BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

v.

VALLEY MOUNTAIN REGIONAL CENTER, Service Agency.

OAH No. 2022080321

DECISION

Administrative Law Judge Ed Washington, Office of Administrative Hearings (OAH), State of California, heard this matter via videoconference on October 27, 2022, and November 4, 2022, from Sacramento, California.

Compliance Manager Jason Toepel represented Valley Mountain Regional Center (VMRC or regional center).

Claimant's father represented claimant. Spanish language interpreter Alfredo Martell provided interpreting services throughout the hearing.

Oral and documentary evidence was received. The record closed and the matter was submitted for decision on November 4, 2022.

ISSUE

Is VMRC obligated to fund insurance copayments for claimant's behavioral services?

FACTUAL FINDINGS

Background and Reimbursement Request

1. Claimant is a four-year-old eligible for Regional Center services under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code section 4500, et seq., based on an autism diagnosis.[1] She lives with her parents and siblings in Tracy, California. Claimant was in the Early Start program prior to her third birthday, through which claimant's family received funding from VMRC to cover insurance copayments for Applied Behavioral Analysis (ABA) therapy.[2]

2. The regional center was considered the educational entity for claimant up until the claimant's third birthday. When a consumer reaches three years of age, the educational responsibilities become the responsibility of the consumer's school district. Claimant turned three years old in May of 2021 and aged out of Early Start

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[1] Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

[2] The Early Start Program is an early intervention program for infants and toddlers with disabilities and their families.

eligibility. Her local school district, Tracy Unified School District (District), became responsible for her ABA therapy at that time.

3. However, the regional center actually extended its Early Start funding of the copayments for claimant for several months beyond the age of three. This was based on a Department of Developmental Services directive that extended the expiration of Early Start services due to the COVID-19 Pandemic and delays families may face transitioning to special education services. Regional center funding for claimant's ABA services insurance copayments was extended through the completion of her initial Individualized Education Program (IEP) meetings with the District to discuss and identify her needs.

4. Claimant's initial IEP meeting with the District began on May 12, 2021 and was finalized on June 11, 2021. In consultation with claimant's parents, the District offered claimant a Free and Appropriate Public Education (FAPE) in the least restrictive environment that included "Early Intensive Behavior Therapy/Treatment (EIBT) utilizing ABA and other evidence-based practices provided by a Nonpublic agency under contract with [Special Education Local Planning Area] or the District." This offer constituted 35 hours a week of EIBT and was initially accepted by claimant's parents.

Claimant's Evidence

5. In or around June 2021, the District contacted claimant's parents and offered ABA services through The Kendall Centers at Therapeutic Pathways (Kendall Pathways). These services were provided in the home. Approximately three to four months later, the District informed claimant's parents that they needed to update claimant's IEP, as the District no longer had a contract with Kendall Pathways.

6. Next, the District offered ABA services through Behavioral and Educational Strategies and Training (BEST). However, this offer was declined. BEST was located approximately 25 miles away from claimant's home. Claimant's father could not drive claimant to BEST for daily services, because he worked fulltime in the Bay Area, which required a two-to-three-hour daily commute before and after his full-time work shift. Claimant's mother was also unable to transport her to BEST because she does not drive on the freeways. Additionally, there were other disabled children in the home that claimant's mother cared for during the day.

7. The District also offered ABA services through Applied Behavior Consultants, Inc., which is located in Stockton, approximately 25 miles from Tracy. This offer included daily transportation by bus with others. Claimant's parents declined this option because they were not comfortable with their young disabled child riding on the bus with strangers to receive services so far from home. Finally, the District offered ABA services at an unidentified "county facility" in Tracy, to allow claimant to receive services close to home. However, claimant's parents also declined this offer because they were dissatisfied with the county facility, as it appeared over-crowded and out of compliance with COVID-19 safety protocols, including the wearing of face masks.

8. Claimant's parents stopped working with the District to find a suitable ABA services provider for claimant after their medical insurance provider approved their request to have the costs of their preferred ABA services provider covered by under their medical insurance plan. Specifically, on January 24, 2022, claimant's mother sent an email to the District informing them that claimant was attending Kendall Pathways for behavioral services, and that they preferred to utilize Kendall Pathways rather than the San Joaquin County Office Education—the provider last made available to them by the District at that time. Claimant's mother also informed the District that

they would notify the District to request a new IEP meeting to make changes when appropriate.

9. In or around July 2022, claimant's parents contacted VMRC and requested reimbursement and funding for the insurance copayments related to claimant's ABA services. Effective, July 15, 2022, VMRC issued a Notice of Proposed Action (NOPA) denying claimant's request. The NOPA specified that the request was being denied because there was a generic service available to claimant that was not being utilized, as the District offered FAPE to claimant that included behavioral services in the form of 35 hours of early intervention behavioral therapy with a non-public agency, as specified in claimant's IEP. The NOPA concluded with the following statements: "School districts provide ABA services when needed. Family is currently not accessing free and appropriate public education (FAPE). The regional center is prohibited from funding co-pays under this circumstance." VMRC NOPA cites several code sections in support of its decision. These codes specify that a consumer must first utilize generic resources before receiving regional center funding and also provide that a regional center may pay insurance copayments for certain services if the family or consumer's income meet certain poverty level requirements and the parents or consumer demonstrate that they meet one or more of three exceptions specified therein.

10. On October 12, 2022, claimant's parents contacted the District and requested reimbursement for the insurance copayments for claimant's ABA services. The District denied the request because claimant did not have an active IEP at the time and was not a student with the District.

Analysis

11. Claimant has requested assistance in paying for insurance copayments for ABA services. The regional center funds copayments for ABA services as the law provides. A specified in the Legal Conclusions below, a regional center must ensure that the services and supports provided are centered on the needs and preferences of the individual with disabilities and their family and must reflect the cost-effective use of public resources. (Welf. & Inst. Code, § 4646, subd. (a).) A regional center may fund insurance copayments for disability-related services and supports only when certain conditions are met, which include that there is no other third-party having liability for the cost of the service or support, that the family does not have an income level that exceeds 400 percent of the federal poverty level, and that at least one of three extenuating circumstances described in Section 4659.1, subdivision (d), exists. (Welf. & Inst. Code, §§ 4646.4, subd. (a)(2), 4648, subd. (a)(8) and 4659.1, subds. (a) & (d).)

12. There are very specific regulations that governs the regional center's ability to fund insurance copayments as claimant's family requests. Those regulations indicate that the regional center may fund copayments when there is no third-party responsible for the cost of the service or support, and the family meets certain poverty level requirements, and the family demonstrates that any of three extraordinary circumstances specified in Section 4659.1, subdivision (d) exists.

13. Here, the District is responsible for providing ABA services to claimant. The District made an offer to claimant's family for FAPE that included behavioral services. Claimant's family declined the offer of FAPE from the District. Claimant's family has the right to decline the offer from the District. And, to the extent they feel the District's offers fail to meet claimant's needs there are due process provisions included in the IEP process that will allow claimant's family to work with the District to

find a suitable option. However, that claimant's family disagrees with or does not prefer the ABA service options made available by the District does not change that the regional center is bound by the regulation from funding these services when they remain the responsibility of the District.

14. Notwithstanding that there is a third-party with liability for the cost of claimant's ABA services, claimant's parents also failed to establish that any of the extenuating circumstances specified in Section 4659.1, subdivision (d) exists. Instead, it appears claimant's parents chose to utilize ABA services through their insurance provider by preference, rather than necessity. This is certainly their prerogative but does not transfer responsibility to fund this option back to the regional center. Accordingly, the regional center's denial of claimant's request to fund insurance copayments for ABA services is valid.

LEGAL CONCLUSIONS

1. The Lanterman Act sets forth the regional center's responsibility for providing services to persons with development disabilities. An "array of services and supports should be established…to meet the needs and choices of each person with developmental disabilities…to support their integration into the mainstream life of the community…and to prevent dislocation of persons with developmental disabilities from their home communities." (§ 4501.) The Lanterman Act requires regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP includes the consumer's goals and objectives as well as required services and supports. (§§4646.5 & 4648.)

2. The Lanterman Act mandates that a consumer's Individual Program Plan (IPP) be based on his or her individual needs. In providing the services and supports necessary to meet those needs, the regional center must look to the availability of generic resources, avoid duplication of services, and ensure the cost-effective use of public funds.

3. Section 4646, subdivision (a), provides:

> It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, if appropriate, [and] to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

4. Section 4646.4, subdivisions (a)(1), (2) and (3), provide:

> (a) Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal

process shall ensure adherence with federal and state law and regulation, and if purchasing services and supports, shall ensure all of the following:

(1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.

(2) Utilization of generic services and supports if appropriate. The individualized family service planning team for infants and toddlers eligible under Section 95014 of the Government Code may determine that a medical service identified in the individualized family service plan is not available through the family's private health insurance policy or health care service plan and therefore, in compliance with the timely provision of service requirements contained in Part 303 (commencing with Section 303.1) of Title 34 of the Code of Federal Regulations, will be funded by the regional center.

(3) Utilization of other services and sources of funding as contained in Section 4659.

5. Section 4648, subdivision (a)(8), specifies:

In order to achieve the stated objectives of the consumer's individual program plan, the regional center shall conduct activities including, but not limited to, all of the following:

(a) Securing needed services and supports.

[¶] ... [¶]

(8) Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.

6. Section 4659, provides in part:

(a) Except as otherwise provided in subdivision (b) or (e), the regional center 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 supplemental program.

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

7. Section 4659.1, in pertinent part, provides:

(a) If a service or support provided pursuant to a consumer's individual program plan under this division 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, coinsurance, or deductible 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 their 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).

[¶] ... [¶]

(d) Notwithstanding paragraph (2) of subdivision (a) ... a regional center may pay a copayment, coinsurance, or deductible 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, coinsurance, or deductible.

(2) The existence of catastrophic loss that temporarily limits the ability to pay of the parent, guardian, or caregiver, or adult consumer with a health care service plan or health insurance policy 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.

8. The District is presently responsible for providing claimant's ABA services. There was no evidence presented to demonstrate that District is unable to meet claimant's current needs. Claimant must first access and exhaust this available generic resource before VMRC may consider funding claimant's request.

ORDER

Claimant's appeal is denied.

DATE: November 21, 2022

ED WASHINGTON
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.