

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

In the Matter of:

CLAIMANT,

vs.

SAN GABRIEL/POMONA REGIONAL CENTER,

Service Agency.

OAH No. 2019120542

DECISION

Deena R. Ghaly, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 28, 2020, in Pomona, California.

Daniel Ibarra, Fair Hearing Specialist, represented San Gabriel/Pomona Regional Center (SGPRC or Service Agency).

Claimant's mother (Mother) represented Claimant, who was not present for the hearing.¹

¹ Claimant's and family members' names are not disclosed to protect their privacy.

ISSUE

Should the Service Agency provide funds to defray the cost of heating the swimming pool at Claimant's home?

FACTUAL FINDINGS

Background

1. Due to his autism diagnosis, Claimant, a 16-year old boy, is an SGPRC consumer. He is non-verbal, not toilet-trained, and prone to self-injury. Claimant lives with his parents and his younger sister. Mother is Claimant's primary caretaker. Claimant attends school during the week where he is accompanied by a one-on-one aide at all times.

2. Beginning at age eight, Claimant began to injure himself, including punching his face repeatedly, causing an open wound. To prevent him from injuring himself, Claimant's parents put a helmet on his head. The helmet is also sometimes used at school.

3. Over a period of approximately two years, Claimant received behavioral training. Claimant improved somewhat but the sessions could also be counterproductive, adding to his state of frustration which, in turn, increased his self-injurious behavior.

4. Claimant's behavior and a burgeoning problem with insomnia caused Mother to seek medical intervention. Claimant now regularly sees a psychiatrist, Dr. Jacob Said, and takes psychotropic drugs, which calm him and help him sleep;

however, the medication has also contributed to Claimant gaining substantial weight and becoming preoccupied with eating. Claimant currently stands over six feet tall and weighs 240 pounds.

5. Since he was a toddler, Claimant was drawn to water. He taught himself to swim at the age of three. Several years ago, at great expense, Claimant's family installed an in-ground swimming pool in their yard. The pool has an adjoining Jacuzzi, which, while smaller than the pool, always contains heated water; however, Claimant will not remain in the Jacuzzi and, when directed there, leaves it at the first opportunity and jumps into the pool, regardless of the pool water temperature.

6. As Claimant has grown, his interest in swimming and its ability to calm him and help him avoid self-injurious behavior have all increased. In fact, according to Mother's testimony, Claimant's sole enjoyment besides eating, is swimming. When the weather and the pool temperature permit, Claimant spends six or more hours in the pool.

7. During the times Claimant can swim most of the day, he is calmer, more cooperative, and seemingly happier. Mother's responsibilities for Claimant feel more manageable to her as well.

8. Because of the ameliorative effects swimming has on Claimant, his psychiatrist has recommended that he swim throughout the year. Mother believes that, even when the pool is heated, it is too cold for Claimant to swim in an outdoor pool during the coldest months of the year, usually November, December, and January. However, from as early as February, there are days warm enough for Claimant to swim if the pool is heated.

9. Claimant's family normally heats the pool in June, when the weather is usually consistently warm but the pool water is still uncomfortably cool. From July through as late as October, the weather is sufficient to keep the pool water warm.

10. Based on gas bills admitted into evidence (see Exhibit A) reflecting costs for periods when the pool heater was utilized versus periods when it was not, the record established that the cost for heating the pool is \$100 per month.

Claimant's Individual Program Plan

11. a. Claimant's most recent Individual Program Plan (IPP) was prepared in April 2018. The most recent IPP Progress Report was prepared in April 2019.

b. Claimant's IPP acknowledges that Claimant is overweight and "will eat all day" if not prevented, noting that Claimant's family installed a lock on the refrigerator and safety clips on the kitchen cabinets. (Exh. 3, p. 2.) The IPP Progress Report notes that recent blood sugar tests on Claimant showed him to be at risk for diabetes. (Exh. B, p. 2.)

c. Among the desired outcomes listed in both the IPP and the IPP Progress Reports are that Claimant remain healthy. (Exh. 3, p. 10 and Exh. B, p. 5.)

SGPRC'S POSITION

12. In a Notice of Proposed Action (NOPA) issued sometime in the fall of 2019², SGPRC denied Claimant's request for funding to cover the cost of heating the pool at his home. The NOPA stated that behavioral therapy should be tried again with

² The NOPA is undated; however, it references informal meetings held between the parties in October 2019.

the objective of regulating Claimant's behavior and reducing his self-injurious behavior. (Exh. 1.)

LEGAL CONCLUSIONS

Lanterman Act

1. a. The Lanterman Developmental Disabilities Service Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.)³ recognizes a public responsibility to provide services and supports for individuals with developmental disabilities. The purpose of the Lanterman Act is to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community and to enable them to lead as independent and productive lives as possible. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.)

b. Under the Lanterman Act, qualifying individuals (consumers) have the right to services and supports to help them achieve the most independent and normalized lives possible and regional centers are principally responsible for coordinating them. (§§ 4500.5, subd. (d), 4512, subd. (b), 4620 et seq.) "Services and supports" 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

³ Further statutory references are to the Welfare and Institutions Code unless otherwise designated.

disability, or toward the achievement and maintenance of independent, productive, normal lives.

(§ 4512, subd. (b).)

c. Services and supports must be cost-effective. Regional centers may not fund duplicate services that are available through another publicly funded agency or “generic resource.” (§ 4648, subd. (a)(1); see also, e.g., § 4659.) Moreover, regional centers must consider a family’s responsibility to provide similar services and supports for a child without disability. (§ 4646.4, subd. (a)(4).) Certain primarily recreational services may no longer be funded by regional centers. (§ 4648.5, subd. (a).)

2. The Lanterman Act further provides for an administrative fair hearing to determine the respective rights and obligations of the consumer and the regional center when there is a dispute. (§§ 4700-4716.) In administrative proceedings, the moving party – here, Claimant - has the burden of proof. (See *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051-1052; *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9; *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161.) The applicable standard of proof is preponderance of the evidence. (Evid. Code, § 115.)

3. Mother has presented sufficient evidence demonstrating the efficacy and appropriateness of heating the pool in order to meet Claimant’s need to avoid self-injurious behavior and the weight-related side effects of his medication as set out in the IPP. (Factual Findings 3-10 and Legal Conclusion 1a and 1b.) There are no generic resources given Claimant’s condition. Moreover, Claimant’s need for access to the pool even during the colder months is directly related to his disability and is not a typical expense a child without disabilities would need. Finally, accommodating

Claimant's need to access the pool for longer periods is primarily to address his behavioral and health issues, and so is not subject to the Lanterman Act's limitations on funding recreational activities. (Factual Findings 3-9 and Legal Conclusion 1c.)

4. Mother did not establish that Claimant's need for a heated pool will continue indefinitely. Especially in light of regional centers' obligations to provide only cost-effective services, Mother has the obligation to demonstrate the ongoing need for the funds as set out in the Order below.

ORDER

1. Claimant's appeal is granted in part and denied in part.

2. Upon proof of payment, the San Gabriel Pomona Regional Center will reimburse Claimant's parents for payments made during the period of February to May, 2020 at the rate of no more than \$100 per month, up to a maximum of \$400.

3. In subsequent years, Mother or other authorized representative acting on Claimant's behalf will establish the ongoing need for Claimant to have access to a heated pool at his residence and the need for SGPRC to provide funds for increased expenses incurred for heating the pool through the IPP process. If the parties are unable to reach agreement and the matter proceeds to an administrative hearing, Mother or other authorized representative will retain the burden of proof to establish the necessity and appropriateness of continued funding. Nothing in this order effects Claimant's rights to payments pursuant to aid paid pending the appeals process pursuant to section 4715.

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DATE:

DEENA R. GHALLY

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