

**BEFORE THE  
DEPARTMENT OF DEVELOPMENTAL SERVICES  
STATE OF CALIFORNIA**

**In the Matter of:**

**CLAIMANT**

**and**

**SAN DIEGO REGIONAL CENTER, Service Agency**

**DDS Case No. CS0018613**

**OAH No. 2024060859**

**PROPOSED DECISION**

Marion J. Vomhof, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 7, 2024, by videoconference.

Claimant's mother appeared at the hearing and represented claimant.

Neil Kramer, Fair Hearing Manager, Fair Hearings and Legal Affairs, represented San Diego Regional Center (SDRC).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on August 7, 2024.

## **ISSUE**

Should SDRC provide funding, through claimant's Self-Determination Program's (SDP) Spending Plan, for the Brain Balance program?

## **FACTUAL FINDINGS**

### **Background**

1. The following factual findings are derived from documentary evidence submitted by SDRC and claimant, and the testimony of claimant's mother, claimant's independent facilitator William Camacho, SDRC Director of Community Services Miguel Larios, SDRC Program Manager David Webb-Rex, and SDRC Coordinator of Behavior Services Melissa Melgar.

2. Claimant is a 17-year-old male who resides with his mother. According to claimant's Individual Program Plan (IPP), he is eligible for regional center services based on his diagnosis of Autism.

3. Effective February 1, 2024, claimant transitioned from traditional services into the SDP. A budget and spending plan were prepared and approved by SDRC.

4. On May 28, 2024, claimant's mother requested that SDRC fund the Brain Balance program in claimant's SDP spending plan. On June 10, 2024, SDRC issued a notice of action (NOA) denying claimant's request because Brain Balance is an experimental treatment and regional centers are prohibited from funding experimental treatments.

5. Claimant appealed and this hearing followed.

6. SDRC's Position Statement and claimant's rebuttal thereto set forth the parties' respective positions.

## **Self-Determination Program**

7. In 2013, the legislature enacted Welfare and Institutions Code section 4685.8, requiring the Department of Developmental Services (DDS) to implement a statewide SDP to provide individuals and their families with more freedom, control, and responsibility in choosing services and supports to help them meet objectives in their IPP. DDS began pilot programs in certain regional centers and oversaw statewide working groups from various regional centers and consumer groups to develop policies and procedures to implement the program.

8. Starting July 1, 2021, the SDP was available to all eligible regional center consumers, who wished to use it. All regional center consumers now have the option to have their services delivered through the SDP model or continue to receive services through the traditional model. With the SDP model, while participants have more choice over which services they receive and who delivers those services, participants also have more responsibility because they must manage their own budget resources with the assistance of a Financial Management Service (FMS) and support from the regional centers. The regional centers must certify that the cost of the SDP does not exceed the cost if the individual were to remain in the traditional services model.

9. After the budget is certified, the participant and regional center must develop a spending plan identifying the cost of each good, service, and support that will be purchased with regional center funds. Each item in the spending plan must relate to goals in the participant's IPP and be identified by a specific service code from a list of codes DDS publishes. A participant can annually transfer up to 10 percent of

the funds in any budget category to other budget categories without regional center approval. Transfers exceeding 10 percent require regional center approval.

10. Participants may also create Person Centered Plans, but these plans do not obligate regional centers to fund any of the items listed therein, nor must regional centers approve those plans. However, regional centers are required to certify individual SDP budgets and review spending plans to ensure compliance with applicable laws and federally-approved categories.

## **SDRC Evidence**

11. A January 11, 2019, DDS Directive for SDP Individual Budget Development and Spending Plan states:

SDP funds can only be used for goods and services that have been approved by the federal Centers for Medicare and Medicaid Services and are not available through other funding services (e.g., Medi-Cal, In-Home Supportive Services, schools, etc.).

A July 8, 2024, Updated Goods and Services Directive from DDS provided guidance to determine what costs can be included in the SDP budget. As stated, before any good or service can be included in an individual budget or SDP spending plan, "the planning team must first be clear about how the good or service addresses an identified need or goal in the IPP."

12. Mr. Pak, on behalf of Brain Balance filed an application to be an SDRC vendor. On April 10, 2023, Saralynn Keenan, SDRC Resource Coordinator, notified Brain Balance that its request had been denied because the service was experimental and

did not meet any regional center service code. SDRC's justification for the decision was based, in part, on Welfare & Institutions Code section 4648, subdivision (a), which states that regional centers "shall not purchase experimental treatments or therapeutic services . . . that have not been clinically determined or scientifically proven" to be effective.

13. Ms. Keenan attempted to determine a specific service code to qualify the program. She initially explored Service Code 106, Specialized Recreational Therapy, which requires the vendor to be credentialed and/or licensed by the state of California to practice in the field of therapy being offered. When asked, Brain Balance responded that most staff members have backgrounds in Kinesiology or Exercise Science or education, and that staff are all board-certified cognitive coaches. Ms. Keenan determined those backgrounds did not meet the required criteria.

Next, Ms. Keenan looked at Service Code 605, Adaptive Skills Trainer, which requires that the vendor possess the skills, training, and education necessary to enhance existing consumer skills, including skill deficits in communication and social function, and possess a master's degree in areas such as education psychology, counseling, nursing, or applied behavior analysis. Ms. Keenan determined Brain Balance staff did not meet the educational requirements for this service code. After speaking with Mr. Webb-Rex she determined the services had an academic focus, and local school districts are the generic resource responsible for providing funding for SDRC's clients' educational needs. (Welf. & Inst. Code, §§ 4648(a)(8) and 4659(a).) Brain Balance replied that they do not do academic training or teach any academic information.

14. On May 4, 2023, Mr. Pak appealed SDRC's decision, stating that: "Brain Balance is the leading evidence-based, drug-free training program designed to help

individuals improve focus, behavior, social skills, anxiety, and cognitive performance.” The appeal stated further that multiple research studies had been conducted, with “results published in medical, peer reviewed scientific journal demonstrating improvements participants have obtained from the Brain Balance program.”

15. A June 6, 2023, memo prepared by Ms. Melgar, provided support for SDRC’s decision to affirm its denial of Brain Balance’s appeal.

16. In a June 26, 2023, letter from Mr. Kramer to Mr. Pak, Mr. Kramer notified Mr. Pak that Brain Balance’s appeal was denied, and that Brain Balance could appeal this decision to DDS.

17. Claimant’s SDP Budget for February 1, 2024, through January 31, 2025, prepared in October 2023, and adjusted in April 2024, was approved by SDRC for a total of \$12,044.57. The approved plan allocates funds by categories, services, and codes. Claimant’s budget includes services for community integration supports, Service Code 331, and individual training and education, Service Code 334. A Spending Plan, created in January 2024, and adjusted in March 2024 and May 2024, listed the budget categories, SDP services, SDP service codes, amounts paid per year, and descriptions of the services provided.

18. Claimant’s January 2024 IPP, and April 2024 and May 2024 addendums, described his outcomes, and approved services, which include community education supports (Service Code 331), individual training and education (Service Code 334), and Olive You Independent Facilitator (Service Code 340).

## **TESTIMONY OF MIGUEL LARIOS**

19. Mr. Larios has been with SDRC for 15 years. As Director of Community Services, one of his duties is to review applications from vendors to be on SDRC's vendor list. The review includes determining the proper service codes, requesting documents from the vendor, and assuring that the vendor complies with SDRC vendor requirements. The final approval or denial of vendor applications is made by the Community Services team. Mr. Larios is also responsible for quality assurance of each vendor to assure they are in compliance with all state and federal regulations.

There are 21 regional centers in California, but because one regional center funds a service does not mean that all other regional centers must fund that service. Mr. Larios recently attended a quarterly meeting of all California community services directors. The group discussed experimental therapies, including Brain Balance, and was seeking standardization of services throughout the state. It was determined that the Brain Balance program is an experimental therapy and not evidence-based, and therefore regional centers should not be funding this service, either through traditional funding or through SDP. There is one regional center that is currently funding Brain Balance, but this funding is currently in the appeal process, and will likely be denied.

## **TESTIMONY OF DAVID WEBB-REX**

20. Mr. Webb-Rex is Program Manager for SDRC's SDP. He holds a bachelor's degree in elementary education and moderate disabilities and severe disabilities. He has worked for SDRC for three and one-half years.

When a consumer is enrolling in the SDP, they must prepare an individual budget and a spending plan. The SDP budget is based on the cost to the regional

center if the individual remained in traditional services. The spending plan is prepared by the consumer with the aid of an independent facilitator if they so choose. SDP participants are not required to use a regional center vendored service, however, the service provided by a vendor must be in compliance with state and federal requirements. Brain Balance's application was denied because the service was experimental and also it did not meet the criteria for specialized recreational therapies (service code 106) or adaptive skills trainer (service code 605). Participant directed goods and services (service code 333) is used if no other code applies, and it states that "experimental or prohibited treatments are excluded."

SDRC has two SDP clients who have been accessing Brain Balance since 2020. This occurred when the clients developed their own spending plans where they are not required to use SDRC approved vendors. SDRC did not have literature on Brain Balance at that time but had only the information received from the clients' families. SDRC understood at the time that Brain Balance was a method of tutoring so it would not have had to present a program design to SDRC. Now that SDRC is aware that Brain Balance is experimental and not in compliance with the Lanterman Act's approved services, SDRC is not able to continue to fund this program. SDRC has told those clients that funding of Brain Balance will be faded out by end of this fiscal year and that they will need to find an alternative service.

### **TESTIMONY OF MELISSA MELGAR**

21. Ms. Melgar is SDRC's Coordinator of Behavior Services where she currently oversees Autism Services. She has been with SDRC for seven years. She has a master's degree in clinical psychology and she is a board certified behavioral analyst (BCBA). All of these therapies deal with individuals with intellectual disabilities or autism.



22. Ms. Melgar reviewed Brain Balance's program design, and she and colleagues visited a Brain Balance facility. She found the facility to be "clinically unusual." Upon arrival she was asked to remove her shoes. She was given various devices to stimulate visual, olfactory, and tactical senses. She was given glasses which had blinking lights. Blinking lights may be disturbing to individuals with autism or other developmental disability. She observed metronomes, a balance beam, monkey bars, gymnastics mats, and an exercise ball. There were several computers and some computers had eye tracking software. Ms. Melgar said these are not standard services used for developmental disability or autism.

Ms. Melgar continued her research on Brain Balance and prepared a memo which she later sent to Mr. Kramer. The following was taken from that memo:

Brain Balance was developed by a chiropractor, offering treatment such as brain and sensory training, exercises, and nutritional advice. Published materials on Brain Balance involve testimonials, self-reports, and low quality research studies lacking in scientific rigor. These few studies should be considered with caution as they are lacking in empirical evidence, often presenting with serious scientific shortcomings including lack of a control group, and reliance on self-reports with lack of measurable outcomes. In addition, the research presented has been conducted by individuals with a vested interest in the success of the program as they benefit financially. Much of the research available is on individuals with ADHD and does not address developmental disabilities.

23. Ms. Melgar stated that the qualifications of the providers presented to SDRC indicated a lack of experience and education in developmental disabilities. She reviewed 37 studies received from Brain Balance and found that only seven of those studies actually related to the Brain Balance program. In those seven studies, six studies were written by someone who worked at Brain Balance and the main author of the seventh study received consulting fees from Brain Balance. Because Brain Balance had a financial interest in these studies, there may be bias, or least there is an appearance of bias, in the outcome. Ms. Melgar said these were low quality studies that were "lacking in scientific rigor." SDRC could not fund Brain Balance services because they were experimental and did not appropriately fit into any service code.

24. Ms. Melgar stated that "evidence based" indicates that "there is rigorous scientific research that supports the use of that intervention with a specific population that has shown clinically significant improvement." Journals can publish literature that is not scientifically rigorous which is not the same thing as being peer reviewed. If nothing could be published unless it was scientifically rigorous, there would be no research base to build on. She said, "We allow for lesser quality in terms of scientific rigor studies to be published because we need pilot studies and we need the research base to be established." Brain Balance does not have the scientific evidence to support its effectiveness for individuals with developmental disabilities. In addition, there are components of the Brain Balance treatment program that are available through generic resources such as school districts and insurance.

### **Claimant's Evidence**

25. Claimant provided the following certificates/documents:

- October 26, 2023, Person Centered Plans, documented claimant's needs, supports, goals, challenges, outcomes, and other personal information;
- Certificates of Completion of American Red Cross training in Babysitting Basics - December 27, 2023, and Adult and Pediatric First Aid/CPR/AED – April 1, 2023;
- Certificate of Recognition of claimant's participation in Special Olympics 2023;
- Digital Media Achievement Award from The Winston School - May 17, 2023;
- Certificate of Completion of the 2024 California Youth Leadership Forum for Students with Disabilities;
- Certificate of official completion of Amazon's Advanced Alexa Skills, Ahead, 2023-2024;
- Claimant's Transition Plan: January 1, 2024 - Goals are to be financially secure, engage in positive social relationships, and live independently;
- Claimant's High School transcript for Grades 9, 10, and 11 reflecting an overall GPA of 3.18 - March 15, 2024; and
- Certificate of Completion of "TEAM's Video Analytics 101" - November 28, 2020.

26. In a July 31, 2024, letter to SDRC, Anshu Batra, MD, FAAP, stated that she supports SDRC's funding of the Brain Balance Program and that, as a developmental pediatrician, she has witnessed firsthand the profound impact that "comprehensive, multifaceted interventions" can have on improving the lives of individuals with

developmental delays. She included testimonials from the parents of six children ages 4 to 12 years, regarding the progress of their children in the Brain Balance Program.

27. A National Autism Center 2011 publication titled, Findings and Conclusions: National Standards Project, Phase 2: Addressing the Need for Evidence-Based Practice Guidelines for Autism Spectrum Disorder, included the following regarding "inclusion criteria:"

Peer review requires that researchers submit their work for scrutiny by experts in their fields of study . . . It should be noted that all articles published in peer-reviewed journals are not necessarily of equivalent quality. However, peer review increases the likelihood that studies meet the minimum requirements for scientific methodology. Journals that are not peer reviewed may include articles that are published primarily because the author has paid for this service, thus undermining acceptable standards of scientific publication.

### **TESTIMONY OF CLAIMANT'S MOTHER**

28. Claimant's mother requested the Brain Balance program to help claimant meet his IPP goals: to increase his community safety, executive functioning, and self-advocacy skills through individual training and education. Claimant "has lots of strengths" and he has challenges that she and he want to keep working on, which is why they want Brain Balance. Claimant will be turning 18 next year and he wants to be a strong, independent person.

Brain Balance meets the regional center's requirements for service code 605, adaptive skills trainer, because Brain Balance's center director and program manager each have a master's degree in education and more than one year of experience in design and implementation. Brain Balance's research and studies have been published in peer-reviewed journals, which she believes qualifies Brain Base as scientific and no longer experimental, and the services should be approved by SDRC. Brain Balance should be funded for claimant because five Brain Balance Centers receive regional center funding for services through SDPs. San Diego is one of those regional centers.

Claimant prepared a Transition Plan as of January 1, 2024, reflecting on independence, social, college, and career plans. Claimant plans to obtain a degree in computer technology with a goal of obtaining financial security, engaging in positive social relationships, and living independently through self-advocacy effort.

Claimant's mother stated that she has been claimant's advocate for the past 17 years. She said, "My main investment is my son." She would not advocate for something for her son where she had not done her research or for something that she did not believe would benefit him.

### **TESTIMONY OF WILLIAM CAMACHO**

29. Mr. Camacho is claimant's independent facilitator. He said that claimant's mother thoroughly researches issues and he supports her in her advocating for claimant.

## **LEGAL CONCLUSIONS**

### **Purpose of the Lanterman Act**

1. The purpose of the Lanterman Developmental Disabilities Act (Lanterman Act) is to provide a “pattern of facilities and services . . . 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.” (Welf. & Inst. Code § 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

### **Burden and Standard of Proof**

2. Each party asserting a claim or defense has the burden of proof for establishing the facts essential to that specific claim or defense. (Evid. Code, §§ 110, 115, 500; *McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1051, footnote 5.) In this case, claimant bears the burden to prove his budget should include funding for Brain Balance.

3. The standard by which each party must prove those matters is the “preponderance of the evidence” standard. (Evid. Code, § 115.)

4. 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. It is “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.)

## **The Lanterman Act, DDS, and Regional Centers**

5. The Lanterman Act is found at Welfare and Institutions Code section 4500 et seq.

6. Welfare and Institutions Code section 4501 sets forth the state's responsibility and duties.

7. Welfare and Institutions Code section 4512, subdivision (b), states:

Services and supports for persons with developmental disabilities 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 an independent, productive, and normal life.

8. DDS is the state agency responsible for carrying out the laws related to the care, custody and treatment of individuals with developmental disabilities under the Lanterman Act. (Welf. & Inst. Code, § 4416.) In order to comply with its statutory mandate, DDS contracts with private non-profit community agencies, known as "regional centers," to provide the developmentally disabled with "access to the services and supports best suited to them throughout their lifetime." (Welf. & Inst. Code, § 4620.)

9. A regional center's responsibilities to its consumers are set forth in Welfare and Institutions Code sections 4640-4659.2.

10. Welfare & Institutions Code section 4648, subdivision (a)(17) provides in part: "regional centers shall not purchase experimental treatments, therapeutic services, or devices that have not been clinically determined or scientifically proven to be effective or safe or for which risks and complications are unknown."

11. Welfare and Institutions Code section 4686.2, subdivision (d)(3) defines "evidence-based practice" as follows:

(3) . . . 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 of clinical judgments and facilitates the most cost-effective care.

12. Welfare and Institutions Code section 4685.8 requires DDS to implement a state wide SDP which shall be available to all regional centers. Subdivisions (c)(6) and (c)(7), respectively, define "Self-determination" and "Spending Plan." Subdivision (d) makes participation in the SDP voluntary. 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)(5) requires regional centers, "in addition to annual certification, [to] conduct an additional review of all final individual budgets . . . ." 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.

## **Evaluation**

13. When all the evidence is considered, claimant did not prove by a preponderance of the evidence that the treatment provided by Brain Balance has been clinically determined or scientifically proven to be effective for the treatment or remediation of claimant's disability. As a result, SDRC is prohibited from paying for those services.

14. Claimant's mother clearly wants the best for her son and she was hopeful that Brain Balance may have helped him in some way. However, SDRC is prohibited by the Lanterman Act from funding therapies that have not been clinically determined or scientifically proven to be effective for the treatment or remediation of developmental disabilities. The legislature enacted this prohibition not only to safeguard taxpayers from the wasteful spending of public funds, but also to protect consumers and their parents from the false hope of therapies that have not been established to meet the claims made by some of their practitioners. There was inadequate support presented

at hearing for the effectiveness of the treatment provided by Brain Balance.  
Consequently, SDRC's denial of funding must be upheld.

## **ORDER**

Claimant's appeal of SDRC's denial of his request that SDRC fund the Brain Balance program in his SDP is denied. SDRC is unable to fund Brain Balance under any category.

DATE: August 19, 2024

MARION J. VOMHOF  
Administrative Law Judge  
Office of Administrative Hearings

BEFORE THE  
DEPARTMENT OF DEVELOPMENTAL SERVICES  
STATE OF CALIFORNIA

In the Matter of:

Claimant

OAH Case No. 2024060859

Vs.

**DECISION BY THE DIRECTOR**

San Diego Regional Center (SDRC),

Respondent.

ORDER OF DECISION

On August 19, 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 September 4, 2024.

*Original signed by:*

Nancy Bargmann, Director