

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

Case No. 2018031147

DECISION

The hearing in this matter took place on May 10, 2018, at Culver City, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings.

Claimant was represented by his mother, B.K. (Mom),¹ and Debra Marcia, Office of Clients' Rights Advocacy, Disability Rights California.

Westside Regional Center (Westside or Service Agency) was represented by Lisa Basiri, Fair Hearing Specialist.

Evidence was received, and the case was argued and it was submitted for decision on the hearing date. The ALJ hereby makes his factual findings, legal conclusions, and order.

¹ Titles and initials are used in the interests of privacy.

ISSUE PRESENTED

Should the Service Agency provide specialized swim lessons for Claimant, either as a therapeutic tool, or as an exception to the general rule that such services may not be provided?

FACTUAL FINDINGS

THE PARTIES AND JURISDICTION

1. Claimant is a boy aged 11 years, 5 months, who is a consumer of services from the Service Agency. He receives the services pursuant to the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500, et seq.² He is eligible for services based on diagnoses of Autism and Intellectual Disability. (Ex. 7, p. 2.) He lives in the Service Agency's catchment area with Mom, his father, and his 13-year-old-sister. Their home has a pool, which in some ways is at the center of this case.

2. In approximately February 2018, Mom, on Claimant's behalf, requested that Westside provide swimming lessons for him. In a letter dated February 16, 2018, Mom set out reasons that the Service Agency should provide the services. The tenor of the letter indicates she may have conveyed the request before that date, and had sent the letter in

² All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

support of the request.³

3. On March 15, 2018, Westside issued a Notice of Proposed Action to Claimant, which was accompanied by a letter. Both denied the request for swimming lessons. (Ex. A; ex. 2.) The two documents stated that the Claimant's request for such services was denied pursuant to section 4648.5, subdivision (a). The letter pointed out that legislation passed in 2009 provided that social recreational services could no longer be funded, absent an exemption based on extraordinary circumstances. The Service Agency did not deem such extraordinary circumstances existed.

4. Thereafter, Mom submitted a timely Fair Hearing Request. This hearing ensued, all jurisdictional requirements having been met.

CLAIMANT'S CONDITION AND CURRENT SERVICES

5. As set forth above, Claimant is eligible for services based on Intellectual Disability and Autism. However, other documentation indicates he suffers from Microcephaly and hypotonia. (Ex. I, p. 1.)

6. Claimant did not walk until he was four and one-half years old. He sat at nine months, and he "combat" crawled instead of crawling on his hands and knees. According to his mother, he was not strong enough to crawl on his hands and knees. She reported to a physical therapist that he "bottom scooted" before he walked. (Ex. I, p. 1.) He has had foot and ankle braces, and a special walker. He walks with a wide and abnormal gait, and plants his whole foot—flat footed—when he walks; he does not use a

³ During the hearing, Ms. Basiri represented that a prior request for swim lessons had been denied, and that the prior request was denied after a fair hearing before ALJ Carla Garrett. The prior decision was not offered in evidence. It is inferred that the request for swim lessons was renewed after the prior proceeding.

heel to toe motion. He is unable to run, and has trouble getting off of the floor.

7. Mom's description of Claimant's current condition is corroborated by his most recent Individual Education Plan (IEP). Claimant receives special education and related services from his local school district, based on his Autism.⁴ His September 2017 IEP was received in evidence as Exhibit M.

8. (A) In addition to deficits expected with an autistic and intellectually disabled child, such as problems with social communication and learning, Claimant exhibits significant deficits in mobility and motor skills. Claimant's IEP document describes some of those issues.

(B) According to his IEP, Claimant's motor skills are weak. At nearly 11 years of age, he can kick a stationary ball but with little force, and as of September 2017, he could not kick a moving ball. He could throw a ball about five feet. Claimant could participate in some moderate physical activity, stretching and doing warm-ups, with assistance. The IEP also indicates he can not balance on one foot. It was concluded that his autism and inability to stay focused on task might impact his ability to participate in physical education. (Ex. M, p. 5.)⁵

(C) In the performance area of "physical access," the IEP provides nearly a full page of information. It states that Claimant has sufficient functional strength, range of motion, balance and endurance to participate in educational activities and to "access his school campus with adult support including adult supervision and assistance as needed via verbal

⁴ To obtain special education services for Autism requires a finding of "autistic like behaviors."

⁵ Claimant paginated his exhibits with "Bates stamp" numbers, and references to the pages of his exhibits shall be to those added numbers.

and/or physical prompting.” (P. 6.) He needs adult supervision and support to engage in basic physical tasks, such as transitioning from his classroom to the playground and other campus areas; he occasionally requires verbal prompts for “directionality and pacing.” (*Id.*) To use stairs with alternate foot placement requires adult assistance through verbal prompts; he has difficulty climbing stairs on apparatus without “close supervision for focus and safety.” (*Id.*)

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(D) Regarding Claimant’s areas of need in connection with physical access, the September 2017 IEP states, at page 6: “Due to hypotonia, impaired single leg balance and motor planning, lower extremity weakness, and poor safety awareness, [Claimant] has difficulty climbing ladders on the playground apparatus without assistance and prompting.”

(E) Claimant demonstrates needs in the area of sensory processing, visual motor and fine motor skills. He does not use his fingers in a coordinated manner for in-hand manipulation skills, such as transferring a small item from his palm to his fingertips. (P. 9.)

(F) A perceptual motor goal was set, whereby Claimant would balance on either foot independently for eight seconds, three of four times, with 75 percent accuracy. (P. 21.) A goal for physical access was set, which called for Claimant to increase his access to playground apparatus. One of the incremental objectives was for Claimant to climb a three-step or larger ladder, with close standby assistance—meaning within five feet—with three or less verbal prompts, without loss of balance, in three of five opportunities, 50 percent of the time. The next increment was for Claimant to climb such a ladder with the assistance five feet away, without loss of balance in three of five opportunities, and 75 percent of the time. (P. 22.)

9. (A) In August 2014, an independent Physical Therapy (PT) School Evaluation was performed by Debra Bohn, MPT, a pediatric physical therapist; the report is exhibit I.

At that time he was seven years and eight months old. Bohn observed Claimant at school, and she interviewed his teacher, aide, and adaptive physical education teacher.

(B) At that time, Claimant was walking, but he could not walk sideways or backwards. His left leg was externally rotated, he was pronated in both ankles, with the left being more significantly pronated. When climbing stairs, he could not alternate his feet. Initially during the school observation, he could not use stairs without upper body support, though using the railing. (Pp. 2-3.)

(C) It was noted that a formalized manual muscle test was not attempted because Claimant had difficulty focusing and cooperating in the testing. (Pp. 3-4.)

(D) Other deficits were observed, and Bohn recommended school based PT, and continuing adaptive P.E. She also stated that Claimant “would benefit from swim therapy to be more aware of his body and for his sensory issues.” (P. 5.) She emphasized increasing PT with a goal of improving his transition skills off the floor, and she recommended a program to get him off the bench during recess. (P. 6.)

10. The school district provides speech and language services, occupational therapy (60 minutes per week), physical therapy (30 minutes per week), recreation therapy to further social goals, behavior interventions, adapted physical education (60 minutes per week), a one-to-one aide at the school and during transportation. Approximately 19 percent of Claimant’s time is spent outside general education. (Ex. M, pp. 52-58.)

11. Claimant currently receives services that include respite care, child care, and extended child care. The Service Agency also provided funding so that his parents could attend a conference about autism. (Ex. 5.)

CLAIMANT’S SWIM LESSONS

12. Claimant’s parents have been paying for him to take swim lessons at SwimSCAAPE. The record indicates that he has taken lessons there for about one year.

13. In August 2017, the owner of the program, Chris Durian, outlined the

approach that would be taken if Claimant received lessons from SwimSCAAPE. (Ex. K.) Goals included developing water safety awareness, building muscle tone, learning to float and to turn from front position to back position, and learning to ambulate through water 25 yards without touching bottom, which was described as a standard safety test at municipal pools.

14. (A) A report generated by SwimSCAAPE, signed by Bailee Goodman, a program practitioner, states that as of February 6, 2018, Claimant has made progress in the program, which uses “occupational and physical therapy-inspired techniques.” (Ex. L, p. 1.) The report goes on to state that Claimant, in the area of water safety, can keep himself up in the water and swim to the side of the pool, for a “limited and variable amount of time and distance” but not the length of the pool. (*Id.*, p. 2.) He swims better when he bobs underwater, and he can swim to the bottom of the pool and bring himself back up on his own. It is not stated how deep he goes.

(B) The report states that by using weights in the pool he is building muscle tone, but measurements are not provided. (*Ibid.*)

(C) Claimant can float on his own with consistency, needing assistance to back float, but on occasion can do so for up to 30 seconds. He can go from the front position to the back on his own inconsistently; he resists doing so on demand. (*Ibid.*)

(D) As to the ability to pass the municipal pool tests, he cannot yet swim the required distance, and the instructors continue to work on consistent kicking and overall technique. He is swimming with his head down with moderate consistency, which was described as “great progress” for him. The report forecasted continued progress with continued sessions.

OTHER MATTERS

15. The SwimSCAAPE program is not vendored by the Service Agency. There is no evidence it is vendored by any other regional center. There is no evidence that it is

operated by licensed therapists, such as a registered occupational therapist, or physical therapist. The firm charges Claimant's parents \$45 per half hour session, two sessions per week. No evidence was adduced as to the cost of swim lessons at non-specialized settings, such as the YMCA. In that regard, the family tried generic swim lessons, but the instructor did not know how to work with a child with disabilities as significant as Claimant's.

16. Claimant's case was based in part on the need for protecting him, as the family home has a swimming pool, and he has a tendency to elope, such that he needs 24/7 supervision. If he does get away from the house, he will head toward the pool. Mom acknowledged that the family pool is not fully fenced, that there is no cover, and there are no alarms on the doors and windows. Claimant sometimes uses the family pool, with supervision.

17. Mom testified that she believes that the swim lessons are bringing other improvements to Claimant's condition. He is more verbal, and can not blow out birthday candles, something he could not do before he started the swim lessons.

18. Claimant's pediatrician, Carlos Lerner, M.D., MPhil, an Associate Professor of Clinical Pediatrics at UCLA, asserts that adaptive swim lessons are a medical necessity for Claimant, for his safety and to help his motor development. (Ex. J.) Ms. Bohn opined that Claimant would benefit from adaptive swim lessons in a letter written in July 2017. (Ex. H.)

19. Claimant cited the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM5) to show that problems with mobility are often associated with autism. The DSM5 is a widely used and widely accepted reference tool published by the American Psychiatric Association. Under the heading, Associated "Features Supporting Diagnosis" (of Autism Spectrum Disorder) the DSM5 states that "motor deficits are often present, including odd gait, clumsiness, and other abnormal motor signs (e.g., walking on tiptoes.)" (DSM5, p. 55.)

20. The DSM5 also teaches that “the essential features of autism spectrum disorder are persistent impairment in reciprocal social communication and social interaction . . . , and restricted repetitive patterns of behavior, interests, or activities.” (DSM5, p. 53.) The essential features of intellectual disability are deficits in general mental abilities and impairment in everyday adaptive function, in comparison to a person’s age-, gender-, and socioculturally matched peers. (*Id.*, p. 37.)

LEGAL CONCLUSIONS

JURISDICTION

1 Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 through 4.

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GENERAL RULES APPLICABLE TO RESOLVING SERVICE DISPUTES:

2. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act mandates that an “array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream life of the community.” (§ 4501.) These services and supports are provided by the state’s regional centers. (§ 4620, subd. (a).)

3. The California Legislature enacted the Lanterman Act “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; hereafter, *ARC v. DDS*)

4. Services provided under the Lanterman Act are to be provided in conformity with the Individual Program Plan (IPP), per section 4646, subdivision (d). Consumer choice is to play a part in the construction of the IPP. Where the parties cannot agree on the terms and conditions of the IPP, a Fair Hearing decision may, in essence, establish such terms. (See § 4710.5, subd. (a).)

5. Regional centers must develop and implement IPP's, which shall identify services and supports "on the basis of the needs and preferences of the consumer, or where appropriate, the consumer's family, and shall include consideration of . . . the cost-effectiveness of each option . . ." (§ 4512, subd. (b); see also §§ 4646, 4646.5, 4647, and 4648.) The Lanterman Act assigns a priority to services that will maximize the consumer's participation in the community. (§§ 4646.5, subd. (a)(2); 4648, subd. (a)(1), (2).)

6. In order to determine how an individual consumer is to be served, regional centers are directed to conduct a planning process that results in an IPP designed to promote as normal a life as possible. (§ 4646; *ARC v. DDS, supra*, 38 Cal.3d at 389.) Among other things, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services (which must be provided based upon the client's developmental needs), contain a statement of time-limited objectives for improving the client's situation, and reflect the client's particular desires and preferences. (§§ 4646; 4646.5, subd. (a)(1), (2) and (4); 4512, subd. (b); and 4648, subd. (a)(6)(E).)

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

"Services and supports for person with developmental disabilities" means specialized services and supports or special adaptations of generic services and support 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 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, . . . physical, occupational, and speech therapy, . . . education, . . . adaptive equipment and supplies, . . . behavior training and behavior modification programs, . . . respite, . . . social skills training, . . . [and] transportation services necessary to ensure delivery of services to persons with developmental disabilities.

8. Services provided must be cost effective (§ 4512, subd. (b)), and the Lanterman Act requires the regional centers to control costs so far as possible, and to otherwise conserve resources that must be shared by many consumers. (See, e.g., §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.) To be sure, the obligations to other consumers are not controlling in the decision-making process, but a fair reading of the law is that a regional center is not required to meet a disabled person's every possible need or desire, in part because it is obligated to meet the needs of many children and families.

9. The IPP is to be prepared jointly by the planning team, and will include any services purchased or otherwise obtained by agreement between the regional center representative and the consumer or his or her parents or guardian. (§ 4646, subd. (d).) The planning team, which is to determine the content of the IPP and the services to be utilized, is made up of the disabled individual or their parents, guardian or representative, one or more regional center representatives, including the designated service coordinator, and any person, including service providers, invited by the consumer. (§ 4512, subd. (j).)

10. Pursuant to section 4646, subdivision (a), the planning process is to take into account the needs and preferences of the consumer and his or her family, "where

appropriate.” Further, services and supports are to assist disabled consumers in “achieving the greatest amount of self-sufficiency possible” In the planning process, the planning team is to give the highest preference to services and supports that will enable a minor to live with his or her family, and an adult person with developmental disabilities to live as independently in the community as possible. Planning is to have a general goal of allowing all consumers to interact with persons without disabilities in positive and meaningful ways. (§ 4648, subd. (a)(1).)

11. The planning process includes the gathering of information about the consumer and “conducting assessments to determine the life goals, capabilities and strengths, preferences, barriers, and concerns or problems of the person with developmental disabilities. . . . Assessments shall be conducted by qualified individuals Information shall be taken from the consumer, his or her parents and other family members, his or her friends, advocates, providers of services and supports, and other agencies.” (§ 4646.5, subd. (a)(1).) Given that services must be cost effective and designed to meet the consumer’s needs, it is plain that assessments must be made so that services can be properly provided in a cost-efficient manner.

12. The services to be provided to any consumer must be individually suited to meet the unique needs of the individual client 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) & (b), 4648, subd. (a)(1) & (a)(2).) The Lanterman Act assigns a priority to services that will maximize the consumer’s participation in the community. (§§ 4646.5, subd. (2); 4648, subd. (a)(1) & (a)(2).) Under section 4640.7, each regional center is to assist consumers and families with services and supports that “maximize opportunities and choices for living, working, learning, and recreating in the community.”

13. Under the Lanterman Act the regional centers cannot supplant the budgets

of generic resources. Section 4648, subdivision (a)(8), provides that "Regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services."

DISPOSITIVE CONCLUSIONS

14. In 2009, the Legislature enacted numerous statutes that impacted the delivery of services to regional center clients. Among those statutes is section 4648.5, which provides in its subdivision (a) that the authority of regional centers to purchase certain types of services was suspended. Among the list of suspended services was "social recreation activities." (Subd. (a)(2).) Generally, swimming lessons are deemed social recreation activities.

15. The Legislature did allow for exemptions. Subdivision (c) of section 4648.5 provides that "an exemption may be granted on an individual basis in 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."

16. (A) It has not been established that adaptive swim lessons are necessary to enable Claimant to remain in his home. That there are safety issues raised by his potential elopement, and access to the pool thereby, are not forcing him out of the home, where he is constantly supervised. At the same time, the family should consider better fencing, or a safety cover; indeed such may be required by local building codes, and in any event should be considered as protection against a small child inadvertently gaining access to the yard. Put another way, safety devices near the pool should be provided by every owner of a swimming pool. And, alarm systems, such as an alarm on doors signaling when they open,

are commonly used by parents who have children and who have a pool.

(B) When purchasing services as part of the IPP process, the regional centers are obligated to 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 as provided in the least restrictive and most appropriate setting." (§ 4646.4, subd. (a)(4).)

17. In terms of section 4648.5, this leaves the issue of whether extraordinary circumstances exist, and whether the current swim lessons constitute the primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of Claimants autism and intellectual disability. The swim lessons may be having an effect on the physical effects of Claimant's autism; he is learning to swim, and Mom points to other improvements. But, Claimant is also receiving other therapy from the school, and the causal links are difficult to forge. Based on this record, it has not been established that the sought-after swim lessons are the primary or critical means of ameliorating the physical effects of Claimant's autism.

18. Claimant asserted that the swim lessons, recommended by a physician and physical therapist, should be deemed services available under the ambit of section 4512, subdivision (b). As noted in Factual Finding 15, there is no evidence that licensed therapists are operating the program. While section 4512, subdivision (b), authorizes a regional center to provide physical or occupational therapy, the statute should be read to require licensed therapists be used, where provision of such services are otherwise justified.

ORDER

Claimant's appeal is denied, and the Service Agency will not be required to provide him with swim lessons.

DATE:

JOSEPH D. MONTOYA
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.