

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

**In the Matter of the Fair Hearing of:**

**CLAIMANT,**

**vs.**

**SAN GABRIEL/POMONA REGIONAL CENTER,**

**Service Agency.**

**OAH No. 2021020601**

**DECISION**

Eileen Cohn, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on May 4, 2021, by video and telephonic conference.

Daniel Ibarra, Fair Hearing Specialist, represented the San Gabriel/Pomona Regional Center (Service Agency).

Claimant's Mother (Mother) represented Claimant who was not present.<sup>1</sup>

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on May 4, 2021.

## **ISSUE**

The parties stipulated to the following issue:

Is the Service Agency required, under the Lanterman Developmental Disabilities Act (Lanterman Act) to fund Claimant's gymnastics program through the Athletic Athlete Program at a frequency of four sessions per month?

## **EVIDENCE RELIED UPON**

The Service Agency submitted Exhibits 1-9 which were marked and admitted without objection and provided the sworn testimony of Danial Ibarra. Claimant did not submit any exhibits and provided the sworn testimony of Mother.

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<sup>1</sup> Formal names of Claimant and family members are not used to protect their privacy. The name of Claimant's school district is also omitted to protect Claimant's privacy.

## **FACTUAL FINDINGS**

### **Background and Jurisdiction**

1. Claimant is 17 years of age, lives at home with Mother, a homemaker, his father, who is retired, and one younger sibling, and is eligible for services under the Lanterman Act as an individual with autism and mild intellectual disability. Claimant also had suffered from seizures in the past, is nonverbal, and requires prompts and assistance for most of his daily activities, including self-care, exercise, school, and chores. Claimant does not have friends, does not typically engage with his peers, communicates mainly through gestures and pointing and exhibits “stimming” behaviors related to his autism diagnosis such as rocking and thumb-sucking. Claimant also is prone to make loud noises. (Exs. 3, 5.)

2. Claimant receives services as a special education pupil from his local school district (school district) and has an Individual Education Program (IEP). As part of his IEP Claimant receives” Adapted Physical Education (APE), for 30 minutes, twice weekly, but this has only been provided over the internet during the Covid-19 pandemic. Claimant has benefitted in the past from physical activity which has had a calming effect on his disposition and behaviors. Claimant is about to transition to another school district program which will focus on his independent living skills but the IEP meeting to confirm those services has not yet been held. Due to the Covid-19 pandemic, Claimant has mostly remained isolated at home this school year and part of the previous school year with Mother as his primary caretaker and companion.

3. Claimant has been unable to attend a community socialization program because he is nonverbal. (Ex. 5.) Claimant attends an after-school program, Ability First, from 2:00 or 3:00 p.m. to 5:00 p.m. five days per week, Monday through Friday. Before

the pandemic he attended in person, and during the pandemic he has primarily attended on Zoom, and sometimes in person for services provided at his home, one to two times weekly. When Ability First staff members came to his home, they engaged Claimant by speaking with him and having him participate in a variety of activities, including yoga, ball play, and walks to the park. (Ex. 4 and 5.) However, home visits were not consistent.

4. On January 27, 2021, the Service Agency issued a Notice of Proposed Action (NOPA) denying Claimant's request for four sessions per month to attend the Athletic Athlete Program. The Service Agency provided the following background and rationale for its denial which were supported by the evidence provided during the fair hearing:

[Claimant] is a 17-year-old male who is diagnosed with Autism and Moderate Intellectual Disability. [Claimant] attends the 11th grade at [school district] funded by [school district]. [Claimant] attends school from Monday through Friday from 8 am – 2 pm, remotely as the COVID-19 pandemic has suspended in person schooling.

Currently, SG/PRC is funding for a 1) 20 hours per month of Parental Choice Respite through California Respite 2) 48 hours per month of Extended Day through Ability First. Current schedule for Ability First is Monday through Friday from 2 or 3 pm till 5 pm depending on schedule.

[Mother] has been funding \$120 for 4 sessions per month of Athletic Athlete Program and has requested funding for

[Claimant] to continue attending the program at the current rate. Mother believes attending Athletic Athlete Program [will address] [Claimant's] mental health and personal health. Mother shared since pandemic, [Claimant] has developed more prompting behaviors, OCD behaviors, and depression. [Claimant] has also been gaining weight just being home and is limited to outside activities.

In reviewing services, it was found that there are no extraordinary circumstances that will allow for funding of program.

(Ex. 1.)

5. The Service Agency also relied upon its Purchase of Service Guidelines and considered the Athletic Athlete Program duplicative of Ability First. (Exs. 8-9.) The Service Agency's Purchase of Service Guidelines provide for social skills training, in a group or individual format, for the purpose of developing social interaction skills for clients to work individually or in a group format, and to advance engagement and awareness of other people, same-aged peers and non-verbal communications skills, such as eye contact, pointing and waving, non-verbal cues. (Ex. 9, pp. 31-32, stamped as pp. 90-91.)

6. Mother timely appealed the Service Agency's NOPA. All jurisdictional requirements for this matter to proceed to hearing have been satisfied.

7. At the outset of the hearing the parties stipulated to a modification of the issue presented in the fair hearing request. As part of the fair hearing request Claimant had requested four sessions per month for a total of \$120 a month of group

fitness classes. The current issue is funding for four sessions per month for a total of \$160 a month of individual one-on-one gymnastics.

### **Claimant's Request for the Athletic Athlete Program**

8. As part of his current Individual Program Plan (IPP) the Service Agency currently provides funding for the following services: 1) 20 hours per month of Parental Choice Respite through California Respite 2) 48 hours per month of Extended Day through Ability First. The current schedule for Ability First is Monday through Friday from 2:00 or 3:00 pm until 5:00 p.m. depending on the schedule. (Exs. 1, 3-5.) This program has been very enriching for Claimant. (Ex. 4.)

9. Claimant's IPP "outcomes" include Outcome #2, participating in the least restrictive environment. During the Covid-19 pandemic, this has not been possible because Claimant has been attending school via the Internet from home. On-line schooling has required Mother to sit with him and attend to him most of the day. Claimant has also been unable to attend Adapted Physical Education (APE) in person but has APE available to him remotely via the internet, twice weekly or 30 minutes a day. (Ex. 4.) Outcome #3 refers to Claimant's interaction with at least one peer either at school or at his after-school program, which Claimant enjoys. During the pandemic, his interactions have been limited to Zoom sessions. (Ex. 4.) Outcome #6 addresses Claimant's parents' desires to have Claimant involved in more physical activities, including fitness. (Ex. 4.) Claimant's parents are responsible for funding sports and recreational activities. (Ex 5.)

10. Mother's report to the IPP team about Claimant's progress as of January 2021 was consistent with her testimony at hearing. Mother presented as a very candid and honest individual and provided her observations without any attempt to

exaggerate Claimant's deficits or needs. Mother has been spending most of her day monitoring or accompanying Claimant since the school district and afterschool program closures in 2020 and 2021 due to the Covid-19 pandemic. Mother must sit next to Claimant during remote school hours, from 8:00 a.m. to 2:00 p.m. to manipulate the mouse, operate the computer, and keep him engaged in school activities. She also accompanies him during APE and Ability First remote afterschool sessions. As such, she has been able to observe Claimant and accurately report his regression, physical status, and declining mental health. (Exs. 5, 7.; Mother's testimony.)

11. Mother reports that because of the Covid-19 pandemic, Claimant has increased his prompt dependence on her. Claimant is nonverbal which complicates his condition, has developed obsessive compulsive disorder (OCD) behaviors, exhibits symptoms of depression, and does not engage in physical activity unless instructed, mostly by her. When he attended Ability First in person his behavior improved but Claimant has regressed during the Covid-19 pandemic and the accompanying isolation. Claimant currently does not have other third party supports, aside from that provided by the school district, such as Supplemental Security Income (SSI) or Applied Behavioral Analysis (ABA) insurance services. Claimant's family's financial situation has been impacted by Mother's diagnosis of leukemia in 2014 and her doctor's instruction for her to stay out of the workforce for many years. Mother remains unemployed and is the primary caretaker of Claimant particularly during the Covid-19 pandemic because she had to assist Claimant with distance learning. Claimant's father is retired and works part-time in property management. (Exs. 5, 7; Mother's testimony.)

12. Mother has subsidized social recreation-related community opportunities for Claimant over the years including equine instruction and yoga. Claimant obtains

great comfort from exercise and Mother has observed an improvement overall in his behaviors when he is engaged in exercise and is able to be among his peers. She enrolled Claimant in the Athletic Athlete Program to provide him with more social and physical engagement opportunities outside the home for exercise, to provide needed intervention for his regressive behaviors, e.g., his increased prompt-dependency, OCD, and depression, related to his increased isolation from his peers and the community during the Covid-19. (Ex. 7; Mother's Testimony.)

13. The Athletic Athlete Program provides instructors trained in applied behavioral analysis (ABA) which is a method of intervention appropriate to individuals, like Claimant, who have autism and engage in behaviors which make it difficult for them to function in the community or with their peers.

14. Mother reported to the Service Agency that she found Claimant's "spirit light up, just being around his peers. [Claimant] enjoys, prefers and excels with the gross motor workout" at the Athletic Athlete Program. "If he didn't have this class, he'd sit on the sofa or lay in his bed all day if we let him. The Staff at the [Athletic Athlete Program] are extremely skilled trainers that are ABA trained and have the overall patience and understanding of the special needs' community. Something you will not find at a regular gym." (Ex. 7; Mother's testimony.)

15. Mother has been funding four sessions of the fitness program per month of the Athletic Athlete Program at a rate of \$120 a month, for four sessions a month, at a frequency of one 60-minute session per week. The beginning and ending date of Claimant's participation in the program was not firmly established by the evidence. However, at the time the parties held an informal meeting on March 17, 2021, (ex. 8), Claimant had not been participating in the Athletic Athlete Program for two months, but it is unclear whether his participation resumed thereafter. At some point during



Claimant's fitness program, the staff at the Athletic Athlete Program determined that Claimant was better suited for the gymnastics program. The gymnastics program costs \$160 per month for four sessions per month, at a frequency of one thirty-minute session per week. This price is based upon individual sessions, not group sessions. Mother stated that there is a waiting list for the group sessions and that the cost of those sessions should be consistent with the \$120 charged for the group fitness program.

16. Claimant is in the process of transitioning to a program sponsored by the school district focused on independent living skills. Mother will be working with the school district and has been invited to access the support of the Service Agency in developing Claimant's IEP to ensure that he receives needed services that the school district is responsible for supplying to advance his ability to interact with others.

## **LEGAL CONCLUSIONS**

### **Jurisdiction and Burden of Proof**

1. The Lanterman Act governs this case. (Welf. & Inst. Code, (Code) § 4500 et seq.)<sup>2</sup> An administrative "fair hearing" to determine the respective rights and obligations of the consumer and the regional center is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal the Service Agency's denial of his request for funding gymnastics through the Athletic Athletes Program. Jurisdiction in this case was thus established. (Factual Findings 1-6.)

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

2. Because Claimant seeks benefits or services, Claimant bears the burden of proving he is entitled to the services requested. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9; *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) Claimant must prove his case by a preponderance of the evidence. (Evid. Code, § 115.)

## **The Lanterman Act**

3. The Lanterman Act acknowledges the state's responsibility to provide services and supports for developmentally disabled individuals and their families. (Code § 4501.) The state agency charged with implementing the Lanterman Act, the Department of Developmental Services (DDS), is authorized to contract with regional centers to provide developmentally disabled individuals with access to the services and supports best suited to them throughout their lifetime. (Code § 4520.)

4. Regional centers are responsible for conducting a planning process that results in an IPP. Among other things, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services based upon the client's developmental needs and the effectiveness of the services selected to assist the consumer in achieving the agreed-upon goals, contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences. (Code §§ 4646, subd. (a)(1), (2), and (4), 4646.5, subd. (a), 4512, subd. (b), 4648, subd. (a)(6)(E).)

5. Although regional centers are mandated to provide a wide range of services to facilitate implementation of the IPP, they must do so in a cost-effective manner. (Code §§ 4640.7, subd. (b), 4646, subd. (a).) A regional center is not required to provide all the services that a client may require but is required to "find innovative

and economical methods of achieving the objectives” of the IPP. (Code § 4651.) Regional centers are specifically directed not to fund duplicate services that are available through another publicly funded agency or “generic resource.” Regional centers are required to “. . . identify and pursue all possible sources of funding. . . .” (Code § 4659, subd. (a).) The IPP process “shall ensure . . . [u]tilization of generic services and supports when appropriate.” (Code § 4646.4, subd. (a)(2).) But if a service specified in a client’s IPP is not provided by a generic agency, the regional center must fund the service to meet the goals set forth in the IPP. (Code § 4648, subd. (a)(1); see also, e.g., § 4659.)

## **Services for the Claimant**

6. The Lanterman Act defines “services and supports” to include “community integration services . . . [and] social skills training.” (Code § 4512, subd. (b).)

7. The Service Agency denied Claimant’s request based upon its conclusion that Claimant’s request did not constitute an extraordinary service to justify an exemption to its purchase of service guidelines and the prohibition for purchasing Code Sections 4646.4 (a) and 4648.5, subdivision (a). (Factual Finding 1 and Ex. 1.)

8. Code section 4646.4, subdivision (a) provides:

Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer’s individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process

shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all the following:

(1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.

(2) Utilization of generic services and supports when appropriate.

(3) Utilization of other services and sources of funding as contained in Section 4659

9. Code section 4648.5, subdivision (a) provides:

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.

10. Based upon the unique and extraordinary circumstances presented by the Covid-19 pandemic, Claimant met his burden of proof that he requires an additional, short-term intervention, of no more than 12 months, to address his social and behavioral regression, and that the requested service is not duplicative of generic or other services. Given the interruption in his interpersonal interaction with peers and staff at Ability First, and his in-person services at the school district, the Athletic Athlete Program will provide additional interventions to restore Claimant's pre-Covid status and assist him in making progress toward his IPP goals as he should have if all his previous in-person supports and services continued without interruption. Claimant shall remain responsible for pursuing group enrollment and enrolling in the group

program when it becomes available and for pursuing similar services through the school district.

## **ORDER**

1. Claimant's appeal is granted.
2. The Service Agency shall fund 12 months of the Athletic Athlete Program, at a rate of no more than \$160 a month for four sessions monthly for the gymnastics program.
3. Claimant shall actively pursue enrollment in the group gymnastics program at the Athletic Athlete program and shall provide reports to the Service Agency of all efforts to do so.
4. Claimant shall comply with all record-keeping and reporting requirements of the Service Agency.

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5. Nothing in this Order shall bar the Service Agency from funding this program after 12 months.

DATE:

EILEEN COHN

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.