

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

CLAIMANT

v.

VALLEY MOUNTAIN REGIONAL CENTER

OAH No. 2019110983

DECISION

Tiffany L. King, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, conducted a fair hearing on January 23, 2020, in Stockton, California.

Matthew Bahr, Attorney at Law, represented Valley Mountain Regional Center (VMRC or Regional Center).

Claimant's mother and authorized representative represented claimant with the assistance of Gina Montanez, a qualified Spanish interpreter.

Evidence was received, the record closed, and the matter submitted for decision on January 23, 2020.

ISSUE

Should VMRC be required to provide funding for Claimant to receive one-to-one water safety awareness training?

FACTUAL FINDINGS

1. Claimant is a 14-year old male consumer of VMRC based on his qualifying diagnosis of Autism Spectrum Disorder (ASD).
2. In a letter dated September 11, 2019, claimant's mother requested VMRC provide funding for claimant to take private swim lessons to increase his water safety awareness. In her letter, she explained claimant is attracted to the water but does not understand the dangers associated with being in or around the water.
3. In a Notice of Proposed Action, dated November 13, 2019 and with an effective date of December 18, 2019, VMRC denied the funding request on the grounds that "[t]here is no documented clinical need for 1:1 swimming lessons and [VMRC] cannot fund social recreational activities."
4. On November 21, 2019, claimant's mother submitted to VMRC a Fair Hearing Request in which she appealed the proposed denial of funding. This hearing followed.

Claimant's Funding Request

5. Claimant lives at home with his parents and two sisters, ages 10 and 11, in Linden, California. Spanish is the family's primary language. The family home is

located on a farm in a remote area. Canals are located nearby. Claimant's father works in the fields to support the family.

6. Under the "Safety Awareness / Medic Alert" section of claimant's most recent Individual Program Plan (IPP), dated January 8, 2019, claimant is described as follows:

[Claimant] is seemingly unaware of dangers and needs someone nearby to ensure his safety within the home and out in the community. He requires constant prompts and reminders to stay safe. Parent explained . . . that the family lives in the country where there [are] open fields and tractors that often pass by. Parent reported that if [claimant] is not being watched, he may wander beyond his front lawn. She added that if she does not remind him to stay nearby, he will continue to wander off. [Claimant] is unaware of street signs and does not know what they mean. Parent also reported that [claimant] has poor spatial awareness and does not pay attention to where he [is] walking; he will trip over curbs, walk over mud, or may fall into pools if parent isn't watching. Parent stated that she has to be prompting and reminding him to look at where he is going/walking. Mom commented to SC that when they are in the kitchen, he will often hit his head against the cabinets because he does not pay attention. He cannot be near the stove as he may touch it when it is hot. . . . In the case of an emergency, [claimant] is unable to recite emergency personnel as he

has limited communication skills and would be unable to care for himself appropriately. [Claimant] would benefit from wearing a medic-alert identification emblem at all times while out in the community for safety and due to his lack of safety awareness and vulnerability.

7. Through VRMC, claimant receives specialized education services as well as 18 hours of respite care per month. He also wears a "Medic-Alert" emblem while out in the community due to his lack of safety awareness.

8. Emaley Escalera is a Service Coordinator at VMRC who has worked with claimant for approximately one year. At hearing, she explained she has frequent contact with claimant's family to see how he is doing, and to review his needs, progress and parental concerns. Ms. Escalera is fluent in Spanish and is able to communicate with claimant's family. Ms. Escalera forwarded claimant's request for water safety awareness training to VRMC's Purchase of Service (POS) Exceptions Committee to see if funding was available. The POS Exceptions Committee denied the request, noting there was no clinical need for such lessons.

9. After claimant's request was denied, Ms. Escalera discussed with claimant's mother what public resources and other swim lesson options may be available to claimant. She provided claimant's mother with a list of facilities which offer swim lessons, including three facilities which offer lessons for children with special needs. Ms. Escalera has not personally contacted any of the specialized facilities, and conceded the cost of such programs is generally greater than swim lessons typically offered to the general public. Ms. Escalera also discussed with claimant's mother the Direct Help Grant Program offered by Carlos Vieira Foundation, to provide "services,

medical necessities, and educational tools for families affected by autism who live in Central California.”

10. At hearing, claimant’s mother explained that claimant loves the water, and will run toward a swimming pool or other water source (lake, canal, etc.) if he sees it. Although 14 years old, claimant has the awareness and mindset of a four-year-old. His parents must constantly remind him to be safe, e.g., stay away from ditches, walk around the water, keep his head up while in the water. Claimant is also unaware of his physical surroundings. If he is near the edge of a water source, he does not notice where he is, and is at risk of stepping or falling into the water source. Claimant does not know how to float, lift up his head so that he does not swallow water, or swim to the water’s edge. He has no awareness of the dangers associated with water, and his mother is worried this puts him at a greater risk than a child without ASD.

11. Claimant enjoys spending time with his family and cousins at the lake. His cousins, who are similar in age, will jump in the lake, and claimant wants to follow them. Claimant does not understand when his mother tells him he must wait. Claimant’s mother will enter the lake with him. However, claimant is taller and heavier than she is.¹ Claimant’s mother is also pregnant² and could not physically restrain claimant or hold him back if he tried to go deeper into the lake. She also must keep an

¹ At the time of his Annual Review Summary on March 6, 2019, claimant stood 67 inches tall and weighed 159.8 pounds.

² Claimant’s mother noted the baby is due in June 2020.

eye on her two daughters. Claimant's father has permanent work-related injuries to his neck, back and shoulder, which prevent him from swimming.

12. Claimant's mother asserted that the requested funding is to increase claimant's water safety awareness, and not for recreational activities. In a letter dated January 21, 2020, claimant's pediatrician, Roy Anunciacion, M.D., recommended claimant "take water safety training to prevent any water danger and life-threatening accidents." Claimant's mother also introduced a 2014 article³ which discussed the need for aquatic safety awareness for individuals with ASD. According to the article, drowning is the leading cause of injury-related death in children, and children with ASD are at an even greater risk of drowning than those in the general population. This is due to a variety of factors, including a tendency to wander or elope, difficulties with assessing danger or responding if a dangerous situation occurs, difficulties with communication or expressing oneself, decreased capacity to predict the consequences of one's actions for himself or other people, and difficulties in the ability to modify one's behavior during times of stress.⁴

13. Claimant's mother has searched online for businesses who offer swim lessons to children with special needs. One of the gyms she contacted informed her that it could not offer claimant lessons because children with ASD require an instructor with specialized training in working with children with special needs as well as

³ Grosse, Susan J. (2014) "Aquatic Safety for Individuals with Autism Spectrum Disorders," *International Journal of Aquatic Research and Education*, Vol. 8, No. 3, Article 8. Volume 8, Number 3.

⁴ *Id.* at pp. 296, 300 (Citations omitted).

additional insurance. Claimant's mother has looked for other facilities to help her son, including one of the specialized facilities suggested by VMRC, to no avail.

14. At hearing, VMRC argued that swimming lessons are a strictly recreational activity. As a result, VMRC is prohibited by law from granting claimant's request and claimant's family must utilize generic resources available in the community. Additionally, the ability to swim and water safety are skills that every family is responsible for teaching their child, with or without a disability, and water safety awareness is not critical to ameliorate ASD. Finally, even if VMRC was able to provide funding, claimant thus far has been unable to identify a vendor that can provide the requested services.

Discussion

15. Swimming is typically a recreational activity. By law, regional centers are prohibited from providing funding for social recreation activities or nonmedical therapies. (Welf. & Inst. Code, § 4648.5, subd. (a).)⁵ However, the law carves out an exemption to this prohibition for "extraordinary circumstances . . . 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." (*Id.* at subd. (c).)

16. Here, claimant offered no evidence that swim lessons, or water safety awareness training, are necessary to enable him to remain in his home. Claimant lives

⁵ All further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

on a farm and there is no pool or other large water source located on the property. There was no evidence that the canals near the property pose a particular danger to claimant. Moreover, even if claimant were to receive swim lessons, he would still require close supervision while at a lake with family.

17. Nor did claimant establish that swim lessons, or water safety awareness training, are the primary means of ameliorating the effects of his ASD. Rather, the primary means of addressing those effects remain medical attention, as well as the specialized educational services, respite care, and other services claimant receives through VMRC.

18. Notwithstanding the above, claimant established that, due to his ASD, he has a particular vulnerability to the dangers posed by water as well as a general disregard for his own personal safety. Standard swim lessons offered to the general public are inadequate as teaching water safety skills to claimant will require more specialized training. Moreover, as claimant's mother noted, facilities offering swim lessons to the general public are either ill-equipped, unqualified, or unwilling to help her son. Swim lessons tailored to the needs of children with ASD would help claimant achieve water safety, and are therefore critical to address the effects of claimant's developmental disability. Therefore, extraordinary circumstances are present such that the exemption applies and funding is not precluded by the Lanterman Act.

19. While VMRC pointed to facilities which specialize in swim lessons for children with special needs, including ASD, it conceded that such resources would be more expensive than swim lessons typically offered to the general public and children without a disability. Consequently, claimant's parents should not be required to pay the cost of swim lessons suited to the claimant's particular needs due to his ASD. Instead, VMRC should be required to fund the cost of such services for claimant.

20. Finally, VMRC's argument, that funding should be denied because claimant's mother has thus far been unable to identify a vendor to provide the requested services, is rejected. Claimant's family is primarily Spanish-speaking, and their limited ability to speak English poses an additional barrier to finding services which meet claimant's needs. Claimant's Service Coordinator, Ms. Escalera, is bilingual and equipped to help claimant find available specialized services in his area.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, the Legislature has decreed that persons with developmental disabilities have a right to treatment and rehabilitative services and supports in the least restrictive environment and provided in the natural community settings as well as the right to choose their own program planning and implementation. (§ 4502.) Here, claimant has the burden of proving, by a preponderance of the evidence, that he is entitled to the requested funding. (Evid. Code, §§ 115, 500.)

2. "'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, normal lives." (§ 4512, subd. (b).) Services and supports may include physical and occupational therapy, recreation, behavior training, community integration services, daily living skills training, and social skills training. (*Ibid.*)

3. The Legislature has further declared regional centers are to provide or secure family supports that: respect and support the decision-making authority of the family; are flexible and creative in meeting the unique and individual needs of the families as they evolve over time; build on family strengths, natural supports, and existing community resources; are designed to meet the cultural preferences, values, and lifestyles of the family; and, focus on the entire family and promote the inclusion of children with disabilities in all aspects of school and community. (§ 4685, subd. (b).) Services by regional centers must be provided in the most cost-effective and beneficial manner, and must be individually tailored to the consumer (§§ 4685, subd. (c)(3) & 4648, subd. (a)(2)).

4. Effective on September 1, 2008, section 4646.4, subdivision (a), requires regional centers, when purchasing services and supports, to ensure conformance with purchase of service policies and to utilize generic services and supports when appropriate. In addition, regional centers must consider 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. Regional centers are required to take into account the consumer's need for extraordinary care, services, and supports and supervision.

5. Finally, since July 1, 2009, section 4648.5, subdivision (a), has prohibited regional centers from purchasing camping services, social recreation activities, educational services for children ages three to 17, and non-medical therapies, including specialized recreation. An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of these services 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. (§ 4648.5, subd. (c).)

6. As set forth in the Factual Findings as a whole, and particularly Factual Findings 15 through 20, claimant established that extraordinary circumstances exist such that the exemption under section 4648.5 applies. VMRC shall be required to assist claimant with identifying available vendors in his local area which offer swim lessons, or water safety awareness training, tailored to the needs of children with ASD. VMRC shall also be required to fund the cost of such lessons for claimant.

ORDER

Claimant's appeal is granted. Valley Mountain Regional Center shall assist claimant with identifying a vendor who offers swim lessons targeting water safety and tailored to the needs of children with Autism Spectrum Disorder. Valley Mountain Regional Center shall thereafter provide funding for the cost of such services for claimant.

DATE: February 5, 2020

TIFFANY L. KING
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.