

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2017080159

DECISION

Debra D. Nye-Perkins, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on September 18, 2017.

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

Claimant's mother represented claimant, who was not present at the hearing.

The matter was submitted on September 18, 2017.

ISSUE

Should IRC be required to fund claimant's special needs swimming lessons?

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is a 13 year-old child who qualifies for regional center services based on a diagnosis of mild intellectual disability.
2. Claimant's mother believes claimant requires special needs swimming lessons because claimant goes to a pool about three times per week with her school as part of a school group program, but claimant does not know how to swim, and the school will not provide swim lessons. Claimant's parents believe claimant would benefit from swimming lessons by improving her physical fitness and ensuring her safety in the pool.
3. On June 29, 2017, claimant's mother proposed that claimant would attend the special needs swimming lessons at the Fontana Aquatic Center and requested that IRC provide funding for the lessons.
4. In a Notice of Proposed Action dated July 19, 2017, IRC denied claimant's request to fund the special needs swimming lessons. The basis of the denial was that "Regional Centers are prohibited from funding social/recreational programs, such as swim lessons," unless the requesting party can satisfy an exception to the law. IRC did not believe claimant's situation constituted an exception under the law.
5. Claimant disagreed with IRC's decision to deny funding, and she submitted a fair hearing request on July 31, 2017.

TESTIMONY OF MARVIN FRANKLIN

6. Marvin Franklin is a consumer services coordinator at IRC. He has held that position for over 29 years. His duties include assisting families with developing an Individual Program Plan (IPP) for individuals receiving services from IRC, evaluating support services that may benefit those individuals in their home, and assisting families

with funding for those services. Mr. Franklin is claimant's current consumer services coordinator at IRC and has been for the past six years.

7. Mr. Franklin testified he met with claimant's parents on May 11 2017, to finalize claimant's proposed IPP. During that meeting claimant's mother asked to receive drafts of the IPP for her review, mentioned that there had been an incident with claimant in a pool that had caused her some concerns, and stated she was interested in swimming lessons for claimant. On June 28, 2017, claimant's parents and Mr. Franklin met again to discuss and finalize the IPP report. During that meeting, claimant's mother asked that the swimming lessons be added to claimant's IPP and suggested that they "could work out the details later." Mr. Franklin was unsure if claimant's mother was requesting a referral for swimming lessons or funding for a particular program for swimming lessons. Regardless, Mr. Franklin stated they agreed to complete the proposed IPP as planned, and claimant's mother would submit a request for the swimming lessons. On June 29, 2017, Mr. Franklin received an email from claimant's mother asking for information on IRC paid programs for swimming lessons, or in the alternative for funding for special needs swimming lessons at the Fontana Aquatic Center, which program Mr. Franklin had mentioned in the prior IPP meeting. Mr. Franklin testified he was not aware of any IRC paid programs for swimming lessons. He stated he is also familiar with claimant's home and that home does not have a swimming pool.

8. After the meeting with claimant's mother, Mr. Franklin spoke with his supervisor, Millee Martin-Walton, regarding claimant's request and looked into options for special needs swimming lesson programs. Mr. Franklin stated IRC does not fund any programs for special needs swimming lessons, but he was aware that the Fontana Aquatic Center and the All-Star program offered by California State University San Bernardino offer special needs swimming lessons for the same cost as regular swimming lessons.

9. IRC determined it was not permitted to fund the special needs swimming lessons requested by claimant and advised claimant of its decision in the Notice of Proposed Action described above. Claimant filed a Fair Hearing Request appealing IRC's denial of funding for the special needs swimming lessons.

TESTIMONY OF MILLEE MARTIN-WALTON

10. Millee Martin-Walton is a program manager at IRC and has held that position for the past 18 years. She has worked at IRC for a total of 33 years. Her position as program manager requires that she supervise a team of consumer services coordinators and, as part of her position, she reviews requests from family members for services to determine whether those services can be funded by IRC. Ms. Martin-Walton discussed claimant's request for special needs swimming lessons with Mr. Franklin. Ms. Martin-Walton noted that the swimming lessons would not ameliorate claimant's developmental disabilities. Instead, she stated the swimming lessons would address claimant's social or recreational needs and would not address any medical need of claimant. Ms. Martin-Walton further stated that, pursuant to an amendment to the Lanterman Act in 2009, IRC is prohibited from funding any social or recreational program for consumers unless the request qualifies as an exception. In order to qualify as an exception, the requested service must help to improve or alleviate the developmental disability, must be necessary for the consumer to remain in the home, and there must be no alternative services available. Ms. Martin-Walton testified that, based on the statute, claimant's request for special needs swimming lessons was denied. Additionally, she noted that while swimming lessons will provide good exercise and physical benefits for any person, such swimming lessons are typically paid for by parents of a child regardless of special needs. She also noted the cost of the special needs swimming lessons at the Fontana Aquatic Center was the same as the cost for regular swimming lessons for any child.

11. Ms. Martin-Walton acknowledged she is aware that claimant receives physical therapy and occupational therapy in a pool about three days a week while she is at school. She noted that because claimant is receiving those services while she is at school, it is the school's responsibility to ensure claimant's safety while in the pool. Additionally, Ms. Martin-Walton explained that, while one regional center may fund services such as special needs swimming lessons, it is not required that all regional centers offer those same paid services, and each regional center has different funded services based on their location and other factors.

12. Ms. Martin-Walton also stated that, in the Notice of Proposed Action letter dated July 7, 2017, sent to claimant's mother regarding the denial of claimant's request for special needs swimming lessons, she recommended that claimant discuss the possibility of incorporating swim lessons as part of the adaptive skills or socialization training provided in the Behavioral Health Treatment (BHT) services claimant is already receiving from Easter Seals. Ms. Martin-Walton testified she made this recommendation to claimant's mother as an option for her to avoid paying for the swimming lessons.

TESTIMONY OF CLAIMANT'S MOTHER

13. Claimant's mother testified that, while claimant receives services from IRC under a diagnosis of mild intellectual disability, she believes her daughter has additional qualifying diagnoses, specifically autism spectrum disorder and Trisomy 21, Down Syndrome. Claimant's mother produced a letter from claimant's primary care physician providing a list of diagnoses and noting that claimant needs constant supervision. She also provided a document from claimant's physical therapist noting as follows:

Adaptive swimming would be [*sic*] benefit to patient as long as patient has no medical restrictions. Swimming can improve muscle tone, strength, body coordination and

postural control [*sic*] which promote safety in functional mobility such as tub transfer and walking on compliant terrain.

14. Claimant's mother testified she believes her daughter would benefit greatly from swimming lessons because it would increase her muscle tone and strength, improve her mental status, ensure pool safety, and improve her skills and endurance. She provided multiple articles discussing the benefits of swimming for individuals with autism spectrum disorder and other conditions, as well as an article regarding the risks of drowning for individuals with autism spectrum disorder. She is concerned about her daughter drowning, especially because she is in the pool three times per week at school, and her neighbors and family members have swimming pools. Claimant's mother stated there has been at least one incident where claimant unzipped her life jacket while in the swimming pool, and she is concerned that claimant may drown if she is unable to swim. She admits that claimant is always monitored, but stated drowning can take only a minute. Claimant's mother believes the special needs swimming lessons will ensure claimant's safety while helping her physically and mentally.

15. Claimant's mother stated that, while her daughter receives therapy in a swimming pool three days per week, the school refuses to provide her with special needs swimming lessons. Additionally, claimant's mother testified that special needs swimming lessons are an existing funded program at the Eastern Los Angeles Regional Center, and she believes it is unfair that IRC does not offer the same paid services. She also stated her belief that if the school refuses to provide the special needs swimming lessons, IRC must therefore agree to fund the special needs swimming services. She is asking that claimant be provided the special needs swimming lessons as an exception to the prohibition to IRC funding social and recreational services. She believes the swimming lessons will provide claimant better health and ensure her safety.

16. Claimant's mother stated the Fontana Aquatic Center is close to their home and provides special needs swimming lessons for \$45 per session. She believes claimant would need at least five swimming lesson sessions to be able to learn to swim. She stated claimant requires the special needs swimming lessons rather than the standard swimming lessons because of her conditions.

LEGAL CONCLUSIONS

THE BURDEN AND STANDARD OF PROOF

1. In a proceeding to determine whether an individual is entitled to a specific service, the burden of proof is on the claimant to establish that he or she requires the additional services. The standard of proof required is 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.)

THE LANTERMAN ACT

2. Under the Lanterman Act the State of California accepts responsibility for persons with developmental disabilities. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

3. The Lanterman Act is intended to provide an array of necessary services and supports sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, at each stage of life and to support their integration into the mainstream life of the community. (Welf. & Inst. Code, §§ 4501, 4512, subd. (b).) Such services include locating persons with developmental disabilities (§ 4641); assessing their needs (Welf. & Inst. Code, §§ 4642 – 4643); and, on an individual basis, selecting and providing services to meet such needs. (Welf. & Inst. Code, §§ 4646 – 4647.) The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (Welf. & Inst. Code, §§ 4501, 4509, 4685), and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (Welf. & Inst. Code, §§ 4501, 4750.)

4. Welfare and Institutions Code section 4512, subdivision (b), defines “services and supports” and describes how one should determine which supports are necessary.

“Services and supports for persons with developmental disabilities” means specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, and normal lives. The determination of which services and supports are necessary for each consumer shall be made through the

individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to . . . recreation, . . . behavior training and behavior modification programs, camping, community integration services, community support, daily living skills training, . . . social skills training, . . . training for parents of children with developmental disabilities, . . . Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.

5. In order to be authorized, a service or support must be included in the consumer's IPP. (Welf. & Inst. Code, § 4512, subd. (b).)

6. In 2009, the enactment of Welfare and Institutions Code section 4648.5 modified section 4512 and suspended a regional center's authority to purchase certain services, including social recreational activities. Subdivision (c) of section 4685.5 provides that an exemption may be granted "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."

EVALUATION

7. Claimant seeks funding for special needs swimming lessons for claimant at the Fontana Aquatic Center at a cost of \$45 per session for a minimum of five sessions.

8. Regardless of the undisputed value to claimant in learning to swim and receiving special needs swimming lessons, IRC is prohibited from purchasing services that constitute social recreational activities. (Welf. & Inst. Code § 4685.5.) An exception to this prohibition exists only "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." (Welf. & Inst. Code § 4685.5, subd. (c).)

9. The evidence did not support a finding, that claimant's attendance at special needs swimming lessons satisfies any of the exceptions in Welfare & Institutions Code section 4685.5, subdivision (c), that would allow IRC to fund the special needs swimming lessons. Therefore, claimant has failed to sustain her burden to establish by the preponderance of the evidence that she is entitled to funding of the special needs swimming lessons.

ORDER

Claimant's request that IRC fund special needs swimming lessons is denied.

DATED: September 29, 2017

DEBRA D. NYE-PERKINS
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.