

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

REGIONAL CENTER OF THE EAST BAY,

Service Agency.

OAH No. 2017060035

DECISION

Administrative Law Judge Jill Schlichtmann, State of California, Office of Administrative Hearings, heard this matter on June 19, 2017, in San Leandro, California.

Mary Dugan, Fair Hearing and Mediation Specialist, represented Regional Center of the East Bay, the service agency.

Claimant was represented by his mother.

The matter was submitted for decision on June 19, 2017.

ISSUE PRESENTED

Should Regional Center of the East Bay fund claimant's tuition, lodging and travel expenses to attend Paskowitz Surf Camp in San Diego?

FACTUAL FINDINGS

1. Claimant is a 13-year-old consumer of the Regional Center of the East Bay (RCEB). He is a healthy, happy and well-nourished boy. Claimant is eligible for regional center services based upon a diagnosis of autism. Claimant is largely non-verbal; his primary methods of communication include picture exchange communication, bringing

objects to others, vocalizations and hand leading. Claimant resides with his mother; he sees his father on an occasional basis.

2. Claimant is on a casein, gluten and lactose free diet; his mother prepares juices including carrots, spinach, lettuce, cilantro and parsley for him. Claimant needs assistance with toileting, bathing, hygiene, dressing and safety awareness. Claimant does not sleep through the night. He often engages in self-stimulation, also referred to as stimming.

3. Claimant is verbally and physically aggressive. He engages in property destruction, self-injurious behavior, socially disruptive behavior and inappropriate undressing. Claimant will hit his mother and scream inconsolably; these behaviors occur three to four times daily. Claimant bites and chews on his hands throughout the day and is very aggressive with those whom he does not know well.

4. Claimant was attending Oak Hill Elementary School, a non-public school setting funded by the West Contra Costa Unified School District. His Individualized Education Plan (IEP) goals are preacademic/academic/functional skills. Claimant had a one-on-one aide and received language and speech services and occupational therapy services. Encouraging appropriate social behavior through a structured environment was added to his IEP. He also had goals in place for communication, reading, math and science.

Claimant had a behavior support plan in place at Oak Hill Elementary to address aggression, self-injurious behavior and tantrums. Claimant has been engaging in frequent aggressive behaviors, including hair pulling, non-compliance and spitting. Based on the intensity and frequency of his aggressive behaviors, and the potential for staff injury, the school recently notified his mother that it was no longer an appropriate educational environment for him.

5. Claimant's mother is very attentive to her son's needs and has developed a trusting relationship with him. However, he has a very difficult time interacting with strangers, and even with aides that he has known for a number of years. It took claimant's mother years of effort to get him to look her in the eye.

6. A couple of years ago, claimant's mother discovered that claimant loves to be in the ocean. They were in Southern California and she took him to the beach. When he entered the ocean he became calm, relaxed and peaceful; he stopped stimming behavior and appeared as if he did not suffer from autism. The experience had a very positive experience on claimant, which endured for two months. Spending time in the ocean is the only activity which provides claimant with this peaceful mindset. Claimant's mother is fearful of having to place claimant in an institution. She wonders whether spending more time in the ocean would be beneficial enough to change claimant's behavior over time.

CLAIMANT'S IPP

7. Claimant's 2016 Individual Program Plan (IPP), sets forth the following objectives: 1) claimant will be safe and well cared for while his mother takes a break from caregiving; 2) claimant will continue to work on language and communication skills; 3) claimant will participate in appropriate recreational activity programs; 4) claimant will make progress on independent living skills; and, 5) claimant will continue to be healthy, happy and well-nourished.

PASKOWITZ SURF CAMP

8. In an effort to meet claimant's first and third IPP goals, in 2016 RCEB funded a portion of claimant's tuition at Paskowitz Surf Camp in San Diego. Paskowitz Surf Camp provides a three-day session for children with autism. It was started by a surfer whose autistic child benefited greatly from being in the ocean surfing. This year

the camp is from July 9 to 12, 2017. RCEB funded a portion of the tuition last year because it considered the camp to meet the definition of an out-of-home respite opportunity for claimant's mother.

Last year, claimant's mother observed claimant's behavior from the shore during surf camp. He readily held his instructor's hand despite him being a stranger, smiled and entered the water. Claimant was overjoyed by surfing; it was the only time his mother had observed claimant to be so relaxed, joyful and at peace. Claimant surfed for six hours each day and exhibited no maladaptive behaviors during the camp. At the end of the day, claimant went to a hotel with his mother to eat his blended vegetables and use his iPad. He was exhausted each day after surfing and slept through the night, which he does not do at home. Claimant's mother describes his response to surfing as "miraculous." No other activity or therapy has resulted in such a positive impact on claimant's behavior. Claimant's mother researched the availability of a local surf camp, but could not locate one. Claimant's mother reports that claimant's behavior improved significantly for a couple of months after Paskowitz Surf Camp ended last year. She believes that if she were able to incorporate surf camp into his life each year, he might make strides with his behavior that would last indefinitely.

9. Claimant requested that RCEB fund the cost of his tuition at Paskowitz Surf Camp again this year as well as the cost of airfare to San Diego and nearby lodging. The camp discounted the tuition from \$1,250 per three day session to \$850 for claimant. The cost of the camp includes overnight camping. At present, claimant's mother does not believe claimant would be able to participate in overnight camping because he is accustomed to having his vegetable juice and using his iPad; however, she is hopeful that in coming years, he would be able to participate. Claimant's mother testified credibly that the family does not have the funds to pay for the surf camp tuition,

transportation or lodging because her only source of income is SSI, but she did not bring documentation to establish that.

RCEB EVIDENCE

10. Claimant's case manager, Rhonda Kimble-Kelly, has worked with claimant and his mother for three years. She appreciates the challenges claimant and his mother face. Kimble-Kelly seeks to support claimant and would like to provide respite to his mother.

11. Kimble-Kelly approved funding of a portion of claimant's tuition at Paskowitz Surf Camp last year because she believed it was a form of out-of-home respite. She learned this year that claimant's mother is required to be at the beach while claimant surfs. Because her attendance is required at camp, it does not meet the definition of respite. Kimble-Kelly did not approve RCEB funding tuition for the camp as a social or recreational activity because regional centers are prohibited from funding social and recreational activities unless an exemption is made under extraordinary circumstances. Kimble-Kelly did not approve funding transportation or lodging costs because in her experience, those are not expenses regional centers fund for minors to attend camp.

12. The RCEB Transportation Policy provides that it will fund transportation for a consumer to access services that will meet the goals of the IPP when the Planning Team has made an assessment that the consumer is not able to use public transportation and no other means of transportation is available. Transportation is provided to the service closest to the consumer's home.

13. Kimble-Kelly recommended instead that claimant attend Camp Krem, a camp located in Santa Cruz, that provides camp experiences for children with autism. Kimble-Kelly has been to the camp and observed the camp in action. Camp Krem tailors the activities to the child's needs and provides a one-on-one aide for each camper.

Camp Krem takes campers to the Santa Cruz Beach Boardwalk and to the beach. They do not take the children surfing. Kimble-Kelly would like claimant and his mother to try Camp Krem to see if he benefits from it. Claimant's mother would not be at Camp Krem, so it could be funded as out-of-home respite.

Claimant's mother is concerned that leaving claimant with strangers at Camp Krem may cause him to regress, resulting in the loss of small victories won through years of hard work. Moreover, claimant's mother is not seeking respite, but for claimant to benefit from surfing.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, the State of California accepts responsibility for persons with developmental disabilities. The Lanterman Act provides that an "array of services and supports should be established ... to meet the needs and choices of each person with developmental disabilities ... and to support their integration into the mainstream life of the community." (Welf. & Inst. Code, § 4501.) Regional centers are required to carry out the state's responsibility to the developmentally disabled. (Welf. & Inst. Code, § 4501.) An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act. (Welf. & Inst. Code, §§ 4700 – 4716.) Claimant requested a fair hearing to appeal RCEB's denial of his request for funding to attend Paskowitz Surf Camp and related expenses. (Factual Finding 9.)

2. The standard of proof in this case is the preponderance of the evidence because no law or statute (including the Lanterman Act) requires otherwise. A consumer seeking new services has the burden of proof. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9 [party asserting a claim or making charges generally has the burden of proof in administrative hearings].) In this case, claimant bears the burden of proof because he seeks new funding.

3. A consumer is entitled to services and supports directed toward the alleviation of a developmental disability, the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, and the achievement and maintenance of an independent, productive, and normal life. (Welf. & Inst. Code, § 4512, subd. (b).) Services and supports authorized by the Lanterman Act include, but are not limited to, recreation, behavior modification programs, camping, community integration services, social skills training, and transportation services necessary to ensure delivery of services. (*Ibid.*)

A regional center's policies must be consistent with the provisions of the Lanterman Act. (*Williams v. Macomber* (1991) 226 Cal.App.3d 225, 232.) The application of "an inflexible policy" denying services is contrary to the Lanterman Act. (*Id.* at p. 233.) Eligibility for specific services "depends upon a consideration of all relevant circumstances." (*Ibid.*)

4. An important goal of the Lanterman Act is to support a consumer's integration into the mainstream life of the community. This goal is consistent with claimant's IPP goals that he interact with others and participate in appropriate recreational activities. (Factual Finding 7.) Claimant seeks to attend the Paskowitz Surf Camp because his mother has observed a significant impact on his behavior during and following his attendance at the camp. Claimant did not request financial assistance in attending the camp in order to provide respite for his mother. (Factual Finding 13.)

5. In the Budget Act of 2009, the Legislature made significant changes regarding the provision of services under the Lanterman Act. With respect to social recreation and non-medical therapies, Welfare and Institutions Code section 4648.5 was added to provide, in relevant part, as follows:

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

[s/c] 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 those activities vendored as community day programs.

[¶]

(4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

[¶]

(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.

CAMP TUITION

6. Claimant requests that RCEB fund the tuition for him to attend Paskowitz Surf Camp. The camp provides an opportunity for claimant to engage in social recreation activities and is subject to the provisions of Welfare and Institutions Code section 4648.5. The Lanterman Act prohibits RCEB from funding social recreation activities unless grounds for an exemption are established.

7. In order for an exemption to apply, either the services must be necessary to enable claimant to remain in his home, or the service must be a "primary or critical" means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability. Claimant's mother described claimant's attendance at the surf camp last year as "miraculous." (Factual Finding 8.) It is the only time that she has witnessed him so peaceful and joyful. (Factual Findings 6 and 8.) Claimant's mother observed a reduction in his aggressive behaviors for a couple of months following his attendance at the camp. No other intervention has been as successful in ameliorating claimant's aggressive behavior. (Factual Finding 8.) Although the Lanterman Act normally prohibits regional centers from funding social or recreational activities, this is an extraordinary and unusual situation that calls for an exemption. Claimant's mother has established by a preponderance of the evidence that his attendance at Paskowitz Surf Camp constitutes a primary or critical means in ameliorating the psychosocial effects of his disability and no alternative service is available to meet his needs. (Factual Finding 8.)

Therefore, RCEB will be ordered to fund claimant's discounted tuition at Paskowitz Surf Camp.

TRANSPORTATION EXPENSE

8. Claimant requests financial assistance with the travel expenses associated with attending Paskowitz Surf Camp. Welfare and Institutions Code section 4648.35 provides that a regional center shall fund the least expensive transportation modality that meets the consumer's needs, as set forth in the consumer's IPP. A regional center may fund transportation services for a minor child living in the family residence only if the family of the child provides sufficient written documentation to the regional center to demonstrate that it is unable to provide transportation for the child. (Welf. & Inst. Code, § 4648.35, subd. (d).) Claimant's mother testified credibly that she is unable to fund the cost of airfare to San Diego; however, she did not provide documentation of her financial status. (Factual Finding 9.)

The RCEB Transportation Policy provides that it will fund transportation for a consumer to access services that will meet the goals of the IPP when the Planning Team has made an assessment that the consumer is not able to use public transportation and no other means of transportation is available. Transportation is provided to the service closest to the consumer's home. (Factual Finding 12.) San Diego is the nearest surf camp that claimant is able to access. (Factual Finding 8.) In order to make it possible for claimant to attend, RCEB will be ordered to pay up to \$250 toward claimant's travel expenses (including airfare, gas and/or Uber or Lyft expenses) to attend Paskowitz Surf Camp if claimant's mother provides sufficient documentation to RCEB to establish that she cannot afford to pay for transportation. Claimant shall provide receipts to RCEB documenting his transportation costs.

LODGING

9. In order to attend camp, claimant requires lodging in San Diego. Claimant requests financial assistance with the cost of lodging during camp. Although camping is

included at Paskowitz Surf Camp, claimant is currently unable to access that option due to the effects of his disability. (Factual Finding 9.) RCEB will be ordered to pay up to \$250 toward claimant's lodging expenses upon submission of sufficient documentation by claimant's mother to RCEB to establish that she cannot afford to pay for lodging. Claimant shall provide receipts to RCEB documenting the costs incurred in lodging.

ORDER

1. RCEB shall fund up to \$850 in tuition for claimant to attend Paskowitz Surf Camp.
2. RCEB shall fund up to \$250 in transportation costs for claimant to travel to San Diego to attend Paskowitz Surf Camp if claimant's mother submits documentation to RCEB that establishes that she is unable to pay those costs. Claimant shall provide RCEB with receipts for all transportation costs incurred, up to \$250.
3. RCEB shall fund up to \$250 in lodging costs associated with claimant's attendance at Paskowitz Surf Camp if claimant's mother submits documentation to RCEB that establishes that she is unable to pay those costs. Claimant shall provide RCEB with receipts for all lodging expenses incurred, up to \$250.

DATED: June 21, 2017

JILL SCHLICHTMANN

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.