

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

FRANK D. LANTERMAN REGIONAL
CENTER,

Service Agency.

OAH No. 2017110790

DECISION

Administrative Law Judge Nana Chin (ALJ), State of California, Office of Administrative Hearings, heard this matter at Los Angeles, California on January 30, 2018.

Claimant's mother represented Claimant, who was not present.¹ Sonia Hernandez acted as a Spanish language interpreter for Claimant's mother.

Frank D. Lanterman Regional Center (Regional Center or FDLRC) was represented by Pat Huth, Esq., Waterson & Huth, LLP.

During the hearing, Claimant's mother presented three letters that had not been provided to the Regional Center before the hearing. The letters were admitted into evidence with the provision that the Regional Center be allowed until March 28, 2018, to have the letters reviewed and commented upon by Regional Center's reviewing panel. The Regional Center's response was timely received and

¹ The names of Claimant and his mother are omitted to protect their privacy.

marked and admitted as Exhibit 10.²

The record was closed and the matter submitted for decision on March 28, 2018.

ISSUE

Whether the Regional Center is required to fund swimming lessons for Claimant.

EVIDENCE

Documents: Service Agency exhibits 1-10; Claimant's exhibits A-F.

Testimony: William Crosson, Regional Manager; Lorenzo Hernandez, Executive Designee; Claimant's mother.

FACTUAL FINDINGS

BACKGROUND

1. Claimant is nine-year-old boy who is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.)³ based upon a qualifying diagnosis of autism.

2. Claimant lives at home with his mother and his older sister and attends special education classes in a public day school. The school district provides Claimant with supports and accommodations which include occupational and speech therapy, full-time 1:1 aide services, transportation, and extended year

² Official notice was taken of the authorities cited in Exhibit 10.

³ Undesignated statutory references are to the Welfare and Institutions Code.

programming.

3. The family receives 253 hours per month of In-Home Supportive Services (IHSS). In addition, Claimant's private medical insurance funds 1.5 hours per week of behavior intervention services, and applied behavior analysis (ABA) intervention.

4. Claimant's Regional Center supports include 16 hours of respite services per month, applied behavior analysis (ABA) co-payments,⁴ and 90 minutes per week of social skills services.

REQUEST TO FUND SWIMMING LESSONS

5. In addition to the services described above, Claimant's mother has been funding swimming lessons for Claimant at the YMCA and the local recreational center (McCambridge Pool) for about three years. On October 5, 2017, Claimant's mother contacted Claimant's Service Coordinator, Celene Heman, and advised her that she was finding it difficult to continue to pay for Claimant's swimming lessons and requested funding from FDLRC.

6. William Crosson, a Regional Manager at FDLRC and Ms. Heman's supervisor, reviewed Claimant's request and determined that FDLRC was not authorized to fund the swimming lessons. On October 11, 2017, the Regional Center issued a Notice of Proposed Action (NOPA), denying the request.

7. Claimant filed a timely fair hearing request on November 3, 2017, to

⁴ Though an Annual Review dated October 4, 2017, indicates that ABA co-payments were approved for up to five visits a week from January 1, 2017 until December 31, 2017 (Exhibit 5), Claimant's Individual Program Plan indicates the Service Agency only provided co-payments for up to four visits a week during that same period (Exhibit 4).

appeal the Regional Center's decision. A hearing in this matter was initially set for December 13, 2017, but was continued at Claimant's request after he waived the 50-day time limit for holding the hearing and the 80-day time limit for a final administrative decision. §§ 4712, subd. (a), 4712.5, subd. (a).).

8. Following the fair hearing request, Lorenzo Hernandez, Regional Manager and executive designee for Claimant's Fair Hearing, reviewed the request for services. On November 15, 2017, Mr. Hernandez conducted an informal meeting with Claimant's mother to review any additional documentation she had and to ensure that FDLRC had not missed anything when conducting their review.

9. During the meeting, Claimant's mother informed Mr. Hernandez that she wanted Claimant to continue with his swimming lessons at the YMCA as the swimming classes had been very beneficial for Claimant. She felt that the classes improved Claimant's social skills, provided him a full body workout, and helped him work on the skills he needed to regulate his behaviors.

10. Claimant's mother provided Mr. Hernandez with progress reports from the YMCA and McCambridge Pool. These documents were presented at hearing and were admitted as Exhibits 8 and 9. The progress reports document the steady progress of Claimant's swimming skills.

11. Claimant's mother also asserted that she believed she misspoke when making the request and stated that her request was not for swimming lessons but rather for aquatic therapy at the YMCA.

12. Claimant presented Mr. Lorenzo with letters from Lisa Tran, occupational therapist, and Joanie Ghazarian, speech therapist. Both therapists work with Claimant at his school. Both letters, which were admitted into evidence as Exhibits 6 and 7, state the belief of the therapists that swim classes would be of benefit to Claimant. Neither therapist, however, appears to be aware that Claimant

has been taking swim lessons for the last three years.

13. Mr. Lorenzo discussed parent responsibility and generic resources with Claimant's mother. Specifically, Mr. Lorenzo asked Claimant's mother if she had attempted to obtain either aquatic therapy or swim lessons through Claimant's private health insurance. Claimant's mother advised Mr. Lorenzo that she did not attempt to obtain coverage through Claimant's insurance provider as the insurance provider redirects her to the Regional Center whenever she makes a request for services.

REGIONAL CENTER'S CONTENTIONS

14. Mr. Crosson testified that pursuant to Welfare and Institutions Code section 4648.5, subdivision (a), FDLRC is not authorized to fund for non-medical therapies or social recreational activities absent extraordinary circumstances which would justify an individual exemption. According to Mr. Crosson, FDLRC does not consider Claimant's request to justify an individual exemption because Claimant's swimming lessons are not considered a primary or critical means for ameliorating the physical, cognitive, or psychological effects of Claimant's disability.

CLAIMANT'S CONTENTIONS

15. Claimant's mother feels the swim classes are therapeutic in nature and have resulted in both health and personal improvements, increasing his motor and coordination skills and water safety skills.

16. Jennifer Cervantes, the Aquatics Director at the Burbank Community YMCA, submitted a letter on Claimant's behalf. The letter, admitted into evidence as Exhibit D, discusses Claimant's progress in his swimming lessons and states Claimant is presently able to swim freestyle without assistance for 17 yards.

17. Claimant's mother admitted that his skills have improved through

these classes, but testified that she feels that the lessons needed to be ongoing in order for Claimant to retain the benefits.

18. Claimant also submitted letters from a number of his medical providers, Kek Khee Loo, M.D., and Diane Santana, M.D. of Kaiser Permanente and Perri Johnson, Ph.D. with The Center for Neurotherapy. These letters were admitted respectively as Exhibits C, E, and F. These letters from Dr. Loo and Dr. Santana state that Claimant “could” benefit from having swimming lessons, while the letter from Dr. Johnson states that “children with Autism routinely benefit from training in swimming and aquatic therapy.”

19. Though the testimony from Claimant’s mother and letter from Ms. Cervantes established that Claimant’s water safety and swimming skills have improved through Claimant’s participation in his swimming lessons and the letters from treating professionals established that Claimant may benefit from swimming lessons, Claimant did not establish that his continued swimming lessons are a “primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of” Claimant’s disability or that the swimming lessons were “necessary to enable [Claimant] to remain in [his] home,” and “no alternative service is available to meet [his] needs.”

LEGAL CONCLUSIONS

JURISDICTION AND BURDEN OF PROOF

1. Pursuant to section 4710.5, subdivision (a), “Any . . . authorized representative of the applicant or recipient, who is dissatisfied with any decision or action of the service agency which he or she believes to be illegal, discriminatory, or not in the recipient’s or applicant’s best interests, shall . . . be afforded an opportunity for a fair hearing.”

2. The party seeking government benefits or services bears the burden of proof. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) As no other statute or law specifically applies to the Lanterman Act, the standard of proof in this case is preponderance of the evidence. (See Evid. Code, §§ 115, 500.) As the party seeking funding for a previously unfunded service, Claimant bears the burden of proving, by a preponderance of the evidence, that he is entitled to the requested funding.

APPLICABLE LAW

3. In enacting the Lanterman Act, the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (§ 4501.)

4. A regional center is required to secure services and supports that: meet the individual needs and preferences of consumers (§§ 4501, 4646, subd. (a)); support their integration into the mainstream life of the community (*ibid*); “foster the developmental potential of the person” (§ 4502, subd. (a)); and “maximize opportunities and choices for living, working, learning and recreating in the community” (§ 4640.7, subd. (a)).

5. Pursuant to section 4512, subdivision (b), “services and supports” mean “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” and include community integration services.

6. Pursuant to section 4648.5:

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

DISCUSSION

7. In this case, Claimant's swimming lessons fit within the types of

programs subject to the suspension of funding set forth in Section 4648.5. The classes are taught by non-medical personnel. Since the Individual Choice Budget has not yet been implemented, the Regional Center has no authority to continue the funding for these classes. This is so even though the swimming lessons provide benefits to Claimant.

8. "Therapy" and "therapeutic" treatment, in the most common sense (see, for example, Webster's Seventh New Collegiate Dictionary (1969) p. 916), refer to treatment of a disease or disorder. Swimming lessons are in the nature of a recreational activity, although they may also provide benefits that help address the symptoms of a disorder and/or improve the behavior or muscle tone of the participant. Swimming lessons are not, however, a treatment for a disorder. Even if a broader definition of therapy is used, the swimming lessons are still subject to suspension under the statute because swimming lessons are a "non-medical therapy" in the form of specialized recreation.

9. Although an exemption may be granted on an individual basis, the evidence did not establish that the swimming program is a primary or critical means of amelioration for Claimant's disability, nor did it establish that the swimming program is necessary to enable him to remain in his home. (§4648.5, subd. (c),) Therefore, an individual exemption for Claimant is not warranted pursuant to section 4648.5, subdivision (c).

ORDER

Claimant's appeal is denied.

DATED:

NANA CHIN
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.