

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

KENNETH T.,

Claimant,

v.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2012070439

A Proceeding Under the
Lanterman Developmental Disabilities
Services Act

DECISION

This matter was heard by Vincent Nafarrete, Administrative Law Judge of the Office of Administrative Hearings, in Alhambra on August 22, 2012. Eastern Los Angeles Regional Center (Service Agency) was represented by Judy Castaneda, Fair Hearing Coordinator. Claimant Kenneth T. was represented by his mother, Yenney L., who was provided with the services of an interpreter in the Vietnamese language.

The Service Agency presented Exhibits 1– 12 and the testimony and argument of the Fair Hearing Coordinator. Claimant presented the testimony of the mother. The exhibits were received in evidence pursuant to Welfare and Institutions Code section 4712, subdivision (i).

Oral and documentary evidence having been received and argument heard, the Administrative Law Judge submitted this matter for decision on August 22, 2012, and finds as follows:

ISSUE

The issue presented for decision is whether claimant should continue to receive private or one-to-one swimming lessons.

FACTUAL FINDINGS

1. Claimant Kenneth T. is 10-years-old and lives with his mother and twin brother in the family home in Rosemead. His parents are separated. Claimant has been diagnosed with autism and mental retardation. Based on his diagnoses and developmental delays and/or disabilities, claimant is eligible for and receives regional center services from the Service Agency, including socialization training, discrete trial training, case management, and private swimming lessons.

2. This fall, claimant will be in the fifth grade at Fremont Elementary School in Alhambra, where he receives special education services and supports, including speech therapy and a behavior support plan. His speech is limited but he can gesture for desired objects. He requires prompts and assistance from his mother to complete his self-help tasks, such as bathing, dressing, and toileting.

3. Claimant presents with behavioral problems. At school, he engages in aggressive and self-injurious behaviors. At home, he throws objects at his mother and hits her when he is upset. He bangs his head or kicks when he does not get his way. Claimant engages in aggressive behaviors once or twice each week and has temper tantrums daily. He will also cry or laugh for no apparent reason and run around in circles in the living room. When he is out in the community, claimant tends to wander away unless his mother holds his hand. His

mother locks the door at home to prevent her son from running away. Claimant lacks safety awareness.

4. One hour each week, claimant receives socialization or adaptive skills training at Pasadena Child Development Associates. His goals for the socialization training include engaging in pleasurable experiences with his mother and sibling, managing his emotions while interacting with family members, and remaining regulated and avoiding emotional "meltdowns" while communicating his needs. His mother and twin brother attend developmental behavioral consultation sessions as well. Claimant's mother is required to learn strategies to calm and comfort her son when distressed and to be attuned and anticipate his wants and needs by analyzing his gestures and body language.

5. At the annual conference on June 12, 2012, to review and discuss claimant's Individual Program Plan (IPP), the Service Agency informed his mother that his weekly swimming lessons at the West San Gabriel Valley Y.M.C.A. (YMCA) would be terminated due to changes in the law. Under claimant's IPP, the swimming lessons have been classified as a social recreational service. Under the service code for this service, the YMCA has been categorized as a sports club or community recreation service provider.

6. On June 20, 2012, the Service Agency issued a Notice of Proposed Action, notifying claimant and his mother that the regional center proposed ending the funding to purchase swimming lessons for claimant based on changes to the Lanterman Developmental Disabilities Services Act (Lanterman Act) that suspended the Service Agency's ability to purchase social recreation services. Claimant thereupon filed a Fair Hearing Request to appeal this determination.

7. On July 26, 2012, the Service Agency held an Informal Meeting with claimant's mother to discuss the proposed termination of her son's swimming lessons. Following the Informal Meeting, the Service Agency affirmed its determination to suspend funding for the swimming lessons. The Service Agency suggested that claimant apply for financial assistance or a reduced rate at the YMCA in order to continue his swimming lessons there.

8. (A) Claimant's mother seeks continued regional center funding for her son's swimming lessons at the YMCA for safety reasons. Claimant has been taking weekly swimming lessons at the YMCA since August 2006. He has learned to float in the water and can swim dog-paddle style for approximately seven feet. He enjoys swimming. Yet, claimant still cannot swim that well. His mother does not know how to swim either. For example, this summer, claimant's family visited relatives in Arizona where claimant swam for three hours each day of their visit with his twin brother and grandmother, who both know how to swim. He tended to stand in the shallow part of the pool and to move around by hanging onto the edge of the pool.

(B) What concerns claimant's mother the most are the past incidents when her son has climbed, or tried to climb, over the fence at home in order to go swimming in the next door neighbor's pool. The adjoining fence is constructed of cement blocks and is approximately four feet and nine inches tall. Two years ago, claimant climbed over the fence and his mother found him swimming in the neighbor's pool. One day this past June, claimant became upset when he was not able to take his swimming lesson due to a problem with his regional center authorization. When he came home, claimant was still upset and went to the neighbor's house to ask if he could swim there. When no one

came to the front door, claimant went back to his home and tried climbing over the fence. In the past, he has used an overhanging tree on the neighbor's property and cement debris in the family's yard to try to climb over the fence to access the neighbor's pool. Claimant's mother is afraid that her son will run away, climb over the fence, and go swimming by himself in the neighbor's pool.

(C) In addition, claimant seemingly has no fear of deep water. On one occasion, claimant tried to swim to the deep part of a pool at the Raging Waters water park in San Dimas. On another occasion, he tried to go into the ocean at Huntington Beach.

9. The Service Agency emphasizes that swimming lessons do not necessarily make a child "water safe." In its Water Safety Guide, the American Red Cross recommends that parents maintain constant supervision of children in a pool and not leave them unattended and that parents learn to swim well themselves. The American Red Cross also recommends that young children and inexperienced swimmers wear a life vest and be taught not to go near the water without adult supervision. The American Academy of Pediatrics advises that parents never leave their children alone in or near a pool.

10. Claimant receives 15 hours per week of intensive behavioral treatment or discrete trial training services as well as monthly supervision hours from SEEK Education, Inc. (SEEK). According to the SEEK progress report dated April 10, 2012, claimant has shown "great progress in his behavioral program," especially in the areas of communication and listening responses. The discrete trial training services are also helping claimant to develop safety awareness skills. His goals in this area are to walk by his mother without holding her hand for one minute and to follow the verbal instruction of his mother to stop while engaged

in an on-going activity. The discrete trial training is not currently addressing claimant's tendency to elope or to climb over the fence to access the neighbor's pool, but the Service Agency plans to have claimant's service coordinator advise SEEK that this goal should be added to his behavioral program. Finally, SEEK has conducted an applied behavioral analysis of claimant's tantrum behavior.

11. There are a number of community programs and organizations that offer aquatic and swimming classes and lessons for consumers of the Service Agency. The Service Agency has provided claimant's mother with a list of social recreational resources in the community. The YMCA has an income-based financial assistance program for families who have difficulty paying the fees for its activities and programs.

Pursuant to the foregoing findings of fact, the Administrative Law Judge makes the following determination of issues:

LEGAL CONCLUSIONS

1. Grounds do not exist under the Lanterman Act to grant claimant's request that he continue to receive private or one-to-one swimming lessons at the YMCA, based on Findings 1 – 11 above.

2. 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. (Welf. & Inst. Code, § 4502.)¹

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.*)

The Legislature has further declared regional centers are to provide or secure family supports that, in part, 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, and build on family strengths and natural supports. (§ 4685, subd. (b).) Services by regional centers must not only be individually tailored to the consumer (§ 4648, subd. (a)(2)) but also must be provided in the most cost-effective and beneficial manner (§§ 4685, subd. (c)(3), and 4848, subd. (a)(11))

Further, section 4648, subdivision (a)(8), provides that the regional center funds shall not be used to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving

¹ Further section references are to the Welfare and Institutions Code unless indicated otherwise.

funds to provide those services. Section 4659, subdivision (a)(1), directs regional centers to identify and pursue all possible sources of funding for consumers receiving regional center services.

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.

Finally, effective on August 1, 2009, the Legislature enacted section 4648.5, subdivision (a), which provides that the authority of regional centers to purchase camping services, social recreation activities, educational services for children ages three to 17, and non-medical therapies, including specialized recreation, shall be suspended until the Individual Choice Budget is implemented and certified to result in sufficient state budget savings to offset the costs of providing such services. 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).)

3. Discussion—In this appeal, claimant’s mother contends that her son should continue to receive private swimming lessons at the YMCA because he still cannot swim despite taking lessons for six years and lacks safety awareness. He tends to wander away and has climbed or tried to climb over the fence at home to go swimming in the next door neighbor’s pool. He has no fear of water.

Claimant’s swimming lessons have been authorized under his IPP as a social recreational activity and the YMCA is categorized as a sport club provider or community recreational setting. The swimming lessons have neither been shown to be specially adapted to alleviate conditions of claimant’s developmental disability, such as his social or behavioral challenges, nor administered or supervised by a trained person such that the lessons can be described as medical therapy or a specialized form of recreation. As such, claimant’s swimming lessons constitute a generic recreational resource that is similar to services that a minor child without disabilities may receive from a recreational center. The private swimming lessons must be considered a social recreational activity that the Service Agency is barred from providing to consumers by the enactment of section 4648.5 to the Lanterman Act, unless claimant or the swimming lessons qualify for exemption.

Claimant does not qualify for an exemption from application of section 4648.5 since the swimming lessons have not been a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of his developmental disability and are not necessary for him to remain in his home. Claimant receives both socialization and discrete trial training services which more directly help to habilitate the physical, social, and emotional effects of his developmental disability of autism. Under section 4646.4 then, claimant’s family

will have to be responsible for providing and/or paying for his swimming lessons. In order to achieve a smooth transition in this change in services, claimant will continue to receive swimming lessons through the month of September 2012 before the swimming lessons may be terminated or suspended.

Wherefore, the Administrative Law Judge makes the following Order:

ORDER

The appeal of claimant Kenneth T. must be denied. The determination of the Eastern Los Angeles Regional Center to terminate or suspend the provision of private or one-to-one swimming lessons for claimant at the San Gabriel Y.M.C.A. is affirmed; provided, however, Eastern Los Angeles Regional Center shall continue to provide funding for the swimming lessons through the month of September 2012.

Dated: September 4, 2012

Vincent Nafarrete
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision and either party may appeal this decision to a court of competent jurisdiction within ninety (90) days.