

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

**In the Matter of:**

**CLAIMANT #1**

**OAH No. 2019110254**

**Consolidated with**

**CLAIMANT #2**

**OAH No. 2019110255**

**INLAND REGIONAL CENTER, Service Agency.**

**DECISION**

Marion J. Vomhof, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter via telephonic conference, on August 10, 2020, pursuant to the July 17, 2020, Order converting the hearing from an in-person hearing to a telephonic hearing due to the Governor's proclamation of a State of Emergency and Executive Orders N-25-20 and N-63-20.

Senait Teweldebrhan, Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Anslem Gbemudu, authorized representative and father of claimants, represented minor claimants, who were not present for the hearing.

Both matters were consolidated for hearing pursuant to Presiding Administrative Law Judge Donald Cole's December 11, 2019, order. On the Administrative Law Judge's own motion, with no objection from the parties, an order was issued consolidating the matters for decision.

Oral and documentary evidence was received. The record was closed and the matter submitted for decision on August 10, 2020.

## **ISSUE**

Should IRC be required to fund Visual Communication Analysis services for claimants?

## **CASE SUMMARY**

The evidence established that IRC is not required to fund Visual Communication Analysis (VCA)<sup>1</sup> services for claimants as this is not an evidence-based treatment, but rather it is an experimental treatment, and the regional center is prohibited from funding an experimental treatment. In addition, claimants have not exhausted generic funding resources.

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<sup>1</sup> This service is also referred to as Visual Communication Services (VCS).

## **FACTUAL FINDINGS**

### **Background**

1. Claimant #1 is a 14-year-old female eligible for regional center services based on a diagnosis of mild intellectual disability. Her twin brother, claimant#2, is eligible for regional center services based on a diagnosis of autism and mild intellectual disability. On October 15, 2019, claimants' father filed separate requests on behalf of each claimant, requesting that IRC fund VCA services from the Alternative Teaching Strategy Center for both claimants.

2. On October 25, 2019, IRC sent claimants' father Notices of Proposed Action and attached letters denying each claimants' request for IRC to fund VCA services. IRC determined that VCA is a non-evidenced-based and experimental treatment. Regional centers are prohibited by law to fund treatments that are experimental rather than evidence based, and have not been scientifically proven to be effective. IRC is further prohibited from purchasing a service that is available through generic resources such as private insurance or a health care service plan. The letters informed claimants that if they disagreed with the decision, they could file a Fair Hearing Request within 30 days of receipt of the letter.

3. On October 29, 2019, claimants' father, Anslem Gbemudu, filed a Fair Hearing Request on behalf of each claimant, appealing IRC's decision to deny claimants' requests to fund VCA services.

4. On November 13, 2019, an informal meeting was held between IRC and claimants' parents. In a letter dated November 18, 2019, IRC maintained its decision to deny funding for VCA services because it is considered to be an experimental

treatment and because generic funding resources have not been exhausted. According to the letter, IRC discussed the need for claimants to appeal the denial of coverage by Inland Empire Health Plan (IEHP) and the denial of funding through claimants' school district.

## **IRC's Evidence**

### **GIOVANNY URRUTIA**

5. Giovanni Urrutia has been a Consumer Services Coordinator (CSC) at IRC for more than two years; he is the CSC for both claimants. Mr. Urrutia testified at the hearing and the following factual findings were made from his testimony. Claimant #1's qualifying diagnosis for IRC services is mild intellectual disability. She is "pretty capable" of self-care, although she needs reminders and prompts. Her communication is limited to her wants and needs only, and it is often hard to understand her. She does have some disruptive behaviors, some aggressiveness and emotional issues, and she has poor safety awareness. Claimant #1 has been approved for 40 hours per month of routine respite services. She receives Applied Behavioral Analysis (ABA) therapy; approximately 210 hours per month of In-Home Supportive Services (IHSS) with her mother as caregiver; and special academic instruction and speech services through her school district. She receives medical insurance through IEHP.

Claimant #2's qualifying diagnosis is autism and mild intellectual disability. He requires assistance for all self-care, his communication is more limited than his sister and he often uses "gestures." His disruptive behaviors include pulling out wires and cables, and his safety awareness is very poor. Claimant #2 has been approved for 40 hours per month of routine respite services. He receives ABA therapy; approximately 227 hours per month of IHSS with his mother as caregiver; and special academic

instruction and speech services through his school. He receives medical insurance through IEHP.

6. The family requested VCA services for both claimants. Their father provided documentation from Alternative Teaching Strategy's website, which was reviewed with IRC's behavioral team. The request was denied, and claimants' father appealed.

The parents did pursue generic resources, including ABA and funding through their insurance. Mr. Urrutia is not certain of the status of funding through the school district as IRC has not received a denial from the school. IEHP denied coverage for VCA services for both claimants, stating that VCA "is considered to be experimental and investigational," and "is not accepted as standard medical treatment."

### **PAMELA HUTT**

7. Pamela Hutt has been a program manager with IRC since 1995. She is a behavior specialist and oversees behavioral support services at IRC. Ms. Hutt holds a master's degree in social work and has taken courses in applied behavior analysis.

Ms. Hutt explained that when IRC receives a request for behavioral services, she, along with the claimant's service coordinator, review the claimant's complete file and whatever information they can locate regarding the requested service. She was not familiar with VCA services so she conducted research but found no information as to the validity of the services and no information in peer reviews or scientific journals. The only information she found was on Alternative Teaching Strategy Center's website. She also reached out to ABA providers, and they had no knowledge of VCA services.

To determine which therapies for individuals with autism spectrum disorder are evidenced based and therefore may be funded under the Lanterman Act, IRC refers to a National Clearinghouse on Autism Evidence and Practice (NCAEP) report identifying 28 evidence-based practices (EBPs). These EBPs have undergone research and have shown positive outcomes for autism and intellectual disability. They are based on literature published from 1990 to 2017; VCA services are not on this list.

As an example, ABA has been around for more than 50 years and is widely accepted. It is evidence and research based, and uses certain strategies to provide intervention services. ABA encourages positive behavior and skills for self-care and other critical skill needs.

Ms. Hutt noted that Alternative Teaching Strategy Center does not have a rate agreement and contract with IRC. Regional centers are required to adhere to the Lanterman Act and related regulations, which authorize regional centers to reimburse an individual or agency for services provided to a regional center consumer if the individual or agency has a rate of payment for vendored or contracted services established by the Department of Developmental Services.

#### **DR. MICHELLE LINDHOLM**

8. Dr. Michelle Lindholm is a board-certified behavioral analyst in IRC's community service group. She previously held the position of staff psychologist in the clinical services unit. Dr. Lindholm was not familiar with VCA services prior to claimants' request. She located information on Alternative Teaching Strategy Center's website but found no empirical validity support. She described self-determination theory, which is also not evidence based. This is a macro theory of motivation, self-

awareness, advocacy, decision making, and problem solving. It focuses on the degree to which an individual's behavior is self-motivated and self-determined.

Dr. Lindholm provided a summary of VCA presentations by primary authors and explained that presentations may peak interest but are only fact gathering. Peer review requires a rigorous review and re-creation of the authors research. Dr. Lindholm could not locate any research on VCA, and said she believes it may work but does not know of possible harm or ineffectiveness. She referred to the NCAEP report and the 28 evidence-based practices for treating individuals with autism spectrum disorders. VCA is not listed, and neither is the self-determination theory. VCA is not evidence based.

### **FELICIA VALENCIA**

9. Felicia Valencia is program manager for IRC's Riverside School Age West Unit, and previously worked for 15 years as an IRC case manager. Ms. Valencia reviewed claimants' casefiles and requests. Per the Lanterman Act, regional centers are "payors of last resort" and are required to exhaust all other possible sources of funding, including generic resources and private insurance, before it purchases services. Claimants' currently receive ABA services funded through their insurance. Ms. Valencia reiterated the testimony of other staff members, that she had never heard of VCA and could find no evidence of its credibility or viability.

### **Testimony of Claimants' Father**

10. Mr. Gbemudu testified that after 90 days of receiving VCA services from the Alternative Teaching Strategy Center, he and his wife "saw significant improvements in both children." The children were able to type words they saw without being prompted, and they could type their first and last names unassisted when asked. As a parent he wants to do all he can so that his children "will have a

chance in this world,” and to do so they need to communicate. He was encouraged by the improvements and knew that the \$5,000 he was spending per month “was not being thrown away.” He acknowledged that ABA helps the children but VCA “accelerated their functional development” after only three months. He understands that VCA may be experimental, but he said, “it works.” Claimants both receive treatment from a speech pathologist at school, but their father does not see that it is very helpful.

Ms. Hutt advised claimants’ father that claimants’ functional development needs can be addressed at school through verbal therapy, which is under the umbrella of ABA services. They will be taught words, utilize technology, use an iPad, and speech generated programs. Ms. Hutt will follow up with claimants’ speech pathologist. With Mr. Gbemudu’s permission she will attend claimants’ ABA program so that she and IRC staff will be able to assist claimants’ parents in advocating for a “more robust” behavioral program for their children.

## **LEGAL CONCLUSIONS**

### **Burden of Proof**

1. In a proceeding to determine whether an individual is eligible for services, the burden of proof is on the claimant to establish by a preponderance of the evidence that IRC should fund the requested service. (Evid. Code, §§ 115, 500; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.)



## **The Lanterman Act**

2. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.) to provide a pattern of facilities and services sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme 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. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.)

3. Welfare and Institutions Code section 4501 outlines the State's responsibility for persons with developmental disabilities and the State's duty to establish services for those individuals.

4. The Department of Developmental Services (DDS) is the public agency in California responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.) In order to comply with its statutory mandate, DDS contracts with private non-profit community agencies, known as "regional centers," to provide the developmentally disabled with "access to the services and supports best suited to them throughout their lifetime." (Welf. & Inst. Code, § 4620.)

5. Welfare and Institutions Code section 4512, subdivision (b) defines "services and supports" as:

[S]pecialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option . . . Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.

6. Welfare and Institutions Code section 4646 requires that the Individual Program Plan (IPP) and the provision of the services and supports be centered on the individual with developmental disabilities and take into account the needs and preferences of the individual and the family. Further, the provisions of services must be effective in meeting the IPP goals, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

7. Welfare and Institutions Code section 4648, subdivision (a)(3) specifically provides that in order to achieve the objectives of a consumer's IPP, a regional center shall conduct activities, including securing needed services and supports by:

A regional center may, pursuant to vendorization or a contract, purchase services or supports for a consumer from an individual or agency that the regional center and consumer or, if appropriate, the consumer's parents, legal guardian, or conservator, or authorized representatives, determines will best accomplish all or part of that consumer's program plan.

(A) Vendorization or contracting is the process for identification, selection, and utilization of service vendors or contractors, based on the qualifications and other requirements necessary in order to provide the service.

(B) A regional center may reimburse an individual or agency for services or supports provided to a regional center consumer if the individual or agency has a rate of payment for vendored or contracted services established by the department, pursuant to this division, and is providing services pursuant to an emergency vendorization or has completed the vendorization procedures or has entered into a contract with the regional center and continues to comply with the vendorization or contracting requirements. The director shall adopt regulations governing the vendorization process to be utilized by the department,

regional centers, vendors, and the individual or agency requesting vendorization.

[¶] . . . [¶]

(4) Notwithstanding subparagraph (B) of paragraph (3), a regional center may contract or issue a voucher for services and supports provided to a consumer or family at a cost not to exceed the maximum rate of payment for that service or support established by the department. If a rate has not been established by the department, the regional center may, for an interim period, contract for a specified service or support with, and establish a rate of payment for, a provider of the service or support necessary to implement a consumer's individual program plan.

8. Welfare and Institutions Code section 4648, subdivision (a)(16), provides:

[R]egional centers shall not purchase experimental treatments, therapeutic services, or devices that have not been clinically determined or scientifically proven to be effective or safe or for which risks and complications are unknown. Experimental treatments or therapeutic services include experimental medical or nutritional therapy when the use of the product for that purpose is not a general physician practice . . .

9. Welfare and Institutions Code section 4659, subdivision (a) requires that regional centers shall "identify and pursue all possible sources of funding for

consumers receiving regional center services. These sources shall include, but not be limited to, both of the following:

(1) Governmental or other entities or programs required to provide or pay the cost of providing services, including Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, school districts, and federal supplemental security income and the state supplementary program.

(2) Private entities, to the maximum extent they are liable for the cost of services, aid, insurance, or medical assistance to the consumer.

10. Welfare and Institutions Code section 4659, subdivision (c) provides:

. . . notwithstanding any other law or regulation, 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.

11. Welfare and Institutions Code section 4659, subdivision (d)(1) provides in part:

. . . a regional center shall not purchase medical or dental services for a consumer . . . 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 . . . 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 the state council in pursuing these appeals.

12. The regional center is also required to consider generic resources and the family's responsibility for providing services and supports when considering the purchase of regional center supports and services for its consumers. (Welf. & Inst. Code, § 4646.4.)

13. Health and Safety Code section 1374.73, subdivision (a)(1) provides in part: 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.

14. Health and Safety Code section 1374.73, subdivision (c)(1) states, in part:

‘Behavioral health treatment’ means professional services and treatment programs, including applied behavior analysis and evidence-based behavior intervention programs, that develop or restore, to the maximum extent practicable, the functioning of an individual with pervasive developmental disorder or autism . . .

## **Evaluation**

15. A preponderance of the evidence demonstrated that IRC is not required to fund VCA services for claimants. Specifically, a preponderance of the evidence shows that the VCA services are experimental and not evidence based or scientifically proven to be effective or safe, and IRC is forbidden pursuant to Welfare and Institutions Code section 4648, subdivision (a)(16) from funding those services. In addition, claimants must exhaust their generic resources first. IRC services are provided as a last resort, and IRC cannot fund a service if it is available to claimants from another source. For the reasons stated above IRC is not required to fund VCA services for claimants.

## **ORDER**

Claimants' appeal from IRC's denial of their request to fund Visual Communication Analysis services is denied.

DATE: August 19, 2020

MARION J. VOMHOF  
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.