

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2016040949

DECISION

Adam L. Berg, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on May 31, 2016.

Stephanie Zermeño, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

There was no appearance by or on behalf of claimant.

The matter was submitted on May 31, 2016.

ISSUE

Should IRC be required to reimburse claimant for swim lessons or fund future swim lessons?

FACTUAL FINDINGS

BACKGROUND INFORMATION

1. On March 9, 2016, IRC notified claimant that it was denying his request to

fund swim lessons from January through March 2016.¹ The letter stated that IRC was prohibited from funding services retroactively.

2. Claimant filed a fair hearing request appealing IRC's decision on April 15, 2016, requesting IRC "fund/reimburse for swim program."

3. OAH served claimant and IRC with a Notice of Hearing on April 25, 2016. The Notice of Hearing advised claimant of the time, date and location of the hearing.

4. On May 9, 2016, IRC representatives and claimant's authorized representative attended an informal meeting. Following the informal meeting, IRC adhered to its original determination denying claimant's request to fund swim lessons.

5. On May 12, 2016, IRC sent claimant a letter memorializing the informal meeting; summarizing IRC's determination; and reminding claimant of the hearing date, time, and location.

6. On May 24, 2016, IRC sent claimant a letter advising him of the potential witnesses and documentary evidence to be presented at hearing. The letter also reminded claimant of the date, time, and location of the hearing.

7. On the morning of the May 31, 2016, hearing, claimant's mother left a voicemail message with OAH requesting a continuance. Claimant's mother did not provide a reason for the continuance request. OAH administrative staff left a voicemail message with claimant's mother advising her of the procedure for submitting a continuance motion. Neither OAH nor IRC received a motion to continue. Neither claimant nor his representative appeared after being properly provided notice of the date and time of the hearing. IRC elected to proceed with the hearing and present its evidence for a decision.

¹ The letter stated that IRC would fund services for December 2015 as a courtesy because IRC was closed for a month following the events of December 2, 2015.

IRC'S PRIOR FUNDING OF CLAIMANT'S SWIMMING PROGRAM

8. On March 4, 2014, in accordance with claimant's most recent Individual Program Plan (IPP), IRC agreed to fund an eight-week program called "Get Swimming" for claimant to acquire skills that will allow him to be safe when he is in or around the swimming pool. The eight-week session began the week of March 17, 2014, and ended the week of May 5, 2014.

9. Without IRC's prior authorization, claimant's mother enrolled claimant in a second eight-week session of Get Swimming for the period from of May 12, 2014, to July 28, 2014. Claimant did not seek reimbursement for the second session until July 17, 2014. IRC accepted claimant's mother's explanation that she failed to timely request funding for the second session of swimming instruction because there was some confusion regarding when the program started. IRC reminded claimant, however, that all requests for funding must be presented to IRC before a service is provided. With the second session, IRC agreed to waive that requirement and fund the second session of Get Swimming.

10. On September 3, 2014, claimant's mother asked IRC to fund a third session of Get Swimming. The third session began the week of August 11, 2014, and continued until the week of October 6, 2014. On September 26, 2014, claimant's mother asked IRC to fund a fourth session of Get Swimming that was scheduled to begin the week of October 6, 2014. IRC denied both requests.

11. IRC denied the request for funding the third session partly because the request was made after the program had begun and constituted a retroactive request for funding. IRC denied the request for funding of the third and fourth sessions because they were deemed to constitute "social recreational/community integration/nonmedical therapies," which are services IRC could not fund unless claimant met the criteria for an exemption. IRC concluded that claimant did not meet the criteria to permit continued funding of the swimming program.

12. Claimant appealed IRC's determination, and a fair hearing was held on January 15, 2015. In a decision dated January 30, 2015, an administrative law judge (ALJ) denied claimant's request to retroactively fund a third session of Get Swimming. However, the ALJ granted claimant's request to fund a fourth session of Get Swimming. In granting funding for a fourth session, the ALJ wrote, "Any additional requests for funding of Get Swimming sessions should be made in sufficient time for the IPP team to review claimant's progress, obtain reports from Get Swimming, and reach a determination whether there is a need for additional sessions based upon safety considerations."

REQUEST FOR FUNDING OF ADDITIONAL SESSIONS OF CLAIMANT'S SWIMMING PROGRAM

13. At a meeting with IRC representatives on August 10, 2015, claimant requested funding for additional Get Swimming sessions. It appears no decision was made until March 9, 2016, when IRC issued a notice of proposed action denying claimant's request to fund swim lessons. Based on the records, claimant attended eight Get Swimming sessions from August 24, 2015, to November 11, 2015. There was no evidence presented at hearing that claimant attended any additional sessions for which he is seeking reimbursement.

TESTIMONY AT HEARING

14. Oscar Reyes, a Consumer Services Coordinator with IRC, is familiar with claimant. He testified that IRC is prohibited in most cases from retroactively funding services. IRC denied claimant's request to fund future services because the latest report from the Get Swimming program, dated February 16, 2016, stated, claimant is water safe and he has received the maximum therapeutic benefit. Mr. Reyes said that claimant's mother has not granted IRC permission for IRC to contact Get Swimming personnel directly in order to obtain progress reports.

15. John Caville, has been an IRC program manager for the past 19 years. He reiterated that IRC is authorized to fund retroactive services only in limited emergency situations. He believed that based on the most recent progress report, additional swim lessons are not therapeutically necessary for claimant.

16. Annette Richardson has been an IRC staff occupational therapist for the past 15 years. She reviewed the records from the Get Swimming program. Ms. Richardson noted that a speech and language pathologist concluded that claimant was water safe and that he has received the maximum therapeutic benefit of the program. Based on this information, Ms. Richardson believed that future swim lessons were not therapeutically necessary.

GET SWIMMING RECORDS

17. An aquatic skill safety sheet showed claimant attended eight lessons beginning on August 24, 2015. A discharge summary dated February 16, 2016, was signed by Amber Gray, a speech and language pathologist. In the summary, the report stated: "[claimant] is water safe and can sustain self in water independently. He does, however, need do be supervised by an adult while in the pool." A handwritten note stated, "Pt has received maximum therapeutic benefit." A handwritten note, dated February 29, 2016, signed by Michele Alaniz, an occupational therapist, stated "[Claimant] continues to work on building endurance & coordination. He demonstrates good swim skills but would likely struggle in a mainstream, community program due to his limited language skills & slow to acquire motor skills."

LEGAL CONCLUSIONS

BURDEN OF PROOF

1. In a proceeding to determine whether an individual is entitled to a service or support, the burden of proof is on the claimant to establish he or she requires the service

or support. The standard is a preponderance of the evidence. (Evid. Code, § 115.) A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

STATUTORY AUTHORITY

2. The Lanterman Act is set forth at Welfare and Institutions Code section 4500 et seq. Welfare and Institutions Code section 4501 provides:

The State of California accepts a responsibility for persons with developmental disabilities and an obligation to them which it must discharge. Affecting hundreds of thousands of children and adults directly, and having an important impact on the lives of their families, neighbors and whole communities, developmental disabilities present social, medical, economic, and legal problems of extreme importance . . .

An array of services and supports should be established which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community. To the maximum extent feasible, services and supports should be available throughout the state to prevent the dislocation of persons with developmental disabilities from their home communities.

3. Pursuant to Welfare and Institutions Code section 4646, subdivision (a), the development of the individual program plan should take into account the needs and preferences of the consumer and his or her family "where appropriate." Services and supports are intended to assist disabled consumers in achieving the greatest amount of self-sufficiency possible. (Welf. & Inst. Code, § 4648, subd. (a)(1).)

4. California Code of Regulations, title 17, section 50612, provides:

(a) A purchase of service authorization shall be obtained from the regional center for all services purchased out of center funds. . . .

(b) The authorization shall be in advance of the provision of services except as follows:

(1) A retroactive authorization shall be allowed for emergency services if services are rendered by a vendor service provider.

EVALUATION

5. Claimant requested funding of an eight-week Get Swimming session two weeks before he enrolled in the session on August 24, 2015. Claimant was fully aware that IRC is not permitted to retroactively fund programs, based on two previous fair hearing decisions. Although claimant sought authorization of funding before enrolling in the program, two weeks was not sufficient time for IRC to evaluate the program and its costs, determine need, and consider alternative services and supports. Despite not having pre-approval, claimant enrolled in at least one other session of Get Swimming. Under California Code of Regulations, title 17, section 50612, IRC is prohibited from funding the swim program retroactively. Claimant's request for reimbursement of Get Swimming sessions is denied.

Claimant failed to meet his burden to establish by the preponderance of the evidence that he is entitled to funding of any additional Get Swimming sessions. The most recent Get Swimming program report indicated that claimant has received maximum

therapeutic value from the program. Additionally, the report indicated claimant is water-safe. Therefore, claimant's request for funding of additional Get Swimming sessions is denied.

ORDER

Claimant's appeal from the IRC's decision not to reimburse claimant or fund additional swim sessions is denied.

DATED: June 13, 2016

ADAM L. BERG

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 ninety days.