

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH No. 2016090684

DECISION

This matter was heard by Julie Cabos-Owen, Administrative Law Judge with the Office of Administrative Hearings, on November 8, 2016, in Bakersfield, California. Claimant was represented by his mother.¹ Kern Regional Center (Service Agency or KRC) was represented by its Program Manager Specialist, Mark E. Meyer, LCSW.

Oral and documentary evidence was received, and argument was heard. The record was closed, and the matter was submitted for decision on November 8, 2016.

ISSUES

Should KRC be required to fund swimming lessons for Claimant?

¹ Claimant's and his mother's names are omitted throughout this Decision to protect their privacy.

EVIDENCE

Documentary: Service Agency exhibits A-G; Claimant's exhibit 1.

Testimonial: Claimant's mother.

FACTUAL FINDINGS

1. Claimant is a 13-year-old male consumer who qualifies for regional center services under a diagnosis of autism. He lives with his mother and siblings in Kern County. He is five feet, five inches tall and weighs 163 pounds.

2(a). Claimant attends a day program at Valley Achievement Center, a private school for autistic children. He also attends Valley Achievement Center's after school program at a different location. Valley Achievement Center's day program location has a gated pool on the grounds which the students utilize during hot weather under staff supervision.

2(b). The Program Director of Valley Achievement Center and Claimant's teacher both signed and submitted a September 2, 2016 letter stating, "During the swimming months at Valley Achievement Center, [Claimant] has enjoyed participating in swimming activities with his staff. Though he enjoys engaging in swimming he continues to need assistance with floating, holding his breath under water, and using his arms to stay afloat. Overall he enjoys the activity but continues to require lessons to develop his skills." (Exhibit 1.)

3. Claimant's home does not have a pool on the premises. However, his mother worries about him wandering in the neighborhood and drowning in someone else's pool. He has no fear of the water and no sense of the danger involved.

4. Claimant sometimes plays in the pools at friends' or family's homes. Claimant has a life jacket which his mother requires him to wear when he is in a

pool. However, he does not like to wear it because he thinks it is unfair that other children are not required to wear one.

5. Although Claimant is supervised at Valley Achievement Center, his mother worries about Claimant swimming there. She believes that the staff members are "young girls" who are "half his size" and cannot properly protect him from danger in the pool.

6. For four weeks in July 2016, Claimant attended private swimming lessons at American Kids Swim Program funded by a scholarship through Autism Society-Kern Autism Network. The one-on-one lessons were taught by a trained swimming instructor with experience working with autistic children.

7. Claimant's mother requested that KRC fund additional swim lessons for Claimant at American Kids Swim Program. In a letter and Notice of Proposed Action, dated September 14, 2016, KRC informed Claimant's mother that KRC was denying Claimant's request for KRC to fund his swimming lessons. Citing Welfare and Institutions Code section 4646.4, subdivision (a)(4), KRC stated that the denial was based on the following: "It is parental responsibility to pay for and arrange swimming lessons." (Exhibit A.)

8. On September 16, 2016, Claimant's mother filed a Fair Hearing Request on Claimant's behalf, contesting the Service Agency's denial of funding. (Exhibit A.)

9. At the administrative hearing, Claimant's mother stated that she wants Claimant "to be proficient swimmer so he can be safe." During Claimant's swimming lessons in July, she observed that Claimant continued to lack coordination in moving his arms and legs, and he did not know how to hold his breath under water but "pop[ped] up" quickly after immersion. Claimant's mother noted, "He thinks he is an expert, and that is what is scary." She maintained that

KRC should pay for Claimant's swimming lessons because "typical parents do not have to look for specialized swim lessons and someone who can handle an autistic child."

10. Bharati Shah, M.D. submitted a letter, dated September 1, 2016, stating, "Patient would benefit from swim lessons which would improve his leg and arm movements and also help with agility. Swimming lessons would also help him with safety." (Exhibit E.)

11. At the administrative hearing, KRC maintained that Claimant's mother is responsible for funding additional swimming lessons because the lessons are not necessary to meet his specific needs relating to his autism or to ameliorate his disability. Although the lessons were also sought to help his agility, his disability is a neurological disorder, not a physiological disorder, and the swimming lessons are not considered a medical therapy. KRC noted that Claimant does not live near a swimming pool, and he currently has individuals supervising him when he is near water. He also has a life jacket to address his safety.

LEGAL CONCLUSIONS

1. Cause does not exist to grant Claimant's appeal and to order the Service Agency to provide funding for Claimant's swimming lessons.

2. Where a change in services is sought, the party seeking the change has the burden of proving that a change in services is necessary. (See, Evid. Code, §§ 115 and 500.) 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 proving, by a preponderance of the evidence, that he is entitled to funding for swimming lessons which KRC had not previously provided. Claimant has not met his burden.

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3(a). Welfare and Institutions Code section 4648.5 provides:

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

3(b). In the case at hand, the Service Agency's authority to fund swimming, which can be considered either social recreation or non-medical therapy/specialized recreation, has been suspended by statute. (Welf. & Inst. Code, § 4648.5, subds. (a)(2) and (a)(4).)

3(c). The statute provides for an exemption on an individual basis when the regional center determines that specifically enumerated extraordinary circumstances exist. (Welf. & Inst. Code, § 4648.5, subd. (c).) The Service Agency determined that there was no evidence that such extraordinary circumstances exist, and thus did not grant an exemption. Since Claimant seeks to establish grounds for granting the exemption and funding swimming lessons, he must demonstrate that the Service Agency's determination is incorrect and that he is entitled to the exemption. Claimant has not met this burden.

3(d). Additional swimming lessons may help Claimant become a more proficient swimmer, become safer in the water, and improve his leg and arm coordination. However, Claimant did not establish that the swimming lessons are “primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of” Claimant’s autism or that the swimming lessons are “necessary to enable [Claimant] to remain in [his] home and no alternative service is available to meet [his] needs.” Consequently, Claimant did not establish that he is entitled to the statutory exemption set forth in Welfare and Institutions Code section 4648.5, subdivision (c).

4(a). Welfare and Institutions Code section 4646.4 provides:

(a) Effective September 1, 2008, 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.

(b) Final decisions regarding the consumer's individual program plan shall be made pursuant to Section 4646.

4(b). In this case, the Service Agency also maintains that it cannot properly fund Claimant's swimming lessons because it must "conside[r] the family's responsibility for providing similar services and supports for a minor child without disabilities." (Welf. & Inst. Code, § 4646.4, subd. (a)(4).) This argument was persuasive.

4(c). Swimming lessons are services (for social recreation and safety purposes) which are also offered to children without disabilities. Therefore, the Service Agency is required to consider the family's responsibility for providing such services.

5. Given the foregoing, the Service Agency's denial of funding for Claimant's swimming lessons was appropriate.

ORDER

Claimant's appeal is denied.

DATED: November 15, 2016

JULIE CABOS-OWEN

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.