

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

ANDRES M.,

Claimant

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. 2013061093

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DECISION

Administrative Law Judge Jerry Smilowitz, State of California, Office of Administrative Hearings, heard this matter on September 20, 2013, in Torrance, California, at the offices of Harbor Regional Center (HRC or Service Agency).

Andres M. (Claimant) was not present. He was represented by his parents.<sup>1</sup>

Dorla Watson, Program Manager, represented the Service Agency.

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on September 20, 2013.

ISSUES

The parties agreed on the following statement of the issues to be decided: (1) Should Harbor Regional Center be required to fund the Family Support/Interpersonal Communication Group, a program offered by Progressive Resources, on behalf of Claimant?; (2) Would Progressive Resources provide to Claimant those social recreation activities whose funding is currently prohibited by the Lanterman Act?

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<sup>1</sup> Initials and titles are used to protect the privacy of Claimant and his family.

## EVIDENCE RELIED UPON

*Documents.* Service Agency's exhibits 1-13; Claimant's exhibits A-S.

*Testimony.* For Service Agency, Barbara Maeser, Program Manager, and Jahn Rokicki, Director of Early Childhood teams; for Claimant, his father and mother.

## FACTUAL FINDINGS

1. Claimant is a four-year-old boy with a diagnosis of Autistic Disorder who has been found eligible for regional center services. He is an only child who lives at home with his parents. Claimant attends a special day class with an autism focus at an elementary school in his school district for about four hours a day. The only Individual Education Program (IEP) in the record is dated July 10, 2012, when Claimant was a few weeks away from turning age three. The IEP expressed the concerns of his parents that Claimant showed significant deficits and slow improvements in socialization and had difficulty interacting or engaging socially with others. Under "Social Emotional/Behavioral," the IEP team concluded that testing revealed a "significant developmental delay (SS = 58; 0.3 percentile) as compared to other children his age."

2. The other students in the class function at or below Respondent's level. The father reports that, when the students as a team take breaks at recess and lunch, their schedule is such that they have no contact with the other students in the school.

3. The family receives 12 hours of Applied Behavioral Analysis (ABA) services through Easter Seals Southern California which are paid for by their private insurer. ABA intervention involves parent training and education where the parents learn through hands-on application with the assistance of a behavioral therapist. An Easter Seals report prepared when Respondent was 3 years, 10 months old, described Respondent's progress in developing socialization skills since he joined the program as being limited: "During the last 10 months Andres has shown steady progress in various areas, but continues to lack skills necessary for appropriate social interactions with his peers. While Andres is a very expressive young man, he has not yet learned how to initiate social interactions with his

peers, or recognize the multiple social cues that are needed to start and maintain healthy social interactions. Andres often shows interest and enjoyment in interacting with and communicating with people both familiar and non-familiar. Unfortunately, most of these interactions have involved adults due to the limitations in Andres schedule and access to age appropriate peers during ABA sessions.”

4. The parents’ principal concern is that Claimant has no relatives or friends his age. He does not interact with any “typical peers,” i.e., those of his age group who do not have a developmental disability, because he has no exposure to them in a natural environment, and thus has no opportunity to apply the skills he has been taught through ABA and other interventions in his home and school.

5. As related by Claimant’s father, the family, along with ABA therapists, have taken Claimant to public parks in the afternoons when Claimant is out of school, but there are few typical peers there at that time. Other children are not interested in interacting with a child with autism and reject Claimant. The other parents look at them in a reproachful way likely because they wonder why adults want to play with their children. Claimant becomes frustrated, and acts aggressively towards other children in the parks.

6. Claimant’s last Individual Program Plan (IPP) meeting was on July 29, 2013. The IPP described his social status as follows: “Andres is reportedly displaying social interest but lacks the skills to interact appropriately with others. He can respond to someone saying ‘hi,’ but needs prompting to respond when they say ‘bye.’ He gets excited about interacting with peers, but shows that by running around, running away, trying to hug, trying to hold hands, or trying to push peers. When his peers lose interest in playing with him because of these behaviors, Andres becomes frustrated. His parents are working closely with his ABA behaviorists to address his lack of socialization since he has limited opportunities for social interaction with peers (i.e. he is an only child, his extended family lives in Bolivia, and he attends school with only non-typical students). When on outings to the park, it is often difficult to find peers for Andres to play with and even more difficult to keep them engaged with him. He displays poor self-regulation, cannot begin or end a

conversation, does not initiate peer interaction or join in play, is unable to read facial expressions and body language, does not observe or imitate social behavior, is unable to understand the emotions/reactions of others, and has poor frustration management.”

7. Service Agency consulted its Special Agency Consultant who advised that the best approach to improving Claimant’s socialization skills would be for the school district to provide for an ABA behaviorist in the classroom to work with Claimant on developing such skills. This sentiment is not necessarily shared by his teacher who, according to the latest Individual Program Plan, responded to the parents’ concern that Claimant requires more adult support in the classroom. She opined that Respondent does not need “more adult support because he has shown improvement since the beginning of the year and he is at the point where he needs more leeway in order for him to process for himself the needs to engage and pick up on social cues.”

8. The parents further expressed their belief that Claimant could develop his ability to initiate interactions, which he does not appear able to do, by being included in a “typical” classroom for part of his school day. There is a new Kindergarten Transition class at the school, but Claimant’s participation would likely not happen until January of 2014.

9. Claimant’s parents met the staff of Progressive Resources at an annual Autism Awareness Walk. The parents expressed their concerns over their son’s social deficits, and the staff recommended Progressive Resources’ “Family Support/Interpersonal Communication Group” (FSICG) program for Claimant.

10. In its brochure, Progressive Resources’ total description of the “Family Support/Interpersonal Communication Group” is as follows: “The individual with special needs joins a peer group to develop communication skills through participation in motivating, structured activities, while parents meet to build a support network and discuss resources, advocacy, and the unique experience of raising a child/adult with special needs. The individual’s siblings also participate in peer groups to normalize their own experience, and to provide typical modeling of interpersonal skills for others in the group. Families attend weekly one-hour sessions.”

11. The Service Agency fleshed out this description in its Position Paper and denial letter: "Progressive Resources' Interpersonal communication Group's goal is to work on effective communication and to decrease frustration and behaviors. This group meets once a week for one hour and the clients range in age 3 to adult. The clients are divided into groups of about 12 (by age), with 3-4 adults leading the groups. Clients work on activities and have individual goals that they are working towards. If clients have 'typical' siblings, they are incorporated into the group in order to use them as role models and to teach them new ways to interact with their sibling. While the clients are in the activity group, the parents are expected to participate in a support group/facilitated discussion on various topics that pertain to their child (i.e. advocacy, resources, what it is like raising a child with special needs, etc.)."

12. The mother described the program as occurring in a room where the child participants, joined, if possible, by typical peer siblings, interact with each other. There is no specific training for the parents, although the parents, who are in a separate room, can meet with the therapist and receive specific tips. The participants are encouraged to take turns playing with, and sharing, toys, and playing games where they are encouraged to ask if they can join in the activity.<sup>2</sup>

13. The parents explained that no one was present from Progressive Resources at the fair hearing because it has a policy of testifying on behalf of only those who are existing consumers of their services. The parents had sought from Progressive Resources a copy of its "program design," a document which is presented when a vendor is going through a "vendorization"—i.e., approval--process with a regional center. Progressive Resources declined to provide one on the grounds of confidentiality, and suggested that the request be made to HRC. Service Agency contacted another regional center, which funds Progressive Resources, but the same objection was raised. Regardless, the record reveals the pertinent outline of the program.

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<sup>2</sup> All further statutory references are to the Welfare and Institutions Code.

14. Service Agency believes that Claimant's social skills would improve if he first learned those skills necessary to socially interact with others from ABA therapists and family who are trained by the therapists, and then apply those skills in social settings at school, through groups like the Boy Scouts and Y-Indians, and programs sponsored by the city's Parks and Recreation Department. There was no evidence presented that Claimant's participation in FSICG would in any way undermine concurrent ABA training or exposure to other possible venues where Claimant can also practice and hone those social skills he has learned from a therapist or family member.

15. Service Agency funded programs operated by Progressive Resources before 2009. However, in that year, Welfare and Institutions Code section 4648.5 was enacted. That statute suspended funding for "social recreation activities." As a result, Service Agency, which had paid for programs offered through Progressive Services before 2009, took the position that it would no longer fund Progressive Resources or any other socialization program, even though, to this day, and notwithstanding the enactment of section 4648.5, at least four other regional centers continue to fund programs offered through Progressive Resources.

16. HRC does not have a Service Policy on socialization. However, the HRC position, formulated as a result of the enactment of section 4648.5, is that it recognizes only those programs where all the services are supervised by a Board Certified Behavior Analyst on an ongoing basis and the vendor's clinical director is a Ph.D. or M.D., which is not the situation with Progressive Resources.

17. Service Agency regards the staff of Progressive Resources as lacking the necessary credentials since no one identified in its materials was trained on behavior intervention techniques. HRC views section 4648.5 as requiring the suspension of regional center funding for all socialization programs, allowing instead a structured training with very specific goals, as opposed to social recreation, which is much less rigorous or structured. Acknowledging that it once used Progressive Resources as a vendor, and that other regional centers still do so, HRC attributes its shift in focus in part to the changes enacted by

section 4648.5. As a result of the section's enactment, HRC now favors program staff who have behavior intervention credentials.

18. The parents counter that a program like FSICG provides an environment unlike others (e.g., parks, school) where the skills Claimant has learned can be transferred and demonstrated in a larger and more diverse environment than is available in his home or classroom. They characterize the services offered by Progressive Resources as "social skills training."

19. Claimant's request for funding of FSICG was denied, and this appeal followed.

## CONCLUSIONS OF LAW AND DISCUSSION

1. The program at issue here would not provide to Claimant any services that fall within the definition of "social recreation activities," and thus funding for FSICG is not prohibited by section 4648.5. Further, Claimant has sustained his burden of showing that development of socialization skills which he would acquire through the program are necessary for him to interact with others. As set forth in his IPP and in other reports, he exhibits severe social deficits. Service Agency once funded the program, but decided to stop doing so and elected to fund only programs which involved behavior intervention and no socialization because of the passage of section 4648.5. These decisions are not supported by the regulation that defines a social recreation program.

2. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (§ 4500 et seq.) The purpose of the Lanterman Act is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (§§ 4501, 4509 and 4685), and to enable them to approximate the pattern of everyday living of non-disabled persons of the same age and to lead more independent and productive lives in the community (§§ 4501 and 4750-4751.) Accordingly, persons with developmental disabilities have certain statutory rights, including the right to treatment and habilitation services and the right to services and supports

based upon individual needs and preferences. (§§ 4502, 4512, 4620 and 4646-4648.)

3. The determination of which services and supports are necessary for a consumer is made through the IPP process. The IPP must be developed through a process of individual needs determination, which may include the consumer, the consumer's parents, a legal guardian or conservator, or authorized representative. The consumer and the family must have the opportunity to actively participate in the development of the plan. (§ 4646, subd. (b).) The IPP includes a statement of the consumer's goals and objectives based on the consumer's needs and preferences or, when appropriate, the needs and preferences of the consumer's family. (§ 4646, subd. (a).) The development of the IPP must include consideration of a range of service options proposed by the IPP participants, the effectiveness of each option in meeting the goals stated in the IPP, and the cost-effectiveness of each option. (§ 4512, subd. (b).)

4. Section 4648 describes the activities for which regional centers are responsible in order to achieve the stated objectives of a consumer's IPP, including securing needed services and supports. Services and supports may include, but are not limited to, "social skills training," and "recreation." (§ 4512, subd. (b).)

5. A service agency is required to secure services and supports that maximize opportunities and choices for living, working, learning and recreating in the community." (§ 4640.7, subd. (a).) The planning team shall consider all appropriate options for meeting each individual program plan objective. (§ 4647, subd. (a).) A service agency "shall give highest preference to those services and supports . . . that allow all consumers to interact with persons without disabilities in positive, meaningful ways." (§ 4648, subd. (a)(1).) "Services and supports shall be flexible and individually tailored to the consumer. (§ 4648, subd. (a)(2).) When necessary to expand the availability of needed services of good quality, a regional center may use "creative and innovative service delivery models." (§ 4648, subd. (e)(3).)

6. The enactment of section 4648.5 appears to be a cost-saving measure wherein the legislature suspended regional center funding for activities that only inci-



dentally promote socialization skills. It provides:

- (a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers' authority to purchase the following services shall be suspended pending implementation of the Individual Choice Budget and certification by the Director of Developmental Services that the Individual Choice Budget has been implemented and will result in state budget savings sufficient to offset the costs of providing the following services:
    - (1) Camping services and associated travel expenses.
    - (2) Social recreation activities, except for those activities vendored as community-based day programs.
    - (3) Educational services for children three to 17, inclusive, years of age.
    - (4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.
  - (b) For regional center consumers receiving services described in subdivision (a) as part of their individual program plan (IPP) or individualized family service plan (IFSP), the prohibition in subdivision (a) shall take effect on August 1, 2009.
  - (c) An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs.
7. Section 4648.5's suspension of the designated activities is still in effect.
8. "Social Recreation Program" is specifically defined by the California Code of Regulations (CCR), title 17, section 54302, subdivision (a)(64): "'Social Recreation Program' means a community based day program which provides community integration and self-

advocacy training as they relate to recreation and leisure pursuits.” Thus, the term “social recreation activities” applies to group interactions which center on a recreational or leisure pursuit. The term may encompass karate lessons, swimming lessons, gymnastics, and sports—e.g., basketball, baseball, or tennis—which are generic activities available to everyone, and not just those who have a developmental disability. Had the Legislature intended, as HRC maintains, to eliminate all services that provide consumers with the opportunity to practice their learned socialization skills, it could easily have so expressed this aim. HRC’s stated position that section 4648.5 prohibits funding for any and all socialization programs is not supported by the statute’s language, its evident purpose, and the CCR section that defines “social recreation program.”

9. If FSICG does not fall within the definition of a social recreation program, then there is no need to determine whether the “extraordinary circumstances” exemption applies. The services offered by FSICG do not fit the definition of a social recreation program. The use of toys and games is incidental to the overriding goal of the program to create an environment where children are made comfortable and encouraged to interact with one another in socially acceptable ways. The toys and games are used only as tools to spark interaction, and are not ends in themselves where participants gain a sense of achievement and confidence through mastering an endeavor like gymnastics or karate

10. The burden of proof is on Claimant to prove the need for services provided by Progressive Resources. Claimant has demonstrated that his socialization skills are far below what is expected of a 4-year-old child, and he has raised questions about whether the plan promoted by the Service Agency best promotes the goals of the Lanterman Act. The Service Agency’s position that there are other ways by which his social needs can be addressed is a valid one, but it does not preclude an assessment of whether, given the cost, which is not in the record, Progressive Resources can also further Claimant’s socialization development, and do so in a quicker and more immediate way. As described by HRC and his mother, Claimant will have the opportunity through Progressive Resources to be in an environment specifically designed for children with his socialization needs as well as

typical peers. Nonetheless, given the array of options suggested by HRC, enrollment in the program should be reasonably time-limited followed by an assessment to determine its effectiveness.

## ORDER

The appeal of Claimant Andres M. from the determination of Harbor Regional Center not to fund Claimant's enrollment in Family Support/Interpersonal Communication Group, a program offered by vendor Progressive Resources, is granted. Service Agency shall provide funding for the program for six months. Thirty days before the six-month period ends, the parties shall convene an Individual Program Plan meeting to discuss and determine Claimant's then-deficits in social skills and social interaction, and to identify what services are available to meet Claimant's needs in social interaction.

Date: October 4, 2013

A handwritten signature in black ink, appearing to read 'JERRY SMILOWITZ', written over a horizontal line.

JERRY SMILOWITZ

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.