

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

WILLIE C.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2012040066

DECISION

Administrative Law Judge Glynda B. Gomez, Office of Administrative Hearings, State of California, heard this matter on May 3, 2012 in Alhambra, California.

Lilia Ortega, Case Management Supervisor, represented the service agency, Eastern Los Angeles Regional Center (Service Agency or ELARC). Claimant's mother (Mother) represented Willie C. (Claimant). Claimant did not attend the hearing.

Testimony and documentary evidence was received, the record was closed, and the matter was submitted for decision on May 3, 2012.

ISSUE

Whether ELARC may stop funding Claimant's swimming lessons at the YMCA under Welfare and Institutions Code section 4646.4, subdivisions (a) and (d), and section 4648.5, subdivision (a).

FACTUAL FINDINGS

1. Claimant is 16 years old. He is eligible for regional center services based upon his diagnosis of Down's Syndrome. Claimant was born with a hole in his heart and a collapsed lung. Over time, Claimant's heart healed without surgical intervention. Claimant also has a diagnosis of asthma. His asthma is well controlled and he has not had any acute episodes in nine years. Claimant lives in La Habra, California with his mother. Claimant is cognitively impaired, non-verbal and requires constant supervision. Due to his Down's Syndrome, Claimant has low muscle tone and is generally weak. Although Claimant is ambulatory, he has difficulty walking. Mother and caregivers help Claimant with many self-care tasks such as dressing and bathing. Mother and caregivers have had Claimant try various forms of exercise including walking, bowling and Special Olympics to improve his coordination, strength and recreational skills. Swimming is Claimant's preferred form of exercise.

2. Claimant is a tenth grade student at Sonora High School in the Fullerton Unified School District. Claimant is placed in a special day class (SDC) with a functional and community based integration curriculum where he receives speech and language therapy, adaptive physical education and consultative occupational therapy pursuant to an individualized education program (IEP). Claimant's school program focuses on adaptive and life skills development.

3. Claimant's individual program plan (IPP) dated December 5, 2011, provides in part that ELARC would provide two swimming lessons per week at the YMCA. The swimming lessons were offered to provide Claimant with a social/recreational opportunity and to teach Claimant to swim. The swimming lessons also provide Claimant with an opportunity to exercise. ELARC has funded swimming lessons for Claimant since 2004.

4. Claimant's swimming lessons were given individually by a swimming instructor. The swimming instructor did not have any qualifications to provide any type of therapy, but may have developed a familiarity with the needs of the developmentally disabled from working with Claimant and other regional center consumers. The swimming lessons were the same as those available to the general public. Claimant enjoys the swimming lessons and looks forward to the sessions. Mother saw improvement in Claimant's strength as a result of the swimming lessons. Recently, Claimant has been moved to a larger pool with deeper water. In that setting, he has been improving his water safety skills and working hard to learn to swim. He is not able to coordinate his limbs sufficiently to swim. Claimant has a pool at his home. The pool is surrounded by a locked gate. During the summer, when the water is warmer, Mother and Claimant's sister take him in the pool to exercise and play.

5. The YMCA has a grant program whereby membership and swimming lessons are made available to low income and disabled individuals. The program has an application process and a wait list of approximately two months.

6. Claimant's primary care physician, Robert J. Riewerts, M.D., Regional Chief of Pediatrics at Kaiser Permanente Medical Group, wrote a letter dated April 10, 2012, in which he advocated the continuation of Claimant's swimming lessons. In his letter, Dr. Riewerts stated that Claimant "has continued to make steady improvement in his development every year. His involvement in a weekly swim program has been incredibly beneficial to his overall mobility and strength."

7. On January 12, 2012, ELARC sent Claimant a Notice of Proposed Action letter stating that it would no longer fund social/recreational services provided by the YMCA effective February 14, 2012. ELARC intended to end funding for Claimant's swimming lessons pursuant to Welfare and Institutions

Code sections 4646.4, subdivisions (a) and (d), and 4648.5, subdivision (a). On March 7, 2012, Claimant filed a request for fair hearing appealing ELARC's determination. The swimming lessons have continued as "aid paid" pending the appeal.

LEGAL CONCLUSIONS

1. ELARC contends that Claimant's swimming lessons have been funded as a social/recreational activity, and the lessons are not therapeutic or adapted to Claimant's disability; they are available through generic resources in the community; and, they are the type of activity that any parent would provide for a non-challenged child. ELARC further contends that it is prohibited from funding such social/recreational activities by Welfare and Institutions Code section 4648.5 (a). Claimant contends that he benefits from the swimming lessons and that they provide more than a social/recreational benefit. Claimant contends that he receives a physical benefit from the mobility and strength he has gained from swimming and that he needs to learn to swim for safety reasons because there is a pool on the premises of his home. For the reasons set forth below, Claimant's appeal is denied.

2. The burden of proof is on ELARC, as the party seeking to terminate the service or change the status quo, to establish that it may discontinue funding the swimming lessons. If ELARC establishes that the service it seeks to terminate is a service barred by the recent amendments to the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.), the burden is on the party seeking to retain the services to prove that the services come within an exception to the Lanterman Act amendments. The burden of proof in this matter is a preponderance of the evidence. (See Evid. Code, §§ 115 and 500.)

3. The Lanterman Developmental Disabilities Services Act¹ (Lanterman Act) sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. As the California Supreme Court explained in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, the purpose of the Lanterman Act 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 and to lead more independent and productive lives in the community." Under the Lanterman Act, regional centers are charged with providing developmentally disabled persons with access to the facilities and services best suited to them throughout their lifetime and with determining the manner in which those services are to be rendered. (*Id.* at p. 389; Welf. & Inst. Code, § 4620.)

4. To comply with the Lanterman Act, a regional center must provide services and supports that enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age. (Welf. & Inst. Code, § 4501.) The types of services and supports that a regional center must provide are "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." (Welf. & Inst. Code, § 4512, subd. (b).) The

¹ Welfare and Institutions Code section 4500 et seq.

determination of which services and supports the regional center shall provide is 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 individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option." (Ibid.) However, regional centers have wide discretion in determining how to implement an IPP. (Association for Retarded Citizens v. Department of Developmental Services, supra, 38 Cal.3d at p. 390.)

5. As set forth in Welfare and Institutions Code section 4646, subdivision (a):

It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

6. Welfare and Institutions Code section 4646.4, subdivision (a), provides:

Effective September 1, 2008, 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 of the following:

[¶] . . . [¶]

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

[¶] . . . [¶]

(4) Consideration of the family's responsibility for providing similar services and supports for a minor child without disabilities in identifying the consumer's service and support needs as provided in the least restrictive and most appropriate setting. In this determination, regional centers shall take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care.

7. Welfare and institutions Code section 4646, subdivision (d), provides in relevant part that:

Decisions concerning the consumer's goals, objectives, and services and supports that will be included in the consumer's individual program plan 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.

8. In addition, a regional center is responsible for using its resources effectively. Welfare and Institutions Code section 4648, subdivision (a)(2), provides that:

In implementing individual program plans, regional centers, through the planning team, shall first consider services and supports in natural community, home, work, and recreational settings. Services and supports shall be flexible and individually tailored to the consumer and, where appropriate, his or her family.

9. Welfare and institutions Code section 4648.5, provides in pertinent part that:

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:

- (a)(1) Camping services and associated travel expenses.
- (a)(2) Social recreation activities, except for those activities vendored as community-based day programs.
- (a)(3) Educational services for children three to 17, inclusive, years of age.
- (a)(4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

[¶] . . . [¶]

(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.

(Welf. & Inst. Code § 4648.5.)

10. Here, the evidence showed that the swimming lessons at the YMCA are not "specialized services" within the meaning of Welfare and Institutions Code section 4512, subdivision (b). Instead, the swimming lessons are the same as

those available to the general public. The swimming lessons are being provided to meet a social and recreational goal and to promote water safety. The YMCA instructor is not a therapist. The evidence demonstrated that the swimming lessons, though beneficial, are not specialized services and are being funded to provide Claimant with social/recreational opportunities. (See Welf. & Inst. Code, § 4512, subd. (b).)

11. The swimming lessons at issue here fall within the category of “generic” services that a family would be expected to provide a child. The YMCA lessons are available to anyone in the community. ELARC proved by a preponderance of the evidence that the swimming lessons at issue are the type of social or recreational activity that is the family’s responsibility to provide. (See Welf. & Inst. Code, § 4646.4, subd. (a)(2) & (4); Cal. Code Regs., tit. 17, § 54326, subd. (d)(1).)

12. Finally, the swimming lessons fall within the category of social/recreational activities contemplated by Welfare and Institutions Code section 4648.5, subdivision (a)(2), for which ELARC must suspend funding. The evidence did not establish that Claimant is entitled to an exemption from the suspension of funding. Claimant did not present sufficient evidence to establish that the swimming lessons, although beneficial, are not a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of his developmental disability or that the swimming lessons are necessary to enable him to remain in his home. (See Welf. & Inst. Code, § 4648.5, subds.(a) & (c).)

13. Based upon factual findings 1 through 6 and legal Conclusions 1 through 12, ELARC’s decision to terminate swimming lessons was appropriate.

ORDER

Claimants' appeal is denied. ELARC may terminate funding for Claimant's YMCA swimming lessons.

DATED: May 11, 2012

GLYNDA B. GOMEZ

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.