

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

A.C.,

Claimant,

vs.

TRI-COUNTIES REGIONAL CENTER,

Service Agency.

OAH Case No. 2012100474

DECISION

This matter came on regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on March 13, 2013, in Simi Valley, California.

Deena Bernabe, Services and Supports Manager, represented Tri-Counties Regional Center (Regional Center or Service Agency).

Ida D.¹, Claimant's mother, represented Claimant.

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

ISSUE

Whether Regional Center may terminate funding of the behavioral support services provided by Support and Treatment for Autism and Related Disorders (STAR).

FACTUAL FINDINGS

1. Claimant is a nine-year-old Service Agency consumer with a diagnosis of autism. He resides with his parents, sister, and grandfather.

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

2. Claimant started receiving services from STAR in January 2010. He has made significant progress, and STAR has recommended a fade out of direct intervention services by December 13, 2013. At present, Claimant receives one hour of direct intervention services per week, five hours per week of parent education services, and two hours per week of supervision services. As stated in STAR's latest report, dated February 12, 2013, Claimant is using appropriate voice volume with his parents, initiating play with peers, reacting appropriately to sarcastic comments in the community, and understanding indirect social cues and responding in both contrived and natural opportunities within therapy. Nevertheless, he continues to engage in some elopement, tantrums, inappropriate comments, and aggression. The present focus of services is on improving generalization of skills, increasing interaction with others, and increasing self-management skills.

3. Lindsee Porter, M.S., B.C.B.A. (Porter), is STAR's Clinical Manager and has had oversight responsibility over Claimant's program the entire time he has received services from the agency. In Porter's opinion, Claimant's parents have embraced the program, have met goals set for them, and have been critical to Claimant's success. As his parents have taken on more responsibility, the number of direct intervention hours has decreased and the emphasis on parent education has increased. The level and extent of parental participation has also enabled STAR to focus Claimant on higher level tasks.

4. Porter testified that Claimant is particularly impacted by change. While aversion to change is typical in autistic children, Porter noted that because Claimant is bright and very aware of his environment he has greater sensitivity to change. She provided the example of Claimant's reaction to the removal of the therapist who had spent approximately one and one-half to two years with Claimant. Claimant's maladaptive behaviors, including tantrums, escapes, and inattention, increased significantly, and it took approximately four months to establish rapport with the new therapist and attain the level of skill acquisition existing at the time of the change. Porter is therefore concerned about potential regression in any change in Claimant's applied behavior services (ABA).

5. Following the passage of Senate Bill 946 (SB 946), Service Agency has taken steps to inform its consumers and their families about the new legal obligations of insurers for covering autism services and to assist families to plan for transition.

6. Claimant's family 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 STAR. Kaiser has selected Easter Seals Autism Services (Easter Seals) as its sole provider of ABA services. Easter Seals has not been vendored by Service Agency to provide ABA services.

7. On July 27, 2012, Claimant's mother filed a request for an out-of-network referral with Kaiser for Claimant to continue to receive services from STAR. On August 24, 2012, Kaiser denied the request, concluding that since the ABA services were available within the Kaiser health plan there was no medical indication to refer Claimant to STAR. Kaiser informed the family that the request had been reviewed by a committee that included two pediatricians, but did not disclose the physicians' names or their expertise in the field of autism. Claimant's family was referred to Easter Seals for development of a treatment plan.

8. On December 28, 2012, Jill Reder, M.Ed., M.A., BCBA (Reder), issued an Initial Assessment and Recommendation Report for Easter Seals. Reder reviewed available documentation, spoke to Claimant's family, and observed Claimant during a session with STAR staff. Reder determined that intensive ABA services were appropriate, and recommended eight hours per week of direct services. Direct services are to be composed of home- and clinic-based services focused on skill remediation, with the anticipated addition of interventions in community settings. Goals were proposed in the areas of expressive and receptive communication, pragmatic communication, daily living skills, and socialization skills. Maladaptive behaviors, such as tantrums, aggression, and elopement, would be addressed in therapy.

9. Claimant's mother criticized Reder's report as being incomplete and inaccurate. She believes that the assessment report lacks relevant information, such as an accurate and complete history of Claimant's condition and the treatment he has received, and that the report does not accurately reflect Claimant's needs, such as his struggles with coping, problem solving, and elopement. In addition, Claimant's mother has been concerned about the number and qualifications of Easter Seals staff. Those with whom she has been dealing have changed, and they do not appear knowledgeable about her son's needs.

10. Tammy Brandt, Psy.D. (Brandt), Service Agency Psychologist, opined that, as set forth in Reder's report, the treatment plan was adequate to address Claimant's needs and she did not see any reason for Claimant not to have a successful transition from STAR to Easter Seals. Dr. Brandt testified that Service Agency had continued to fund the ABA services provided by STAR in part because Easter Seals had not been ready to provide the services, but that Easter Seals now appeared ready to provide the services.

11. Porter reviewed Reder's assessment report, but declined to comment about its accuracy because she had not been involved in the data gathering that led to the report. However, she opined that a provider must gain a family's trust in order for the program to be successful.

12. Adrienne Kessler, M.A., BCBA, Easter Seals Regional Vice-President, testified that the agency now has adequate, qualified staff and is ready and willing to provide services to Claimant.

13. On February 19, 2013, Claimant's mother filed an appeal with the Department of Managed Health Care (DMHC), challenging Kaiser's failure to enter into a single case agreement for referral to STAR for provision of ABA services. On February 27, 2013, DMHC informed Claimant's mother that the matter was under review and that it expected to issue a decision within 30 days, after hearing from Kaiser.

14. On September 26, 2012, Service Agency issued a notice proposing to terminate funding for the ABA services provided by STAR because such services were now the responsibility of Kaiser. On October 3, 2012, Claimant's mother 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 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 (IPP), 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 STAR constitute necessary and appropriate services to cost-effectively address Claimant's developmental needs.

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

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 SB 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. The ABA services provided by STAR have cost-effectively met, and continue to meet, his developmental needs. The provider’s plan to shift greater responsibility to Claimant’s parents and to stop providing direct services is at a critical junction. Claimant 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, and the family has appealed its denial. This dispute is now before the regulatory agency that must determine whether Kaiser’s offering is adequate and consistent with insurance law requirements. Thus, at present, there no “service otherwise available” from a private insurer that would prohibit Service Agency from purchasing the service pursuant to section 4659, subdivision (c).

8. In addition, section 4659, subdivisions (d)(1)(B) and (C), permit regional centers to continue to fund needed services while a claimant is pursuing an appeal or where services have not actually been provided. There is no question that Claimant continues to need ABA services, and continued funding of the ABA services provided by STAR is warranted during the pendency of the appeal and until services consistent with Lanterman Act requirements are funded by Kaiser.

9. Accordingly, in order to effectuate the purposes of the Lanterman Act, and recognizing Service Agency's obligations under the statute as the payor of last resort, Service Agency shall continue to fund the services provided by STAR until Claimant's appeal of Kaiser's decision is resolved and services consistent with Lanterman Act requirements are available to him from Kaiser.

ORDER

Claimant's appeal is granted, and Service Agency shall continue to fund the services provided by STAR until Claimant's appeal of Kaiser's decision is resolved and services consistent with Lanterman Act requirements are available to him from Kaiser.

Dated: March 21, 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.