

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter

of:

CLAIMANT,

v.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2018060983

DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter in San Bernardino, California, on August 8, 2018.

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. Claimant's father was also present.

The matter was submitted on August 8, 2018.

ISSUE

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

FACTUAL FINDINGS

JURISDICTIONAL MATTERS

1. Claimant is a 14-year-old girl who qualifies for regional center services based on a diagnosis of mild intellectual disability. Claimant receives 40 hours of IRC-funded respite, and IRC has also paid for her parents to attend conferences related to claimant's condition. Claimant also receives In Home Supportive Services and behavioral services through her private insurance.

2. At claimant's May 16, 2018, Individualized Program Plan (IPP) meeting, claimant's mother requested IRC fund special needs swimming lessons.

3. On May 29, 2018, IRC sent claimant's mother a Notice of Proposed Action, denying claimant's mother's request to fund special needs swimming lessons for claimant. IRC wrote:

This letter is about your request for the funding of swim lessons for your daughter. This request was made on May 16, 2018 during the Individual Program Plan, (IPP) meeting with Marvin Franklin, Consumer Services Coordinator, (CSC). A request for swim lessons was made in 2017. The request was denied, and a Notice of Action was sent. A state level hearing was held on September 18, 2017. The Office of Administrative Hearing denied your request for IRC to fund swim lessons. Inland Regional Center (IRC) has reviewed your request and has decided the following:

Your recent request has been denied because regional centers are prohibited from funding social/recreational programs, such as swim lessons. In addition, IRC is not aware

of any changes since the OAH decision that would warrant IRC to fund swim lessons. During the IPP meeting the CSC did inquire if there were any changes since the OAH decision. It is IRC's understanding that since this is a new IPP meeting you are once again requesting for swim lessons.

While there are some exceptions to law under extraordinary circumstances, they don't apply in this case. Instead, regional centers must rely on local school districts, natural supports and other community resources to meet this need. Also, families are counted on to carry out the same responsibilities for their family members with disabilities as they do for other family members. It would not be unusual for a parent of a non-disabled child to pay for activities such as swimming lessons.

4. In OAH case number 2017080159, claimant's mother had made an identical request to fund special needs swimming lessons for claimant. Welfare and Institutions Code section 4685.5 prohibits a regional center from funding social recreation activities such as swimming lessons, unless certain exceptions are met. Claimant did not qualify under any of the exceptions, so the request for special needs swimming lessons was denied in a decision dated September 29, 2017.

5. On June 19, 2018, claimant's mother filed a fair hearing request appealing IRC's May 29, 2018, denial to fund claimant's special needs swimming lessons. The matter was set for hearing.

RES JUDICATA AND COLLATERAL ESTOPPEL

6. On July 30, 2018, OAH received IRC's motion to dismiss based on the doctrines of res judicata and collateral estoppel. IRC contended that, since the issue of special needs swimming lessons had already been litigated, claimant was precluded under those doctrines from re-litigating the same issue.

IRC contended that claimant is precluded from re-litigating the issue of whether she is entitled to funding for special needs swimming lessons. On July 31, 2018, OAH ordered claimant to show cause as to why her appeal should not be dismissed under the doctrines of res judicata and collateral estoppel.

The doctrine of res judicata gives certain conclusive effect to a former judgment when there is subsequent litigation involving the same controversy. It seeks to curtail litigation that causes vexation, wasted effort, expense, and the possibility of inconsistent judgments.

In *People v. Sims*, (1982) 32 Cal.3d 468, the California Supreme Court dealt with collateral estoppel. The decision is instructive particularly for the court's review of cases concerning the application of res judicata principles to administrative law decisions. That discussion is found at pages 477 through 583. The *Sims* court dealt with a Department of Social Services decision that exonerated Sims of welfare fraud. The court held that the decision collaterally estopped a prosecuting attorney from re-litigating the underlying factual finding in a subsequent criminal proceeding. (*Sims, supra.*)

In *Aylward v. State Board of Chiropractic Examiners* (1948) 31 Cal.2d 833, the Court dealt with issue preclusion. The court held that, when an administrative agency has made a determination within the powers conferred on it, the agency may be bound by its prior action, "and it lacks authority to rehear or reopen the question." (*Aylward, supra*, at p. 829.)

Claimant did produce new evidence concerning claimant's alleged need for special needs swimming lessons at the hearing, so the issue to be litigated is not the same as it was in the previous hearing. Therefore, neither the doctrines of res judicata or collateral estoppel apply in this instance.

EVIDENCE PRESENTED AT HEARING

7. Millee Martin Walton is a Program Manager at IRC. Ms. Martin Walton is familiar with claimant's request to fund special needs swimming lessons. Ms. Martin Walton is familiar with Welfare and Institutions Code section 4648.5, which forbids the funding of social recreational activities such as swimming, except in certain circumstances. Ms. Martin Walton testified that claimant does not qualify under the exception for funding because swimming is not a primary or critical means of ameliorating the physical, cognitive, or psychosocial effects of claimant's disability. Ms. Martin Walton also said that IRC does not have any vendors that provide special needs swimming lessons.

8. Annette Richardson is an occupational therapist at IRC. Ms. Richardson testified that she reviewed the evidence packet provided by claimant's mother. Specifically, she reviewed the SKY physical therapy report in great detail. She noted that claimant is obese, but has been making gross motor gains and other gains as a result of therapy. When she looked at the recommendations for the aquatic program, she noted that the main goal of that program was to increase her aerobic activity and make her adaptive physical education program more demanding. Ms. Richardson said that there are many other ways, however, to improve claimant's physical fitness such as exercising more at home. In other words, swimming is not the only activity that can improve balance and muscle tone.

9. Claimant's mother sent an e-mail to IRC on June 29, 2017, wherein she expressed her desire for IRC to fund special needs swimming lessons. In the e-mail,

claimant's mother wrote that claimant loves the pool but does not know how to swim. Claimant is at the local pool three times per week as part of a group program, but the school does not provide swimming lessons. Claimant receives services in the pool such as physical therapy, occupational therapy, and adaptive physical education, and would therefore benefit from swimming lessons because it would help improve her upper and lower muscle tone. Lessons are available at the Fontana Aquatic Center for \$45 per session. Claimant's mother wrote that she believes claimant might require five sessions in order to learn how to swim safely.

Claimant's mother's testimony echoed her sentiment in the June 29, 2017, e-mail. Claimant's mother added that claimant does still attend the swimming sessions three times per week, and she uses a life jacket in order to help her be able to participate in the activities. There is also an aide in the pool to monitor activities.

Claimant's mother said claimant has been diagnosed with Downs Syndrome, Trisomy 21, and Autism Spectrum Disorder. Claimant attends a special needs private school. Claimant loves swimming and is a very happy child. Claimant has had at least one close encounter where she was "in danger" while in the water, so claimant's mother feels she needs the swimming lessons. Claimant's mother submitted documentation showing how swimming can benefit a person with respect to their muscle tone, among other things. Claimant's mother feels that the swimming lessons would also help claimant learn to be more independent and improve her quality of life.

Claimant's mother said claimant's father has tried to instruct her in the pool but it is too difficult. Claimant's mother said she and claimant's mother have tried to get claimant's special needs swimming lessons funded through her school as well, without success. Claimant's mother appealed to IRC because, as the payor of last resort, IRC should fund the swimming lessons.

10. Claimant's father's testimony was similar to that of claimant's mother. He added that at some point, he and claimant's mother will not be around so they want to ensure claimant is as safe as possible. Claimant's father did try to teach claimant how to swim but he found he did not have the skill to do so. Although claimant does listen to him, children with her developmental challenges learn in a different way, and this is why a professional is needed. Claimant's father testified that they do not have the resources to pay for private special needs swimming lessons.

11. Claimant's parents submitted a SKY Pediatric Therapy report stemming from observations of claimant on January 4, 2018, and January 23, 2018. In the report, the physical therapist recommended the pool as a fitness goal, noting that the pool is an "excellent area for fitness and exercising, especially since [claimant] enjoys the water and [exercising in the pool] has minimal impact." The physical therapist further felt that a "structured aquatic exercise program can be put in place" to help claimant improve her performance in adaptive physical education.

12. Claimant's parents also submitted a report from Kaiser Permanente dated August 7, 2017, which noted:

[A]daptive swimming would be a benefit to [claimant]
Swimming can improve muscle tone, strength, body
coordination and postural control which can promote safety
in functional mobility such as tub transfer and walking on
compliant terrain.

13. Claimant's parents provided an internet printout from the National Autism Association that attests to the dangers that open bodies of water and pools present to persons with autism.

14. Finally, claimant's parents provided information about the special needs aquatic program, as well as documentation showing that the East Los Angeles Regional Center has special needs aquatic vendors in their system.

LEGAL CONCLUSIONS

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; *Assn. for Retarded Citizens v. Dept. 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 Assn. 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 (Welf. & Inst. Code, § 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 services. 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." (Emphasis Added).

EVALUATION

7. Claimant had the burden of proving she met an exception to the general prohibition of regional centers from funding social recreation activities like swimming lessons. Claimant did not meet that burden.

It is not disputed that claimant would benefit from special needs swimming lessons. It is not disputed that swimming is a good cardiovascular activity that helps with a variety of things, including muscle tone and mobility. In claimant's case, it would also help her achieve better safety awareness in the pool. However, regional centers are prohibited from purchasing services that constitute social recreational activities, and swimming is considered a social recreational activity. 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."

Claimant has been able to participate in her adaptive physical educational activities in the pool despite her swimming challenges. She is able to do so because she has an aide in the pool and uses a life jacket. Moreover, although claimant would physically benefit from the swimming, she can still benefit from the swimming while utilizing protective gear like a life jacket. In other words, claimant can still improve her muscle tone and physical functioning through an aquatics program despite the fact she cannot swim unassisted.

Claimant's parents' desire to have claimant attend special needs swimming lessons is understandable. Claimant's parents' dedication to claimant was evident, and they are commended for their excellent research in learning about what types of programs might help their daughter lead a more independent and physically fit life. Nonetheless, there is a high bar to overcome when seeking to have a regional center

fund social recreational activities like swimming. On this record, it was not established by a preponderance of the evidence special needs swimming lessons are a **primary or critical means** for ameliorating the physical, cognitive, or psychosocial effects of claimant's developmental disability.

ORDER

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

DATED: August 20, 2018

KIMBERLY J. BELVEDERE

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.