

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

A.S.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH Case No. 2013010811

DECISION

This matter came on regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on June 18, 2013, in Bakersfield, California.

Mark Meyer, Program Manager, represented Kern Regional Center (Regional Center or Service Agency).

L.S.<sup>1</sup>, Claimant's mother, represented Claimant.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision.

ISSUE

Should Regional Center continue to fund the services provided by Holdsambeck

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<sup>1</sup> Initials have been used instead of family surnames to protect Claimant's and his family's privacy.

and Associates (Holdsambeck)?<sup>2</sup>

Should Regional Center continue to fund the services provided by Society for Disabled Children (SDC)?

## FACTUAL FINDINGS

1. Claimant is a five-year-old Service Agency consumer with a diagnosis of autism. He resides with his four siblings and his parents. He is scheduled to start school in the fall.

2. Claimant was made eligible for Regional Center services on March 17, 2011. His areas of major impairment were communication, learning, self-care, self-direction, and social functioning. The multidisciplinary team recommended an education program, speech follow-up, behavioral training, and social skills training. The team recommended review of school reports over time to determine continuing eligibility.

3. a. The individual program plan (IPP) prepared after a meeting on February 23, 2012, which contains Service Agency's and Claimant's family's agreement, sets forth specific objectives and goals, and the services and supports to achieve them, which include those at issue in this case. As noted in Objective number 2 (Claimant will continue to maintain good health during the next 12 months), Claimant has a speech deficit, a social skills deficit, and he is not toilet trained. He exhibits tantrums at home and needs

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<sup>2</sup> A third issue, the funding of Valley Achievement Center (VAC), had also been scheduled to be part of this hearing. After an incident at VAC, Claimant's existing vendor, Holdsambeck, took over providing the services previously provided by VAC. A separate Notice of Proposed Action issued regarding VAC, but because of the incident Claimant's mother no longer wishes to receive the services of VAC.

assistance with all activities of daily living. He is not ambulatory.

b. In support of Objective number 3 (Claimant will continue to receive appropriate education and will have an emphasis on social skills development during the next 12 months), Service Agency agreed to fund the VAC social skills and adaptive skills training pre-school program.

c. In support of Objective number 4 (Provided with four or less verbal prompts per attempt, Claimant will dress by learning to put on his socks independently at least one time per week by February 2013), Service Agency agreed to fund continence training, social skills training and adaptive skills training through Holdsambeck.

d. In support of Objective number 5 (Provided with verbal prompts as needed, Claimant will increase his speech and communication during the next 12 months) Service Agency agreed to fund speech services through SDC. Claimant is nearly non-verbal and his speech is not fully understood by others.

4. The new IPP, disputed in part by Claimant's family, sets forth the same or similar objectives and goals, sets forth Service Agency's position that new legislation requires private insurance or a public school to fund the services provided by VAC, Holdsambeck, and SDC, and Claimant's mother's desire to continue existing programs.

5. Claimant has been receiving services from Holdsambeck in accordance with the IPP agreement. Utilizing applied behavior analysis (ABA) and other techniques, it provides continence training, social skills training and adaptive skills training. If misbehaviors are detected, they are addressed. Claimant requires safety awareness training, and Holdsambeck provides some of its services in community settings, where Claimant can be taught about safety issues involving potential hazards such as cars. Claimant has been benefitting from the services provided by Holdsambeck, and has been making progress with toileting and daily living skills.

6. Claimant's family has private insurance with Kaiser Permanente (Kaiser). On April 16, 2013, Kaiser declined to approve a request for out-of-network funding for the services provided by Holdsambeck.

7. Kaiser's in-network provider is Easter Seals Disability Services (Easter Seals). Easter Seals has assessed Claimant, and is in the early stages of providing in-home ABA services. These services are focused on behavior management and do not involve social skills training or adaptive skills training.

8. Claimant has also been receiving the services of SDC in accordance with the IPP, and has benefitted from them. Claimant's therapist stated that Claimant is beginning to include final sounds on drill words and his mother noted that he is speaking more at home.

9. Service Agency issued nearly identical notices of proposed action with respect to both services at issue. As the reason for its proposed discontinuation of funding for the services provided by Holdsambeck, Service Agency wrote: "Regional Centers are prohibited from purchasing any service that would otherwise be available from private insurance/health care service plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage." (Service Agency Exhibit 3, at p. 3.) The notice regarding SDC services adds a reference to the services being otherwise available "through public education services." In each case, Service Agency cites Welfare and Institution Code<sup>3</sup> section 4659, subdivision (c), and Health and Safety Code section 1374.73 in support of its decision. Claimant's family filed timely requests for fair hearing, and the services remain in place pursuant to section 4715.

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<sup>3</sup> Unless otherwise stated, all further statutory references are to the Welfare and Institutions Code.

## LEGAL CONCLUSIONS

1. In enacting the Lanterman Developmental Disabilities Act, section 4500 et seq., the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (§ 4501.)

“Services and supports should be available to enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age. Consumers of services and supports, and where appropriate, their parents, legal guardian, or conservator, should be empowered to make choices in all life areas. These include promoting opportunities for individuals with developmental disabilities to be integrated into the mainstream of life in their home communities, including supported living and other appropriate community living arrangements. . . .” (*Id.*)

2. The Lanterman Act gives regional centers, such as Service Agency, a critical role in the coordination and delivery of services and supports for persons with disabilities. (§ 4620 et seq.) Thus, regional centers are responsible for developing and implementing individual program plans, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (§§ 4646, 4646.5, 4647, and 4648.)

3. Section 4512, subdivision (b), defines the services and supports that may be funded, and sets forth the process through which such are identified, namely, the IPP process, a collaborative process involving consumers and service agency representatives. Through this process, Claimant and Service Agency have determined that the services provided by Holdsambeck and by SDC constitute necessary and appropriate services to cost-effectively address Claimant’s developmental disability needs.

4. At issue in this case is the manner in which the agreed-to services are to be

funded. Section 4659, subdivisions (c) and (d), provides:

"(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. If, on July 1, 2009, a regional center is purchasing that service as part of a consumer's individual program plan (IPP), the prohibition shall take effect on October 1, 2009.

"(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. If, on July 1, 2009, a regional center is purchasing the service as part of a consumer's IPP, this provision shall take effect on August 1, 2009. Regional centers may pay for medical or dental services during the following periods:

"(A) While coverage is being pursued, but before a denial is made.

"(B) Pending a final administrative decision on the administrative appeal if the family has provided to the regional center a verification that an administrative appeal is being pursued.

"(C) Until the commencement of services by Medi-Cal, private insurance, or a health care service plan.

"(2) When necessary, the consumer or family may receive assistance from the

regional center, the Clients' Rights Advocate funded by the department, or area boards on developmental disabilities in pursuing these appeals."

5. Recent legislation requires private insurers to provide coverage for behavioral health treatment for autism, including ABA. Health and Safety Code section 1374.73, which was enacted pursuant to Senate Bill 946, provides, in pertinent part:

"(a) (1) Every health care service plan contract that provides hospital, medical, or surgical coverage shall also provide coverage for behavioral health treatment for pervasive developmental disorder or autism no later than July 1, 2012. The coverage shall be provided in the same manner and shall be subject to the same requirements as provided in Section 1374.72.

"(2) Notwithstanding paragraph (1), as of the date that proposed final rulemaking for essential health benefits is issued, this section does not require any benefits to be provided that exceed the essential health benefits that all health plans will be required by federal regulations to provide under Section 1302(b) of the federal Patient Protection and Affordable Care Act (Public Law 111-148), as amended by the federal Health Care and Education Reconciliation Act of 2010 (Public Law 111-152).

"(3) This section shall not affect services for which an individual is eligible pursuant to Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code or Title 14 (commencing with Section 95000) of the Government Code.

"(4) This section shall not affect or reduce any obligation to provide services under an individualized education program, as defined in Section 56032 of the Education Code, or an individualized service plan, as described in Section 5600.4 of the Welfare and Institutions Code, or under the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400, et seq.) and its implementing regulations.

"(b) Every health care service plan subject to this section shall maintain an adequate

network that includes qualified autism service providers who supervise and employ qualified autism service professionals or paraprofessionals who provide and administer behavioral health treatment. Nothing shall prevent a health care service plan from selectively contracting with providers within these requirements. . . .”

6. As set forth in Legal Conclusion numbers 1, 2, and 3, the Lanterman Act guarantees certain services and supports to individuals with developmental disabilities, such as Claimant. These entitlements are recognized in Health and Safety Code section 1374.73, subdivision (a)(3), which provides that services for which a developmentally-disabled consumer is eligible under the Lanterman Act shall not be affected by the private insurer’s obligation to fund the services. It thus appears that the Legislature intended to shift the funding of autism services from taxpayers to insurers without impacting the entitlement to the services.

7. Claimant has unique needs, and his entitlement to appropriate services and supports to meet those needs is protected by the Lanterman Act. He also has private insurance, which covers ABA services, and his private insurance is required by law to pay for such services. However, the insurer has refused to fund existing services provided by Holdsambeck. The insurer has instead offered a program that does not include critical components Claimant has been receiving, social skills training and services in the community. Despite Kaiser’s assertion in its letter of denial, no clinical evidence was presented at the hearing to show that Claimant’s needs that resulted in funding for Holdsambeck have changed. To allow Service Agency to cease funding the services provided by Holdsambeck when Kaiser refuses to fund them would deprive Claimant of needed services.

8. In addition, Holdsambeck is providing adaptive skills services, which Kaiser is not providing or funding. These services address needs apart from any behavior issues

Claimant may have. Whether these services will ultimately be found to be the responsibility of insurers as a “behavioral health treatment” under Health and Safety Code section 1374.73, they are different from the behavior program offered by Kaiser and are not being provided by the insurer.

9. Section 4649, on which Service Agency relies, does not prohibit funding the services in the existing circumstances, as funding for Holdsambeck is not available from Kaiser. Claimant’s family is not refusing coverage. Rather, Kaiser has refused to fund a cost-effective service that has met and that continues to meet Claimant’s needs.

10. Similarly, Claimant continues to need, and continues to benefit from, the services provided by SDC, and such services are not available from a generic provider. He is not yet receiving educational services and there is presently no generic funding source available to Claimant.

11. Accordingly, in order to effectuate the purposes of the Lanterman Act, and recognizing Service Agency’s role as the payor of last resort, Service Agency shall continue to fund the services provided by Holdsambeck and by SDC to the extent that those services are not paid for by a private insurer.

## ORDER

Claimant's appeal is granted, and Service Agency shall continue to fund the services provided by Holdsambeck and by SDC to the extent that those services are not paid for by a private insurer.

Dated: June 28, 2013

/s/

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SAMUEL D. REYES

Administrative Law Judge

Office of Administrative Hearings

## NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.