

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

In the Matter of:

CLAIMANT

v.

SAN GABRIEL/POMONA REGIONAL CENTER,

Service Agency

OAH No. 2021030368

DECISION

Glynda B. Gomez, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on May 18, 2021 by video and teleconference.

The San Gabriel/Pomona Regional Center (SGPRC) was represented by Daniel Ibarra, Fair Hearing Coordinator.

Claimant was represented by his mother.¹

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on May 18, 2021.

SUMMARY

Claimant appeals SGPRC's denial of his request for funding of swimming lessons. Claimant asserts that SGPRC should fund swimming lessons to promote water safety, assist with Claimant's sensory issues and provide a socialization opportunity. SGPRC contends that although Claimant may benefit from swimming lessons, it is prohibited from funding them. For the reasons set forth below, Claimant's appeal is denied.

ISSUE

Was SGPRC's denial of Claimant's request for funding of swimming lessons appropriate.

FACTUAL FINDINGS

1. Claimant is an almost four year-old child, eligible for regional center services through SGPRC based upon a diagnosis of autism. Claimant lives with parents

¹ The names of Claimant and his family members are not used in this decision in order to protect privacy interests.

and three siblings. Consistent with autism, Claimant has behavior, communication, sensory, gross motor and social deficits.

2. SGPRC denied Claimant's request for swimming lessons and issued a Notice of Proposed Action on March 9, 2021. SGPRC asserts that it is prohibited from funding such services. Claimant contends that an exemption from the prohibition should be granted.

3. Claimant is eligible for special education services through the local school district. Due to the Covid-19 Pandemic, Claimant's educational program and services are delivered remotely via computer. Claimant receives school-based occupational therapy and speech therapy. Claimant also receives clinic-based occupational therapy through private health insurance.

4. Claimant is an active child with behavioral issues and has limited communication skills. Claimant is impulsive and difficult to control around water. Although Claimant does not have a swimming pool at home, but Claimant's relatives have swimming pools that are accessible when Claimant visits them. Additionally, Claimant visits the ocean and locations with water features with his parents. Claimant's parents are concerned by Claimant's behavior and worry about Claimant's safety. Claimant has not had much social interaction during the last year because of the restrictions and health dangers associated with the Covid-19 Pandemic.

5. Claimant would like to take swimming lessons at Aqua Tots to improve Claimant's water safety and to soothe sensory issues. According to Mother's testimony, Claimant's Applied Behavior Analysis (ABA) therapist is also willing to assist the swimming instructor with Claimant in the pool. The swimming lessons may also provide a social and physical benefit. In promotional materials and correspondence

with Mother, the facility represents that its instructors are trained and can provide instruction to the developmentally disabled. However, there is no evidence that the instructors of Aqua Tots have any specialized knowledge or specific training to provide lessons to the developmentally disabled or that the lessons offer any special adaptations for consumers such as Claimant. As such, the swimming lessons are generic services.

6. Claimant's individual Program Plan (IPP) contains goals to decrease tantrums (Outcome #4); improve sensory processing skills (Outcome #8) and strengthen gross motor skills (Outcome #9).

7. The proposed swimming lessons would provide benefits to Claimant in that the lessons would provide instruction on water safety, a physical outlet for Claimant's sensory issues and a potential social benefit. Funding of swimming lessons is consistent with Desired Outcomes #4, #8 and #9 of Claimant's IPP. However, the swimming lessons are not a primary or critical method of ameliorating Claimant's disability and will not be necessary for Claimant to continuing living in the family home. Claimant's educational program and therapies are the primary and critical methods of ameliorating his disability.

LEGAL CONCLUSIONS

1. Once SGPRC established that the service Claimant seeks is a service barred by the amendments to the Lanterman Developmental Disabilities Services Act (Lanterman Act)(Welf. & Inst. Code, § 4500 et seq.), the burden is on the party seeking the services to prove that the services come within an exemption or 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.) While Claimant established that Claimant would benefit from the swimming lessons, Claimant needs instruction on water safety and has sensory and issues that might be alleviated by water activity, Claimant did not establish by a preponderance of the evidence that SGPRC must fund his swimming lessons or that an exception to the legal prohibition on funding of such services in this case.

2. The Lanterman Act sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. The Lanterman Act is meant 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. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.) 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.)

3. 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 determination of which services and supports the regional center shall provide is to 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 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, supra*, 38 Cal.3d at p. 390.)

4. 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.

5. Welfare and Institutions Code section 4646.4, subdivision (a), provides, in relevant part:

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:

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

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

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

(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.

6. California Code of Regulations, title 17, section 54326, subdivision (d)(1), provides that regional centers shall not:

Use purchase of service funds to purchase services for a minor child without first taking into account, when identifying the minor child's service needs, the family's responsibility for providing similar services to a minor child without disabilities. In such instances, the regional center must provide for exceptions, based on family need or hardship.

7. In addition, a regional center is responsible for using its resources efficiently. 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, if appropriate, the consumer's family.

8. Welfare and Institutions Code section 4648, subdivision (a)(8) provides that:

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.

9. Welfare and Institutions Code section 4648.5 provides that:

(a) 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...

(1) Camping services and associated travel expenses.

(2) Social recreation activities, except for those activities vendored as community-based day programs.

(3) Educational services for children three to 17, inclusive, years of age.

(4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

[¶] . . . [¶]

(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. In this case, the evidence showed that the swimming lessons at Aquatots were not "specialized services" within the meaning of Welfare and Institutions Code section 4512, subdivision (b). Instead, the swimming lessons were the same as those available to the general public. The swimming lessons were proposed to meet a social and recreational goal of learning to swim and become safe around water and as a sensory outlet. Accordingly, the swimming lessons were not specialized services and if funded would merely provide recreational opportunities and address water safety issues (See Welf. & Inst. Code, § 4512, subd. (b).)

11. Under these facts, SGPRC proved by a preponderance of the evidence that the proposed swimming lessons at issue constitute a category of generic social and recreational activity that a family would be responsible for providing to a typical child. (See Welf. & Inst. Code, § 4646.4, subd. (a)(2) & (4); Cal. Code Regs., tit. 17, § 54326, subd. (d)(1).)

12. The swimming lessons fall within the category of social recreation activities contemplated by Welfare and Institutions Code section 4648.5(a) for which SGPRC's funding authority has been suspended.

13. The evidence did not establish that Claimant was entitled to an exemption from the suspension. The swimming lessons are not a primary or critical

means for ameliorating the physical, cognitive, or psychosocial effects of Claimant's developmental disability and the swimming lessons are not necessary to enable Claimant to remain in the family home. (See Welf. & Inst. Code, § 4648.5, subd.(a) & (c).) On the contrary, the evidence established that Claimant's proposed swimming lessons are a social recreational activity or non-medical therapy for Claimant, available through generic resources in the community, and it is the type of activity that a parent would be required to provide for a typical child.

14. As such, SGPRC is prohibited from funding Claimant's swimming lessons. Based upon factual findings 1 through 7 and Legal Conclusions 1 through 14, SGPRC's decision to deny funding for swimming lessons was appropriate.

ORDER

Claimant's appeal is denied.

DATE:

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.