

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

In the Matter of:

CLAIMANT

vs.

EASTERN LOS ANGELES REGIONAL CENTER,

Service Agency.

OAH No. 2022010335

DECISION

Nana Chin, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on February 22, 2022.

Claimant was represented by Matthew Pope, Attorney at Law, and by his mother (Mother). (Names are omitted and family titles are used to protect the privacy of Claimant and her family.) Eastern Los Angeles Regional Center (ELARC or Service Agency) was represented by Jacob Romero, Fair Hearing Coordinator.

Evidence was received. The record was held open until April 6, 2022, to allow Claimant to submit a "Statement of Position," which would serve as Claimant's written

closing argument. The Statement of Position was timely filed and marked as Exhibit L. The record was closed, and the matter submitted for decision on April 6, 2022.

ISSUES

1. Whether ELARC should fund Claimant's membership and personal training sessions two times per week at LA Fitness, Alhambra.
2. Whether ELARC should pay Matthew Pope's attorney's fees of \$3,000.

EVIDENCE

Documents: Service Agency's Exhibits 1-25; Claimant's Exhibits A-K.

Testimony: Lily Ting, ELARC Service Coordinator; and Mother.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a 29-year-old consumer who is eligible for and receives services from Service Agency under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.) under a diagnosis of cerebral palsy, epilepsy and severe intellectual disability Claimant also has been diagnosed with scoliosis, vision impairments, epilepsy and polycythemia vera

2. In a Notice of Proposed Action (NOPA) dated December 13, 2021, Service Agency notified Mother that "ELARC is hereby providing you with written notice

denying exercise service at LA Fitness.” (Exh. 1, p. A1.) The reason for the action was “[Claimant] still exercises at Rose Bowl Aquatic. Now that the exercise program, Movement Unlimited, has closed, ELARC wants the [Individualized Program Plan (IPP)] team to explore resources in the natural community, home and recreational settings prior to considering gym funding.” (*Ibid.*)

3. Mother submitted a Fair Hearing Request dated November 1, 2021, to appeal Service Agency’s decision.

Background

4. Between July 2009 and July 2021, Welfare and Institutions Code section 4648.5 suspended a regional center’s authority to purchase: (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 years of age; and (4) non-medical therapies, including, but not limited to, specialized recreation, art, dance and music. Exemptions to permit the purchase of these identified services could be granted on an individual basis “in extraordinary circumstances” 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.” (Welf. & Inst. Code, § 4648.5, subd. (c).)

5. On February 28, 2010, Service Agency issued a NOPA notifying Claimant of its intention to terminate funding for the gym/exercise program provided by Movement Unlimited Fitness Center (Movement Unlimited). (A similar

NOPA was issued the same day, notifying Claimant that it would also be terminating funding for swimming lessons at the West San Gabriel Valley YMCA (YMCA).) In addition to Welfare and Institutions Code sections 4648.5, Service Agency cited Welfare and Institutions Code sections 4646, subdivision (d), and 4646.4, subdivision (a), as support for its decision to terminate funding of both services.

6. On January 25, 2011, following hearing on January 10, 2011, ALJ Humberto Flores issued a decision in OAH Case number 2010040567 (2011 Decision). ALJ Flores found that "the exercise program helps [Claimant] to strengthen his muscles, builds strength in his arms, has a positive effect on his scoliosis and his posture, increases his ability to bear weight, and helps to improve his respiratory function. This enhances [Claimant's] ability to use his walker and to take a more active role in his life functioning and be more independent." (Exh. 3, p. A15.) ALJ Flores granted Claimant's appeal, concluding Claimant qualified for an exemption under Welfare and Institutions Code section 4648.5, subdivision (c), in that the gym program provided by Movement Unlimited was a "critical means for ameliorating the physical effects of [Claimant's] disability." (Exh. 3, p. A15.) (ALJ Flores issued a separate decision in the companion matter, OAH case number 2010090768, the same day, finding that the swimming program offered by the local YMCA addressed a different physical problem associated with claimant's disability and was also a critical means for ameliorating the physical effects of claimant's disability.)

7. Service Agency has been providing funding for Movement Unlimited pursuant to the 2011 Decision until Movement Unlimited permanently closed its facilities due to the Coronavirus Disease 2019 (COVID-19) pandemic.

2021 Individual Program Plan

8. An IPP meeting was conducted on September 15, 2021, with Mother and Claimant's service coordinator (SC) Lily Ting at the ELARC offices. The primary areas of concerns during the meeting were: (1) maintaining Claimant's health and safety; and (2) increasing Claimant's socialization.

9. Mother reported Claimant remained medically fragile and required constant supervision to maintain his health and safety. Claimant was continued to experience episodes of encephalopathy, which manifests in periods of reduced responsiveness, remained extremely allergic to insect bites of any kind, and the results of Claimant's recent blood tests revealed his blood cell count (hemoglobin and hematocrit) levels were elevated. (According to the record of Claimant's January 14, 2022 visit to Global Oncology, Claimant's red blood cell count has been high but relatively stable over the years. (Exh. A, p. B3.) It is unclear from the record if the results of his recent blood test are considered medically significant.)

10. Claimant's currently receives adaptive skills training (AST) from REACH Integrated Services (REACH), augmented communication development, mobility training, swimming lessons from Rose Bowl Aquatic, music therapy from Professional Child Development Associates (PCDA) and exercise program services with Movement Unlimited. Mother expressed her concern that if any of these activities were discontinued, Claimant "may suffer from decreased mobility, pain, muscle or joint [contracture], decreased cognitive function and/or behavioral distress." (Exh. 6, pp. A36-A37.)

11. Mother considers Claimant's current "regime of activity" to be "optimal" but did report that Claimant had not been able to go swimming or to the gym since

mid-March 2020 due to the COVID-19 pandemic. (Exh. 6, p. A36.) Mother also requested ELARC change Claimant's swimming and gym service provider to the YMCA of Greater LA (YMCA/LA). SC Ting agreed to contact YMCA/LA to get them vendorized in ELARC's system. (At the time of hearing, YMCA/LA was unable to accept new clients due to a staffing shortages. (Exh. 19, pp. A145-146.))

12. Mother also stressed the importance of Claimant's participation in community integration activities. Mother expressed a concern that Claimant would regress if he spent too much time alone and wanted Claimant to develop more group social skills to ease his interactions with peers and other individuals. At the time of the IPP, Claimant was receiving discrete trial training (DTT) from REACH Integrated for 15 hours a week, and music therapy and augmentative communication support services. Mother reported that the DTT resulted in a significant improvement in Claimant's overall demeanor and reduction in his disruptive behaviors. Mother requested half of Claimant's DDT be provided in the community so that Claimant could learn proper social behaviors with his peers in natural community settings. Mother also reported that both music therapy and augmentative communication support services have been helpful in improving Claimant's communication skills, he needed continued supports and services in the areas of functional communication and social interaction to become more independent.

LA Fitness

13. LA Fitness and the trainers at LA Fitness are not presently vendorized by Service Agency. Though not expressly established at hearing, Claimant appears to be enrolled in the Self-Determination Program (SDP). SDP is an alternative service delivery model designed to provide participants with increased flexibility in purchasing the services and supports necessary to implement their IPP. According to the Service

Agency, if funding for services is approved, Mother receives payment from Service Agency and can use those funds to pay LA Fitness directly.

14. Hugo Estrada with LA Fitness provided Mother a proposed exercise regimen for Claimant by email on January 25, 2022. Mr. Estrada further claims in his email that LA Fitness was worked “with these clients more than 10 years in wheelchair and clients like [Claimant].” (Exh. 15.) It is unclear from the email, however, whether Mr. Estrada is familiar with the extent of Claimant’s medical diagnoses and has the qualifications to determine whether the proposed activities could negatively impact Claimant’s health and safety.

15. In addition, though the personal trainers at LA Fitness appear to be certified by different private institutions, there was no evidence to suggest that the trainers are qualified to assist individuals with the kinds of physical disabilities Claimant has.

Medical Recommendation and Physician Consultant Record Review

16. Christopher C. Giza, M.D., wrote a letter dated September 1, 2021, containing his treatment recommendations for Claimant. The letter was largely unpersuasive in that Dr. Giza offered a number of opinions that appear to be outside his area of expertise. Dr. Giza, however, did establish that due to Claimant’s many medical conditions, Claimant requires “complex care.” (Exhs. 12 & K.)

17. Service Agency forwarded Claimant’s request for LA Fitness gym membership and personal training services for a review:

On November 10, 2021, Angela Espinoza Puopolo, Licensed Occupational Therapist reviewed Claimant’s request for exercise program offered by LA Fitness. Ms.

Espinoza Puopolo noted that “continued movement and exercise can be beneficial” but did not know whether the personal trainer at LA Fitness had the qualifications to safely provide Claimant with exercise services.

On January 26, 2022, the Physician Consultant determined that, “[b]ased on the information available for review cannot recommend funding.” (Exh. 17.) (The evidence presented at hearing did not establish who conducted the review. The name of individual who signed the request is illegible and there is no information regarding the individual’s qualifications.) The review indicted that additional information was needed to recommend funding, specifically: (1) a physician prescription, (2) medical insurance denial, and (3) current documentation from a physician indicating that the need for the service is related to Claimant’s developmental disability. As set forth in the Factual Findings 4 through 6 and the Legal Conclusions below, these issues were previously litigated and are not subject to review.

LEGAL CONCLUSIONS

Jurisdiction

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500, et seq.) An administrative “fair hearing” to determine the respective rights and obligations of the consumer and the regional center is available under the Lanterman Act. (Welf. & Inst. Code, §§ 4700-4716.) Claimant requested a fair hearing to appeal ELARC’s denial of funding of the gym/exercise program provided by LA Fitness.

Standard and Burden of Proof

2. When a party seeks government benefits or services, he bears the burden of proof. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) Where a change in services is sought, the party seeking the change bears the burden of proving that a change in services is necessary. (See, Evid. Code, § 500.) As no other statute or law specifically applies to the Lanterman Act, the standard of proof in this case is preponderance of the evidence. (See, Evid. Code, § 115.)

3. The party asserting a claim or making changes generally has the burden of proof in administrative proceedings (Evid. Code, § 500; see also., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) Service Agency, as the party seeking to terminate funding for exercise/gym services, has the burden to demonstrate its decision to terminate funding is correct. Claimant, as the party seeking to utilize a new service provider, has the burden of proving that the proposed service provider is qualified to provide exercise/gym services.

Applicable Law

4. In enacting the Lanterman Act, 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. (Welf. & Inst. Code, § 4501.) The Lanterman Act gives regional centers a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620, et seq.)

5. A regional center is required to secure the services and supports that meet the needs of the consumer, as determined in the consumer's IPP. (Welf. & Inst.

Code, § 4646, subd. (a)(1).) The determination of which services and supports are necessary for each consumer shall be made through the IPP process. (Welf. & Inst. Code, § 4512, subd. (b).) The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by IPP participants, the effectiveness of each option in meeting the goals stated in the IPP, and the cost-effectiveness of each option. (Welf. & Inst. Code, § 4512, subd. (b).)

6. The consumer's needs are determined through the IPP process. (Welf. & Inst. Code, § 4646.) "Individual program plans shall be prepared jointly by the planning team. Decisions concerning the consumer's goals, objectives, and services and supports that will be included in the consumer's [IPP] and purchased by the regional center or obtained from generic agencies shall be made by agreement between the regional center representative and the consumer or, where appropriate, the parents, legal guardian, conservator, or authorized representative at the program plan meeting." (Welf. & Inst. Code, § 4646, subd. (b).)

7. Pursuant to Welfare and Institutions Code section 4646, subdivision (a), a regional center's provision of services to consumers and their families must "reflect the cost-effective use of public resources." When purchasing services and supports for a consumer, a regional center shall ensure, among other things, "[c]onformance with the regional center's purchase of service policies, as approved by the [Department of Developmental Services] pursuant to subdivision (d) of Section 4434," and "[u]tilization of generic services and supports when appropriate." (Welf. & Inst. Code, § 4646.4, subd. (a)(1) and (2).) Regional center funds "shall not be used to supplant the budget of any agency that has a legal responsibility to serve all members of the general public

and is receiving public funds for providing those services." (Welf. & Inst. Code, § 4648, subd. (a)(8).)

Gym/Exercise Program

8. The issue of whether Service Agency properly funded Claimant's gym/exercise program was addressed in the 2011 Decision and therefore involves an issue of res judicata.

9. The doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy.' (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, §280, p. 820.) The California Supreme Court has described res judicata as having a "double aspect." (*People v. Barragan* (2004) 32 Cal.4th 236, 252-253 .) The principles of res judicata are also generally applicable to decisions resulting from an administrative hearing. (*Pacific Coast Medical Enterprises v. Department of Benefit Payments* (1983) 140 Cal.App.3d 197, 214).

10. In its primary aspect, commonly known as claim preclusion, res judicata acts to bar claims that were, or should have been, advanced in a previous suit involving the same parties. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*)). Claim preclusion arises if a second suit involves: (1) the same cause of action, (2) between the same parties, (3) after a final judgment on the merits in the first suit. (citations) (*Ibid.*)

11. In its secondary aspect, commonly known as collateral estoppel or issue preclusion, res judicata prohibits the relitigation of issues argued and decided in a previous case and applies: "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*Id.* at pp. 824-825.)

12. Courts, however, have held that collateral estoppel cannot bar relitigation where there has been a change in law or circumstances, as the issues litigated in the first action would not be the same ones arising in the second action because of the changes. (See. e.g., *California Hosp. Assn v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 572 [the pertinent provision of law in the prior case was no longer applicable to the situation before the court]; *Powers v. Floersheim* (1967) 256 Cal.App.2d 223, 230 [the statute under which the prior action was filed was substantially changed after the former action concluded].)

13. The elements of res judicata have been met in this matter. The issue of whether a gym/exercise program was properly funded by Service Agency was litigated before ALJ Flores. In coming to the decision Service Agency was required to continue funding the gym/exercise program, ALJ Flores necessarily determined that the grounds cited by Service Agency to support its decision to terminate the services did not apply. Specifically, there was a determination made that the services conformed with Service Agency's purchase of service policies, there were no other generic resource available to provide those service to Claimant, and the services are necessary to ameliorate the physical effects of Claimant's disability. (Welf. & Inst. Code, §§ 4646, subd. (a)(1), 4648.5, subd. (c), & 4646.4, subd. (a).)

14. The repeal of Welfare and Institutions Code section 4648.5 does not validity of that decision. Both Claimant and Service Agency were parties to the case and Service Agency presented no evidence that Claimant's physical effects of Claimant's developmental disability had been ameliorated to the extent gym/exercise services were no longer necessary or that there is another available generic resource for Claimant to obtain there services.

15. Therefore, Service Agency may not relitigate the issue of whether a gym/exercise program is a service that appropriate to meet Claimant's needs

LA Fitness as a Service Provider

16. When securing needed service and supports, a regional center must consider all the following when selecting a service provider: (1) a provider's ability to deliver quality services or supports that can accomplish all or part of the consumer's IPP; (2) a provider's success in achieving the objectives set forth in the IPP; (3) if appropriate, the existence of licensing, accreditation, or professional certification; (4) the relative cost of different service providers; and (5) the consumer's choice of providers. (Welf. & Inst. Code 4648, subd. (a)(6).)

17. The severity of Claimant's developmental disabilities is such that he requires a regular exercise/gym program to ameliorate the physical effects of his developmental disability. In addition, Claimant's is medically fragile and requires nursing supervision by a licensed vocational nurse (LVN) 56 hours per week. Though the evidence indicates the personal trainers at LA Fitness have been certified by various private institutions, there is no evidence that they have the qualifications to provide services to individuals with Claimant's physical disabilities. The services provided must not only ensure that Claimant meets his physical fitness goals but also ensure his health and safety.

18. Accordingly, Claimant and Service Agency shall decide upon a service provider that can provide supports and services to help Claimant meet his health and fitness goals as outlined in his IPP, and is qualified to provide services to individuals with Claimant's physical disabilities. In approving a new service provider, Service Agency cannot substitute its own preference for Claimant's by having Claimant explore

"natural resources for exercise in the natural community, home and recreational settings before funding for a gym." (Exh. 1, p. A1.)

Request for Attorney Services

19. Claimant requested Service Agency be ordered to pay Mr. Pope's attorney fees in connection with his services in the current matter. Generally, California follows the "American rule" for attorney fees, which is that each party bears his own costs unless there is a statute saying otherwise. (Civ. Proc. Code, § 1021; see also *Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 237.)

20. In the context of an administrative hearing concerning a specific state-regulated agency, "when the Legislature wants to permit the recovery of expenses or attorney fees . . . , it has done so explicitly." (*K.I. v. Wagner* (2014) 225 Cal.App.4th 1412, 1423 , as modified (June 2, 2014); see Code Civ. Proc., § 1028.5, subd. (b) [a small business or qualifying licensee may recover reasonable litigation expenses from a regulatory agency, including "expenses incurred in administrative proceedings"]; see also Bus. & Prof. Code, § 5107 [California Board of Accountancy may recover attorney fees incurred in administrative disciplinary hearings]; Bus. & Prof. Code, § 3753.7 [same for Respiratory Care Board of California].) As there is no provision for reimbursement of attorney's fees under the Lanterman Act, Claimant's request for reimbursement of his attorney's fees is denied.

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ORDER

Claimant's appeal is granted in part and denied in part as follows:

1. Claimant's request for Service Agency to fund a gym/exercise program is granted. Within 30 days of this Decision, the parties shall participate in an IPP meeting. At that time, Service Agency will have conducted a review of whether LA Fitness is a qualified service provider, pursuant to Welfare and Institutions Code section 4648, subdivision (a)(6), to provide Claimant with the gym/exercise program. If it is determined LA Fitness is not a qualified service provider, Service Agency will provide Claimant with information for alternative providers.
2. Claimant's request for attorney fees is denied.

DATE:

NANA CHIN

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.