

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

J.H.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH Case No. 2013050424

DECISION

This matter came on regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on September 30, 2013, in Bakersfield, California.

Cherylle Mallinson, Interim Director of Community Services, represented Kern Regional Center (Regional Center or Service Agency).

E.H. and J.H.¹, Claimant's parents, 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 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 nine-year-old Service Agency consumer with a diagnosis of autism. He resides with his two brothers and his parents.

2. Claimant requires assistance to complete most daily living and self-care tasks, including bathing, dressing, grooming, hygiene, and meal preparation. He has deficits in communication and socialization, and needs supervision for his own safety.

3. Claimant has been receiving applied behavior analysis (ABA) services from VAC since he was four years old. He attends the program for five days each week, from 2:00 p.m. to 5:00 p.m. Claimant's program with VAC has goals in communication, socialization, functional living, and self-help. VAC addresses misbehaviors as they arise, in the context of its program. VAC provides services at its facilities and in the community. Claimant has made progress with the assistance of VAC, and continues to benefit from the program. His sense of self confidence and his independence have increased. Claimant's mother has noticed that the social interaction he has with other participants and with staff is critical to Claimant and his well-being. VAC recommends continuation of the services. The family is very satisfied with the services provided by VAC, and wants them to continue.

4. When Claimant was younger, he participated in another ABA program for eight months, the home-based MAPS. Claimant engaged in more tantrum behaviors at the time, and required greater assistance with daily living tasks.

5. 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 services.

6. Starting in 2012, following enactment of Health and Safety Code section 1374.73, which required health insurers to provide coverage for ABA services, Service Agency has sought to end its funding of the VAC services. Service Agency agreed to temporarily fund the program while Claimant's family obtain coverage through their private insurance carrier.

7. Claimant had coverage with Kaiser Foundation Health Plan, Inc. (Kaiser), and has recently obtained health coverage with Blue Shield of California (Blue Shield). Blue Shield Mental Health Service Administrator (MHSA) has contracted with the Center for Autism and Related Disorders (CARD) to provide ABA services in the Bakersfield area.

8. Blue Shield MHSA has offered to provide CARD's in-home ABA program. Claimant's family believes that returning to an in-home program will represent a step back in Claimant's development, as he will miss the social interaction and accompanying benefits he receives at VAC.

9. Claimant's family has requested Blue Shield MHSA to approve and pay for the services provided by VAC. VAC is in the process of seeking approval to join the Blue Shield service provider network to facilitate such approval. In the meantime, Blue Shield MHSA has funded the ABA services provided by VAC through November 1, 2013.

10. On May 6, 2013, Service Agency issued a Notice of Proposed Action to terminate funding for the VAC services because the services are now the responsibility of the private insurer. On May 13, 2013, Claimant's parents filed a Fair Hearing Request. Service Agency funding for VAC has continued during the pendency of the instant proceedings.

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 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. The insurer has agreed to fund the services provided by VAC, but at present has only agreed to pay for them on a temporary basis. Blue Shield MHSA has offered to pay for a program that is different and, based on the evidence received at the hearing, not as effective in meeting Claimant’s needs as VAC’s program. The CARD program is missing critical social interaction and community participation components. Accordingly, unless Blue Shield MHSA agrees to fund the VAC program on a more permanent basis, the program will not “otherwise be available” within the meaning of section 4649, subdivision (c), and Service Agency is not prohibited from funding the services.

8. 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 after November 1, 2013 to the extent that those services are not paid for by a private insurer.

ORDER

1. Claimant's appeal is granted.
2. 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: October 8, 2013

_____/s/_____
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.