

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

FRANK D. LANTERMAN REGIONAL
CENTER,

Service Agency.

OAH Case No. 2016010277

DECISION

Administrative Law Judge Michael A. Scarlett (ALJ), Office of Administrative Hearings, State of California, heard this matter on March 2, 2016, in Los Angeles, California.

Pat Huth, Esq., Waterson & Huth, LLP, represented Frank D. Lanterman Regional Center (FDLRC or the Service Agency.) B.M. (father) and K.M (mother) represented Claimant.¹

Oral and documentary evidence was received and argument made. The record was closed and the case was submitted for decision on March 2, 2016.

ISSUE

The parties agreed that the following issue is to be decided by the ALJ:

¹ Claimant and his parents' identity are undisclosed to protect their confidentiality.

Did Service Agency improperly deny claimant's request to fund individual swimming lessons?

FACTUAL FINDINGS

1. Claimant is an eight year-old boy who is eligible for regional center services based on a diagnosis of autism spectrum disorder. Claimant is an only child who lives with both of his parents.

2. On June 3, 2015, claimant's father contacted claimant's service coordinator to ask Service Agency to fund individual swimming lessons for claimant. Father asserts that claimant's autism and vestibular challenges prevents him from learning to swim in a group setting. Parents expressed that claimant needed to learn to swim because claimant's friends and grandparents have swimming pools at their homes, and when claimant visits, it is important that he is able to swim for safety reasons.

3. On June 24, 2015, claimant's occupational therapist (OT), Steven T. Bates, Glendale Adventist Medical Center, recommended that claimant receive 1:1 assistance during swimming lessons because of claimant's "gravitational insecurity." (Exh. 9.) Bates described gravitational insecurity as a "relatively rare problem with modulating vestibular sensory input" (the sense of gravity and movement located in the inner-ear). (Exh. 9.) Bates again noted that this condition results in an extreme, and often irrational, fear of movement, when on elevated/unstable surfaces, and especially being upside down. He noted that children with gravitational insecurity typically want to be in contact with the ground, and when not, they feel "as if they are floating off the planet." (Id.) Bates stated that claimant was very fearful of being upside down and that his parents consistently reported he was very fearful of swimming. Bates stated that fear of swimming was common for children with gravitational insecurity. Bates also stated that claimant had "tactile modulation problems" or "tactile defensiveness" that results in claimant having an intolerance of water on his head or face, which is exacerbated by

unexpected splashing during swimming activity. ²

4. On October 15, 2014, FDLRC conducted an Individual Program Plan (IPP) meeting with claimant's parents. Service Agency agreed to assist claimant in obtaining support from the Koch-Young Family Resource Center to support claimant and family in obtaining an appropriate Individualized Education Program (IEP) through the school district, and to fund 16 hours per month of agency respite from March 1, 2014 to February 28, 2015. Subsequent amendments to the October 15, 2014 IPP were made on February 13, 2015 (continued funding for 16 hours per month of agency respite), and June 19, 2015 (funding for extended year program through The Help Group August 3-7, 2015).

5. On September 2, 2015, Service Agency denied claimant's request to fund individual swimming lessons. Service Agency noted claimant's parents concern that claimant's autism presented a challenge for him to learn to swim in a group setting and that claimant's OT therapist had recommended individual swimming lessons due to claimant's vestibular challenges. Service Agency denied funding for individual swimming lessons based on Welfare and Institutions Code section 4648.5, subdivisions (a), (b) and (c), which prohibit regional centers from funding social recreation activities and nonmedical therapies unless claimant qualifies for an exemption. Service Agency determined that claimant had not established that an exemption applied in his case. Service agency offered to fund twelve 30-minute swimming sessions per week at \$13.00

² On March 25, 2014, Bates' OT assessment for claimant indicated that he had a history of gravitational insecurity. (Exh. 13.) He described the condition as a fear reaction to being on moving, unstable, or elevated equipment/structures, and a fear of being upside down. He noted that claimant was making excellent progress in addressing this issue.

per session, the difference between the cost for individual lessons, which was \$38 per lesson, and group lessons which was \$25 per lesson. Service Agency informed parents that they would be responsible for \$25 per session, the cost of a group swimming lesson. On December 31, 2015, claimant filed a Fair Hearing Request (FHR) appealing Service Agency's denial of full funding for individual swimming lessons, and this hearing ensued.

6. On December 3, 2015, FDLRC conducted an Annual Review of claimant's supports and services. Service Agency continued to provide 16 hours per month of respite and the extended year program. The Annual Review noted that claimant is an energetic, healthy child who is progressing well in his educational environment although he demonstrated some behavioral problems in school and some difficulty interacting with his peers. Claimant's behaviors rarely included tantrums and he no longer hit or kicked when experiencing a tantrum. He socialized more with adults than his peers, and his interactions with peers had improved as a result of an afterschool program which provided an opportunity to improve his social skills. Parents indicated that claimant's safety skills had improved and that he no longer required constant supervision. However, they were funding individual swimming lessons for claimant at the Rose Bowl Aquatics Center due to water safety concerns. The Annual Review noted that parents requested funding for the swimming lessons and Service Agency agreed to fund twelve 30-minute lessons once per week at a cost of \$13.00 per session, the difference between the cost of group swimming lessons (\$25) and individual swimming lesson (\$38). Claimant's parents did not accept Service Agency's offer to fund partial payment for individual swimming lessons.

7. On January 19, 2016, Service Agency convened an informal meeting with claimant's parents to discuss the denial of funding for the individual swimming lessons. Parents stated that claimant required individual swimming lessons because of his autism

and acute fear of water. Parents again expressed water safety concerns for claimant if he is unable to learn to swim. Service Agency again offered to pay the difference between individual swimming lessons and group swimming lessons. Service Agency reasoned that if claimant did not have a disability, parents would have to fund swimming lessons if he had a fear of water and no water safety skills. Parents are expected to provide swimming lessons to claimant just as if they would for a child who did not have a disability, except that because claimant has autism, which impacts his ability to learn to swim in a group setting, the Service Agency would fund the additional cost to place claimant in individual swimming classes. Service Agency also agreed that because of claimant's disability and his extensive fear of water and need to learn water safety, additional time and swimming sessions may be required to meet his goal of learning to swim. Subsequently, Service Agency agreed to extend the number of swimming sessions the regional center was willing to partially fund to help claimant meet his goals. Service Agency again informed parents that funding for social recreation activities and nonmedical therapies were prohibited by Welfare and Institutions Code section 4648.5 and that claimant had not met the criteria for an exemption to this prohibition. Finally, Service Agency noted that most children with autism spectrum disorder did not have a "phobia" with, or fear of water and that Applied Behavioral Analysis (ABA) services should be considered to further address claimant's fear of water.

8. Claimant has been receiving individual swimming lessons at the Rose Bowl Aquatics Center (Center). On February 25, 2016, the Center indicated that claimant started swim lessons with no swim skills and a heavy fear of water, but that he has grown in both confidence and skill. The Center recommended that claimant continue to receive swim lessons to build confidence and to achieve water safety.

9. Parents also have obtained intensive behavior intervention (IBI) and behavior management (BM) services for claimant from California Pediatric & Family

Services (CPFS). These support services were intended to assist in decreasing claimant's fear of water while simultaneously increasing his tolerance of water submersion, specifically targeting the face and head area. Claimant has shown great improvement with these issues as a result of the IBI and BM services. CPFS recommended that claimant continue receiving services and supports which targets improving claimant's interaction with water and swimming.

LEGAL CONCLUSIONS

1. Claimant's appeal of the Service Agency's decision to deny full funding for individual swimming lessons was timely filed and proper jurisdiction to proceed with this hearing was established.

2. Claimant appeals the denial of a service by the Service Agency and therefore has the burden to demonstrate that Service Agency decision was incorrect. Claimant has the burden to show that full funding for claimant's individual swimming lessons should be granted.

3. Claimant's appeal is governed by the Lanterman Developmental Disabilities Services Act (Lanterman Act.) (Welf. & Inst. Code, §§ 4500 et seq.)³ Under the Lanterman Act, the Service Agency is required to secure services and supports that meet the needs of a person found eligible for services based upon a qualifying developmental disability. (Welf. & Inst. Code, § 4501.) Sufficient services and supports should be established to meet the needs and choices of the consumer, regardless of age or degree of disability, to support their integration into the community. (*Id.*) In providing these services, consumers and their families, when appropriate, should participate in decisions affecting their own lives, including the planning and implementation of services

³ All further statutory references are to the Welfare and Institutions Code.

provided by the Service Agency. (*Id.*)

4. Service Agency denied funding for individual swimming lessons for claimant based on section 4648.5, which prohibits funding for social recreation activities and nonmedical therapies. Section 4648.5 provides in pertinent part:

(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:

[¶] . . . [¶]

(2) Social recreation activities, except for those activities vendored as community-based day programs.

[¶] . . . [¶]

(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."

5. Here, cause exists to deny claimant's appeal because the Service Agency is prohibited from funding social recreation activities or nonmedical therapies, such as swimming lessons, and claimant failed to establish that he qualified for an exemption to this prohibition, by reason of Factual Findings 1 through 8, and Legal Conclusions 1 through 5.

6. It is undisputed that claimant's gravitational insecurity and fear of water hinders his ability to learn to swim. It is additionally undisputed that claimant's autism makes it difficult for him to learn to swim in group settings and that he requires individual swimming lessons to meet parents' goal of claimant learning to swim. Claimant has benefitted from individual swimming lessons both in terms of learning to swim and addressing his fear of water. However, swimming lessons are social recreation activities or nonmedical therapies, even though the lessons are intended to address water safety concerns. (Welf. & Inst. Code § 4648.5, subd. (a).) Further, claimant did not establish that his gravitational insecurity and acute fear of water are conditions related to his autism.

7. Claimant has not shown that he qualifies for an exemption under section 4648.5 because there are not extraordinary circumstances indicating that swimming lessons will ameliorate the physical, cognitive or psychosocial effects of his developmental disability, autism. Claimant, like any other child without a disability, would benefit from swimming lessons for safety concerns as well as the health and wellness effects associated with the swimming activity. But there is no basis to determine that swimming lessons would ameliorate the effects of claimant's autism, or that such lessons are necessary to enable claimant to remain in his home.

8. Although claimant suffers from gravitational insecurity and a fear of water,

these conditions are not attributed to his developmental disability. These conditions hinder claimant's ability to learn to swim, and like any other child who does not have a disability, claimant would benefit from individual swimming lessons to insure that he learns to swim and improve his water safety skills and awareness. However, claimant's parents are expected to take responsibility for activities that would typically be provided by parents for any child without a disability, and swimming lessons are included as such activities. (Welf. & Inst. Code § 4646.4, subd. (a).) Service Agency correctly concedes that claimant's autism, gravitational insecurity and fear of water impedes his ability to learn to swim, particularly in a group setting, and admits that claimant would benefit from having individual swimming lessons. To that end, Service Agency offered to fund the \$13.00 difference between the cost of group swimming lessons (\$25), which parents are expected to provide just as they would for a child without a disability, and the cost for individual swimming lessons (\$38) that is required for claimant because of his developmental disability, gravitational insecurity and fear of water.

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9. Service Agency properly denied parents' request to fully fund individual swimming lessons for claimant. Service Agency's offer to fund the \$13.00 difference in the cost of individual swimming lessons and group swimming lessons was appropriate.

ORDER

Claimant's appeal of the Service Agency's denial of fully funding individual swimming lessons is denied.

IT IS SO ORDERED.

DATED: March 17, 2016

_____/s/_____

MICHAEL A. SCARLETT

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5, subdivision (a). Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.