BEFORE THE
DEPARTMENT OF DEVELOPMENTAL SERVICES
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

and

FRANK D. LANTERMAN REGIONAL CENTER,

Service Agency.

DDS No. CS0017196

OAH No. 2024051041

PROPOSED DECISION

Administrative Law Judge Deena R. Ghaly, Office of Administrative Hearings (Hearing Officer), heard this matter on September 16, October 22, and October 23, 2024.

Cindy Lopez, Fair Hearing Coordinator, represented Frank D. Lanterman Regional Center (FDLRC). Cynthia Dickey-Morgan, Independent Facilitator, represented claimant. Claimant's mother (Mother)[1] was also present.

At the conclusion of the fair hearing on October 23, 2024, the Hearing Officer ordered the parties to submit written closing statements and left the record open through December 6, 2024, for the parties to submit written closing statements and any responses to each other's submissions. Both parties timely filed their post-hearing submissions. FDLRC's written closing statement was marked Exhibit 27 and lodged with the record. Claimant's written closing statement and response to FDLRC's written closing statement were marked Exhibits Z and AA, respectively and lodged with the record.

The matter was deemed submitted and the record closed on December 6, 2024.

ISSUE

Should FDLRC provide funding through claimant's Self-Determination Program's Spending Plan for the Brain Balance program?

EVIDENCE

For FDLRC: Exhibits 1 through 27 and the testimony of FDLRC Assistant Director of Client and Family Services Megan Mendes and Dr. Leslie Richard.

[1] To protect their privacy, claimant and his mother's names are not used.

For claimant: Exhibits A through AA and the testimony of Dr. Maulik Purohit, Rebecca Jackson, Lori Sheldon, and Mother.

FACTUAL FINDINGS

Background

1. Claimant is seven years old. He is a consumer of FDLRC based on a diagnosis of Autism Spectrum Disorder (ASD).

2. As an FDLRC consumer, claimant's services are established through the development of an Individual Program Plan (IPP) which, consistent with applicable law, is regularly updated. According to his most recent IPP, among claimant's desired outcomes are that he will "participate independently in typical activities of daily life such as using functional communication, participating at meals, getting ready for school, and going to bed." (Exh. 3, p. A18.)

Self-Determination Program

3. Claimant receives his services through the Self-Determination Program (SDP). SDP is an alternative to the traditional manner regional centers deliver services to their consumers. Under SDP, participant consumers may select and direct services and supports though "person-centered" planning. Though designed to be more flexible and customized than the traditional service delivery system, applicable law still requires SDP to be administered pursuant to certain restrictions and requirements.

4. Megan Mendes is FDLRC's Assistant Director of Client and Family Services and is an SDP specialist, having undertaken over 500 hours of SDP training and having served as an SDP trainer. Among her responsibilities at FDLRC is taking the

lead in implementing its SDP program and approving SDP budgets. At hearing, Ms. Mendes testified, giving an overview of SDP requirements: SDP funds must be used for supports and services intended to alleviate the condition for which consumers are eligible for regional services, the program must be "cost-neutral," meaning it should not cost more than one delivered through traditional means, and all the rights and obligations applicable to consumers receiving services through traditional means apply to those receiving services under SDP. This includes the prohibition against using public funds for treatments deemed to be experimental.

Claimant's Request for SDP Funding for Brain Balance

5. In March 2024, claimant's independent facilitator submitted a spending plan for FDLRC's review, a standard part of the administration of SDP. The spending plan included $10,100 for 48 sessions at Brain Balance. Brain Balance is a program involving nutritional instruction and coaching, and cognitive, sensory and physical activities designed to engage and strengthen different regions of the brain. The services are provided either virtually or in-person at one of Brain Balance's centers.

6. In claimant's spending plan, the budget item for the Brain Balance sessions was categorized under Service Code 331 (Community Integration Support).

7. On April 22, 2024, FDLRC issued a Notice of Action (NOA) denying claimant's request to fund a Brain Balance program in his SDP spending plan. According to the NOA, FDLRC denied funding Brain Balance for the following reasons: (i) Participants in the SDP program may only purchase non-experimental, evidence-based supports and FDLRC deemed Brain Balance to be experimental and not evidence-based; (ii) The regional center must only purchase the necessary and most cost-effective services necessary to achieve consumers' goals as set out in their IPP

and for claimant, the combination of services covered by his family's health insurance plan, his school district, and FDLRC meet his needs comprehensively; and (iii) FDLRC cannot fund Brain Balance because it is duplicative of other services claimant is receiving and because it amounts to an impermissible supplementing of claimant's school district services and health insurance-provided services.

8. At hearing, FDLRC argued an additional basis for denying Brain Balance, that its categorization under SDP Service Code 331, the code for Community Integration Services, was improper because the Brain Balance program did not qualify under the Community Integration definition in SDP and no other service code exists under which Brain Balance can be categorized. FDLRC's argument in this regard implies that, if there is no suitable service code category for a budget item, FDLRC cannot authorize SDP funds to pay for it.

9. Claimant timely appealed the NOA and this hearing followed. In both his Appeal Request Form and his evidence and argument presented as part of the hearing, claimant opposed each of the grounds upon which FDLRC relied for denying funding for Brain Balance.

FDLRC's Expert Witness – Dr. Leslie Richard

10. FDLRC introduced Dr. Leslie Richard as its expert witness. Dr. Richard obtained her undergraduate degree in human biology at Stanford University, her medical degree at the University of California, San Francisco, and completed her residency in pediatrics at Children's Hospital, Los Angeles. Dr. Richard is double board-certified in general pediatrics and developmental behavioral pediatrics and has served as a consultant for FDLRC for over 25 years. She also maintains a private practice treating pediatric patients with developmental disabilities.

11. Dr. Richard testified at the hearing. She was on the clinical planning team at FDLRC which first evaluated claimant's request for Brain Balance funding. Dr. Richard reviewed the evaluation report Brain Balance personnel had prepared for claimant. Dr. Richard noted the metrics used in the evaluation, including indicators of progress, were not the standardized metrics used for measuring and tracking progress in developmentally disabled patients used in virtually every other clinical setting. As a result, there is a "comparing apples to oranges" aspect to Brain Balance's reports, making it impossible to determine whether the initial evaluation as well as progress reports prepared using Brain Balance's metrics can be confirmed by other testing methods.

12. Dr. Richard also reviewed representations in Brain Balance's literature about brain anatomy and brain function. Dr. Richard found many of these representations to be, at best, oversimplifications and in some respects, incorrect. Dr. Richard stated Brain Balance's representation that the brain is a muscle is inconsistent with general medical understanding of the organ. Dr. Richard found Brain Balance's representations of left-brain functions and right-brain functions to also be inconsistent with standard medical understanding of how the brain works. According to Dr. Richard, there is some distinction between where certain functions are housed in the brain but that, in general, there is a great deal of shared responsibility between the two hemispheres of the brain and they work in conjunction with each other to a much greater degree than what the Brain Balance literature indicates. Moreover, Dr. Richard found Brain Balance's representations about how certain developmental disabilities had their origins in weaknesses on one hemisphere of the brain or the other has never been established by conventional science.

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13. Brain Balance's protocol includes visual and auditory exercises intended to strengthen the purportedly relatively weaker right side of the brain. For instance, Brain Balance participants use special headphones through which they hear different words in each ear. Dr. Richard opined there is no scientific evidence supporting a finding that such exercises improve brain function for individuals with ASD. According to Dr. Richard, not only is there no proof that one side of the brain of developmentally disabled individuals is, in fact, weaker than the other, even if this was true, there are no clinical findings supporting the theory that it is possible to strengthen one brain hemisphere while limiting or quieting the stimulation received by the other hemisphere.

14. Dr. Richard also noted the individual aspects of the Brain Balance program – comprised of visual and auditory stimulation, specialized diets, physical activities, and tutoring – have each been studied and found not to affect any of the underlying developmental, language, social, repetitive behaviors, or other symptoms of ASD. Dr. Richard opined that, if these components individually have not ameliorated any aspect of autism, there is no scientifically based reason to believe that all of them together can measurably improve the symptoms of the condition.

15. Dr. Richard also disagreed with another of Brain Balance's foundational principles, that developmental disabilities are the result of certain primitive reflexes present in infancy persisting into older children. According to Dr. Richard, no scientific evidence exists to support such a hypothesis. Dr. Richard also noted that specifically in claimant's case, no evidence of persistent primitive infant reflexes exists.

16. Dr. Richard also disagreed the studies cited in Brain Balance's literature support a finding that its program is not experimental. Dr. Richard noted the subjects of these studies, including one undertaken by Harvard University and its mental health

hospital, McLean Hospital, were diagnosed with Attention Deficit/Hyperactivity Disorder (ADHD), not ASD. None of the studies specifically established that Brain Balance's proprietary program improved the symptomology of children with autism. Relatedly, Dr. Richard noted that, for purposes of assessing the applicability of the studies of Brain Balance to ASD, the studies must be peer reviewed by ASD experts. Dr. Richard concluded some of these studies were reviewed by ADHD experts, which she opined is an entirely different kind of condition and not considered a developmental disability.

17. Additionally, with respect to the quality and reliability of the studies done on the Brain Balance program, Dr. Richard noted there is no evidence the studies have been subjected to testing involving a control group, meaning testing where two groups from a population of individuals with the same or similar symptoms are used, with one group receiving the treatment, and one not, and then the results compared. This type of testing, according to Dr. Richard, is one of the established ways to develop empirical data reflecting the efficacy of a treatment. Relatedly, Dr. Richard noted many of the authors of the studies are affiliated with Brain Balance. As such, there are conflicts of interest compromising the studies' integrity.

Claimant's Expert Witness – Dr. Maulik Purohit

18. Claimant's expert witness is Dr. Maulik Purohit. Dr. Purohit received his medical degree from the University of Texas Southwestern Medical School in Dallas and his residency in physical medicine and rehabilitation at Baylor College of Medicine in Houston. Dr. Purohit described his specialty as encompassing care for neurological and physical ailments, including brain injury, stroke, pediatric disorders, and spinal cord injury. After completing his residency, Dr. Purohit completed a fellowship in brain

injury neurotrauma at Harvard Medical School and its affiliated hospitals. Dr. Purohit also holds a Master's Degree in Public Health.

19. Dr. Purohit has engaged in various academic research projects, including about using MRIs and other sources of diagnoses on brain-injured patients. His work experience includes employment as a faculty physician at Harvard where he oversaw a brain injury program. He next worked at Walter Reed Hospital treating patients for brain injury and neurotrauma. Dr. Purohit is currently the Chief Innovation Officer for PAM Health, a 90-hospital network. In all aspects of his career, Dr. Purohit has been involved in brain wellness and care.

20. During the hearing, Dr. Purohit was asked what percentage of his practice was or is devoted to the treatment of individuals with ASD. Dr. Purohit answered that his best "guestimate" was that approximately 10 percent of his patients have been diagnosed with ASD.

21. Dr. Purohit understands the term "evidence-based medicine" to mean medical treatments backed by research studies. However, because it would be impossible for the scientific community to undertake studies of every question in medical care, he opined evidence-based medicine can also include medical treatments based on extrapolated information from closely related fields or standard medical principles.

22. According to Dr. Purohit, because it is generally understood in the medical field that good nutrition, exercise, and adequate sleep improves neuroplasticity or brain function, it stands to reason that the same elements would help alleviate the symptoms of ASD.

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23. During his testimony, Dr. Purohit also stated that Brain Balance literature depicting certain symptoms such as clumsiness as associated with one hemisphere of the brain is an oversimplification of how the brain works and should be understood to be a "conceptual" rather than literal depiction of brain anatomy and function. Dr. Purohit does believe, however, that ASD is a condition marked by deficiency of function in certain parts of the brain.

Additional Evidence Presented by Claimant

24. Rebecca Jackson testified at the hearing. She is Brain Balance's Chief Program Officer. She has been working with Brain Balance for the past six years. In the course of her work there, Dr. Jackson has researched what constitutes non-experimental or evidence-based treatment for purposes of qualifying for regional center funding. She came across a resource, the California Evidence-Based Clearinghouse for Child Welfare (CEBCCW), that categorizes treatments by level of reliability based on the extent of research supporting them. Applying its criteria, Dr. Jackson believes the Brain Balance program qualifies for CEBCCW's third level category, "Promising Research Evidence," meaning there has been a minimum of one study that utilizes some form of a control and has established the program's benefit. Dr. Jackson stated regional centers have funded supports or services qualifying as promising research and so, by extension believes Brain Balance should be funded as well. Dr. Jackson acknowledged, however, that Brain Balance has never been assessed by CEBCCW.

25. Dr. Jackson also expounded on the studies referenced in Brain Balance's literature. According to her, the studies' results supporting Brain Balance's ameliorative effect on individuals with ASD stems from noting the overall positive effect of the program on its participants combined with the information that, based on voluntary

disclosure of participants' diagnoses, approximately five percent have ASD and are among those reporting positive results. Dr. Jackson acknowledged, however, there has never been a controlled study of the impact of Brain Balance on a solely ASD population. She noted there are two studies such studies currently being undertaken by Brain Balance.

26. Lori Sheldon is the executive director and owner of the Brain Balance claimant attends. Ms. Sheldon testified at the hearing. She is familiar with claimant's case through her review of his Brain Balance assessments. According to these assessments, after claimant attended 48 sessions, he demonstrated improvements in visual processing, his sense of rhythm and timing, ability to show affection, and overall, improved his behavior.

27. In her testimony, Ms. Sheldon also addressed FDLRC's position that Brain Balance cannot qualify as a community integration support. Ms. Sheldon acknowledged that social and socializing opportunities at Brain Balance are largely incidental and peripheral to its main purpose. She noted, however, that the improvements Brain Balance clients reaped generally decreased their need for other interventions and expanded their abilities to enjoy opportunities to socialize and otherwise participate in their communities.

28. Mother testified at the hearing. Regarding FDLRC's representation that claimant already received sufficient services to address his symptoms and behavior, Mother stated these measures, both through the school district and as an FDLRC consumer, were largely ineffective. Specifically, the services claimant receives at school and through FDLRC, including Applied Behavior Analysis, occupational therapy, and piano lessons have not controlled claimant's injurious and maladaptive behaviors. On

the other hand, the Brain Balance sessions have taught claimant coping skills and exercises he can utilize at home to calm and comfort himself.

LEGAL CONCLUSIONS

General Legal Provisions

1. The Legislature enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Act (Lanterman Act), codified at Welfare and Institutions section 4500 et seq. (further statutory references are to the Welfare and Institutions Code unless otherwise specified), to provide services and supports sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life. The purpose of the statutory scheme is twofold: To prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age in order to lead more independent and productive lives in the community. (*Assn. for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 388.)

2. Section 4512, subdivision (b) defines "services and supports" as:

> specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental

disability, or toward the achievement and maintenance of independent, productive, normal lives.

3. The Department of Developmental Services (DDS) is the state agency responsible for administering the Lanterman Act. To comply with its statutory mandate, DDS contracts with private non-profit community agencies such as FDLRC to provide the developmentally disabled with "access to the services and supports best suited to them throughout their lifetime." (§ 4620.)

4. Section 4685.8 requires DDS to implement a state wide SDP which shall be available to all regional centers. Subdivision (d)(3)(C) mandates that the SDP "participant shall only purchase services and supports necessary to implement their IPP and shall comply with any and all other terms and conditions for participation in the" SDP. Subdivision (k) authorizes an SDP participant to "implement their IPP, including choosing and purchasing the services and supports" that are "necessary to implement the plan" and a "regional center shall not prohibit the purchase of any service or support that is otherwise allowable. Subdivision (r)(6) requires the "spending plan to verify that goods and services eligible for federal financial participation are not used to fund goods or services available through generic agencies." Subdivision (y)(3)(D) makes SDP participants accountable for the use of public dollars.

5. Section 4646.4, subdivision (a), requires regional centers to establish an internal process that ensures adherence with federal and state law and regulations, and when purchasing services and supports, ensures conformance with the regional center's purchase of service policies.

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Prohibition Against Funding Experimental Treatment

6. Section 4648, subdivision (a)(17), prohibits regional centers from purchasing "experimental treatments, therapeutic services, or devices that have not been clinically determined or scientifically proved to be effective or safe or for which risks and complications are unknown." This prohibition is related to a more global requirement set out in section 4685.8, subdivision (b)(2)(H)(i), which requires regional centers to limit approval of services to those that are both therapeutically and cost effective.

7. Section 4686.2, subdivision (d)(3), defines "evidence-based practice" as:

> . . . a decisionmaking process that integrates the best available scientifically rigorous research, clinical expertise, and individual's characteristics. Evidence-based practice is an approach to treatment rather than a specific treatment. Evidence-based practice promotes the collection, interpretation, integration, and continuous evaluation of valid, important, and applicable individual or family reported, clinically observed, and research-supported evidence. The best available evidence, matched to consumer circumstances and preferences is applied to ensure the quality effective care.

Analysis

8. In a proceeding to determine whether a regional center should fund certain services, the burden of proof is on the claimant to establish by a preponderance of the evidence that the regional center should fund the requested service. (Evid. Code, §§ 115, 500; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052.) A preponderance of the evidence means that the evidence on one

side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. Itis "evidence that has more convincing force than that opposed to it." (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

9. Claimant failed to meet his burden of proof to establish by a preponderance of the evidence that his participation in Brain Balance should be funded as part of his SDP budget. Claimant substantially relied on evidence produced through Dr. Purohit's testimony that Brain Balance is not an experimental treatment. Dr. Purohit's testimony was not persuasive.

10. Pursuant to Evidence Code section 720, "[a] person is qualified to testify as an expert if he has special knowledge, skill, experience, and education sufficient to qualify him as an expert on the subject to which his testimony relates." Dr. Purohit, a specialist in brain trauma and injury, did not demonstrate he possessed such knowledge, skill, experience and education with developmental disabilities. Dr. Purohit's education and experience may be tangentially related to ASD, but that is insufficient to establish expertise in the condition. This is particularly the case because according to his own testimony, Dr. Purohit's treatment of patients with ASD is a small percentage of his overall practice.

11. Further, Dr. Purohit's opinion that all brain conditions, including ASD, are improved by generally healthful practices such as good nutrition and exercise is less persuasive and substantially undermined by Dr. Richard's more detailed and empirically oriented opinions and experience finding that these practices have not been found to measurably alleviate or improve the symptoms of ASD.

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12. Finally, Dr. Purohit was not able to persuasively demonstrate studies Brain Balance relies upon to establish its program's effectiveness are legitimate in light of the many deficiencies in the underlying method, including a failure to rely on controlled studies and the conflicts of interest inherent in studies undertaken by personnel professionally affiliated with Brain Balance.

13. The lack of controlled studies belies Dr. Jackson's representation that Brain Balance meets the third level of scientific rating under CEBCCW's rating system, Promising Research Evidence. This rating level requires at least one controlled study eliciting positive results.

14. In short, consistent with Dr. Richard's testimony, the overall impression is that Brain Balance, however well-intentioned, is best categorized as experimental and therefore cannot be funded by public moneys under the Lanterman Act's schema.

15. That is not to say Brain Balance could not have helped claimant. Mother, who testified in a forthright, candid and measured manner, testified Brain Balance helped improve claimant's behavior and emotional regulation. Her observations are credited and relevant to other issues in the instant matter, whether claimant's goals as established in his IPP are being met and whether Brain Balance's program is only duplicative of these other services. Given claimant's continued deficiencies and difficulties as explained by Mother, there is compelling evidence claimant's current services are not sufficient and that more needs to be done to address his condition or at least investigate more fully whether improvement to his condition is being maximized. In short, in light of Mother's testimony, FDLRC's conclusions about current services being sufficient are not borne up by the evidence. It appears FDLRC should do more to assist this young child.

16. Nonetheless, resorting to unproven resources such as Brain Balance is not the answer or at least not as part of regional center services. As a public program designed to serve a large population, regional centers must parse out the resources with which they are entrusted in strict compliance with the applicable laws' restrictions and requirements. Brain Balance does not meet these requirements.

17. Finally, regarding FDLRC's argument that Brain Balance is not fundable because its program cannot be categorized under one of the service codes established by DDS, while there may be no existing service code to accurately capture the type of program Brain Balance is, nothing in the record established this circumstance alone would be a sufficient reason to refuse to fund Brain Balance. Because, however, Brain Balance is deemed experimental and therefore cannot be funded under the strictures of the Lanterman Act on that basis, this issue is moot.

ORDER

Claimant's appeal is denied. FDLRC's decision to deny funding for the Brain Balance program is upheld.

DATE:

DEENA R. GHALY
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
DEPARTMENT OF DEVELOPMENTAL SERVICES
STATE OF CALIFORNIA

In the Matter of:

Claimant OAH Case No. 2024051041

Vs. **DECISION BY THE DIRECOR**

Frank D. Lanterman Regional Center,

Respondent.

ORDER OF DECISION

On December 16, 2024, an Administrative Law Judge (ALJ) at the Office of Administrative Hearings (OAH) issued a Proposed Decision in this matter.

The Department of Developmental Services (DDS) takes the following action on the attached Proposed Decision of the ALJ:

The Proposed Decision is adopted by DDS as its Decision in this matter. The Order of Decision, together with the Proposed Decision, constitute the Decision in this matter.

This is the final administrative Decision. Each party is bound by this Decision. Either party may request a reconsideration pursuant to Welfare and Institutions Code section 4713, subdivision (b), within 15 days of receiving the Decision or appeal the Decision to a court of competent jurisdiction within 180 days of receiving the final Decision.

Attached is a fact sheet with information about what to do and expect after you receive this decision, and where to get help.

IT IS SO ORDERED on this day January 9, 2025.

Original signed by:

Pete Cervinka, Director