

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request  
of:

OAH No. 2016040371

CLAIMANT,

vs.

SAN GABRIEL/POMONA REGIONAL  
CENTER,

Service Agency.

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, on July 15, 2016, in Pomona.

Joseph Alvarez, Associate Director of Clinical Services, represented the San Gabriel/Pomona Regional Center (service agency).

Matthew M. Pope, Esq., represented claimant, who was not present.<sup>1</sup>

The record was held open for the submission of additional information until July 29, 2016. The parties timely submitted documents, but on August 2, 2016, claimant submitted a motion to strike portions of the service agency's submission. The documents received and events that occurred while the record was held open are described in the ALJ's order dated August 2, 2016, which resolved the motion to strike. The record was closed and the matter submitted for decision on August 2, 2016.

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<sup>1</sup> Claimant and her family are not identified by name to protect their privacy

## ISSUES

1. Is the service agency required to fund aquatic therapy for claimant?
2. Should the service agency reimburse claimant's family for expenses previously incurred in providing aquatic therapy to claimant?

## EVIDENCE RELIED UPON

In reaching this Decision, the ALJ considered service agency exhibits 1-6, claimant's exhibits A-L, as well as the testimony of Alethea Crespo, P.T., claimant's mother, and claimant's sister C.L. (the service agency called no witnesses).

## FACTUAL FINDINGS

### PARTIES AND JURISDICTION

1. Claimant is a 14-year-old female who is a service agency consumer based on her diagnosis of an unspecified intellectual disability.<sup>2</sup>
2. On a date not established, but no later than January 15, 2016, claimant's mother requested the service agency to provide funding for claimant to receive aquatic therapy provided by the Rose Bowl Aquatic Center (RBAC).
3. On or about January 15, 2016, the service agency sent claimant's mother a Notice of Proposed Action, in which the requested service was denied. For reasons not established, the service agency was requested to re-send that notice.

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<sup>2</sup> Though claimant's mother contends her daughter has also been diagnosed with autism spectrum disorder, the evidence presented indicates the service agency has only deemed her eligible for regional center services based on her intellectual disability diagnosis. This issue is discussed in more detail below.

4. On March 18, 2016, the service agency sent a second Notice of Proposed Action (Notice), again advising claimant's mother it had denied her funding request. The Notice stated the request had been denied because the service agency's prior denial of a similar request had been upheld in a Decision after a Fair Hearing held in February 2015.

5. On March 29, 2016, a Fair Hearing Request appealing the denial of the service requested was submitted by claimant's counsel to the service agency.

6. The initial May 13, 2016 hearing date was continued at the request of claimant's counsel. In connection with that request, claimant's counsel executed a written waiver of the time limit prescribed by law for holding the hearing and for the ALJ to issue a decision.

7. In the continuance request, claimant's counsel also requested to amend the Fair Hearing Request to add the additional issue that, in the event claimant prevails at hearing, the service agency would reimburse claimant's family for the aquatic therapy previously provided by RBAC. The service agency did not object to including that issue in this case.

#### BACKGROUND INFORMATION

8. Claimant resides at home with her biological parents. She has older siblings who have moved out of the home, but who regularly visit. Claimant is ambulatory and speaks in short sentences. She exercises on a treadmill daily. She has a tendency to elope.

9. Claimant has an atrial septal defect which was corrected by open-heart surgery when she was two years old. She has also been diagnosed with chromosome 8P deletion extending from the P-23 to the P terminal, which is associated with autism, mild mental retardation, atrial septal defect, mild hypotonia and microcephaly. As a result of these conditions, claimant lacks strength and muscle tone.

10. In August 2013, claimant's parents bought a house in Glendora. The property was purchased through a probate auction, which enabled her parents to acquire the property on preferred terms. The property has a swimming pool. Before moving to this house, claimant and her family lived in a house with no swimming pool.

11. Although there is a gate around the pool, the claimant is tall enough to reach the latch and open the gate. Claimant likes to be in the pool with her family members. She is also taken through the gate and pool area to access the family garden, which claimant is involved in maintaining.

12. On July 8, 2014, claimant and her mother met with claimant's service coordinator to develop her individual program plan (IPP). That IPP did not specifically identify water safety as a desired outcome of services. The parties met again in July 2015 to update claimant's IPP. Outcome number eight states that claimant's parents "would like for [claimant] to learn water safety skill by learning to tread water and improve in getting herself to the edge of the pool/ladder." (Ex. 3, p. 13.)

#### THE PRIOR FAIR HEARING DECISION

13. In late 2014, claimant's mother requested prospective funding for claimant to take "swimming lessons or aquatic therapy." The service agency denied the request and claimant's family appealed.

14. On February 9, 2015, ALJ Matthew Goldsby conducted a Fair Hearing between the parties. As stated in his Decision dated February 23, 2015, the issue to be decided was "whether the Service Agency should be required to fund swimming lessons or aquatic therapy for the Claimant." (Ex. 4, p. 1.) After making numerous Factual Findings and Legal Conclusions, ALJ Goldsby denied claimant's request for funding and issued an Order providing, "The Service Agency is not required to fund swimming lessons or aquatic therapy for the claimant."

15. ALJ Goldsby concluded that the requested swimming lessons or aquatic therapy was subject to the prohibition against funding for social recreational or nonmedical therapy related to specialized recreation set forth in Welfare and Institutions Code section 4648.5.<sup>3</sup> Specifically, ALJ Goldsby found:

[T]here is no dispute that claimant lacks water safety skills and would benefit from swimming lessons. However, any child who resides on a property with a swimming pool would benefit from water safety skills, regardless of the child's ability or disability. Whereas swimming lessons may have general therapeutic benefits for the claimant, the requested service is nonetheless a social recreational activity or nonmedical therapy subject to the restrictions of Welfare and Institutions Code section 4648.5. (Ex. 4, at p. 5.)

16. ALJ Goldsby also concluded that the requested funding did not meet the special exemption from the above-described funding prohibition set forth in section 4648.5, subdivision (c). ALJ Goldsby noted, "As important as swimming lessons may be to the claimant's safety and wellbeing, the service is neither a primary nor critical means for ameliorating the physical, cognitive, or psychosocial effects of autism or unspecified intellectual disability." (Ex. 4, p. 5.) ALJ Goldsby concluded, "Although the claimant's parents recently chose to purchase a house with a swimming pool, the requested service is not necessary to enable the claimant to remain in the home." (*Id.*, at p. 6.)

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<sup>3</sup> All further undesignated statutory references are to the Welfare and Institutions Code.

17. The Service Agency has a written Purchase of Service Policy manual, which does not specifically address the purchase of swimming lessons or aquatic therapy. However, there is a policy covering "Therapy Services," which defines therapy services and supports as including "occupational, physical, speech or nutritional therapies that are required to prevent deterioration of a specific condition, or to improve functional skills." (Ex. 5, p. 33.)

#### CLAIMANT'S CURRENT REQUEST FOR AQUATIC THERAPY THROUGH THE RBAC

18. In late June 2015, claimant began taking aquatic therapy classes at RBAC, which her family funded. She has continued taking them to the present time.

19. After several months of aquatic therapy classes at RBAC, claimant's primary aquatic therapist, Chase Carstensen, wrote a September 1, 2015 progress note, stating that aquatic therapy helped claimant build strength, endurance, coordination, and water safety. (Ex. D, p. 1.) Mr. Carstensen noted the therapy would continue to focus on those areas.

20. On September 14, 2015, claimant was evaluated for physical therapy (PT) at Glendale Adventist Medical Center (GAMC). Claimant's mother advised the PT evaluator that she was concerned about her daughter's overall balance, protective reactions, attention to task, frequent falls and lack of water safety. After a comprehensive evaluation, the PT evaluator found claimant had deficits in balance and protective reactions, but that those deficits were also impacted by her cognitive deficits. The PT evaluator was advised claimant was taking aquatic therapy classes at RBAC. The PT evaluator opined that therapy was the most appropriate to improve claimant's strength and water safety. The PT evaluator also recommended a limited two-month clinic-based PT program to address claimant's other deficits, which could be used in creating a home-based program thereafter.

21. A. Sometime in the fall of 2015, but after the GAMC PT evaluation, claimant was evaluated by Alethea Crespo of RBAC. Ms. Crespo is a licensed PT and is the Director of RBAC's Therapy Department.

B. Claimant was given a PT evaluation by Ms. Crespo at a playground and in the pool. Ms. Crespo testified at the hearing and her evaluation report was also submitted. Ms. Crespo concluded claimant needs PT to address her low muscle tone and strength. Ms. Crespo found claimant did not have significant balance impairments and did not have problems with falling.

C. Ms. Crespo described RBAC's aquatic therapy as "PT in the water." She testified the therapy is not simply swim lessons, but the client learns how to swim better as a result. Ms. Crespo concluded that the water environment is a better venue for claimant's PT than a clinic, because being in the water makes it harder for claimant to elope and the sensory input from the water keeps claimant calmer and easier to manage. In addition, the aquatic therapy addresses claimant's water safety needs by helping her manage entry in and exit from a pool and how to stay afloat in the water.

22. Claimant's mother has enrolled claimant in the RBAC program because she wants her daughter to improve her strength, coordination and muscle tone, as well as become more water safe. Claimant is attracted to the pool and her mother is concerned that she will get into the pool unattended. Though claimant has improved her water safety skills, claimant's mother is still concerned. Ms. Crespo from RBAC testified that, although claimant is more comfortable in the water, she is still not water safe. Mr. Carstensen's progress note corroborates Ms. Crespo's testimony.

23. A. In August 2015, clinical psychologist Paul Mancillas diagnosed claimant with autism spectrum disorder, moderate intellectual disability, attention deficit hyperactivity disorder, and a language disorder. (Ex. K.) Claimant's mother testified she shared the report with the service agency at or about that time.

B. Dr. Deborah Langenbacher of the service agency reviewed Dr. Mancillas' report. (Ex. 6.) She does not believe aquatic therapy is a scientifically proven means of addressing behavior or communication deficits attendant with autism. (Ex. 6, p. 2.)

C. In any event, the service agency has not deemed claimant eligible for services under the category of autism. Whether claimant has autism is beyond the scope of this hearing. Dr. Mancillas' opinion that claimant is autistic does not, without more, establish claimant is in fact autistic.

24. The service agency has not requested the family pursue insurance or other sources of funding for the aquatic therapy program and the family has so far not been successful in finding any. For example, claimant's mother testified the family's healthcare insurer denied her request to fund the aquatic therapy. She similarly testified she requested the California Children's Services (CCS) for assistance, but it would only cover services related to claimant's heart defect and not water safety. Ms. Crespo testified many of their aquatic therapy clients are subsidized by regional centers or local school districts. Claimant's mother was unaware that any school district funded the program and she has not requested such funding from claimant's school district.

25. Claimant has attended aquatic therapy at RBAC from approximately June 26, 2015, to the present. She typically attends the program twice per week; each session is one hour. Claimant's family has paid for the aquatic therapy so far. The family presented evidence indicating they have paid \$5,473.86 to RBAC. (Exs. H & L.) At her counsel's request, any sum paid to Casa Colima as reflected in the evidence has been deducted, as it is not apparent how such an expense relates to RBAC's aquatic therapy program.

26. During the July 2015 IPP meeting, claimant's mother advised the service agency's service coordinator that she had enrolled claimant in the RBAC aquatic therapy program and that the family was paying for it. (Ex. 3, p. 3.) No evidence establishes that

claimant's family asked the service agency to reimburse them for the RBAC expenses incurred.

## LEGAL CONCLUSIONS

### JURISDICTION AND BURDEN OF PROOF

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)

2. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Claimant's counsel submitted a fair hearing request to appeal the service agency's denial of the request for prospective aquatic therapy funding. Claimant's counsel later requested to add the issue of retroactive reimbursement for aquatic therapy payments already made to RBAC. The service agency did not object. Jurisdiction to decide both issues in this case was thus established. (Factual Findings 1-7.)

3. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) The burden of proof is on the party seeking government benefits or services. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) In this case, claimant bears the burden of proof on both issues because she is seeking funding the service agency has not previously agreed to provide.

### THE SERVICE AGENCY'S REASONS TO DENY CLAIMANT'S SERVICE REQUEST

4. Section 4648.5, subdivision (a), prohibits regional centers' authority to purchase the following services:

(A) Camping services and associated travel expenses;

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

- (C) Educational services for children three to 17, inclusive, years of age; and
- (D) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

5. An exemption may be granted on an individual basis in extraordinary circumstances to permit the purchase of a prohibited service described above 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. A. Claimant established the funding prohibition of section 4648.5 does not apply. In the prior case, the evidence concerning the aquatic therapy was not specific, perhaps because no service provider had been identified and the parameters of a program were not known to the family.

B. In this case, however, the evidence indicates the aquatic therapy is essentially PT in the water. It is being used to address claimant's PT needs, including strength and muscle tone. As such, the aquatic therapy is not a specialized recreational program and it is not a social recreation activity. According to the service agency's Purchase of Service Policy manual, PT services are defined as a form of medical therapy. Thus, the aquatic therapy is not a nonmedical therapy. In addition, aquatic therapy is addressing claimant's water safety needs. While she is improving in that regard, she is not yet water safe. Given the family has a pool in their home that is accessible to claimant to some extent, this is a legitimate need. Such a need does not fit within any of the funding prohibitions of section 4648.5. (Factual Findings 1-24; Legal Conclusions 1-5.)

C. To the extent claimant seeks aquatic therapy to address social, behavioral and/or communication delays related to autism, the request is denied. First, it has not been established that claimant has autism for purposes of the Lanterman Act. Second, it was not established that aquatic therapy is a valid or reliable means of addressing such deficits. Finally, aquatic therapy for this purpose would qualify as a nonmedical therapy and therefore be subject to the funding prohibition of section 4648.5, subdivision (a).

7. In closing, the service agency cited section 4659 and argued it should not provide the aquatic therapy funding because of the availability of funding through insurance, CCS and/or claimant's school district. However, that reason for denying the funding request was not stated in the Notice. Moreover, it was not established that such funding actually exists. If it does, the service agency has not done anything during the IPP process to help claimant identify and advocate for such funding. Before the service agency denies funding a service it is otherwise obligated to provide, by reason of the availability of other funding sources, it should at least show it has advised the family of the existence of other such services and help them access it. (Factual Findings 1-24; Legal Conclusions 1-6.)

8. In closing, the service agency also cited section 4646.4, subdivision (a)(4), and argued funding for teaching a child water safety should be considered a normal parental responsibility since families typically provide "similar services and supports for a minor child without disabilities. . . ." However, given claimant's cognitive and physical deficits related to her intellectual disability, teaching her satisfactory water safety skills has so far been elusive and will take more time. A child without disabilities would not need the same type of extensive training and frequency of classes. The Lanterman Act requires service agencies to bridge the funding gap between what it would cost to serve a developmentally disabled child versus a non-disabled child. (See, e.g., §§ 4512, subd. (a), 4685, subd. (c)(1), 4501, and 4648, subd. (g).) In any event, the aquatic therapy is

required to serve claimant's PT needs, and is the best form of PT given claimant's deficits caused by her disability. Deeming such a service to be a typical parental responsibility would not be a fair characterization or an appropriate application of section 4646.4, subdivision (a)(4).<sup>4</sup>

#### THE REIMBURSEMENT REQUEST

9. The Lanterman Act does not specifically authorize retroactive service payments. Regulations suggest funding is only available when either the service has been preauthorized or, in limited emergency situations, before such authorization can be obtained. (See, e.g., Cal. Code Regs, tit. 17, § 50612, subs. (a), (b) & (c).) RBAC was not preauthorized to provide the aquatic therapy service, nor was it demonstrated that the aquatic therapy was provided on an emergency basis.

10. A. The service agency had not previously agreed to provide funding for aquatic therapy by RBAC through the IPP process. In fact, the service agency prevailed in the Fair Hearing in 2015, when it was decided it was not required to fund aquatic therapy or swimming lessons. A consumer's IPP "shall be reviewed and modified by the planning team . . . as necessary, in response to the person's achievement or changing needs." (§ 4646.5, subd. (b).) The planning process relative to an IPP shall include, among

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<sup>4</sup> However, the parties are reminded that a consumer's IPP "shall be reviewed and modified by the planning team . . . as necessary, in response to the person's achievement or changing needs, . . ." (§ 4646.5, subd. (b).) The IPP planning process includes "[g]athering information and conducting assessments to determine the . . . concerns or problems of the person with developmental disabilities." (§ 4646.5, subd. (a).) Thus, a service should not be continued unless reasonable progress has been made toward goals and objectives, and the funding has been cost-effective. (§§ 4512, subd. (b), 4646, subd. (a), and 4648, subd. (a)(11)).

other things, “[g]athering information and conducting assessments to determine the . . . concerns or problems of the person with developmental disabilities.” (§ 4646.5, subd. (a).)

B. The process of creating an IPP, by its nature, is collaborative. (§ 4646.) The IPP is created after a conference consisting of the consumer and/or her family, service agency representatives and other appropriate participants. (§§ 4646, 4648.)

C. If the consumer or her parents do not agree with all components of an IPP, they may indicate that disagreement on the plan. (§ 4646, subd. (g).) If the consumer or her parents do “not agree with the plan in whole or in part, he or she shall be sent written notice of the fair hearing rights, as required by Section 4701.” (§ 4646, subd. (g).)

D. The issue of reimbursement must be carefully considered to avoid the circumvention of the IPP process, which is one of the cornerstones of the Lanterman Act. A regional center is required and legally obligated to participate in the decision-making process before a service is implemented or expenses for it incurred. Generally, a family cannot unilaterally incur a service cost without regional center input and expect to be reimbursed.

11. Yet, the lack of specific statutory authorization is not necessarily dispositive of the issue. An ALJ is empowered by statute to resolve “all issues concerning the rights of persons with developmental disabilities to receive services under [the Lanterman Act]. . . .” (§ 4706, subd. (a).) That statutory provision may be broad enough to encompass the right to retroactive benefits. However, pursuant to the general principles articulated in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, if the Lanterman Act is to be applied as the Legislature intended, reimbursement should only be available when the purposes of the Lanterman Act would be supported. Otherwise, the general requirements that services should be funded through the IPP process (§§ 4646, 4646.5, and 4648) would be

made superfluous. Thus, prior Fair Hearing decisions have included orders for reimbursement when the equities weighed in favor of the consumer and/or when the purposes of the Lanterman Act would be thwarted if not granted.<sup>5</sup>

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12. In this case, claimant's parents unilaterally decided to enroll claimant in RBAC's aquatic therapy program without first consulting the service agency. The family was able to prevail on prospective funding in this case, in large part, due to the PT evaluations done in September 2015, which were several months after claimant began the RBAC program. It was not proven that that information was provided to the service agency during planning team meetings. In fact, the service agency was not made aware of the reimbursement request until well after the FHR was filed. This is not insignificant, as it is possible the service agency would have explored other funding options at that time when the amount of the expenses involved was revealed. Under these circumstances, the IPP process was circumvented. It cannot be concluded that the equities weigh in favor of claimant's family or that the purposes of the Lanterman Act will be thwarted by denying the family's request for reimbursement. (Factual Findings 1-26; Legal Conclusions 1-11.)

## ORDER

Claimant's appeal is granted, in part, and denied, in part.

The San Gabriel/Pomona Regional Center shall forthwith provide funding for claimant to attend aquatic therapy at the Rose Bowl Aquatic Center twice per week, one hour per session.

The San Gabriel/Pomona Regional Center shall not reimburse claimant's family for the expenses already incurred in that aquatic therapy through July 2016.

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<sup>5</sup> Prior OAH decisions involving other parties are only advisory, not binding.

DATED: August 8, 2016

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ERIC SAWYER

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.**