

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request
of:

OAH No. 2018120331

CLAIMANT,

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on February 14, 2019, in Pomona. The record was closed and the matter submitted for decision at the conclusion of the hearing.

Claimant, who was not present, was represented by his parents.¹

Daniel Ibarra, Fair Hearing Specialist, represented the San Gabriel/Pomona Regional Center (service agency).

ISSUE

Shall the service agency provide funding for claimant to take two private swim lessons per week at the Rose Bowl Aquatic Center?

¹ The names of claimant and his family are omitted to protect their privacy.

EVIDENCE RELIED UPON

In reaching this Decision, the ALJ relied upon exhibits 1-10 submitted by the service agency, as well as the testimony of Mr. Ibarra and both of claimant's parents.

FACTUAL FINDINGS

PARTIES AND JURISDICTION

1. Claimant is an eight-year-old male consumer of the service agency based on his qualifying diagnosis of autism.
2. In September 2018, claimant's mother requested the service agency provide funding for claimant to take private swim lessons at the Rose Bowl Aquatic Center (RBAC). (Ex. 9.) In October 2018, she followed up with a letter including further details about her request. (Ex. 7.)
3. In a Notice of Proposed Action dated November 13, 2018, the service agency denied the funding request, advising claimant's mother that the service agency views funding for swim lessons to be a typical parental responsibility, and that claimant's needs were already being addressed by various services funded by the service agency, claimant's school district, and private insurance. (Ex. 1.)
4. On December 7, 2018, claimant's mother submitted to the service agency a Fair Hearing Request in which she appealed the proposed denial of funding. (Ex. 2.)
5. In connection with her request for a continuance of the initial hearing scheduled in this matter, claimant's mother executed a written waiver of the time limit prescribed by law for holding the hearing and for the ALJ to issue a decision.

CLAIMANT'S FUNDING REQUEST

6. Claimant lives at home with his parents and older brother. His academic programming is provided by his local school district, which funds special education services.

7. One of the features of claimant's autism is his attraction to water, a dynamic common to many autistic children. When claimant was three years old, he once jumped into a pool and had to be rescued. This poses a danger to claimant because he does not know how to swim. For this reason, claimant's parents are nervous when the family visits friends who have pools at their homes. The sense of danger is so great that claimant's parents put a life jacket on claimant after the family arrives at a friend's house with a pool, and claimant's father leaves his cellphone and car keys inside the house in case he needs to jump into the pool to rescue claimant.

8. His parents therefore want to make claimant water-safe. Since the age of three, claimant's parents have enrolled him in swim classes every summer, at their own expense. They estimate the classes generally cost \$55 for eight sessions over two weeks. The classes were generic resources, meaning claimant attended them with 8 to 10 neurotypical children, and was taught by instructors untrained in working with autistic children.

9. The prior swim lessons went well, but the classes were so large that claimant did not get the attention he needed to learn to become safe in and around the water. Whatever swimming skills he learned during the few weeks of lessons in the summer, claimant quickly forgot the next summer. So each year he was relearning the same skills.

10. Last summer claimant took swim lessons at a community pool in El Monte. The instructor identified the problems described above and referred claimant's parents to RBAC's special swim program for disabled children.

11. Claimant was evaluated by RBAC. Staff recommended claimant take RBAC's private swim class, which is taught by an instructor trained in working with autistic children. Each swim lesson costs \$42. Claimant has taken four or five lessons so far, paid for by his parents. The lessons focus on claimant learning to hold his breath under water, move his body in the water, stay focused and calm in the water, and extricate himself from the water when necessary. Claimant's parents report the swim lessons have gone well.

12. His parents want claimant to continue with the RBAC swim lessons, twice per week, for six to twelve months. They believe that the focused, 1:1 attention, combined with the constant reinforcement from several continuous months of service, will help claimant learn to be water-safe.

13. Claimant's parents also testified they have noticed some therapeutic benefits from the swim lessons, namely, that claimant tends to focus better and remain calm longer after a lesson. Both parents believe this benefit helps claimant at school and at home.

14. The service agency believes claimant's needs are being addressed by several services already funded. For example, claimant's school district provides him with occupational therapy once per week for 30 minutes, speech therapy six times per month, and behavior intervention. Claimant also receives 65 hours per month of applied behavior analysis, funded by private insurance, with co-payments reimbursed by the service agency. The service agency believes claimant's water-seeking and safety awareness can be addressed through this constellation of services. However, none of the exhibits in the record support the service agency's contention.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act governs this case. (Welf. & Inst. Code, § 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 timely submitted a fair hearing request to appeal the service agency's proposed denial of her funding request. Jurisdiction in this case was thus established. (Factual Findings 1-5.)

2. 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.) When one seeks government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego County Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) In this case, claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the requested funding. (Factual Findings 1-5.)

3. A. Section 4512, subdivision (b), generally defines services that can be funded under the Lanterman Act as those that are "specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability. . . ."

B. In this case, funding for the swim lessons is being requested primarily as a means of developing claimant's water safety. That need is caused by the peculiar condition of his autism that draws claimant to water and causes him to disregard his own personal safety. Because claimant is not yet water-safe, the necessity for the funding exists. Since the RBAC program is specifically

² Undesignated statutory references are to the Welfare and Institutions Code.

designed for autistic children like claimant, it is a specialized service or special adaptation of a generic service directed toward the alleviation of a problem caused by a developmental disability. Therefore, claimant established by a preponderance of the evidence that the requested funding is supported by the Lanterman Act. The issue therefore turns on whether the service agency has nonetheless identified an overriding provision of the Lanterman Act that would prohibit funding of claimant's swim lessons. (Factual Findings 1-14.)

4. A. Section 4648, subdivision (a)(8), prohibits regional centers from supplanting the budget of any other agency which may provide the funding in question. Likewise, section 4659 prohibits regional centers from funding any service that would otherwise be provided by other entities, such as governmental agencies, Medi-Cal, school districts, or insurance.

B. Section 4646.4, subdivision (a)(4), requires regional centers to consider a family's responsibility for providing "similar services and supports for a minor child without disabilities. . . ."

C. Finally, section 4648.5, subdivision (a)(4), prohibits funding for "[n]on-medical therapies, including, but not limited to, specialized recreation, art, dance, and music."

5. A. In this case, teaching claimant satisfactory water safety skills through generic services has so far been elusive and will take more time and intensive work. A child without disabilities does not need the same type of extensive training and frequency of swim lessons. Deeming the need for the RBAC program to be a typical parental responsibility would not be an appropriate application of section 4646.4, subdivision (a)(4). While it is true claimant is receiving several other kinds of services funded by other entities, it was not established that any of them can help claimant

achieve water safety. Therefore, application of sections 4648 and 4646.4 are not warranted.

- B. However, to the extent funding is requested for therapeutic purposes in helping claimant achieve calm and focus, such funding is barred by section 4648.5, subdivision (a)(4), as a non-medical therapy involving a specialized recreational activity. Since the therapeutic aspect is not the primary reason for the funding request, section 4648.5 should not bar the funding request here, but should simply be noted and considered if the issue is raised in the future.
- C. Finally, claimant presented no evidence concerning how long it will take him to become water-safe through the RBAC program. His parents request funding for six to twelve months. Given the funding request involves two classes per week, it appears six months would be an appropriate time to initially determine if claimant can, or has, become water-safe as a result of the RBAC program. The funding should terminate at that time and, if claimant's parents believe their son has not become water-safe, it will be their burden of establishing that more time in the RBAC program is necessary. (Factual Findings 1-14.)

ORDER

Claimant's appeal is granted. The San Gabriel/Pomona Regional Center shall provide funding for claimant to receive two private swim lessons per week at the Rose Bowl Aquatic Center for no more than six consecutive months, at which time the funding will terminate, consistent with Legal Conclusion 5.C. above.

DATED: February 19, 2019

ERIC SAWYER

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.