

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

In the Matter of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER, Service Agency.

OAH No. 2021020096

DECISION

Chris Ruiz, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on April 15, 2021.

Candace Hein, Fair Hearing Specialist, represented Westside Regional Center (WRC).

Claimant's mother represented claimant.¹

Salvador Barrientos, Hanna Interpreting, served as the Spanish-English and English-Spanish language interpreter for claimant's mother.

¹ Names are omitted to protect the privacy of the parties.

Documents and testimony were received as evidence. WRC offered exhibits 1-6. Claimant offered exhibits A-R.

The record was closed, and the matter was submitted for decision on April 15, 2021.

ISSUE

Shall WRC be required to continue funding swimming lessons for claimant, at a rate of once per week, to be provided by Leaps N' Boundz Sports Club?

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a 22-year-old conserved male diagnosed with cerebral palsy, autism, and mild intellectual disability. Claimant appeals WRC's decision to discontinue funding for swimming lessons, which he receives once a week from Leaps N' Boundz.

2. On January 19, 2020, WRC sent a Notice of Proposed Action (NOPA) to claimant and his parents, informing them that WRC "will not reauthorize funding" for swimming lessons. WRC sent a follow-up letter to claimant on January 22, 2020. In the letter and NOPA, WRC provided three reasons for denying claimant's "request to reauthorize swim classes." Those reasons are:

- Regional centers are prohibited from purchasing “social recreational activities” such as swimming lessons, pursuant to Welfare and Institutions Code² section 4648.5, subdivision (a)(2).
- Regional centers are prohibited from purchasing “specialized recreation” such as swimming lessons, pursuant to Code section 4648.5, subdivision (a)(4).
- Regional centers are prohibited from funding services or supports which may be available through generic resources, pursuant to Code sections 4646.4, subdivision (a)(2), and 4659.

3. On January 29, 2021, claimant’s mother filed a Fair Hearing Request on behalf of claimant, which appealed WRC’s decision.

Prior 2018 Decision by ALJ

4. On March 16, 2018, ALJ Laurie R. Pearlman (ALJ Pearlman), issued a decision in OAH case number 2018010935, which ordered WRC to fund swimming lessons for claimant, once per week, through Leaps N’ Boundz.

5. ALJ Pearlman concluded that the funding prohibition of Code section 4648.5 was not applicable and that swimming lessons served to meet claimant’s need for physical therapy (PT). This decision became final after WRC unsuccessfully appealed ALJ Pearlman’s decision.

² All further statutory references are to the Welfare and Institutions Code.

Events After the Prior Decision

6. WRC funds 21 respite hours per month and 90 hours per month of Personal Assistant hours for claimant. WRC does not fund any PT or occupational therapy for claimant.

7. Claimant attended swimming lessons from 2018 until approximately April 2020, when the COVID-19 pandemic occurred. Since April 2020, Leaps N' Boundz has been providing claimant with an online exercise program via Zoom instead of in-person swimming lessons.

8. On October 26, 2020, the parties held an Individual Program Plan (IPP) meeting. An IPP report was prepared, but claimant's parents disagreed with WRC's decision to discontinue funding for swimming lessons and they declined to sign it.

9. WRC contends that swimming lessons may be available through generic services such as the YMCA or a community college. Claimant contends that, based on his family's prior inquiries, generic services are not available to provide 1:1 swimming instruction, which claimant's disability requires. WRC did not offer any evidence regarding current generic services that would be capable and willing to provide swimming lessons to claimant which would meet his needs.

10. Claimant has received COVID-19 immunization shots and Leaps N' Boundz is schedule to resume in-person swimming lessons in April 2021.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (§ 4500 et seq.)

2. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Claimant's mother submitted a fair hearing request to appeal WRC's decision. Jurisdiction was established to hear this matter.

3. The standard of proof in this case is the preponderance of the evidence, because no law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Generally, the burden of proof is on the party seeking government benefits or services. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) However, in this case, WRC seeks to discontinue funding for claimant's swimming lessons, which were previously ordered by ALJ Pearlman. Therefore, WRC bears the burden of proof because WRC is seeking to discontinue funding for service it currently is funding.

Applicable Law

4. The doctrines of res judicata and collateral estoppel bar re-litigation of a cause of action, or of a specific issue, that was resolved, or that could have been resolved, in a prior adjudicatory proceeding. (*Hi-Desert Medical Center v. Douglas* (2015) 239 Cal.App.4th 717, 733.)

5. The threshold elements for res judicata are: (1) a claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.)

6. Res judicata applies to administrative decisions in cases filed under the Lanterman Developmental Disabilities Services Act (Lanterman Act). (*Ronald F. v. State Dept. of Developmental Services* (2017) 8 Cal.App.5th 84, 99.)

7. However, res judicata does not bar a later claim if new facts or changed circumstances have occurred since the prior decision. (*Melendres v. City of Los Angeles* (1974) 40 Cal.App.3d 718, 730.) Res judicata was never “intended to operate so as to prevent a re-examination of the same question between the same parties where, in the interval between the first and second actions, the facts have materially changed or new facts have occurred which have altered the legal rights or relations of the litigants.” (*Evans v. Celotex Corp.* (1987) 194 Cal.App.3d 741, 748.)

WRC’S Stated Reasons for Discontinuing Funding

8. WRC’s contends, pursuant to Code section 4648.5, subdivisions (a)(2) and (a)(4), regional centers are prohibited from purchasing “social recreational activities” or “specialized recreation” such as swimming lessons. These contentions were previously raised by WRC and considered and decided by ALJ Pearlman. As to these two contentions, WRC is attempting to re-litigate issues previously decided by ALJ Pearlman.

9. ALJ Pearlman's decision, Exhibit G, page 5, states the following:

Claimant established the funding prohibition of section 4648.5 does not apply to his request. The evidence indicates the swimming lessons sought are, in fact, aquatic therapy which is essentially PT in the water. The aquatic therapy is being used to address claimant's PT needs, including endurance, bilateral coordination, standing, balance, strength and motor control. As such, the aquatic therapy is not a specialized recreational program, a social recreation activity, or a non-medical therapy. In addition, aquatic therapy is addressing claimant's water safety needs. He is not water safe, a legitimate need. Such a need does not fit within any of the funding prohibitions of section 4648.5.

10. ALJ Pearlman previously considered WRC's contentions and concluded that claimant's swim lessons are aquatic therapy which address claimant's physical therapy needs and which also teach claimant how to be water safe.

11. WRC did not establish that claimant's circumstances or needs have changed. WRC did not establish that a change in funding is justified.

12. The doctrines of res judicata and collateral estoppel bar WRC from re-litigating these two previously decided issues, absent a change in claimant's circumstances or needs.

13. WRC also contends, pursuant to Code sections 4646.4, subdivision (a)(2), and 4659, that regional centers are prohibited from funding services or supports which

"may be available through generic resources such as virtual exercise classes online offered by a local community resource like YMCA or community college."

14. Section 4646.4, subdivision (a)(2) states, in pertinent part, that regional centers shall, when developing a consumer's individual program plan, "ensure utilization of generic services and supports when appropriate."

15. WRC's contention was apparently based on the assumption that claimant would be using online exercise classes, in place of in-person swimming lessons, for the foreseeable future. WRC's contention is now without merit because claimant established that Leaps N' Boundz will begin providing in-person swimming lessons in April 2021.

16. Claimant also made past inquiries to potential generic resources and none were able to provide 1:1 swimming lessons for a person with claimant's disability. WRC did not offer evidence of any generic resource that could provide swimming lessons for claimant.

17. WRC did not establish a basis, factual or legal, to support its decision to discontinue funding for claimant's swim lessons.

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ORDER

Claimant's appeal is granted. The Westside Regional Center shall continue funding swimming lessons, once per week, through Leaps n Boundz.

DATE: April 28, 2021

CHRIS RUIZ

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.