

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2017080903

DECISION

Administrative Law Judge Chantal M. Sampogna of the Office of Administrative Hearings heard this matter on October 2, 2017, in Culver City, California.

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (WRC or Service Agency).

Claimant's father (Father) represented claimant, who was not present.¹

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

ISSUE

Whether the Service Agency must fund one hour per week of one-on-one personal training gymnastic classes at the Los Angeles School of Gymnastics for claimant.

¹ Titles are used to protect the family's privacy.

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EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1 through 10.

Testimony: Ms. Basiri; Father.

FACTUAL FINDINGS

1. Claimant is a 12-year-old boy who resides with his parents. Claimant is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.)² based on his diagnosis of Autism Spectrum Disorder (ASD). (§ 4512, subd. (a).) Claimant's ASD diagnosis includes a comorbidity diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) and Obsessive Compulsive Disorder (OCD) (comorbid ASD). He has been a consumer of services funded by the Service Agency for over nine years.

2. In a Notice of Proposed Action (NOPA) letter dated June 22, 2016, the Service Agency denied claimant's request for funding for one hour per week of one-on-one personal training at Los Angeles School of Gymnastics.

3. Father filed a Fair Hearing Request on July 14, 2017, asking for funding for the requested service to aid claimant with his obesity.

4. In the NOPA, WRC explains its position. WRC agrees the service may be an effective way to help claimant lose and manage his weight, thereby addressing his obesity. However, WRC determined that weight maintenance is a general health concern of every child, whether the child has a disability or not, and that there was no direct

² All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

correlation between obesity and ASD. WRC believes there are other activities that could help claimant address his obesity, such as walking, running, and swimming. WRC also explained regional centers do not fund physical or occupational therapies, because school districts are responsible for funding these services. WRC concluded that claimant's needs are being met through his Individual Program Plan (IPP), and the requested service is not primary or critical to ameliorating the physical, cognitive, or psychosocial effects of claimant's developmental disability and so the service is excluded under section 4648.5, subdivisions (a) and (c).

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CLAIMANT'S ASD

5. Claimant has full functional use of upper and lower extremities, and is toilet trained. He attends the Help Group, a specialized day school that provides services to individuals with ASD. Claimant is a good writer, reader, typist, and speller. He enjoys board games, swimming, jumping on the trampoline, and gymnastic activities. With age and the help of services and his parents, claimant is gaining independence in self-care, but continues to need some verbal prompts to complete bathing, brushing, and dressing. His parents are supportive and encouraging, and provide claimant with a loving and nurturing home. Claimant's IPP's over the past three years show he has made behavioral improvements, with fewer outbursts, less behavioral issues at home, and decreased frustration. Claimant continues to display some OCD behaviors, and needs verbal prompts to participate in conversations. Claimant's behavior is very hard to control, and while he is making progress on any given goal, due to his comorbidity ASD the progress is slow and gradual. It can take over a year for claimant to move past a repeated activity.

6. Claimant's current IPP includes the following services: social skills as frequently as five times per month (provided by Leaps N Boundz); behavioral intervention as frequently as 21 units per month (provided by STAR of California); 14 hours per month of respite (provided by Maxim Healthcare); and 200 hours per month of extended school year (provided by 24Hr Homecare). Claimant's 2017 IPP identifies claimant's current identified outcomes. Outcome number two provides that claimant will have the benefits of medical treatment for optimal health, including medical care for issues related to his developmental disability; reasonable progress is noted. It is in this outcome that the IPP confirms claimant is overweight and his parents have found a personal trainer that works well with claimant. Outcome number four addresses claimant's opportunities for social and recreational activities, and the requested service is not described in this section.

7. The June 2017 reports from Leaps n Boundz (LB) and STAR CA (STAR) explain claimant's current strengths, needs, and goals.

- A. The LB Social Skills Progress Report noted significant improvement in claimant's Emerging Level of Social Awareness, as seen in his increased awareness of self, others, his emotions, and improved memory and play skills. Claimant's parents regularly attend these sessions and are extremely supportive, participatory, and work to apply the taught skills. Claimant's social skills goals include the following: participating in group discussions for two conversational exchanges, independent of prompting; sharing joint attention during a non-preferred activity; pro-socially coping with his emotions, independent of prompting; and recalling at least one detail about a peer. Parents practice these skills with claimant by engaging in conversation about preferred topics and identifying if claimant is off topic, reminding claimant of the order of events, developing self-calming techniques such as taking a

break or taking deep breaths, and looking at pictures in a year book and then identifying a detail about claimant's peers.

- B. STAR provides claimant behavioral and psychological services and conducted an Adaptive Behavior Assessment System, Third Edition. STAR notes that claimant continues to have challenging behaviors such as hitting, shoving, throwing objects, scripting, preservative behaviors, and noncompliance, on a daily basis. These behaviors inhibit the daily lives of claimant and his parents and deny access to new reinforcing environments. Examples include claimant's struggles with initiating and sustaining conversations with peers, and his perseverating on the apartment building or mall elevators and on father's morning dressing routine. In conversation, claimant will speak in scripting speech patterns, repeating statements or asking questions such as "What color are your socks?" or "Nice to meet you" in a cyclical pattern throughout the day. In the apartment complex or at malls, claimant will need to press all the elevator buttons in all the elevators multiple times before he can move past that activity. Claimant has recently softened on a previously persistent and rigid morning ritual during which he would watch his father get dressed for work and would require father to put on his clothes in a certain order and wear a certain color pair of socks each day. STAR concluded that claimant demonstrates needs across the following domains: communication, socialization, play skills, daily living skills, and behavior reduction, and that Applied Behavior Analysis intervention is medically necessary to adequately address claimant's functional impairments associated with his diagnosis of ASD and ADHD.

CLAIMANT'S OBESITY

8. Claimant was a picky eater for most of his life. He ate limited food types and had to have his food separated on his plate to prevent different foods from touching each other. Until he was eight-years-old, claimant's weight was unremarkable, and he was not obese. However, since he was eight-years-old, and for the past four years, claimant has significantly increased his caloric intake and became obese approximately one year ago. Claimant's weight gain began when he started going to the refrigerator repeatedly, constantly eating food. After eating a meal, he would return to the refrigerator and consume another meal equivalent. Claimant began to eat to the point of feeling physical discomfort and vomiting. The change in claimant's eating habits was unexpected and remains unexplained, but it is agreed by the parties that his weight gain and obesity are not directly correlated to his comorbid ASD.

9. Consistent with claimant's behavioral challenges resulting from his comorbid ASD, claimant was non-compliant when his parents redirected him or asked him to stop eating, and was aggressive and persistent in his taking of food. His inability to self-regulate his food consumption led him to gain well over 40 pounds between the ages of 8 and twelve-years old. When he was ten-years-old, claimant had reached 151 pounds, and was 62 inches tall; when he was eleven-years-old, claimant had reached 160 pounds and was 64 inches tall. Ultimately, working with claimant's doctor, Leila Bozorgnia, M.D., to develop ways to arrest claimant's weight gain, the parents implemented the following strategies: they put a lock on the refrigerator; when claimant demanded consecutive meals, they provided him food but much smaller portions; and they remind him how ill he feels when he eats excessively, sometimes too ill to attend school. Based on these interventions, claimant has recently reduced his caloric intake. However, his obesity persists.

EFFORTS TOWARDS WEIGHT LOSS

10. The parents worked with claimant's medical team to develop a plan to treat claimant's obesity. In a general attempt to help claimant regulate his comorbid ASD behaviors, and to help him control his related eating behaviors, the parents worked with James McCracken, M.D., claimant's doctor through UCLA's Center for Autism Research and Treatment, and considered medication options. Over the past four years, claimant has tried multiple medications, including Adderall, Concerta, and Focalin. However, claimant's response to these medications was increased aggression and combative behaviors. As a result, claimant is not taking any medications.

11. Through their work with Dr. Bozorgnia, claimant's pediatrician through California Kids Pediatrics, the parents learned that they must increase claimant's physical activity to facilitate him losing weight so he is no longer obese. Since claimant's significant weight gain, the parents have enrolled claimant in multiple activities to facilitate claimant's weight loss.

- A. Historically, claimant has enjoyed playing in the pool. When at a pool he wears a swim vest and enjoys jumping into the pool and splashing and being playful. Based on claimant's enjoyment of the water, the parents enrolled claimant in a series of swim classes with an instructor trained in working with children with special needs. These classes cost \$120 each, and were designed to teach children how to swim laps for the purpose of exercise. After four sessions, claimant continued to refuse to work on swimming laps, and instead played in the water during his classes. Claimant's refusal to participate as instructed was so significant that the program manager taught claimant for two classes, but the program manager also could not make any progress with claimant – claimant's comorbid ASD behaviors prevented claimant from utilizing the service in a manner that would affect weight loss.

- B. The parents also enrolled claimant in an afterschool basketball course.

Claimant was able to engage in this activity to the extent it engaged his work on social skills development and communication, i.e., claimant verbally engaged with other children and learned how to play the game. However, claimant would not actually play the game, but rather would hold a basketball and watch other children play the game. Claimant's comorbid ASD prevented claimant from utilizing the basketball course for the purpose of exercise.

- C. In the summer of 2017, the parents enrolled claimant in one-on-one gymnastics classes at Los Angeles School of Gymnastics. These classes are meant to teach gymnastics to children with special needs. The classes cost \$70 per session; claimant attends class every Sunday for one hour. Claimant has responded to the program. He actively participates in the instruction – he is developing skills such as jumping on the trampoline, walking on his hands and feet in a "spider" walk, walking on a balance beam, and doing supported back walkovers over a cushioned rounded support. Claimant is physically active and directed during the hour, his face reddened and he is perspiring at the end of class. Claimant's comorbidity ASD does not prevent claimant from using these gymnastic classes for their intended purpose, exercise. In an August 14, 2017 letter, Dr. Bozorgnia explained that it is incredibly challenging to assist claimant with weight loss and controlling his food portions given his limited functioning and understanding. She found claimant has benefitted tremendously from the service, that it is vital for his mental and physical health, and that the service will help prevent claimant from developing long-term morbidity of obesity such as diabetes, hypertension, and hypercholesterolemia.

12. Though claimant's comorbid ASD did not directly cause claimant's obesity, it is a direct cause of claimant's inability to treat his obesity. Claimant cannot enroll in a sports activity, or go for regular walks or runs, or utilize a gym and its machines, due to his comorbid behaviors which include hitting, shoving, throwing objects, scripting, preservative behaviors, and noncompliance. Due to his comorbid ASD, claimant's options for addressing his health issue are significantly limited. In claimant's case, his parents have been fully participatory in his service plans and claimant is even making progress in his goals, and yet his comorbid ASD behaviors prevent his from participating in sustained physical exertion to address his obesity. The IPP services so far provided to claimant serve his social skill and behavioral needs, but do not address his obesity, the treatment of which is currently unattainable without the service requested.

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal a denial of claimant's request to have WRC pay for claimant's one hour per week of one-on-one personal training gymnastic classes at Los Angeles School of Gymnastics. Jurisdiction was established. (Factual Findings 1-3.)

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, claimant bears the burden of proving, by a preponderance of the evidence, that claimant requires the requested service. (Evid. Code, § 115.)

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3. The state is responsible to provide services and supports for developmentally disabled individuals and their families. (§ 4501.) Regional centers are “charged with providing developmentally disabled persons with ‘access to the facilities and services best suited to them throughout their lifetime’” and with determining “the manner in which those services are to be rendered.” (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389, quoting from § 4620.)

4. A regional center must provide specialized services and supports toward the achievement and maintenance of the consumer’s independent, productive, and normal life that allows the consumer to “approximate the pattern of everyday living available to people without disabilities of the same age.” (§§ 4501, § 4512, subd. (b).) Regional centers are responsible for conducting a planning process that results in an IPP, which must set forth goals and objectives for the consumer. (§§ 4512, subd. (b), 4646.5, subd. (a).) Although regional centers are mandated to provide a wide range of services to implement the IPP, they must do so in a cost-effective manner, based on the needs and preferences of the consumer, or where appropriate, the consumer’s family. (§§ 4512, subd. (b), 4640.7, subd. (b), 4646, subd. (a).)

5. The Lanterman Act prohibits a Service Agency from funding social recreation activities, except for those activities vendored as a community-based day program, and from funding non-medical therapies, including specialized recreation, art, dance, and music. (§ 4648.5, subds. (a)(2), (4).)

6. The Lanterman Act provides an exception for the above noted limits on service funding. A Service Agency may fund a service otherwise prohibited by section 4648.5, subdivisions (a)(2) and (a)(4), “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 effects of the consumer's developmental disability. (§ 4648.5, subd. (c).)

7. Cause exists under section 4648.5 to require WRC to fund claimant's requested service, one hour per week of one-on-one gymnastic classes through Los Angeles School of Gymnastics. Though obesity is not directly correlated to claimant's eligibility diagnosis, his inability to reduce his weight to a non-obesity level is a directly correlated to claimant's disability and the requested service is a primary and critical means for ameliorating the physical, cognitive, and psychosocial effects of claimant's disability. (Factual Findings 1-12.)

8. Claimant has demonstrated that his comorbid ASD has prevented him from utilizing physical activities for the purpose of addressing his obesity. The parents have tried other means. Claimant's ability to focus and be compliant during any exercise activity is unachievable in other settings or with other activities: claimant's comorbid ASD causes claimant to be non-compliant and physically non-participatory in other physical activities designed for weight loss. This is an acute issue that cannot otherwise be addressed, and the circumstances are extraordinary. Claimant's IPP services provide claimant excellent services to assist him with developing his social and behavioral skills in social and family settings. The detailed LB and STAR reports make it clear that these services are addressing claimant's challenging behaviors such as hitting, throwing objects, scripting, preservative behaviors, and noncompliance in social and personal settings. However, these services do not address claimant's needs in an exercise setting cause by his obesity and comorbid ASD – a medical issue, and not a social or recreational issue, as identified in the IPP. While obesity is a problem that all children can have, regardless of disability, claimant's obesity cannot otherwise be addressed due to his individualized presentation of his comorbid ASD. (Factual Findings 1-12.)

ORDER

The appeal by claimant is granted. The Service Agency is ordered to provide claimant funding for one hour per week of one-on-one personal training gymnastics class through Los Angeles School of Gymnastics.

DATED:

CHANTAL M. SAMPOGNA
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; all parties are bound by this decision. Any party may appeal this decision to a court of competent jurisdiction within 90 days.