

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

In the Matter of:

CLAIMANT

vs.

WESTSIDE REGIONAL CENTER, Service Agency.

OAH No. 2020060993

DECISION

Thomas Y. Lucero, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on August 14, 2020.

The Westside Regional Center was represented by Candace Hein, Fair Hearing Specialist. Claimant was represented by his parents. Titles are used to protect family privacy.

As agreed at the hearing, claimant submitted updated documentation. On August 15, 2020, claimant submitted a February 26, 2020 Updated Treatment Plan from Nature and Nurture, which was marked Exhibit RR and admitted into evidence.

Oral and documentary evidence was received. The record was deemed closed and the matter submitted for decision on August 17, 2020.

ISSUE

Whether the service agency must fund private swim lessons.

FACTUAL FINDINGS

1. By means of a June 22, 2020 Fair Hearing Request, claimant timely appealed the service agency's June 15, 2020 Notice of Proposed Action denying funding for private swim lessons.

2. Claimant is a four-year old boy who lives with his parents. He is eligible for services based on a diagnosis of ASD, Autism Spectrum Disorder. Claimant has not learned to swim. Mother testified that claimant is prone to elope and will do so often. He is especially drawn by bodies of water, but oblivious of the danger he could drown.

Medical Opinion

3. Among the physicians who have treated and evaluated claimant is Josh Mandelberg, M.D., F.A.A.P., Developmental-Behavioral Pediatrics, Los Angeles, California.

A. Dr. Mandelberg sent the service agency a July 5, 2020 letter, Exhibit A. He wrote that claimant continues to receive behavioral therapy for ASD and ADHD (Attention Deficit Hyperactivity Disorder), but all of claimant's social classes and occupational and speech therapy programs have been unavailable during the COVID-19 pandemic. Dr. Mandelberg wrote that it is necessary to find other services and supports for claimant's developmental needs. Dr. Mandelberg's recommendation is funding for "one-on-one swim lessons. Swim lessons can support [claimant's]

occupational therapy needs, learning to work with instructors and follow direction as well as provide him with a safety skill. Swim lessons would not be a recreational activity in this context but would be a developmental intervention for adaptive skills. I would recommend . . . 30 minutes with a one-on-one instructor 2 times a week."

B. Dr. Mandelberg's most recent full evaluation of claimant is set out in a March 9, 2020 letter, Exhibit D, addressed to another of claimant's physicians, Kyle W. Monk, M.D., Beverly Hills. Dr. Mandelberg's summary of his evaluation on page 22 of Exhibit D states in part: "[claimant] has been getting ABA [Applied Behavior Analysis] at school and at home. He will do about 6 hours at home on weekdays over the course of the week and another 5 hours on Sunday. In addition to ABA, [claimant] is getting occupational therapy twice weekly and speech therapy once weekly. [Claimant] continues to show strong developmental progress, with his developmental quotient on the Mullen again increasing, now from 65 up to 78." One of the eight recommendations concluding Dr. Mandelberg's letter is on page 26 of Exhibit D: "Continue behavioral therapy with a PRT [Pivotal Response Treatment, a behavioral treatment for ASD] approach of ABA, continue to support safety and self-care skills."

4. Dr. Mandelberg made reference to an Early Childhood Partial Hospitalization Program at UCLA (the University of California at Los Angeles), in which claimant participated with significant benefit. A November 19, 2019 Multidisciplinary Discharge Report from the program, Exhibit G, states that information for the report came from a team of early childhood and special education professionals, including among many others a certified behavior analyst and several psychologists.

Individual Program Plan

5. An Individual Program Plan (IPP) meeting was conducted on June 12, 2019. The IPP is the service agency's Exhibit 3 and claimant's Exhibit J.

A. The planning team included mother, claimant, and, from the service agency, claimant's service coordinator. The team discussed claimant's goals, objectives, and the services and supports that would be included in the IPP and would be purchased by the service agency.

B. An IPP Progress Report was approved on July 21, 2020. The report is the service agency's Exhibit 4 and claimant's Exhibit K. It notes that the service agency will fund in home respite services, 21 hours per month, and that claimant "has been participating in distance learning since March 2020. Mother also reports that he has his good days and his bad days." Page 25 of the report notes that claimant "is receiving ABA therapy with Nature [&] Nurture. They are continuing to go into the home. Mother does report that they were also going to school and providing services there. Aetna [insurance] continues to fund this service."

C. The IPP report and the IPP Progress Report have no specific reference to swimming or swim lessons. Page 23 of the IPP Progress Report noted that "no new services or supports are required, and that the IPP remains appropriate to meet [claimant's] needs and wants."

Other Evidence

6. Denice Renteria-Gonzalez, Clinical Director, Nature & Nurture Applied Behavior Analysis and Consultation, Los Angeles (N&N) has recently treated claimant.

A. In a June 29, 2020 letter, Exhibit C, Renteria-Gonzalez wrote: "From working directly with [claimant] and his family, [claimant] would benefit from one-to-one instruction that targets safety skills, self-care, following instructions, and social skills. By being able to attend swim lessons, [claimant] would be able to engage in receptive skills that target safety skills and generalization."

B. N&N's Updated Treatment Plan, Exhibit C, dated November 25, 2019, notes an August 2018 recommendation that claimant have "40 hours per week of Applied Behavior Analysis treatment During a recent community observation, [claimant] engaged in 17 occurrences of elopement. In addition, [claimant] engaged in 10 occurrences of tantrum behaviors in the community."

C. N&N's additional Updated Treatment Plan, Exhibit RR, dated February 26, 2020, states that claimant requires constant supervision, especially in light of many instances of elopement and resulting danger to claimant's safety,

7. Therapists from Innovative Speech and Language Pathology (Innovative), Beverly Hills, have provided claimant in-person therapy, which however has been interrupted by the pandemic.

A. The March 23, 2020 Occupational Therapy (OT) Progress Report, Exhibit E, by Lauren Berman, OTD, OTR/L of Innovative, describes several therapeutic strategies, including exercise to promote strength, coordination, and motor control for basic living skills. The therapies were scheduled twice per week. The report describes a variety of goals, such as donning socks or using utensils to eat, and how far claimant has progressed toward achieving them.

B. In a Speech Therapy Progress Report, Exhibit PP, signed by Carla Ruggieri, M.A., SF-CLP, and Odelia Mizraddeh, M.S., CCC-SLP, also dated March 23,

2020, but regarding an evaluation on December 19, 2019, the therapists indicate on page 419 that claimant would benefit from therapies previously offered: "While [claimant] has made progress, he continues to demonstrate deficits in the areas of language and social pragmatics."

C. In her August 5, 2020 email, Exhibit MM, to mother, Ms. Mizradah wrote that Innovative had postponed in-person OT and PT (Physical Therapy) because of shutdown orders during the pandemic, and she was uncertain when in-person therapy might be offered again.

8. Exhibit F is a March 27, 2020 initial assessment and developmental profile prepared by Garden of Angels, claimant's preschool in Santa Monica, California. Preschool staff provided various information assessing claimant's development progress.

9. Exhibit H is a detailed description of claimant from his family's perspective, with a significant portion devoted to one alarming occasion of elopement, when claimant wandered from his parents and went unsupervised in an elevator.

10. Exhibit I is an April 16, 2019 Psychological Evaluation by Jessica Quevedo, Psy.D. As requested by the service agency, Dr. Quevedo re-examined the bases for diagnosing claimant with (i) Global Developmental Delay and (ii) ASD, including among other things. Restricted, Repetitive Behaviors: Severity Level 3 (requiring very substantial support).

11. A February 22, 2019 Preschool Team Assessment, Exhibit L, from the Los Angeles Unified School District (LAUSD), Division of Special Education, notes, among other things, concerns with elopement in public and elopement from preferred tasks. On page 228, the assessment discusses applicability to claimant of section 3030,

subdivision (f), of title 5, California Code of Regulations, which identifies "Other Health Impairment" (OHI) as when a pupil has limited strength, vitality, or alertness, due to chronic or acute health problems adversely affecting educational performance. The assessment concludes that claimant did not meet the eligibility criteria for OHI, as his "difficulties with limited attention appear to be secondary to his preference for self-directed behavior and inability to adjust his behavior appropriately to the social context."

12. A February 22, 2019 Language and Speech Preschool Assessment, Exhibit N, from LAUSD's Division of Special Education, adds no pertinent evidence, except perhaps that claimant generally benefits from in-person instruction and therapies, such as ABA therapy.

13. Noted on page 233 in a March 15, 2019 LAUSD OT Assessment Report, Exhibit M, is that claimant wears a wrist to wrist device at times to control elopement. Mother testified at the hearing to use of the device for that purpose. On page 241, respecting claimant's activity level and engagement, the assessment states that, based on multiple measures, claimant "may continue to benefit from sensory strategies, particularly deep pressure and proprioception [a sense of self relating to the body and body movements]"

14. The four authors of Exhibit O, an article published September 1, 2017 entitled *The Effectiveness of Aquatic Group Therapy for Improving Water Safety and Social Interactions in Children with Autism Spectrum Disorder: A Pilot Program*, have been colleagues at Casa Colina Hospital and Centers for Healthcare and Casa Colina's Research Institute in Pomona, California. With graphs and references to the work of other researchers, the article states that there has been little research on teaching swimming to children with mild to severe ASD. It finds that swim lessons for children

with ASD are most effective when the teacher is a therapist, and that as little as eight hours of instruction show improvement in skills. As explained on page 263:

The results of this study demonstrate the feasibility of teaching drowning prevention skills to children with mild to severe ASD. One major limitation of this study is the limited sample size. Future studies should recruit a larger sample size of children with severe ASD to determine if these findings can be generalized. There are clinical implications to these findings as well. Therapists working with children with ASD should consider addressing swim skills as part of their usual care. By targeting skills that are particularly salient for drowning prevention, there is an opportunity to meaningfully reduce the risk of drowning for children with ASD.

15. Like Exhibit O, Exhibit P is a study by several authors, its title: *Effectiveness of a Multisystem Aquatic Therapy for Children with Autism Spectrum Disorders*. The study was published online on January 8, 2018. The seven authors are colleagues at health institutions in Italy which specialize primarily in psychology. It cautions on page 268 that “little is known about the effects of movement-based therapies on adaptive/daily living skills, and overall ASD symptoms.” The authors attempt to evaluate the effectiveness of a “multisystem aquatic therapy programme” on emotional, behavioral, social, and swimming skills of children with ASD. The study, however, as stated on page 275, focused on “general amelioration of functional adaptation,” rather than swimming in particular.

16. Exhibit Q is an article that was published online on July 29, 2009, entitled *Clinicians' Perceptions of the Benefits of Aquatic Therapy for Young Children with Autism, A Preliminary Study*. The three authors are trained in OT. Exhibit Q, page 290, concludes:

Research studies are needed to investigate the effectiveness of aquatic therapy for the treatment of autism. Efficacy studies are especially important in the current climate of diminished resources for services; increased accountability; and increased value by practitioners, consumers, and third-party payers on research-based clinical practice. This study could help maximize such efforts in investigations of aquatic therapy for children with autism by narrowing the field of possible beneficial outcomes. This is especially critical in this situation where there are a large number of possible outcomes and where many of those possible outcomes are difficult to operationally define and measure. This preliminary study provides a foundation for further research on the effectiveness of aquatic therapy for children with autism by helping identify the outcomes of interest for those research efforts.

17. An undated, one-page article, Exhibit R, from the Autism Spectrum Disorder Foundation Swim Program concludes: "Swimming provides invaluable therapy for an individual with autism, as well as providing a social outlet." The article is based primarily on recommendations by people who have encouraged swimming for children with ASD.

18. The Sacramento Autistic Spectrum and Special Needs Alliance (SASSNA) published a July 11, 2015 article, entitled *How Swimming Boosts Happiness for Autistic Children*. The article is a guest contribution to SASSNA publications by a wellness coach, personal trainer, and bootcamp instructor.

19. Exhibit T is a short article similar to that in Exhibit S. Its date is unclear. It was published online by the Texas Swim Academy and describes benefits of swimming for children with ASD. It emphasizes drowning prevention, a therapeutic effect on speech and cognitive functioning, and socialization.

20. Exhibit U is likewise a short article that notes how physical exercise benefits children, and emphasizes that swimming is especially beneficial to children with ASD. The date of the article is not clear. It was published by an organization called We Rock the Spectrum, which operates a gymnasium in Tarzana, California.

21. Exhibit V is an article by the Department of Child Development and Primary Education, Institute of Education, London, UK, excerpted from the British Medical Bulletin 1997. The article, *Critical Periods in Childhood Learning*, generously footnoted and including graphs and statistics, surveys research from several sources on learning in children. It is not specific to children with ASD or swimming. At page 304, it states in summary that: "Research "has shown again and again that early learning has lasting effects on development although they are rarely irreversible."

22. Exhibit W is an online article, *Early Brain Development and Health*, of uncertain date from the CDC, the Centers for Disease Control and Prevention, with content from the National Center on Birth Defects and Developmental Disabilities. Like the previous exhibit, it addresses the benefits of early learning in general and is not specific to ASD or swimming.

23. Exhibit X is an article of uncertain date from Arizona State University, Arizona PBS LearningMedia, and PBS Kids. As it states on page 322, its content is from First Things First, “an organization created by Arizona voters that partners with families and communities to help our state’s young children be ready for success in kindergarten and beyond.” Like that in Exhibit W, the article describes benefits of early learning in general.

24. Exhibit Y is a Harvard University article not specific to swimming, but concerned rather with the general, non-controversial proposition on page 328: “Early experiences and the environments in which children develop in their earliest years can have lasting impact on later success in school and life.

25. Exhibits Z, AA, BB, CC, and DD are Decisions by several respected and learned ALJ’s who decided that a service agency should fund a claimant’s swim lessons.

26. In an August 9, 2020 email, Exhibit EE, Kate Polich, LMFT and principal of Head Above Water, Inc. wrote mother about one-on-one swim lessons. As stated on page 380, claimant would be assigned to a particular instructor with 12 years’ experience at the company, including with “a number of children with Autism” The company’s protocols in observance of CDC guidelines relating to COVID-19 are set out in Exhibit FF.

27. Claimant’s LAUSD Individualized Education Program (IEP), Exhibit QQ, was prepared following an Annual Review meeting on April 20, 2020. The IEP has no portion specific to swimming, but provides some indication that claimant has the ability to benefit from such lessons, stating at page 429: “In the area of physical development; [claimant] demonstrates awareness of major body parts by exploring

their movement potential. [Claimant] is able to move his arms up and down when imitating an adult. When [claimant] is using one hand he's able to add his other hand to push or pull something that is heavy by using both hands."

PRINCIPLES OF LAW

1. Welfare and Institutions Code section 4648, subdivision (a)(2), provides:

In order to achieve the stated objectives of a consumer's individual program plan, the regional center shall conduct activities, including, but not limited to, all of the following:

(a) Securing needed services and supports.

(1) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities to achieve the greatest self-sufficiency possible and to exercise personal choices. The regional center shall secure services and supports that meet the needs of the consumer, as determined in the consumer's individual program plan, and within the context of the individual program plan, the planning team shall give highest preference to those services and supports that would allow minors with developmental disabilities to live with their families, adult persons with developmental disabilities to live as independently as possible in the community, and that allow all consumers to interact with persons without disabilities in positive, meaningful ways.

(2) In implementing individual program plans, regional centers, through the planning team, shall first consider services and supports in natural community, home, work, and recreational settings. Services and supports shall be flexible and individually tailored to the consumer and, if appropriate, the consumer's family.

[1] . . . [1]

(8) Regional center funds shall not be used to supplant the budget of an agency that has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.

2. Welfare and Institutions Code section 4648.5 provides in part:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional center's 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] . . . [1]

(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. [¶] . . . [¶]

(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.

ANALYSIS

1. As the party who seeks to change the status quo, claimant bears the burden of proof. Under Evidence Code sections 115 and 500, the evidentiary standard is proof by a preponderance of the evidence. Claimant did not meet that burden in this case.

2. Welfare and Institutions Code section 4648.5 suspends a service agency's authority to purchase social recreational activities or non-medical therapies. Swimming lessons are in the nature of a recreational activity, though they may also help address symptoms of a disorder or improve behavior. In their most common sense, "therapy" and "therapeutic" treatment refer to treatment of a disease or disorder. Even if a

broader definition is used, swim lessons are nonetheless subject to suspension as “non-medical therapy” in the form of specialized recreation.

3. Under subdivision (c) of section 4648.5 of the Welfare and Institutions Code, exemptions from the prohibition may be granted on an individual basis if the evidence establishes that the swim lessons are a primary or critical means of amelioration for claimant’s disability or necessary to enable claimant to remain in his home.

4. Claimant’s parents marshalled a great deal of evidence in support of personalized swim lessons, but there was little that was pertinent and specific to the issue. For instance, the article from the British Medical Bulletin 1997, Exhibit V, discussed the benefits that various developmental programs may have in early childhood. But this sort of general discussion had scant bearing on swimming or swim lessons.

5. Mother acknowledged at the fair hearing that she would have preferred, but was unable, to cull materials and present the most persuasive. The inference here is not, however, that the documents, or most of them, were wholly irrelevant or should be heavily discounted. For example, while Exhibit H had much extraneous matter, But its description of a dramatic instance of elopement that posed stark and immediate danger to claimant has relevance. It is especially relevant in light of mother’s thoroughly credible testimony, corroborated by and corroborating the testimony of professionals, that claimant elopes often.

6. Among the most pertinent of the documentary evidence is Exhibit A, Dr. Mandelberg’s letter recommending one-on-one swim lessons and his opinion that it would not be merely a recreational activity. Dr. Mandelberg may have been

anticipating citation of Welfare and Institutions Code section 4648.5 and its reference in subdivision (a)(4) to non-medical therapies. It is notable, however, that Dr. Mandelberg does not go so far as to opine that swim lessons have a medical purpose, or that they may be distinguished from non-medical therapies, which a service agency may not fund absent an emergency or extraordinary circumstances.

7. The Preschool Team Assessment, Exhibit L, indicates that swim lessons might be ineffective as a replacement for the in-person services of which claimant has been deprived during the pandemic.

8. The OT Assessment Report, Exhibit M, vaguely suggests that claimant would benefit from swimming and swim lessons to the extent they may be considered a sort of sensory strategy. There was no evidence, however, that swimming or swim lessons might be the equivalent of the sensory strategies described in the assessment, namely deep pressure and proprioception.

9. Exhibit O, the study from researchers associated with Casa Colina in Pomona, is evidence that swim lessons may reduce the danger of drowning in children with ASD, but the study's conclusions are, as the authors acknowledge, preliminary and difficult to generalize. The evidence, including that in Exhibit O, is insufficient to establish that the proposed swim lessons are critical to claimant's safety.

10. There is a great quantity of evidence to support claimant's contention that he would benefit from swim lessons. As already noted, however, the evidence has scant focus on the main issue, whether swim lessons are medically necessary, or on account of an emergency or extraordinary circumstances should be ordered notwithstanding the prohibitions under Welfare and Institutions Code section 4648.5, subdivisions (a)(2) and (a)(4). Absent an exemption under Welfare and Institutions

Code section 4648.5, subdivisions (c), the service agency may not fund social recreational activities and non-medical therapies, including specialized recreation.

11. Claimant's evidence lacks quality in light of the issues. "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it.' (citations omitted) The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant." (*Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325, italics in original.)

12. The evidence does not establish that the proposed swim lessons are, under Welfare and Institutions Code section 4648.5, subdivisions (c), a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of claimant's ASD.

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ORDER

Claimant's appeal is denied.

DATE:

THOMAS Y. LUCERO

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.