

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of :

CLAIMANT,

v.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2018020112

DECISION

Carla L. Garrett, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Culver City, California on March 26, 2018.

Lisa Basiri, Fair Hearing Specialist, represented Westside Regional Center (WRC or Service Agency). Claimant's mother (Mother) represented Claimant.¹

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on March 26, 2018.

ISSUE

Must the Service Agency continue providing swim lesson reimbursement to Claimant?

¹ Claimant and Claimant's mother are not identified by their names to preserve confidentiality.

FACTUAL FINDINGS

1. Claimant is a nine-year-old boy and a consumer of the Service Agency. Specifically, Claimant has been diagnosed with Down Syndrome and Intellectual Disability and is eligible for services pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, sections 4500, et seq.² Claimant resides with Mother and his father (collectively, Parents) and younger sister within the Service Agency's catchment area.

2. On March 15, 2017, Mother sent a letter to the Service Agency requesting it to pay for private one-on-one swim lessons for Claimant. Claimant had been attending municipal group swim lessons for five years, but despite these efforts, Claimant had made very little progress toward swimming independently. Mother explained that Claimant was at an age where typical peers had achieved water safety, and because they lived in a beach community, swimming was a community norm. When around bodies of water, Claimant, because he believed he could swim, would jump into deep water. Consequently, Parents developed significant safety concerns. Mother explained in the letter that she wished for Claimant to achieve water safety and basic swim skills at a level to be able to again utilize generic swim lessons available to all community members.

3. On June 6, 2017, the Service Agency's Purchase of Services Committee (Committee) granted the request and sent Parents a letter stating the same. Specifically, the letter provided that the Service Agency would fund for swim lessons, despite the mandate to suspend funding for such services as set forth in Welfare and Institutions Code section 4648.5. At hearing, Lisa Basiri testified that Claimant met the extraordinary circumstance exception that would permit funding of swim lessons, given the safety concerns inherent in Claimant's matter. The letter stated, however, that Claimant should

² All statutory references are to the Welfare and Institutions Code.

be able to learn the skill of swimming “in a reasonable amount of time.” (Exhibit 4.) The letter did not define what the Committee meant by “reasonable amount of time.”

4. On January 24, 2018, after receiving an undated progress report from the entity providing Claimant with one-on-one swim lessons, South Bay Aquatics, the Service Agency sent Parents a Notice of Proposed Action stating that it would terminate reimbursement for swim lessons as of February 28, 2018, and sent Parents a letter explaining its rationale. Specifically, the Service Agency’s letter stated the following:

Westside Regional Center granted swim lesson reimbursement to ensure that [Claimant] acquired basic swim-survival skills (front to back float) and to support his ability to propel himself safely to the side of the pool. Based on [a] recent update from South Bay Aquatics, [Claimant] is able to roll over onto his back to breathe. The focus now is to get him to maneuver to the side of the pool.

It is anticipated that [Claimant] will have acquired basic swim survival skills by the end of February 2018 and that he will be able to integrate into the swim classes with his peers.

(Exhibit 2.)

5. At hearing, when questioned whether Claimant had, in fact, acquired basic swim survival skills, including maneuvering to the side of the pool, Ms. Basiri testified that the Service Agency did not have that specific information. Indeed, the Service Agency neither proffered any documentary evidence demonstrating that Claimant had acquired basic swim survival skills, including maneuvering to the side of the pool, nor proffered any testimony from anyone from South Bay Aquatics stating the same. Mother, on the other

hand, clearly and emphatically testified that Claimant had not yet learned these skills.

6. Safety concerns still persist concerning Claimant's interaction with bodies of water, however, Mother remains hopeful that Claimant will become proficient in basic survival skills soon, including maneuvering to the side of the pool.

LEGAL CONCLUSIONS

1. Services are to be provided to regional center clients in conformity with section 4646, subdivision (d), and section 4512, subdivision (b). Consumer choice is to play a part in the construction of the consumer's Individual Program Plan (IPP). Where the parties cannot agree on the terms and conditions of the IPP, a Fair Hearing may, in essence, establish such terms. (See §§ 4646, subd. (g); 4710.5, subd. (a).)

2. The services to be provided to any consumer of regional center services must be individually suited to meet the unique needs of the individual consumer in question, and within the bounds of the law each consumer's particular needs must be met. (See, e.g., §§ 4500.5, subd. (d), 4501, 4502, 4502.1, 4512, subd. (b), 4640.7, subd. (a), 4646, subd. (a), 4646, subd. (b), 4648, subds. (a)(1) and (a)(2).) Otherwise, no IPP would have to be undertaken; the regional centers could simply provide the same services for all consumers. The Lanterman Act assigns a priority to maximizing the client's participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).)

3. Section 4512, subdivision (b), of the Lanterman Act states in part:

"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's family, and shall include consideration of . . . the effectiveness of each option of meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to, diagnosis, evaluation, treatment, personal care, day care, . . . special living arrangements, physical, occupational, and speech therapy, . . . education, . . . recreation, . . . community integration services, . . . daily living skills training, . . .

4. Under the Lanterman Act, Claimant has a right to treatment and habilitation services that are a primary or critical means of ameliorating the physical, cognitive, or psychosocial effects of his developmental disability. Section 4648.5 so provides:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers' [sic] 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 cost of providing the following services:

(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.
- (b) For regional center consumers receiving services described in subdivision (a) as part of their individual program plan (IPP) or individualized family service plan (IFSP), the prohibition in subdivision (a) shall take effect on August 1, 2009.
- (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 of 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.

5. The Serve Agency bears the burden of establishing it may terminate Claimant's swim lesson reimbursements by demonstrating that Claimant's extraordinary circumstances no longer exist and therefore the continued exemption from the state's budget spending reductions, as authorized in section 4648.5, are no longer applicable. (See Evid. Code, § 500). The Service Agency has not met that burden.

6. The evidence established that the Service Agency declared that Claimant's safety issues around bodies of water served as an extraordinary circumstance and an exception to the mandate against funding recreational services. (See Factual Findings 3 -4; Legal Conclusion 4.) While the Service Agency anticipated that Claimant would acquire basic swim survival skills, including how to maneuver to the side of the pool, by February

2018, the Service Agency proffered no evidence demonstrating that he had actually achieved the anticipated objectives. On the contrary, Mother persuasively testified that Claimant had not yet met his water safety goal. The safety concerns that warranted the exception, therefore, still persist. As such, no cause exists for the Service Agency to terminate swim lesson reimbursement to Claimant.

ORDER

1. Claimant's appeal is granted.
2. The Westside Regional Center shall continue funding one-on-one swim lessons for Claimant at South Bay Aquatics at the same length and frequency until Claimant remediates his safety issues around bodies of water by acquiring basic swim survival skills, including how to maneuver to the side of the pool.

Dated:

CARLA L. GARRETT
Administrative Law Judge
Office of Administrative Hearings

This is the final administrative decision. This decision binds both parties. Either party may appeal this decision to a court of competent jurisdiction within 90 days.