

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

In the Matter of the Appeal of:

CLAIMANT

v.

VALLEY MOUNTAIN REGIONAL CENTER

OAH No. 2019120576

DECISION

Sean Gavin, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on February 3, 2020, in Stockton, California.

Matthew Bahr, Legal Counsel, represented Valley Mountain Regional Center (VMRC).

Claimant's mother and authorized representative represented claimant with the assistance of Gina Montanez, a qualified Spanish interpreter. Claimant's father also attended the hearing.

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on February 3, 2020.

ISSUE

Should VMRC be required to provide funding for claimant to receive one-on-one water safety awareness training?

FACTUAL FINDINGS

1. Claimant is a five-year-old female consumer of VMRC based on her qualifying diagnosis of Autism Spectrum Disorder (ASD).
2. On October 23, 2019, claimant's mother made a request to VMRC Service Coordinator Jessica Gonzalez for water safety awareness training for claimant. She explained that claimant is very attracted to the water, but does not take instruction on water avoidance or basic water safety skills.
3. In a December 3, 2019 Notice of Proposed Action, VMRC denied the funding request on grounds that "[t]here is no documented clinical need for 1:1 swimming lessons and [VMRC] cannot fund social recreation activities."
4. On December 16, 2019, claimant's mother submitted a Fair Hearing Request to VMRC appealing the denial of funding. This hearing followed.

Claimant's Funding Request

5. Claimant lives at home with her parents and three-year-old sister in Stockton. Claimant's sister is also a consumer of VMRC based on her qualifying diagnosis of ASD. Spanish is the family's primary language. The family lives in an apartment complex with a gated in-ground pool. Claimant's father works six days per week to support the family.

6. On October 15, 2019, claimant's mother met with Ms. Gonzalez for the purpose of generating an Individual Program Plan (IPP) for claimant. In the "Safety Awareness/Medic Alert" section of claimant's IPP, Ms. Gonzalez described claimant as follows:

[Claimant] is seemingly unaware of dangers. [Claimant] requires supervision to prevent her from injury/harm in all settings. [Claimant] is reported to climb things, escape/run/wander, and play in bath tub, toilet. Mom reports in the past [claimant] has climbed back fence and ran to corner store, family was terrified. Family also reports she is attracted to water (pool, ponds, lakes etc.) and fears she does not understand the danger of water.

7. In the "Behaviors" section of claimant's IPP, Ms. Gonzalez wrote, in relevant part, "[claimant] is reported to display challenging behaviors, which include disruptive social behavior, aggression, emotional outbursts, tantrums, self-injurious behaviors (SIB), and running/wandering."

8. Through VRMC, claimant receives 30 hours of respite care per month. She wears a "Medic-Alert" emblem while out in the community due to her lack of safety awareness. She has also been referred to an occupational therapy sensory clinic for additional evaluation.

9. Ms. Gonzalez testified at hearing. She began working with claimant and her family in October 2019, after claimant transferred to VMRC from Bay Area Regional Center. She forwarded claimant's request for water safety awareness training to VRMC's Purchase of Service (POS) Exceptions Committee to see if funding was

available. The POS Exceptions Committee denied the request, noting there was no clinical need for such lessons.

10. After claimant's request was denied, Ms. Gonzalez discussed with claimant's mother what public resources and other swim lesson options may be available. She provided claimant's mother with a list of five facilities, including three that offered swim lessons to children with special needs. The list included the facilities' 2018 schedules. Ms. Gonzalez also produced at hearing an application for a Direct Help Grant Program offered by the Carlos Vieira Foundation, to provide "services, medical necessities, and educational tools for families affected by autism who live in Central California." She had not previously shared that application with claimant's mother. Ms. Gonzalez did not discuss with claimant's mother her efforts to provide water safety awareness training to claimant.

11. Claimant's mother testified at hearing. She explained that claimant is non-verbal, highly strong-willed, and unable to follow directions. She requires individual attention. Claimant's father also testified at hearing. He has tried to teach claimant to avoid the water, and also how to avoid drowning if she does get into a pool, but he has been unsuccessful. He explained that claimant does not make eye contact, does not listen to instruction, and is difficult to control physically. He believes he needs "professional help" to teach her water safety.

12. The apartment complex where claimant's family lives has an in-ground pool that is eight-feet deep at its maximum. The family has installed after-market locks on their windows, but claimant has broken them and escaped from the home on three separate occasions. Claimant is a skilled climber, often climbing to the top of countertops and even the family's refrigerator. According to claimant's mother, claimant is capable of climbing "wherever she wants." Claimant's mother estimates

that the fence surrounding the pool is approximately four-to-five feet tall. The fence consists of vertical metal bars across which horizontal metal crossbars are affixed. The horizontal crossbars would provide adequate footholds in the gaps of the vertical bars for someone wishing to climb over the fence.

13. Claimant is approximately three feet tall. She has already tried to climb the fence surrounding the pool multiple times. The path to the pedestrian gate exiting the apartment complex goes directly past the pool, and claimant's mother struggles every day to prevent claimant from breaking free of her grasp and running to the pool fence. Claimant's mother is fearful that she would not be able to protect claimant from drowning if she were to break free and climb over the fence. Claimant's mother does not know how to swim. In addition, she almost always has her three-year-old with her as well. She explained she is preoccupied by worries that if claimant were to get into the pool area, she would face a dilemma of risking her own life and the safety of her youngest daughter in order to rescue claimant.

14. Claimant's mother asserted that the requested funding is to increase claimant's water safety awareness, and not for social or recreational activities. In a letter dated January 20, 2020, claimant's pediatrician, Lubena Khambaty, M.D., wrote, "[claimant's] mom is seeking swimming class in an attempt to help familiarize the child with water safety. We have discussed that patient would require [sic] to follow and listen to directions in order to be taught how to swim – which might be hard due to her severe autism. Mom would still like to pursue options to teach her water safety as possible."

15. Claimant's mother also introduced a 2014 article¹ which discussed the need for aquatic safety awareness for individuals with ASD. According to the article, drowning is the leading cause of injury-related death in children, and children with ASD are at an even greater risk of drowning than those in the general population. This is due to a variety of factors, including a tendency to wander or elope, difficulties with assessing danger or responding if a dangerous situation occurs, difficulties with communication or expressing oneself, decreased capacity to predict the consequences of one's actions, and difficulties in the ability to modify one's behavior during times of stress.²

16. Claimant's mother has searched for businesses that offer water safety awareness training to children with special needs. She identified one company, StarBurst Gymnastics, that offers generalized swim lessons to groups of five, but these lessons require "parent involvement." Given the group setting, claimant's mother's need to supervise her younger daughter, and her own inability to swim, this class did not adequately address claimant's needs. Claimant's mother has investigated other facilities to help claimant, including those facilities suggested by VMRC, but has been unable to identify an individual water safety awareness training that does not require parental participation in the water.

¹ Grosse, Susan J. (2014) "Aquatic Safety for Individuals with Autism Spectrum Disorders," *International Journal of Aquatic Research and Education*, Vol. 8, No. 3, Article 8.

² *Id.* at pp. 296, 300 (citations omitted).

Discussion

17. VMRC contends that claimant's funding request must be denied for three reasons: (1) generic services and supports are available in the community to provide swimming instruction to claimant; (2) teaching swimming or water safety is the responsibility of families even for children without disabilities; and (3) swimming is a social recreation activity and therefore not eligible for regional center funding. For the reasons discussed below, each of these bases to deny funding is rejected.

GENERIC SERVICES AND SUPPORTS ARE NOT APPROPRIATE

18. When developing IPPs, regional centers are mandated by law to ensure "utilization of generic services and supports *when appropriate*." (Welf. & inst. Code, § 4646.4, subd. (a)(2), italics added.) In this case, there is no dispute that claimant is not able to learn in a group setting. Her IPP describes her as having "disruptive social behavior, aggression, emotional outbursts, tantrums, self-injurious behaviors (SIB), and running/wandering." Her ASD is so severe that, even with one-on-one attention, her father is unable to provide her adequate water safety skills. She is not able to attend a group swimming class.

19. However, all the generic resources claimant's mother has explored, including those that VMRC shared with her, involve group swimming classes. These resources are not appropriate to claimant's needs. As a result, claimant's failure to utilize them does not present a bar to funding the requested services.

FAMILY RESPONSIBILITY TO TEACH WATER SAFETY AWARENESS

20. When developing IPPs, regional centers are mandated by law to ensure "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." (Welf. & Inst. Code, § 4646.4, subd. (a)(4).)

21. The family has tried to teach claimant water safety awareness. Claimant's father has spent time with her attempting to teach her the physical skills necessary to avoid drowning, and both parents have tried to teach claimant water avoidance in general. They have been unsuccessful, and believe they need professional help. Claimant's mother does not know how to swim, and is unable to teach her daughter the physical skills necessary to avoid drowning.

22. The family has met its responsibility of attempting to provide similar supports and services as they would provide a child without disabilities. The family is not responsible for having professional expertise in providing water safety awareness to a child with ASD. While VMRC is obligated to consider the family's obligation, in this case such consideration does not prevent funding the requested services.

WATER SAFETY AWARENESS TRAINING IS NOT A SOCIAL RECREATION ACTIVITY

23. "Services and supports listed in the [IPP] may include, but are not limited to, [. . .] recreation." (Welf. & Inst. Code, § 4512, subd. (b).) This section notwithstanding, effective July 1, 2009, regional centers are not authorized to provide "social recreation activities, except for those activities vendored as community-based day programs." (Welf. & Inst. Code, § 4648.5, subd. (a)(2).) VMRC argues that swimming is recreational, and therefore it cannot fund swimming classes.

24. "[S]tatutes must be harmonized, both internally and with each other, to the extent possible. [Citations.] Interpretive constructions which render some words

surplusage [. . .] are to be avoided." (*California Mfrs. Assn. v. Public Utilities Commission* (1979) 24 Cal.3d 836, 844.) When the Legislature codified Welfare and Institutions Code section 4648.5, subdivision (a)(2), it used the specific term "social recreation activities," not the more general term "recreation" that appears in section 4512, subdivision (b). To interpret "social recreation activities" to be identical to "recreation" would be to render the word "social" surplusage, and such a reading is therefore to be avoided.

25. The distinction between "social recreation activities" and "recreation" is important here because there is no evidence that claimant's parents are pursuing swimming for its *social* benefits to claimant. To the contrary, they are seeking individual one-on-one training, the least social version of lessons available, for its utility in helping to prevent claimant's accidental death. Therefore, the type of training claimant seeks in this context is not a social recreation activity, and section 4648.5, subdivision (a)(2), does not preclude funding it.

LEGAL CONCLUSIONS

1. Claimant has the burden of proving by a preponderance of the evidence that she is entitled to the funding sought. (*Lindsay v. San Diego Retirement Board* (1964) 231 Cal.App.2d 156, 161 [the party seeking government benefits has the burden of proving entitlement to such benefits]; Evid. Code, § 115 [the standard of proof is preponderance of the evidence, unless otherwise provided by law].) This evidentiary standard requires claimant to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.) In other words, claimant must prove

it is more likely than not that she is entitled to funding of water safety awareness training. (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

2. Under the Lanterman Act, the Legislature has decreed that persons with developmental disabilities have a right to treatment and rehabilitative services and supports in the least restrictive environment and provided in the natural community settings as well as the right to choose their own program planning and implementation. (Welf. & Inst. Code, § 4502.) "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." (Welf. & Inst. Code, § 4512, subd. (b).)

3. The Legislature has further declared regional centers are to provide or secure family supports that: respect and support the decision-making authority of the family; are flexible and creative in meeting the unique and individual needs of the families as they evolve over time; build on family strengths, natural supports, and existing community resources; are designed to meet the cultural preferences, values, and lifestyles of the family; and, focus on the entire family and promote the inclusion of children with disabilities in all aspects of school and community. (Welf. & Inst. Code, § 4685, subd. (b).) Services by regional centers must be provided in the most cost-effective and beneficial manner, and must be individually tailored to the consumer. (Welf. & Inst. Code, §§ 4685, subd. (c)(3) & 4648, subd. (a)(2)).

4. Effective September 1, 2008, Welfare and Institutions Code section 4646.4, subdivision (a), requires regional centers, when purchasing services and

supports, to ensure conformance with purchase of service policies and to utilize generic services and supports when appropriate. In addition, regional centers must consider 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. Regional centers are required to take into account the consumer's need for extraordinary care, services, and supports and supervision.

5. Effective July 1, 2009, Welfare and Institutions Code section 4648.5, subdivision (a)(2), prohibits regional centers from funding social recreation activities.

6. As discussed in the Factual Findings as a whole, and in particular Factual Findings 17 through 25, claimant established that generic supports and services are not appropriate, claimant's family has satisfied its responsibility to provide similar supports and services as they would provide a child without disabilities, and the water safety awareness training sought is not a social recreation activity. As a result, VMRC shall be required to assist claimant with identifying available vendors in her local area which offer one-on-one water safety awareness training, tailored to the needs of children with ASD, and to fund the cost of such training for claimant.

//

//

//

//

//

//

ORDER

Claimant's appeal is granted. Valley Mountain Regional Center shall assist claimant with identifying a vendor who offers water safety awareness training tailored to the needs of children with Autism Spectrum Disorder. Valley Mountain Regional Center shall thereafter provide funding for the cost of such services for claimant.

DATE: February 7, 2020

SEAN GAVIN

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.