

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

In the Matter of:

CLAIMANT

v.

EASTERN LOS ANGELES REGIONAL CENTER

OAH No. 2020070977

DECISION

Tiffany L. King, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, conducted a telephonic fair hearing on September 10, 2020, from Sacramento, California.

Jacob Romero appeared on behalf of Eastern Los Angeles Regional Center (ELARC or Regional Center).

Claimant's mother and authorized representative represented Claimant.

Evidence was received, the record closed, and the matter submitted for decision on September 10, 2020.

ISSUE

May ELARC Center stop funding Claimant's private swimming lessons at the Young Men's Christian Association (YMCA)?

FACTUAL FINDINGS

Background

1. Claimant is a 15-year-old male eligible for regional center services based upon a diagnosis of intellectual disability with unspecified severity. His mental retardation stems from myelomeningocele, a severe form of spina bifida, with hydrocephalus. Claimant has shunts to drain the accumulated fluid which results from the hydrocephalus. He uses leg and ankle braces, as well as a wheelchair, to ambulate. He is able to walk short distances on some days. Other days, he is unable to walk at all, and must rely upon his wheelchair, often with the assistance of aides or his mother. Claimant has no bowel control, wears diapers, and must be catheterized each day. At the time of claimant's last annual Individual Program Plan (IPP) meeting on June 29, 2020, he stood 67 inches tall and weighed 266 pounds. This reflects a weight loss of 62 pounds since his 2019 Individualized Program Plan (IPP) meeting.¹

¹ The June 29, 2020 IPP report included conflicting data regarding claimant's measurements. In the Information section, claimant's height and weight is listed as 67 inches and 266 pounds. Later, under the Physical Description/ Communication section,

2. Claimant's parents are divorced, and both have remarried. They share joint custody of claimant. He lives with his father and 13-year-old brother, Monday through Friday, to attend a special day school program at La Serna High School. Claimant's mother is attending school to become a licensed vocational nurse (LVN). She is also claimant's In-Home Support Services (IHSS) worker. Claimant receives 24 hours per month of respite services provided by Cordova Consulting, 86 hours per month of IHSS, and \$700 in SSI² benefits. Additionally, claimant receives quarterly physical therapy (PT) sessions and semiannual occupational therapy (OT) sessions provided by California Children's Services (CCS). Finally, claimant's mother has applied for protected supervision services and is awaiting a decision from the Department of Public Social Services.

3. For over ten years, ELARC has funded twice-weekly individual swimming lessons which claimant takes at the local YMCA. In October 2009, ELARC informed claimant that it would no longer fund swimming lessons on the grounds that the lessons were a recreational activity for which regional center funding was no longer allowed pursuant to the newly enacted section 4648.5, subdivision (a) of the Welfare and Institutions Code.³ Claimant appealed and the matter was set for an evidentiary hearing before an ALJ of the OAH (OAH Case No. 2010100747). In a decision, dated

his height and weight are listed as 63 inches and 286 pounds. The reviewing medical doctor relied on the former, thus that is what is relied on in this Decision.

² Supplemental Security Income from the Social Security Administration.

³ Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

February 8, 2011 (2011 Decision), the ALJ determined the swimming lessons were the type of social or recreational activity that is generally the family's responsibility to fund and for which regional center funding is prohibited under section 4648.5, subdivision (a). However, the ALJ further determined claimant was entitled to an exemption, finding the lessons to be a "primary and critical means of ameliorating the physical and psychosocial effects of claimant's developmental disability and will help him remain in his home by preventing debilitating contractures which impede his mobility." Consequently, ELARC has continued funding the YMCA swim lessons to present.

Evaluations

PSYCHOEDUCATIONAL ASSESSMENT – SCHOOL DISTRICT

4. In January 2020, the Whittier Union School District (District) conducted a psychoeducational assessment of claimant as part of the triennial evaluation process to determine if claimant has a disabling condition which continues to require special education or related services. In separate reports dated January 9, 2020, the District determined that claimant continues to require special education and related services due to his spina bifida condition, but does not require continued speech and language support services.

PHYSICAL THERAPY AND OCCUPATIONAL THERAPY EVALUATIONS

5. On December 10, 2019, Gallagher Pediatric Therapy conducted PT and OT evaluations of claimant to determine his need for school-based PT and OT to participate in his education program. The PT report noted a pressure ulcer in claimant's lower left extremity which he has had since 2015, and for which he receives treatment from his spina bifida physician every two weeks. The report concluded: ". . . [Claimant] demonstrated adequate functional postures and mobility skills to access his

educational program without physical assistance,” and noted that PT intervention was not warranted at this time.

6. The OT report indicated claimant possessed adequate organizational skills to function in an educational environment. Due to his brace, walking was sometimes difficult and he had limited activity restrictions. His motor skills and self-care tasks were rated as functional/independent. His strengths were listed as “social, polite, follows directions, [and] helpful.” The report did not, however, include a recommendation whether or not OT intervention was warranted.

NEUROPSYCHOLOGICAL EXAMINATION – AMY MASER, PH.D.

7. Claimant was referred to Dr. Maser by his neurologist and primary care physician for a neuropsychological examination to assess his cognitive functioning skills, including memory concerns. On August 27 and September 10, 2019, Dr. Maser examined claimant, noting his prior diagnoses of Attention Deficit/Hyperactivity Disorder (ADHD), inattentive type, and mild Intellectual Disability, and that he functioned at “around an eight-year old level.” She also took his social, academic, family, medical, and psychiatric histories. Dr. Maser also administered neuropsychological tests and observed claimant’s behavior during the examination. Dr. Maser confirmed claimant’s diagnosis of mild intellectual disability, explaining this reflected “well below average intellectual functioning that leads to impairments in adaptive functioning in day-to-day social, practical and conceptual functioning.”

Current Notice of Proposed Action

8. On July 15, 2020, ELARC sent claimant a Notice of Proposed Action letter (NOPA) stating it would no longer fund the swimming lessons because claimant has been receiving private swim lessons for more than nine years, which ELARC asserted “is

sufficient time for him to have learned to swim.” The NOPA also stated that ELARC is not responsible for funding social and recreational programs pursuant to section 4648.5, subdivision (a). On July 27, 2020, claimant filed a request for fair hearing appealing ELARC’s determination and asserting ELARC should abide by the 2011 Decision.

Physician Consultant Records Review – M. Lau, M.D.⁴

9. ELARC requested Dr. Lau conduct a records review and opine on claimant’s request for the regional center to continue funding the YMCA swim lessons. Dr. Lau reviewed the evaluations described in Findings 4 through 6, above. She did not review any of claimant’s current medical records, as claimant did not provide any in response to ELARC’s request. Dr. Lau prepared a report, dated August 25, 2020, of her findings and recommendation. She noted that claimant has “attained skills for fairly independent functioning in his general environment,” and that “his school PT/OT evaluations conclude that [he] can adequately access his educational environment without PT/OT.” She further noted claimant is able to ambulate independently with use of his brace, walker and wheelchair. He engages in free play, playing ball with friends, swimming in Special Olympics and bowling. He also continues to work with CCS therapists to increase ambulation and self-care skills.

10. Based on her review, Dr. Lau opined as follows:

In spite of [claimant’s] physical disability, it is clear he is able to access various recreational/physical activities in the community/school. Private swimming lessons may not be

⁴ Dr. Lau’s first name was not included in the record.

the only or the best option for him at this time, considering his abilities, personality and developmental level.

Claimant's Evidence

11. Claimant did not introduce any medical records or reports at hearing, nor did he call any medical or healthcare providers to testify on his behalf. Claimant's mother was present and testified at the hearing.

12. Claimant's mother asserted that none of claimant's conditions have improved but, rather, they have only worsened since the 2011 Decision was issued. She did not provide ELARC with current medical records as requested because claimant's doctor "gets very annoyed when I ask him for the same thing over and over."

13. Claimant's mother described claimant's overall ambulation as "about the same" since 2011. He cannot stand for long periods of time. He has difficulty walking even short distances at school because the campus sidewalks are "slanted," not all school buildings have elevator access, and claimant often requires the assistance of one or more aides to push his wheelchair to the stadium for school assemblies. His mother recently bought claimant an electric wheelchair.

14. Claimant's mother believes swimming is the only exercise claimant can do to keep him mobile and develop muscle tone. Swimming is low impact and causes less skin breakdown and muscle deterioration than other activities, such as basketball, football, or even walking. When bowling with the Special Olympics, claimant was in his wheelchair and was pushed to the foul line by his mother or coach. Claimant cannot play contact sports, such as football or soccer, because contact with his head could result in a seizure due to the shunt. He was able to play basketball with adaptive

physical education (PE) in middle school. His high school does not offer adaptive PE because it has a swimming pool with a lift chair. However, claimant must wear a swim diaper and the high school is concerned about damaging its equipment. Finally, claimant requires constant supervision and cannot be left alone.

15. The YMCA allows claimant to wear a swim diaper and is open year round;⁵ public pools do not permit swim diapers and are open seasonally. Claimant's swim lessons are one-on-one and he is under constant supervision.

Analysis

16. Swimming is typically a recreational activity. By law, regional centers are prohibited from providing funding for social recreation activities or nonmedical therapies. (§ 4648.5, subd. (a).) However, the law carves out an exemption to this prohibition for "extraordinary circumstances . . . 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." (*Id.* at subd. (c).)

17. It has been over nine years since the issuance of the 2011 Decision in which the ALJ found the YMCA swim lessons were a "primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of [claimant's] developmental disability." The ALJ evaluated claimant's medical history, needs and

⁵ Claimant's mother noted the YMCA is not currently open due to restrictions related to COVID-19.

circumstances as they then existed. Nothing in the 2011 Decision prevents the regional center from reevaluating claimant's needs nearly a decade later.

18. As part of the school district's triennial evaluation process, claimant has been evaluated recently by a number of specialists, who collectively found that claimant improved overall in his mobility, motor skills, and self-care functions, but still suffered from mild intellectual disability which impaired his adaptive functioning. Dr. Lau reviewed these evaluations and determined swimming lessons may not be "the only or the best option for him at this time." These findings conflict with claimant's mother's lay opinion that claimant has had no improvement with any of his conditions. Claimant argued Dr. Lau's report should be afforded little or no weight, asserting it misstated claimant's diagnoses and other background facts, and otherwise was not based on a review of his current medical records. However, Dr. Lau's report was based on the evaluations and assessments she was provided for review. Claimant refused to provide any recent medical records or request a report from his healthcare providers to demonstrate that continued swimming lessons are a "primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of [claimant's] developmental disability." By not providing additional documents and information, claimant limited Dr. Lau's perspective. For these reasons, claimant's objections to Dr. Lau's report or opinion are misguided and not persuasive.

19. When all the evidence is considered, ELARC established that the YMCA swimming lessons are no longer "a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of [claimant's] developmental disability." Claimant's appeal should therefore be denied.

LEGAL CONCLUSIONS

1. 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. (§ 4502.) Here, the regional center has the burden of proof, as the party seeking to terminate the service or change the status quo. The standard of proof is a preponderance of the evidence. (Evid. Code, § 500.)

2. “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.” (§ 4512, subd. (b).) Services and supports may include physical and occupational therapy, recreation, behavior training, community integration services, daily living skills training, and social skills training. (*Ibid.*)

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. (§ 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. (§§ 4685, subd. (c)(3) & 4648, subd. (a)(2)).

4. Effective September 1, 2008, 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. Finally, since July 1, 2009, section 4648.5, subdivision (a), has prohibited regional centers from purchasing camping services, social recreation activities, educational services for children ages three to 17, and non-medical therapies, including specialized recreation. An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of these services 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. (§ 4648.5, subd. (c).)

6. As set forth in the Factual Findings as a whole, and particularly Factual Findings 16 through 19, the ELARC established that the YMCA swimming lessons are no longer a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of claimant's developmental disability. Therefore, the regional center is prohibited from funding recreational activities under section 4648.5, subdivision (a), applies; claimant does not fall within the exemption under section

4648.5, subdivision (c). Nothing in this Decision prevents claimant from requesting funding for swimming lessons in the future upon presentation of new circumstances or medical evidence establishing that such lessons are a primary or critical means to address the effects of his disability.

ORDER

Claimant's appeal is DENIED.

DATE: September 24, 2020

TIFFANY L. KING

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.