is located in Arcadia. Petitioner’s mother advised SC Cozens that the Arcadia location (about 11.5 miles from petitioner’s home) is “far from my residence.”

18. A. The family believes the providers in Arcadia and Monrovia are too far away to be feasible options.

B. The family’s chief complaint with the Arcadia provider (and presumably the one in Monrovia) is that the drive would take over 20 minutes and would not be logistically conducive to the parents’ work schedule and obligations to

drive petitioner to his other visits and therapies. Like most families of developmentally delayed and disabled children, petitioner's family has a very busy schedule of work and family commitments.

C. In addition, the Arcadia location apparently only conducts 30 minute sessions. Since petitioner's mother is interested in her son receiving two hours per week of speech therapy, she believes four visits would be needed, which would exacerbate the situation. None of those who have evaluated petitioner have specifically concluded the number of hours per week of speech therapy needed. The amount specified by petitioner's mother is based on her own research.

D. Petitioner's mother testified that taking petitioner to the Arcadia location would be hard on her work schedule and, after factoring in the family's schedule, it would be "impossible for their work and life balance."

E. While taking petitioner to the Arcadia or Monrovia locations would be an inconvenience, at the very least, and perhaps a difficult challenge to the family's work and life balance, it was not established by a preponderance of the evidence that doing so would be impossible, insurmountable, impracticable or unfeasible. Based on the information presented, petitioner's mother has a flexible work schedule and an employer who has provided her with several leave days this year. No evidence was presented indicating that taking on this challenge would impair or endanger either parent's job or the family's integrity.

19. The most promising solution is located in Pasadena at the Center For Developing Kids (CFDK). That facility has indicated that it will hire a new speech pathologist in January 2016 and that petitioner is at the top of the waiting list for those services once commenced. This provider is located where petitioner now goes for daycare, which would address the family's distance and time concerns. This provider apparently will accept the family's insurance.

LEGAL CONCLUSIONS

1. This case is governed by the Individuals with Disabilities Education Act (IDEA), which is federal law (20 U.S.C. § 1431 et seq.); and the California Early Intervention Services Act (CEISA) (Gov. Code, § 95000 et seq.), which is state law that supplements the IDEA. Each act is accompanied by pertinent regulations.

2. The burden of proof in an administrative hearing under the IDEA is placed upon the party seeking relief. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62; see also, 34 C.F.R. § 303.425(a).) In this case, petitioner is seeking funding respondent has not before agreed to pay. As the party seeking relief in this matter, petitioner bears the burden of proof. (Factual Findings 1-4.)

3. Under state law, the standard of proof in administrative matters is generally the preponderance of the evidence, unless another law or statute requires otherwise. (Evid. Code, § 115.) In this case, since the IDEA and CEISA are silent on this issue, the standard of proof here is the preponderance of the evidence.

Speech Therapy Services

4. Early intervention services are defined as those services “designed to meet the developmental needs of each eligible infant or toddler and the needs of the family related to the infant or toddler’s development.” (20 U.S.C. § 1432(4)(A); 34 C.F.R. § 303.12(a)(1).) Early intervention services related to a speech and language pathology are expressly provided for, including services for the habilitation, rehabilitation, or prevention of communicative or oropharyngeal disorders and delays in the development of communication skills. (34 C.F.R. § 303.12(d)(4).) In this case, respondent does not dispute that petitioner needs speech therapy services and it is abundantly clear from the evidence that he does. The frequency of such services, however, was not established.

5. A. Notwithstanding any other law or regulation to the contrary, private health insurance for medical services or a health care service plan identified in the individualized family service plan, other than for evaluation and assessment, shall be used in compliance with applicable federal and state law and regulation. (Gov. Code, § 95004, subd. (b)(1).)

B. When compliance with the above described law would result in any delays in the provision of early intervention services, a regional center may be authorized to use a special service code that allows immediate procurement of the service. (Gov. Code, § 95004, subd. (b)(2).)

6. A. Based on the aforementioned law, respondent correctly required the family to first use their health insurance benefits in funding the required speech therapy services for petitioner. Although a number of local service providers ultimately were not available or feasible, respondent still identified two qualified providers who would accept the family’s insurance. While those two providers were not ideal for the family in terms of their geographical locations, it was not established that they are not feasible or otherwise available.

B. The delay in providing the service to petitioner so far has been caused by the search for a provider who will accept the family’s insurance, as well as the family’s reluctance to use the Arcadia and Monrovia providers, which is understandable. However, the reason for the delay is not one that can trigger the savings provision of Government Code section 95004, subdivision (b)(2), discussed above. More importantly, petitioner’s family has not identified any other speech therapy provider geographically closer or more logistically feasible than CFDK, which hopefully will be available next month. Thus, even if the savings provision of

subdivision (b)(2) were to be used, the ALJ would have no way to enforce it, as no more practicable provider was identified. By the time one could be found and an initial assessment completed, it is likely that CFDK will be available.

C. Hopefully, CFDK will be available next month and take the family's insurance. In the meantime, the family is encouraged to utilize the providers in Arcadia or Monrovia. If they do so, and thereafter experience problems such as to demonstrate that those providers are not feasible, the family is encouraged to immediately reiterate their request for respondent to fund speech therapy services should CFDK turn out to not be available. (Factual Findings 10-19.)

Reimbursing Insurance Payments

7. A. Welfare and Institutions Code section 4659.1, subdivision (a), provides that if "a service or support provided pursuant to a consumer's . . . individualized family service plan pursuant to the [CEISA] . . . is paid for, in whole or in part, by the health care service plan or health insurance policy of the consumer's parent . . . the regional center may, when necessary to ensure that the consumer receives the service or support, pay any applicable copayment, coinsurance, or deductible associated with the service or support," under specified conditions.

B. Absent the exceptional circumstances discussed below, a regional center may fund such insurance expenses if various factors are met, including that the family's annual gross income is less than 400 percent of the federal poverty level. (Welf. & Inst. Code, § 4659.1, subd. (a)(2).)

C. Pursuant to section 4659.1, subdivision (c), if a family's annual gross income exceeds 400 percent of the federal poverty level, the regional center may still provide insurance funding if (1) the service or support in question is necessary to successfully maintain the child at home, and (2) there exists either an extraordinary event that impacts the parents ability to meet the care and supervision needs of the child (subd. (c)(1)); a catastrophic loss that creates a direct economic impact on the family (subd. (c)(2)); or "significant unreimbursed medical costs associated with the care of the consumer or another child who is also a regional center consumer" (subd. (c)(3)).

D. The word "significant," as used in section 4659.1, subdivision (c)(3), is not otherwise defined. However, "significant" is commonly defined as "sufficiently great or important to be worthy of attention; noteworthy." (See, e.g., www.oxforddictionaries.com/definition/english/significant.)

8. A. In this case, the parties agree that the family's annual gross income exceeds the threshold for a family of their size, and that the family is not entitled to insurance financial assistance unless one of the three exceptions applies.

B. It was not established that either exception applies. As a threshold issue, it was not necessarily established that the failure of respondent to provide the insurance funding will jeopardize petitioner's ability to remain in the family home.

C. Moreover, the family did not establish that the "significant unreimbursed medical costs" exception applies. The family includes daycare costs in their total amount of expenses, but they are not "medical costs" and therefore do not qualify. The same is true for the monthly insurance premiums the family must pay. Not only are they not medical costs, but it is clear from section 4659.1 that regional centers may only provide financial assistance for deductibles, co-payments and coinsurance, but not the underlying premiums. What is left is a little more than \$5,000 in unreimbursed medical expenses associated with petitioner's care, which represents approximately three percent of the family's annual gross income. While that amount is not trivial, it cannot be concluded that it is sufficiently great, important to be worthy of attention, noteworthy or otherwise significant. If it were, then almost any family of a child with developmental disabilities or delays would meet the "unreimbursed medical costs" exception, which is not the intent behind the law. (Factual Findings 5-9.)

ORDER

Respondent need not provide funding for petitioner to receive speech therapy services at this time.

Respondent need not reimburse petitioner's parents for insurance deductibles, co-payments or coinsurance expenses required by petitioner's health care plan.

DATED: December 16, 2015

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ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings