

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016110990

DECISION

Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on March 29, 2017.

Claimant's mother and his representative, Peter Atwood, represented claimant, who was not present for the hearing.

Leigh-Ann Pierce, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

ISSUE

Should IRC be required to fund swimming lessons for claimant?

FACTUAL FINDINGS

1. Claimant, a nine-year-old male, receives IRC services based on a diagnosis of Autism. Claimant lives with his family and is home schooled. He currently receives the following services: Respite support; in-home Applied Behavioral Analysis (ABA) and In Home Supportive Services (IHSS), with his mother as the provider.

2. Claimant's mother testified that she has requested swimming lessons for claimant because she is concerned about the possibility of drowning. There is a swimming pool at the housing complex where the family, including claimant, live and claimant is attracted to water. According to mother, her concerns were validated during a visit to her sister's home. Mother's sister has a swimming pool at her home and claimant wandered into the pool with his clothes on and had to be rescued. Mother no longer takes claimant to her sister's home.

Claimant has a history of elopement and has to be monitored/watched at all times. In addition to almost drowning in his aunt's pool, claimant has also run into the street, run away in stores, malls, and parking lots. He has no safety awareness whatsoever.

Mother has explored the following generic resources in her attempts to obtain swimming lessons for claimant: Her health insurance provider, Kaiser Permanente; claimant's school, Spring Charter Schools; the local YMCA; and, the State of California Department of Managed Health Care (DMHC). All of the listed organizations denied mother's request for "Occupational Therapy in an aquatic setting" – swimming lessons. The reasons for the denials were as follows:

a. Kaiser Permanente: “. . . we do not cover aquatic therapy and other water therapy.” “In addition, our Developmental Pediatrics Physician Reviewer determined that Aquatic Therapy is not evidence based treatment for ASD, (Autism Spectrum Disorder) and therefore, is not a covered benefit.” (Exh. D)

b. Spring Charter Schools:

ESCS does not agree to provide Occupational Therapy in an aquatic setting. Occupational Therapy services are currently provided to address educational needs, and are not provided in an area where [claimant] has access to a pool. Drowning prevention has not been identified as an area of educational need. (Exh. G)

c. The YMCA:

. . . We unfortunately do not offer private swim lesson[s], we are not able to accommodate request from [sic] private lessons due to staff training and availability. We are also unable to provide the special equipment needed for [claimant] in order for him to be successful in his swim class. We highly recommend and encourage all children who are at high risk of drowning to seek the special services needed in order to implement water safety. (Exh. H)

d. DMHC:

[¶] . . . [¶]

Your request for authorization and coverage for occupational therapy in an aquatic setting was referred to MAXIMUS Federal Services, Inc. (MAXIMUS), an independent Medical Review organization, where independent medical providers resolve disputes about health care services.

In your son's case, the independent provider determined that the services you requested are not medically necessary. Therefore, DMHC cannot require your health plan to provide these services. . . . (Exh. I)

3. Claimant's mother has located an organization that is ready, willing and able to provide claimant with swimming lessons. Casa Colina Children's Services Center offers a "therapeutic swim program." In a 2016 Occupational Therapy Evaluation report concerning claimant, Casa Colina stated the following:

Casa Colina offers group and individual sessions to develop water safety skills in children with disabilities. [Claimant] qualifies for individual therapy in the pool setting to address drowning prevention. Individual therapy is billed at the rate

of \$90 per one hour session. . . . Goals are individualized for each child, targeting basic water skills such as breath control, submerging and remerging to the side of the pool safely, swimming short distances, and using safety strategies to stay above water. (Exh. J)

4. Gabriela Hernandez, IRC's Program Manager testified that claimant's request for swimming lessons was denied because swimming lessons are not a "primary means of ameliorating Autism," and parents with non-special needs children "typically pay for swimming lessons."

5. Shelley Hoeffy has been claimant's Consumer Services Coordinator (CSC) since 2012. Ms. Hoeffy testified that during claimant's most current Individual Program Plan (IPP) meeting on August 8, 2016, the subject of swimming lessons was not mentioned by mother. Ms. Hoeffy further testified that although IRC could not fund swimming lessons, there were a couple of community resources mother should explore: The City of San Bernardino Center for Individual Development; and Loma Linda University Drayson Center, a Seventh-day Adventist Organization. Both resources offer special needs swimming lessons at reasonable costs.¹

¹ Mother testified that she and her husband could not afford the \$90 per hour charged by Casa Colina; however, "If [swim lessons] were offered at a lower price, then yes."

6. Jacqueline Acinto, claimant's ABA provider testified that claimant's eloping is of great concern because the behavior poses a "danger to himself." She must walk hand-in-hand with claimant when they are near any dangerous situation, such as "around traffic" or "near stairs." She walks hand-in-hand with claimant because he is prone to running "away from you" and "he is fast and can be hard to catch." Part of ABA training is "working on behaviors, such as eloping"; however, she is not trained to teach swimming and she is concerned about the fact that there is a swimming pool in the housing complex where claimant lives. When shown a picture of the pool area with the fence around it, Ms. Acinto testified that she has seen the fence and it is high enough that "I don't see him [claimant] climbing that." The gate to the pool is self-closing and secures itself when it closes. Claimant could possibly use a chair or some other device positioned near the fence to get over the fence; however, Ms. Acinto is not aware of any instances when claimant eloped and got into the pool area.

7. It was established through testimony and written articles that "suffocation, asphyxiation and drowning are the leading causes of fatal injuries among people with autism." (Exh. K)

LEGAL CONCLUSIONS

1. In enacting the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.), 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.)

2. 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.) Thus, regional centers are responsible for developing and implementing IPP's, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

3. Welfare and Institutions Code section 4512, subdivision (b), defines the services and supports that may be funded and sets forth the process through which such are identified, namely, the IPP process, a collaborative process involving consumer and service agency representatives:

'Services and supports for persons with developmental disabilities' means 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. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, where 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

(Underlining added.)

ANALYSIS

4. IRC's assessment of claimant's request was correct. The evidence established that claimant's swimming lessons are not medically necessary; swimming lessons are not "directed toward the alleviation" of claimant's developmental disability; and are not directed toward the social, personal, physical, or economic habilitation or rehabilitation of claimant, or toward the achievement and maintenance of an independent, productive, normal life. Consequently, the swimming lessons requested by claimant are not "services" or "supports" within the definitions contained in the Lanterman Act; therefore, IRC's denial of funding was appropriate.

5. Welfare and Institutions Code section 4648.5 provides, in part:

(a) Notwithstanding any other provisions of law or regulations to the contrary, effective July 1, 2009, a regional center's authority to purchase the following services shall be suspended

[¶] . . . [¶]

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

[¶] . . . [¶]

(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. (Underlining added.)

Swimming lessons do not meet the criteria for granting an exemption to Welfare and Institutions Code section 4648.5; accordingly, IRC is legislatively precluded from granting claimant's funding request.

6. Welfare and Institutions Code section 4646.4 provides, in part:

(a) Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan . . . and when purchasing services and supports, shall ensure all of the following:

[¶] . . . [¶]

- (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. . . .

IRC's denial of claimant's request was based, in part, on the fact that families of minor children without disabilities are required to pay for swimming lessons to prevent their children from drowning. This fact, along with the following conclusions support IRC's denial: As set forth in Legal Conclusion 4, above, swimming lessons are not "services" or "supports" within the definitions contained in the Lanterman Act; and as set forth in Legal Conclusion 5, above, claimant does not meet an exemption that would allow IRC to fund the requested swimming lessons. Consequently, IRC was, and is, statutorily prohibited from funding swimming lessons for claimant.

ORDER

IRC's decision to deny claimant's request that it fund swimming lessons is affirmed and claimant's appeal is denied.

Dated: April 10, 2017

ROY W. HEWITT

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 ninety days.