

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

ALTA CALIFORNIA REGIONAL
CENTER,

Service Agency.

OAH No. 2014070135

DECISION

This matter was heard before Administrative Law Judge Susan H. Hollingshead (ALJ), State of California, Office of Administrative Hearings (OAH), in Sacramento, California, on August 5 and September 26, 2014.

The Service Agency, Alta California Regional Center (ACRC), was represented by Robin Black, Legal Services Manager.

Claimant was represented by her mother, her authorized representative.

Oral and documentary evidence was received on August 5, 2014. The record remained open for the parties to submit closing briefs by August 15, 2014, and reply briefs by August 22, 2014. In an effort to avoid a continuance, the parties agreed that claimant's mother would be allowed to include any additional personal testimony in her closing brief. There was no agreement to allow additional documentary evidence or testimony of anyone other than claimant's mother. Closing briefs were submitted by claimant and respondent on August 15, 2014, and marked as exhibits 295 and 33, respectively.

The ALJ received objections to admission of documentary evidence submitted with claimant's closing brief and, on August 18, 2014, issued an Order Reconvening the Hearing

and Suspending Submission of Reply Briefs. On September 4, 2014, the ALJ issued an Order Limiting Admission of Documentary Evidence and Witness Testimony, which further clarified as follows:

The purpose of the reconvened hearing date is to allow claimant additional time to testify which she did not have on August 5, 2014, and to ensure that both parties and the ALJ have an identical and complete copy of all documentary evidence offered and admitted. The reconvened hearing date is not for the purpose of considering documentary evidence that was not exchanged prior to hearing or at the original August 5, 2014 hearing date, or to allow testimony of witnesses who were not disclosed prior to the original hearing date as required by Welfare and Institutions Code section 4712(d).

The hearing reconvened on September 26, 2014. The record remained open to allow the parties to submit reply briefs by October 6, 2014. Reply briefs were submitted by claimant and respondent on October 6, 2014, and marked as exhibits 318 and 34, respectively. The record was closed and the matter submitted for decision on October 6, 2014.

ISSUES

1. Is ACRC prohibited from funding “warm water swim safety training” for claimant as an identified suspended service pursuant to Welfare and Institutions Code section 4648.5? If so, is claimant entitled to an exemption pursuant to section 4648.5, subdivision (c)?

2. Is ACRC required to fund an expedited behavior assessment through Pacific Autism Learning Services (PALS)?

FACTUAL FINDINGS

1. Claimant is a seven-year-old girl who is eligible for ACRC services based on a diagnosis of mental retardation¹, severity unspecified. She has also been diagnosed with Down syndrome, juvenile idiopathic arthritis (JIA), osteopenia and hypothyroidism. Claimant is prescribed Levothyroxine for her hypothyroidism, as well as Methotrexate, Leflunomide, and Enbrel for her JIA. She has sensory issues with temperature and noise.

Claimant is verbal and described by her mother as being very social with many friends. She is “persistent, silly, imaginative, kind, and active.” She lives in the family home with her parents and three, soon to be four, siblings. Claimant receives services and supports pursuant to the Lanterman Developmental Disabilities Services Act (Welfare and Institutions Code Section 4500 et seq.)²

2. Claimant receives special education services based on a primary eligibility of Other Health Impaired (OHI) and a secondary eligibility of Speech or Language Impairment (SLI). Her Placer County SELPA Individualized Education Program (IEP) notes that she attends a regular education class with a 1:1 aide. Recommended related services include Physical Therapy (PT), Occupational Therapy (OT), and Language and Speech.

¹ Effective, January 1, 2014, the Lanterman Act replaced the term “mental retardation” with “intellectual disability.” The terms are used interchangeably throughout.

² Unless otherwise indicated, all statutory references are to the California Welfare and Institutions Code.

Claimant has also received OT services funded by her private health insurance, as well as through California Children's Services, Placer County, (CCS).

Claimant's mother provided the following:

[Claimant] has exhausted medical OT and PT. [Claimant] has lost interest in medical OT and PT. We saw a plateau with her skills at the medical therapy unit ("MTU") awhile [sic] ago. Now [claimant] wants to just participate in normal recreational activities (park, swim, dancing, swimming, etc.). So we have focused on that. She no longer attends medical therapies or do we feel she needs them. We rely on the school for academic therapies which she still needs though she is very close to phasing out of PT at school. [Claimant's] current need is not for physical therapy, her need developmentally is to learn water safety and how to swim.

3. Claimant's mother testified that claimant's parents have provided her with recreational swim opportunities since birth. They have "paid for recreational swim lessons since Summer 2010 and warm water swim lessons from Fall 2011 through Summer 2013." Claimant was moved to a less public swim facility and received 1:1 lessons from January through April 2014. Claimant's mother believes this service is beneficial for claimant, but it is a financial hardship for the family to continue funding. ACRC was requested to fund this service.

4. On June 16, 2014, ACRC issued a Notice of Proposed Action (NOPA) to claimant advising, "ACRC is denying your request that ACRC fund swim lessons for [claimant] to address her safety awareness around water."

The NOPA advised claimant that the reason for this action was as follows:

ACRC agrees with the family that safety awareness is important for all children. However, swim lessons are primarily a recreational pursuit and not a behavior service, and ACRC's authority to purchase recreational services (such as swim lessons) was suspended effective July 1, 2009, pending implementation of the individual choice budget, unless a child qualifies for an exemption. ACRC has determined that [claimant] does not qualify for an exemption.

Additionally, parents are responsible for providing for or funding recreational opportunities for all of their children, whether or not the children have a developmental disability. As such, [claimant's] parents may wish to look into privately funding swim lessons available from the Roseville Parks and Recreation Department, the Sea Otters program in Loomis, or the City of Folsom Parks and Recreation Department.

5. Claimant filed a Fair Hearing Request, received by ACRC on June 25, 2014, appealing that decision. The requested contained the following:

Seeking assistance in paying for regular water safety lessons. Her arthritis requires a warm pool, shading, and movement. Worried about my daughter's safety around water. We are regularly around pools, water. Been paying \$36 a lesson to Pacific Blue. Progression is slow.

The Fair Hearing Request also contained a second request:

Expedite ABA evaluation. We have been waiting 8 months.

Worried about behaviors affecting my daughter's safety.

6. Claimant sought to have ACRC "pay in full for regular swim/water safety lessons at a nearby pool w/ qualified adult staff and location that accommodates our daughter's specific needs for 1 year" and to "allow outside agency PALS do evaluation as they are open and able to do one now."

7. ACRC responded to the request for the PALS evaluation in a NOPA dated July 29, 2014, advising that ACRC "Is denying your request that ACRC fund an ABA-based behavioral services assessment from Pacific Autism Learning Services (PALS) or Central Valley Autism Project (CVAP) to address [claimant's] self-help skills deficits and behavior excesses." The NOPA contained the following reason for the denial:

Neither PALS nor CVAP is vendored to provide ABA-based behavioral services to individuals like [claimant], who do not have a diagnosis of autism. ACRC does have vendors who can provide ABA-based behavioral services to children without autism like [claimant]. In fact, [claimant] received behavioral services from one of those vendors, Behavior Education Services and Training (BEST) from October 2011 through November 2013. BEST terminated services in November 2013 citing concerns over lack of legally mandated parent participation and the parent's disagreement with BEST's clinical recommendations.

Following the discontinuation of BEST services, ACRC offered ABA-based behavioral services from both Capitol Autism Services (CAS) and Building Blocks, both of whom are

vendored with ACRC to provide services to children without autism. [Claimant] was referred to CAS in late January 2014 and was at that time put on a waiting list. [Claimant] remains on the CAS waiting list at this time.

WARM WATER SWIM SAFETY TRAINING

8. At hearing, the parties specifically stipulated that “warm water therapy” was not at issue in this matter. The request is for swim safety lessons in a warm water pool to best accommodate claimant’s needs due to her JIA. Therefore, claimant is seeking funding for “warm water swim safety training.”

9. Claimant’s mother testified that the family enjoys spending time near and around water and she is concerned that claimant is at risk of drowning because she “is not safe around any body of water.” She “displays inappropriate behaviors around water,” tends to elope, and is difficult to supervise around water. Her mother testified that claimant can unlock their home hot tub and she is afraid for claimant and her younger brother’s safety, though the home is alarmed. Her mother also explained the difficulty of claimant playing in the community toddler pool and then trying to jump into the main pool with her siblings and friends. “She is not safe in our home hot tub, in our extended family’s hot tubs/pools or at our community pool we walk to together as a family.”

10. Claimant and her siblings have enjoyed recreational swim opportunities. Her siblings have progressed quickly and enjoy swimming for recreation and competition. Claimant has not made the same progress. She received swim lessons at Roseville City Aquatics. Her mother stated that she “was not making progress” so she was moved to “a less public facility” (Pacific Blue) where she received 1:1 lessons from January through April 2014, which her mother termed “warm water swim safety lessons.” Pacific Blue invoiced claimant’s parents for her “Pacific Blue Swim Lessons.”

Her parents believed claimant made progress at Pacific Blue and noted that claimant's father was allowed to remain in the pool with claimant for one-half hour after her lesson to work with her on her skills. They found that to be helpful. They also believe she benefited from the smaller facility where less people lead to fewer distractions and more sanitary conditions. The medications claimant is prescribed compromise her immune system.

Pacific Blue maintained an enclosed/covered warm water pool. Warm water was explained to be beneficial for claimant not only in addressing her JIA but also her sensory issues. She has concerns with temperature. She also has sensitivity to loud noises.

11. Claimant was then moved to Sea Otters Swim Lessons, which is an enclosed facility with warm (91°) water, natural salt chlorine and ultraviolet sanitizer. It also offers comfortable areas for changing and for the family to wait/observe claimant's lessons.

Sea Otters Swim Lessons offers an "adaptive swim program" defined as follows:

Our goals are to help each swimmer push past their physical, cognitive or neurological challenges to be successful in learning to swim, learning water safety, developing confidence, increasing fitness and having fun!

A swimming instructor provided claimant's lessons. Instructors receive some training in understanding various disabilities and may have developed a familiarity with the needs of the developmentally disabled. However, there was no evidence that the swimming instructor was qualified to provide any type of therapy.

12. Regional centers are governed by the provisions of the Lanterman Act. Section 4648.5, subdivision (a), which was enacted in 2009, suspends regional centers' authority to purchase 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; and (4) nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

Regional centers retain authority to purchase the services enumerated in section 4648.5, subdivision (a), only where a consumer falls within the exemption set forth in section 4648.5, subdivision (c), which provides:

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.

13. In response to the mandates of section 4648.5, ACRC determined that section 4648.5, prohibits purchase of warm water swim safety instruction because this service constitutes a "social recreation activity" or "a nonmedical therapy" which are suspended services. ACRC further determined that claimant did not qualify for an exemption permitting the purchase of this service.

14. Claimant's mother contends that claimant qualifies for an exemption because "warm water swim safety training and practicing is a critical means for ameliorating her physical effects of her developmental disability." She described the benefits to claimant's low muscle tone, osteopenia and arthritis.

Claimant's mother also believes that "warm water swim safety training can be a critical means for ameliorating her cognitive effects of her developmental disability." She believes that if claimant "is given the opportunity to develop water skills it will inadvertently develop her cognition and intellect." She opined as follows:

In addition to swimming being very important to [claimant's] particular medical diagnosis's, [sic] swimming also aids in the improvement of speech, brain development and works multiple areas of the brain through combined movement such as the kicking of arms and legs together. Swimming also reduces stress, increases mood-boosting chemicals in the brain and allows for muscles to contract and relax which increases blood flow to the brain providing nourishment.

[¶] . . . [¶]

There is no other long-term athletic sport that is better for [claimant] to learn given her medical condition. Studies show that consistent exercise (swimming included) helps to improve a 'typical' child's intelligence, how much more can swimming benefit a child with Down syndrome & arthritis.

Finally, claimant's mother contends that "learning basic swim safety skills would improve [claimant's] psychosocial effects because she won't be excluded from experiences in her community that she would not be able to participate in without having basic safety swim training."

15. Claimant's mother testified that warm water swim safety training was not required to maintain claimant in the family home.

16. Elyssa Bretz is claimant's ACRC Service Coordinator. She testified to the importance of water safety for all children and the responsibility of parents to provide that opportunity. She explained that ACRC determined that it is a suspended service that they are not permitted to fund absent a consumer meeting exemption criteria.

17. Herman Kothe is an ACRC Supervising Counselor, responsible for supervising Ms. Bretz. He testified that warm water swim safety training is not the primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the claimant's developmental disability which is an intellectual disability. He contends that there are alternative services to meet her needs that are more important in addressing the effects of her disability and are not subject to suspension. It was also clear that the absence of warm water swim safety training would not threaten the ability of the claimant to remain in her own home.

Mr. Kothe testified that other services, including those noted in claimant's IEP and offered in her educational program, were more critical to claimant. In fact, there was no evidence of physical effects associated with claimant's intellectual disability or to suggest that warm water swim safety training is critical to ameliorate the cognitive effects of claimant's intellectual disability. Claimant is described as being "very social with many friends" which demonstrates that she has other ways to socialize.

18. Mr. Kothe explained that while warm water swim safety training services may provide a benefit to consumers in general, in light of the statutory changes, ACRC is prohibited from providing the service absent an exemption. He also explained that swim lessons offer one strategy for the prevention of drowning but it is part of a multi layered approach which may include constant supervision of children in and around water, protection of fences, poles and personal floatation devices. Since water safety is important for all children, ACRC considers it the responsibility of all parents to help ensure their

children are safe around water, regardless of whether or not the child has a developmental disability.

ACRC informed parents of the availability of low cost and free community resources providing water safety training, including Red Cross, Access Leisure, Easter Seals, YMCA and United Cerebral Palsy.

19. Evidence did not establish that the services that claimant is receiving from Sea Otters Swim Lessons are a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of her developmental disability, intellectual disability. It was established that the services are not required to enable claimant to remain in her home.

EXPEDITED BEHAVIOR ASSESSMENT THROUGH PACIFIC AUTISM LEARNING SERVICES (PALS)

20. Claimant received ABA-based functional adaptive skills training (FAST) through ACRC vendor Behavior Education Services and Training (BEST) from October 2011 through November 2013. The FAST program "follows a trainer-to-trainer model utilizing Applied Behavior Analysis (ABA) to address skill deficits across multiple domains (e.g. communication, socialization/play, daily living skills, and community integration). The program also targets the reduction of behavior excesses (e.g. aggression, stereotypy, etc.) by teaching replacement skills. Generalization and the functional use of skills learned are critical to this type of program model."

21. Claimant's current ACRC Individual Program Plan (IPP), dated April 15, 2014, includes in the Statement of Goals that claimant "will improve in her self-help and Activities of Daily Living Skills." The IPP provides, "given participation in an ABA-based FAST/AST³

³ Adaptive Skills Training.

program, [claimant] will increase independence in self-help and daily living skills by 5/2015." Claimant's status was described as follows:

[Claimant] is verbal and can communicate her needs.

[Claimant] requires physical and verbal prompting to complete her self-help tasks. She is unable to shower independently. She requires verbal and manual prompting to brush her teeth.

[Claimant] is toilet trained. She is unable to make small meals for herself. [Claimant] does exhibit behaviors such as non-compliance, inappropriate disrobing, spitting and biting.

[Claimant] previously received FAST services through BEST.

Services were terminated with BEST due to vendor stating family was not in agreement with clinical recommendations for program. [Claimant] is on a waiting list for FAST/AST services with Capital Autism Services.

22. Claimant's mother testified that services with BEST became "challenging." The family initially had concerns with the skill level of some of the employees and the number of therapists present at one time "which became cumbersome due to the sheer number of people present in our small home with our family." She stated that claimant became ill and was hospitalized around April 2013. Communication with BEST started to break down about that time. In June 2013, BEST delivered a letter to their home regarding the number of appointments the family had cancelled and that services would be lost with continued cancellations.

Claimant's mother testified that "there was some upheaval" for the family for a period of about seven months from March 2013 through October 2013. The family bought a new home and began the building and moving process. An illness ran through the family

after which they had to “ begin the process of selling our old home, which involved trouble finding lenders, losing three buyers, losing the new home we built, finding renters for our home and securing a rental for our family since the children had already started school in the new district.”

23. The relationship with one of the behavior consultants, Lisa Buhman, “became awkward and uncomfortable, and no longer felt appropriate.” The family asked to switch consultants. A September 2013, Update Report completed by BEST recommended transitioning to a FAST-1 program. Ms. Buhman signed the report as the Behavior Consultant.

Claimant’s mother testified that she did not agree with the clinical report and therefore did not agree with the recommendations for claimant’s program. It was her desire to have behavior services continue as she saw progress with claimant’s program. She disagreed with the FAST-1 recommendation which would phase out the one-to-one services and move to a consultation model. The proposed treatment hours summary provided for “15 hours/month of Behavioral Consultation, 2 hours/month of Clinical Supervision.”

24. A Planning Team meeting was held on October 23, 2013, to discuss claimant’s FAST program. BEST staff explained the recommendation to FAST-1 (trainer-to-trainer model). Claimant’s mother was not in agreement with the proposed transition.

25. BEST decided to terminate claimant’s services and informed her parents by letter dated November 8, 2013 stating:

During the most recent Planning Team Meeting (PTM) on 10.23.13, [claimant’s mother] communicated that she was not in agreement with clinical recommendations for the current home program. In addition, agreements developed

in the previous PTM on 7.08.13 have not been met as referenced in the bulleted section below.

- a) A high rate of cancellations by the family averaging 17% of scheduled sessions across the past review period
- b) Lack of agreement and adherence to recommended community program (length of time in community, proactive scheduling of community, program focused)
- c) Lack of parent training opportunities
- d) Lack of agreement/communicated resistance to transition program toward trainer-to-trainer in alignment with program data
- e) Location of program and proactive communication for planning (e.g. decrease from 3 locations to 1 and planning/communication a minimum of 24 hour notice)
- f) Supervision of siblings in the home during structured teaching program hours

BEST is bringing this matter to your attention as previously outlined modifications and accommodations put in place by BEST have not resulted in consistency of program hours, the ability to meet the recommended program as designed or recommended, and the lack of adherence to Parent Roles and Responsibilities.

Please be informed that BEST will continue to provide the current FAST in-home program through November 30th at which time services with BEST Consulting Inc. will terminate.

26. In a telephone conversation with claimant's Service Coordinator on November 25, 2014, her mother explained that she believed claimant still needed AST services. The Service Coordinator explained that the request for ongoing AST services would need to be staffed by ACRC's Behavioral Services Committee (BSC).

27. ACRC's BSC met on December 9, 2013, to discuss continuing claimant's AST services and recommended Building Blocks or Capital Autism Services (CAS) as appropriate AST vendors for claimant. Claimant's mother was informed and stated that she was not interested in Building Blocks but would like more information about CAS. The Service Coordinator provided CAS contact information.

28. By email dated January 28, 2014, claimant's mother confirmed that CAS worked for the family and also inquired about the possibility of using Autism Spectrum Therapies. The Service Coordinator placed claimant on the waiting list for CAS and inquired about Autism Spectrum Therapies. It was later determined that Autism Spectrum Therapies program design with ACRC only allowed them to serve consumers with an autism spectrum diagnosis (ASD).

29. In April 2014 claimant's mother contacted claimant's Service Coordinator asking for a list of local behavior specialists because she was seeking a behavior assessment at claimant's school before the end of the school year. On June 10, 2014, she asked Ms. Bretz whether Pacific Autism Learning Services (PALS) could perform an assessment for behavioral services for claimant as she still remained on the CAS waiting list. Claimant's mother stated, "PALS is available to come to the home to do the evaluation soon."

30. On June 12, 2014, Ms. Bretz informed claimant's mother that PALS could only provide services to ACRC consumers with an autism diagnosis. She also determined from CAS that ten other people were ahead of claimant on their waiting list and the

approximate remaining wait time was anticipated to be six months at a minimum. Ms. Bretz explained, "It's frustrating for our families and us. We have a shortage."

Claimant's mother also suggested Central Valley Autism Project (CVAP), noting that they were available to perform an evaluation of claimant. ACRC advised that, like PALS, CVAP is only vendored with ACRC to serve consumers with autism. Those vendors' contracts with school districts may allow them to serve students who do not have autism.

31. As of the date of hearing, claimant remained on the CAS waiting list. Ms. Bretz testified that no ACRC vendors were available to provide a FAST assessment and services to claimant any sooner than she would receive those services by waiting her turn on the CAS waiting list. It was also ACRC's opinion that the waiting period for claimant to receive FAST services did not pose any health and safety risks to claimant and that they were unaware of any crucial need for the FAST services to be expedited for claimant.

32. ACRC determined that it cannot fund the requested expedited behavioral assessment with PALS or CVAP because they are vendored with ACRC only to serve consumers with autism. Claimant has an intellectual disability, not autism. ACRC also argued that claimant could still be receiving her AST services from BEST had the family worked with the vendor to ensure services remained ongoing. In addition, there is no provision to allow ACRC to move claimant to the front of the waiting list for services in front of other consumers that are also waiting, and no urgent need was presented that claimant must obtain a behavioral services assessment immediately.

33. Claimant's mother contends that PALS and CVAP both provide services for individuals you are not on the autism spectrum, however they are not vendored with ACRC to do so. She believes claimant was benefitting from her behavior services and should not lose the continuing benefits of this service because one provider, BEST, did not work out.

Claimant's mother contends that ACRC should expedite an assessment to meet claimant's IPP objective. She offered two names of behaviorists (PALS and CVAP) that she

alleges would be able and willing to provide an immediate assessment for claimant. She stated that she "suggested PALS because they were already doing [claimant's] school assessment and it would be best for [claimant] to have consistency in BIP⁴ recommendations at home and school." She concluded as follows:

Working with BEST increased our family stress last year. We were unsatisfied with the number of employees in our home, rigid and attacking notices from office, and inability to do naturalistic community outings. Since [claimant] is now working with PALS at school for consulting behavior services, it makes good sense for ACRC to consider writing a special contract with PALS for a home assessment too so BIP's can better align and communication and support is more uniform.

LEGAL CONCLUSIONS

1. The Lanterman Act sets forth the regional center's responsibility for providing services to persons with development disabilities. An "array of services and supports should be established...to meet the needs and choices of each person with developmental disabilities...to support their integration into the mainstream life of the community...and to prevent dislocation of persons with developmental disabilities from their home communities." (§ 4501.) The Lanterman Act requires regional centers to develop and implement an IPP for each individual who is eligible for regional center services. (§ 4646.) The IPP includes the consumer's goals and objectives as well as required services and supports. (§§4646.5 & 4648.)

⁴ Behavior Intervention Plan.

2. Section 4646, subdivision (a), provides:

(a) It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.

3. Section 4512(b) provides, in pertinent 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 or, where appropriate, the consumer's family, and shall include consideration of a range of services 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

4. Section 4646.4, subdivision (a), provides:

Regional centers shall ensure, at the time of development, scheduled review, or modification of a consumer's individual program plan developed pursuant to Sections 4646 and 4646.5, or of an individualized family service plan pursuant to Section 95020 of the Government Code, the establishment of an internal process. This internal process shall ensure adherence with federal and state law and regulation, and when purchasing services and supports, shall ensure all of the following:

- (1) Conformance with the regional center's purchase of service policies, as approved by the department pursuant to subdivision (d) of Section 4434.
- (2) Utilization of generic services and supports when appropriate.
- (3) Utilization of other services and sources of funding as contained in Section 4659.

(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 as provided in the least restrictive and most appropriate setting. In this determination, regional centers shall take into account the consumer's need for extraordinary care, services, supports and supervision, and the need for timely access to this care.

5. Section 4646.5, subdivision (a)(4), states:

(a)The planning process for the individual program plan described in Section 4646 shall include all of the following:

(4) A schedule of the type and amount of services and supports to be purchased by the regional center or obtained from generic agencies or other resources in order to achieve the individual program plan goals and objectives, and identification of the provider and providers of service responsible for attaining each objective, including, but not limited to, vendors, contracted providers, generic service agencies, and natural supports. The plan shall specify the approximate scheduled start date for services and supports and shall contain timelines for actions necessary to begin services and supports, including generic services.

6. Section 4512, subdivision (e), defines "natural supports" to mean:

[P]ersonal associations and relationships typically developed in the community that enhance the quality and security of life for people, including, but not limited to, family relationships, friendships reflecting the diversity of the neighborhood and the community, associations with fellow students or employees in regular classrooms and workplaces, and associations developed through participation in clubs, organizations, and other civic activities.

7. Section 4648.5 of the Lanterman Act provides:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers' 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 costs 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 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.

8. *Burden of Proof.* In this matter, ACRC determined that it is prohibited from funding "warm water swim safety training" for claimant as it is an identified suspended service pursuant to section 4648.5. Section 4648.5 expressly prohibits regional centers from purchasing social recreation activities or nonmedical therapies by suspending their authority to do so. ACRC determined that such services are no longer authorized and that claimant did not otherwise qualify for an individual exemption.

There was no evidence that claimant's warm water swim safety training is appropriately categorized as anything other than social recreation or nonmedical therapy and, as such, it falls within the prohibition of section 4648.5, subdivision (a)(4).

Claimant bears the burden of establishing that she qualifies for an exemption under section 4648.5, subdivision (c).⁵ Claimant has not met that burden. There is no evidence that the lack of ACRC funding of warm water swim safety training threatens claimant's ability to remain in her home, and that no alternative services are available to meet her needs. In addition, claimant has failed to show that warm water swim safety training is "a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability." Even though this service may provide benefit to the claimant, ACRC is prohibited from funding a suspended service unless claimant qualifies for an exemption pursuant to this section.

9. The above matters having been considered, claimant does not currently qualify for an exemption under section 4648.5, subdivision (c).

10. Claimant's IPP demonstrates her need for participation in an ABA – based FAST/AST program. ACRC met that need but the services were terminated by the vendor. While vendor contracts are out the scope of this proceeding, it is recommended that ACRC work with additional behavioral services providers to increase their vendor base to more quickly accommodate consumers in need of services.

ORDER

The appeal of claimant is denied. ACRC is not required to fund warm water swim safety training. ACRC is required to continue pursuing behavior services for claimant but is not required to expedite a behavior assessment through Pacific Autism Learning Services (PALS).

⁵ California Evidence Code section 500 states that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

DATED: October 20, 2014

SUSAN H. HOLLINGSHEAD
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of this decision. (Welf. & Inst. Code, § 4712.5, subd. (a).)