

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

S.T.C.,

OAH Case No. 2013040176

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

DECISION

This matter came on regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on June 4, 2013, in Bakersfield, California.

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

S.C.¹, Claimant's father, represented Claimant, with the assistance of Eva Clark, Advocate, Kern Advocacy Services.

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

ISSUE

Should Regional Center continue to fund Claimant's after school program at Valley Achievement Center (VAC)?

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

FACTUAL FINDINGS

1. Claimant is a 13-year-old Service Agency consumer with a diagnosis of autism. He is an only child and resides with his parents.

2. Claimant requires assistance with all daily living activities. He requires constant supervision for his safety. He attends middle school with special education supports. His attendance has been erratic, in part because the family does not believe the special education supports are adequate. He is scheduled to commence high school in the fall.

3. Claimant has been receiving the services of VAC, an applied behavior analysis (ABA) program, since he was three years old. He currently attends five days per week, from 2:00 p.m. to 5:00 p.m. Claimant's program with VAC has goals in communication, fine motor development, self-help, recreation/leisure, and social behavioral, and the agency provides its services at its facilities and in the community. Claimant has made progress with the assistance of VAC, and continues to benefit from the program. VAC recommends continuation of the services. The family is very satisfied with the services provided by VAC, and his father attributes Claimant's progress to his participation in VAC.

4. The VAC services have been agreed to by the family and Service Agency in multiple individualized program plans (IPPs), and Service Agency has funded the program.

5. In June 2012, Service Agency notified parents of consumers receiving ABA services that a new law, Health and Safety Code section 1374.72, required insurers to provide coverage for such services, and that Service Agency funding would cease.

6. Claimant has coverage with Kaiser Foundation Health Plan, Inc. (Kaiser), which is affiliated with Kaiser Permanente, and has sought to obtain funding from the insurer for the services provided by VAC. On November 19, 2012, Kaiser denied coverage because its physicians determined that "based on the clinical evidence available, social

skills training at Valley Achievement Center, [sic] is not medically indicated for [Claimant]'s condition at this time. It is necessary that [Claimant] undergo an assessment with a Kaiser Permanente clinician in order to determine the medical necessity of social skills training. . . .” It is unknown what clinical evidence the Kaiser physicians reviewed to reach their decision to deny funding, or if they examined Service Agency clinical evidence supporting the services. No explanation was presented to explain the scope of the contemplated assessment, which apparently has not been undertaken. Claimant’s family has not yet appealed the denial or sought the assistance of Kaiser’s insurance regulator.

7. Kaiser has selected Easter Seals Autism Services (Easter Seals) as its provider of ABA services. Claimant has been receiving services from Easter Seals at home twice per week for three hours at a time since September 2012. The services do not involve social skills goals and do not include community settings.

8. Claimant had prior coverage from Anthem Blue Cross, and the insurer paid an unspecified portion of the VAC services. The details of the termination of this funding were not presented at the hearing.

9. On March 26, 2013, Service Agency issued a notice proposing to terminate funding for the ABA services provided by VAC because such services were now the responsibility of Kaiser. On March 30, 2013, Claimant’s parents filed a Fair Hearing Request. Funding has continued during the pendency of the instant proceedings.

LEGAL CONCLUSIONS

1. In enacting the Lanterman Developmental Disabilities Act, Welfare and Institutions Code² section 4500 et seq., the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals and recognized that services

² Unless otherwise stated, all further references are to the Welfare and Institutions Code.

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 VAC 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. The insurer has offered a program that does not include critical components Claimant has received for many years, 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 VAC have changed. To allow Service Agency to cease funding the services provided by VAC when Kaiser refuses to fund them would deprive Claimant of needed services.

8. Section 4649, on which Service Agency relies, does not prohibit funding the services in the existing circumstances, as funding for VAC 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.

9. 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 VAC 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 VAC to the extent that those services are not paid for by a private insurer.

DATED: June 17, 2013

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.