

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2012100497

G.B.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

**DECISION**

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on March 4, 2013, in Bakersfield, California. G.B. (Claimant) was represented by his mother and authorized representative, J.P.<sup>1</sup> Kern Regional Center (Service Agency or KRC) was represented by its Associate Director, Jeffrey Popkin, LCSW, ACSW, C-ASWCM.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on March 4, 2013.

**ISSUE**

The parties agreed that the issue to be decided is as follows:

Should KRC discontinue funding behavioral services for Claimant because Claimant has insurance coverage for the services?

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<sup>1</sup> Claimant's and his mother's surnames are omitted throughout this Decision to protect their privacy.

## FACTUAL FINDINGS

1. Claimant is an 8-year-old male who lives with his parents and nine siblings. He is a client of KRC based on his diagnosis of Autistic Disorder. (Exhibit 10; Testimony of J.P.)

2. Claimant's deficits are significant. His October 2011 Individual Program Plan (IPP), noted that, at age six, Claimant was not yet toilet trained. He was not communicating using words, but had learned to communicate with a couple of signs and making gestures and sounds. He had daily temper tantrums during which he hit his head and pounded his fists. (Exhibit 6.)

3. Claimant attends an elementary school program for children with Autism. There are only six students in his classroom. (Testimony of J.P.)

4. Claimant's parents both work outside the home. All of Claimant's nine siblings attend day care. However, due to the challenge of his special needs, it is difficult to find a daycare or after-school babysitter for Claimant. (Testimony of J.P.)

5. Claimant currently attends an after-school program, Valley Achievement Center (VAC), and participates in VAC's Socialization Training Program which is funded by KRC. Claimant is provided transportation to VAC after school and to his home at the end of the work day. (Exhibit 9; Testimony of J.P.)

6(a). Claimants' goals at VAC recently included the following: in the Communication Domain - imitating four non-verbal movements, identifying two emotions, matching six sets of 3D objects to 2D pictures, discriminating between five icons, identifying six 3D objects; in the Motors Skills Domain - completing eight new fine motor skills, and completing four new gross motor skills; in the Self Help Domain- brushing his teeth, washing his face, washing his hands, preparing his own meal using the microwave, folding clothes, tying his shoes, zipping his clothes, and buttoning his clothes; and in the Recreational/Leisure Domain – taking turns. Claimant has been making good progress toward his goals. (Exhibit 9.)

6(b). With VAC, Claimant has made great improvement in his social skills and his living skills. He will now join in play with his peers, whereas previously he did not want to go into the same room with them. (Testimony of J.P.)

7. VAC meets Claimant's unique needs in that he is able to address his social skills and living skills deficits in a structured environment which he "loves" and in which he is making steady improvement. Additionally, VAC provides an after school component that is critical for Claimant's family, but has not otherwise been available to Claimant as a child with Autistic Disorder. (Testimony of J.P.)

8. Due to passage of legislation, medical insurance companies are responsible for providing coverage for applied behavioral analysis therapy. On October 1, 2012, KRC sent Claimant's mother a Notice of Proposed Action (NOPA), proposing to discontinue funding for Claimant's "behavioral services." The stated reason for the proposed action was: "Client receives health insurance coverage through private insurance or a health service plan. The Regional Center is prohibited from purchasing a service that is available from private insurance or a health care service plan . . ." The NOPA cited Welfare and Institutions Code sections 4659, subdivisions (a)(1) and (c), and Health and Safety Code section 1374.73. (Exhibit 5.)

9. On October 5, 2012, Claimant's mother filed a Fair Hearing Request. (Exhibit 4.)

10. On October 16, 2012, KRC sent Claimant's mother a letter following an informal fair hearing meeting. That letter stated:

[A]t issue was Kern Regional Center's denial of ongoing services to VAC. It was Kern Regional Center's position that since you have Kaiser coverage for [Claimant], they should be responsible for providing medically necessary behavioral treatment. It was your contention that Kaiser services do not work for your family as there are two working parents and there is a need for services in the afternoon for [Claimant].

We discussed numerous options for how we could proceed. It was agreed that you would work with Kaiser to see if they would send you a denial for VAC, and subsequently you would appeal. In addition, Kern Regional Center would wor[k] with VAC to see if we could provide for a less intensive program and have the behavioral services provided through Kaiser. . . .

(Exhibit 3.)

11(a). Claimant's mother requested that Claimant's medical insurer, Kaiser Permanente (Kaiser), authorize an out-of-plan referral for Claimant to receive social skills training and living skills training at VAC. On November 16, 2012, Kaiser denied Claimant's mother's request. The denial was issued following a file review by two Kaiser physicians and was based on the following stated reasons:

We are denying this request because an out of Plan referral for [Claimant] to receive social skills and living skills training at the Valley Achievement Center, is not medically indicated for [Claimant's] condition at this time. Physician review determined that [Claimant's] medical condition can be addressed with applied behavioral analysis (ABA) therapy

within Plan. A referral has been made for [Claimant] to be seen by Easter Seals for an assessment, and to develop an appropriate behavioral health treatment plan. . . .

[¶] . . . [¶]

This completes [Kaiser's] internal grievance process. If you find this decision unsatisfactory, the following options are available to you or your authorized representative:

### **Department of Managed Health Care Complaint Process**

[I]f you have a grievance against your health plan, you should first telephone [Kaiser] at 1-800- . . . and use your health plan's grievance process before contacting the department. . . . You may also be eligible for an Independent Medical Review . . .

### **Independent Medical Review**

If you qualify, you and your authorized representative may have your issue reviewed through the Independent Medical Review (IMR) process . . .

### **Binding Arbitration . . .**

(Exhibit 2.)

11(b). Although Kaiser's denial letter asserted that social skills and living skills training was "not medically indicated" for Claimant's condition and that a physician file review had determined that ABA therapy was indicated, the Kaiser letter did not specify which records were reviewed to reach these conclusions nor the basis for its conclusions. Apparently, Kaiser did not conduct an assessment of Claimant or observe the VAC program to determine its propriety or efficacy. (Exhibit 2.)

12(a). Claimant's mother believes that the Kaiser-recommended Easter Seals program will not meet Claimant's needs. She is familiar with the Easter Seals program and it does not provide after-school care. Instead, the ABA services must be provided in the home with a parent present. Since she and her husband work outside the home, the services would have to be provided after work hours or on the weekends when all 10 children are present in the home. Claimant's mother does not believe the in-home ABA services would be effective with Claimant's nine siblings creating a distraction during the sessions. (Testimony of J.P.)

12(b). Neither the Kaiser denial letter (Exhibit 2) nor any evidence produced at the fair hearing contradicted Claimant's mother's assertion that VAC is currently meeting Claimant's unique needs.

12(c). Neither the Kaiser denial letter nor any evidence produced at the fair hearing contradicted Claimant's mother's assertion that that the Easter Seals program would not meet his needs.

13. Claimant's mother has not sought review of Kaiser's decision through either Department of Managed Health Care or by way of binding arbitration. (Testimony of J.P.)

### LEGAL CONCLUSIONS

1. Claimant's appeal of the Service Agency's discontinuation of funding behavioral services for Claimant due to insurance coverage is sustained. (Factual Findings 1 through 13; Legal Conclusions 2 through 10.)

2. Where a change in services is sought, the party seeking the change has the burden of proving that a change in services is necessary to meet the consumer's needs or that the consumer no longer needs the current services. (See, Evid. Code, §§ 115 and 500.) The Service Agency has not met its burden of proof.

3. Claimant established that VAC was the most appropriate program to address his social skills and living skills deficits in a structured setting which also provided an after-school component consistent with his particular needs. The Service Agency did not establish that the in-home Easter Seals program would meet Claimant's particular needs. (Factual Findings 1 through 13; Legal Conclusions 2 through 10.)

4. Pursuant to the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act), the Service Agency is required to secure services and supports that: meet the individual needs and preferences of consumers (Welf. & Inst. Code, §§ 4501 and 4646, subd. (a).); support their integration into the mainstream life of the community (Welf. & Inst. Code, §§ 4501 and 4646, subd. (a).); "foster the developmental potential of the person" (Welf. & Inst. Code, § 4502, subd. (a).); and "maximize opportunities and choices for living, working, learning and recreating in the community" (Welf. & Inst. Code, § 4640.7, subd. (a).).

5. Welfare and Institutions Code section 4512, subdivision (b) provides, in part:

[T]he 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. . . . (Emphasis added.)

6. Welfare and Institutions Code section 4646, subdivision (a) provides, in part:

[I]t is the further intent of the Legislature 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. (Emphasis added.)

7. Welfare and Institutions Code section 4659, subdivisions (a)(1), (a)(2) and (c), provides:

(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 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.

[¶] . . . [¶]

(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. (Emphasis added.)

8. Health and Safety Code section 1374.73 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 [FN1]), 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.

9. KRC argued that behavioral services are more appropriately funded through Claimant's medical insurer, not the regional center. This argument is not persuasive. The Lanterman Act does prevent regional centers purchasing "any service that would otherwise be available" from Claimant's private medical insurer. (Welf. & Inst. Code, § 4659, subd. (c).) However, the evidence presented at this fair hearing did not establish that KRC has been or would be purchasing a service that "would otherwise be available" through Claimant's private insurance. Kaiser denied coverage for VAC, and the evidence did not establish that the Easter Seals could equally meet Claimant's unique needs.

10. Given the foregoing, the Service Agency's proposed discontinuation of funding for Claimant's services through VAC was incorrect.

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## ORDER

1. Claimant's appeal of the Service Agency's discontinuation of funding for behavioral services through Valley Achievement Center is sustained.
2. The Service Agency shall continue funding Claimant's behavioral services through Valley Achievement Center.

DATED: March 20, 2013

\_\_\_\_\_/S/\_\_\_\_\_  
JULIE CABOS-OWEN  
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.