

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Claimant,

vs.

REGIONAL CENTER OF THE EAST BAY,

Service Agency.

OAH No. 2015030822

DECISION

Administrative Law Judge Perry O. Johnson, Office of Administrative Hearings, State of California, heard this matter in Oakland, California, on May 18, 2015.

Claimant was represented by his mother.¹

Fair Hearing and Mediation Specialist Ms. Mary Dugan represented Regional Center of the East Bay (service agency).

On May 18, 2015, the parties were deemed to have submitted the matter for decision and the record closed.

ISSUE

Should service agency be required to fund insurance co-payments² for claimant's Applied Behavioral Analysis (ABA)³ services from mid-April 2014 through the current year?

¹ Claimant's name is omitted throughout this Decision to protect his privacy.

² Copayment is a payment by an insured person to a medical care provider each time a medical service is given and then accessed.

³ ABA is a method for teaching individuals with autism a wide variety of skills in order to reduce problem behaviors.

FACTUAL FINDINGS

1. Claimant is an 11-year-old male consumer, who qualifies for regional center services by reason of a diagnosis of autism.

Because of autism, claimant is impaired insofar as exhibiting age-appropriate social skills, using pragmatic communication and controlling his behavior. Before gaining assistance through ABA, claimant experienced dramatic temper tantrums, which are characterized as “meltdowns.” He has exhibited self-injurious behaviors, which include hitting his head with his fists, screaming, yelling and voicing threats of suicide.

Claimant is enrolled in a local public elementary school, and receives Speech, Social Skills and Occupational therapies. He participates in the school’s Autism Inclusion program and claimant benefits from attention from a para-educator classroom aide, who devotes special attention to claimant and other children in claimant’s class.

Claimant plays the trumpet and he has an interest in learning to play the piano. He exhibits extraordinary talent and skills in music. Claimant expects to enroll at the Oakland School of the Arts in the Fall of 2015.

2. Claimant lives at home with his mother and an older sister, who is not impaired by a developmental disability. Claimant’s sister spends most of the year enrolled in a college located in the State of Massachusetts. Claimant’s mother’s domestic partner is also a resident in the family home.

3. Service agency agrees that claimant has attained great benefits from the provision of ABA services, which have been provided to claimant since a date before 2014 when he and his mother moved from Los Angeles to the San Francisco Bay Area. Since approximately April 18, 2015, a provider called “Ed Support Services, LLC” has delivered ABA services to claimant at a rate of three to five sessions each week.

4. Anthem Blue Cross is claimant’s family’s health/medical care plan insurer, and that company is the primary payer for the cost related to claimant’s receipt of ABA services.

5. Effective July 1, 2013, the laws governing regional center funding altered service agency’s ability to fund co-payments. Welfare and Institutions Code section 4659.1, allows regional centers to continue paying co-payments if, among other things, the family has an annual gross income that does not exceed 400 percent of the federal poverty level. If the family’s income exceeds 400 percent of the federal poverty level, the regional centers may fund co-payments only if the consumer’s family can establish one of three exceptions: (1) the existence of an extraordinary event which impacts the ability of the parent to pay the copayment; (2) the existence of catastrophic loss (such as that from a natural disaster or accident involving major injuries) that temporarily limits the parent’s ability to pay and

creates a direct economic impact on the family; or (3) significant unreimbursed medical costs of the consumer's care.

6. By a letter, dated March 5, 2015, service agency first informed claimant's parents that the subject regional center would not fund the ABA co-pays relating to claimant. Also, on March 5, 2015, service agency issued a Notice of Proposed Action that cited the Welfare and Institutions Code section that prompted the denial of a request by claimant's parents for "ABA co-pay reimbursement." And, on April 3, 2015, service agency dispatched a letter, after an informal meeting with claimant's mother that confirmed service agency's inability to bear the costs of the co-pay for ABA services for claimant.

7. On March 13, 2015, service agency received from claimant's mother a Fair Hearing Request.

Service's Agency's Evidence

8. Ms. Liz Vollmer offered credible evidence at the hearing of this matter.

Ms. Vollmer is service agency's Case Manager Supervisor for claimant.

As part of her duties and responsibilities for service agency, Ms. Vollmer examines consumers' eligibility for service agency to pay part of the costs of ABA services.

9. Ms. Vollmer examined the ABA services extended to claimant. She also reviewed claimant's mother's income tax return and other income related statement as to the family's adjusted gross income. When comparing the records of the claimant's mother's income with guidelines and charts prepared by various authorities, Ms. Vollmer concluded that the family's income exceeded 400 percent of the federal poverty line. Hence, she informed claimant's mother that the law precluded service agency from reimbursing co-pay bills relating to the cost of ABA services for claimant.

Very importantly, Ms. Vollmer studied the bills, statements of cost and insurance reimbursement, which claimant's parent filed with service agency, regarding a claim that claimant's family had incurred, and will prospectively incur, costs relating to an "extraordinary event that impacts the ability of the parent . . . to meet the care and supervision of the child . . . or impacts the ability of the parent . . . to pay the copayment or coinsurance." And, Ms. Vollmer determined that claimant's parents failed to provide substantial evidence to sustain any exception under the law that warrants service agency to avoid applying the restrictions prescribed by Code section 4659.1.

10. At the hearing of this matter, service agency presented the 2013 Federal Poverty Level (FPL) Income Guidelines by Family Size. The guidelines set out a determination that for a family of four persons, the 400 percent FPL is an amount of \$79,160.

For 2013 Claimant's family had an adjusted gross income at \$89,915. Accordingly, claimant's family had income during 2013 that was \$13,755 above the FPL, which is more than 454 percent above the FPL. (Of special note is the fact that claimant's mother has a domestic partner, who is employed, according to service agency's records. But, service agency did not make an inquiry regarding the adjusted gross income of the domestic partner of claimant's mother. Nor did service agency ask for proof of the contributions made to the household by claimant's mother's domestic partner.)

11. Ms. Vollmer was reasonable in rendering her determination that claimant's mother's policy of medical/health insurance with Anthem Blue Cross impacts the family with out-of-pocket upper limit expenses of \$3,700 for the calendar years of 2014 for the ABA services for claimant. Claimant did not offer compelling evidence that the family has such extraordinary event that impacts the ability of claimant's mother to meet the care and supervision needs of claimant or impacts the ability of claimant's mother to pay the copayment or coinsurance for the either the past year or the current year.

Claimant's Evidence

12. Claimant's mother provided a compelling and heart-felt presentation at the hearing of this matter.

13. Claimant's mother works for a non-profit corporation. Claimant's father resides in Los Angeles, and according to records, the man is unemployed. So claimant's mother is surprised that her income does not qualify the family for service agency's assistance by funding the ABA service sessions, which are essential for claimant's care and support.

14. Claimant's sister is enrolled in Mount Holyoke College, which is private liberal arts institution that is devoted to educating young women. Mount Holyoke College is located in the State of Massachusetts. The college is part of a loose association of seven liberal arts colleges in the Northeastern United States that are historically women's colleges, namely Barnard College, Bryn Mawr College, Mount Holyoke College, Radcliffe College, Smith College, Vassar College, and Wellesley College.

Claimant's mother pays thousands of dollars each year toward the college education for the sister of claimant. Claimant's sister, however, is entering her final year in college in the Fall.

15. Ed Support Services, LLC, which is the provider of claimant's ABA services, has not been paid by claimant's mother for its provision of service in an amount.

Claimant has incurred a co-pay debt to Ed Support Services, LLC, for its services. The service provider has billed co-pay amounts to claimant's account at a rate of \$45 per session. Through the end of 2014, claimant owed \$3,733.28. And through early April 2015, an additional \$1,496 had been incurred. Hence, at the time of the hearing of this matter,

claimant had a debt of approximately \$5,230 owed to Ed Support Services, LLC, for the provision of ABA services.

16. Claimant's mother did not present at the hearing of this matter sufficient and substantial documentary evidence to establish that the family has been burdened by "the existence of an extraordinary event that . . . impacts the family's ability . . . to pay the copayment, coinsurance, or deductible " for claimant's receipt of ABA services.

The records offered by claimant's mother include a Mount Holyoke College "payment summary" addressed in the name of claimant's sister showing a balance due of \$4,082, as well as debt to "World Learning" for \$18,900 for the young woman's "study abroad" to the South American county of Bolivia, which also is a bill in the name of the sister of claimant. In addition, claimant's mother presented a bill for her personal medical costs in the amount of \$1,715.75. But, there is no proof that those expenses constitute "an extraordinary event (or events)."

Although claimant's mother compellingly described the college expenses paid by her for her daughter's college education, the evidence is not clear that such costs can be considered the existence of "an extraordinary event." Moreover, the documents offered do not establish that complainant adult sister's college tuition and other educational expenses are being solely borne by claimant's mother.

17. Claimant's mother argued the phrase "extraordinary events that impact the ability to pay" is too vague and is so undefined that service agency may arbitrarily apply its meaning so as to capriciously exclude a parent's debt for another child's college expense from being considered as an extraordinary event so as to gain the benefit of the exemption under Code section 4659.1, subdivision (c)(1). But, claimant's mother was not persuasive with the argument.

Ultimate Finding

18. Based on the totality of the evidence, claimant did not establish that his family meets any one of the statutory exemptions that would allow service agency to bear the costs of the insurance co-payments for claimant's Applied Behavioral Analysis services.

LEGAL CONCLUSIONS

1. A regional center seeking to change a support or a service previously approved has the burden to demonstrate its proposed change is correct. (Evid. Code, § 500.)

As no other statute or law specifically applies to the Lanterman Act, the standard of proof in this case is preponderance of the evidence. (Evid. Code, § 115.)

In this case, service agency bears the burden of establishing that it is not required to continue paying the copayments for claimant's ABA in light of Welfare and Institutions Code section 4659.1. Claimant, in turn, bears the burden of establishing that he qualifies under the exceptions set forth under Welfare and Institutions Code section 4659.1, subdivision (c).

2. Welfare and Institutions Code section 4659.1, provides in pertinent part:

(a) If a service or support provided pursuant to a consumer's individual program plan . . . is paid for, in whole or in part, by the health care service plan or health insurance policy of the consumer's parent, guardian, or caregiver, the regional center may, when necessary to ensure that the consumer receives the service or support, pay any applicable copayment or coinsurance associated with the service or support for which the parent, guardian, or caregiver is responsible if all of the following conditions are met:

(1) The consumer is covered by his or her parent's, guardian's, or caregiver's health care service plan or health insurance policy.

(2) The family has an annual gross income that does not exceed 400 percent of the federal poverty level.

(3) There is no other third party having liability for the cost of the service or support, as provided in subdivision (a) of Section 4659 and Article 2.6 (commencing with Section 4659.10).

¶ . . . ¶

(c) Notwithstanding paragraph (2) of subdivision (a) . . . , a regional center may pay a copayment or coinsurance associated with the health care service plan or health insurance policy for a service or support provided pursuant to a consumer's individual program plan . . . if the family's or consumer's income exceeds 400 percent of the federal poverty level, the service or support is necessary to successfully maintain the child at home or the adult consumer in the least-restrictive setting, and the parents or consumer 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, . . . 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.

(d) The parent, guardian, or caregiver of a consumer . . . shall self-certify the family's gross annual income to the regional center by providing copies of W-2 Wage Earners Statements, payroll stubs, a copy of the prior year's state income tax return, or other documents and proof of other income.

[¶] . . . [¶]

(g) Regional centers shall not pay health care service plan or health insurance policy deductibles.

3. An important principle of statutory interpretation provides that an adjudicator in contemplating the meaning of a statute must attempt to ascertain the ordinary, usual meaning of a word or words set out in the legislature's language. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111.) Hence, "extraordinary" has a definition of "out of the ordinary; exceeding the usual, average, or normal measure or degree; beyond or out of the common order or rule; not usual, regular, or of a customary kind; remarkable; uncommon, rare." (Black's Law Dictionary, revised 4th Ed. (1973).)

Although service agency has no policy statement, or statutory provision, that explicitly defines the phrase "extraordinary events" so as to meet the exemption in Code section 4659.1, subdivision (c)(1), appellate court decisions pertaining to other legal disputes have touched upon that which constitutes "extraordinary events." In *Wal-Mart Stores, Inc. v. Workers' Compensation Appeals Board* (2003) 112 Cal.App.4th 1435, the appellate court dealt with the Labor Code section 3208.3, subdivision (d)'s threshold requirement that a psychiatric injury is compensable in the instance of a "sudden and *extraordinary event*" for a worker injured during the first six months of employment with a particular employer. Such extraordinary event "is limited to [an] occurrence such as gas main explosions or workplace violence [namely,] the type of *event that would naturally be expected to cause psychic disturbances* even in a diligent and honest employee" with no pre-existing psychological

ailment or impairment. The *Wal-Mart Stores* decision did not view a store employee's job-related back injury as an extraordinary event that would permit the making of a psychiatric injury claim. And, in *Bayanjargal v. Workers' Compensation Appeal Bd.* (2006) 71.Cal. Comp. Cases 1829, a roofer's fall from a roof was *not determined* to be an "extraordinary event." (Emphasis added.)

There are regulatory provisions that use the term "extraordinary events." One such statute is found under the "Hospital Inpatient Services Reimbursement" provision of the Health Care Services regulations at California Code of Regulations, title 22. The section pertaining to peer group specific administrative adjustment, sets out that the "difference in costs between the provider and other providers in its peer group *due to extraordinary events beyond the provider's control such as fire, earthquake, flood, or similar unusual occurrence* with substantial cost effects shall be an appealable item." (Cal. Code Regs., tit. 22, § 51555, subd. (e).) (Emphasis added.)

The occurrence of events that are of the type expected to occur within a given setting has consistently been held not to be extraordinary events. So under reasonable use of the phrase "extraordinary event," when a parent, such as claimant's mother, incurs the expense of college tuition costs of another child, that expense can not be deemed to be "out of the ordinary" or "exceeding the usual" to come within the meaning of Welfare and Institutions Code section 4659.1, subdivision (c)(1).

Ultimate Determination

4. Claimant's family's adjusted gross income exceeds 400 percent of the federal poverty rate limit. Hence, service agency is precluded from reimbursing the co-pay costs for the ABA service expense that is not covered fully by his parent's medical insurance company, unless the family's situation fits within an exception listed in Welfare and Institutions Code section 4659.1.

Of the three exceptions under Welfare and Institutions Code section 4659.1, only one possibly applies to claimant in the view of claimant's mother. That subdivision (c)(1) concerns, "[t]he 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." The documentary evidence, however, does not show that the family has incurred such extraordinary expense to cause the exception, under Welfare and Institutions Code section 4659.1, to apply in this matter.

ORDER

Regional Center of the East Bay's denial of funding, or reimbursement, of the insurance co-payments for claimant's Applied Behavioral Analysis services is sustained. Claimant's appeal is denied.

DATED: May 29, 2015

_____/s/_____
PERRY O. JOHNSON
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.