BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: IVAN M., Claimant, and EASTERN LOS ANGELES REGIONAL CENTER, Service Agency.	OAH No. 2011031287

DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Alhambra, California on July 20, 2011.

Victoria Baca, M. Ed., represented claimant Ivan M.[1]

Judy Castaneda, HIPAA Coordinator/Fair Hearing Coordinator, represented Eastern Los Angeles Regional Center (service agency or ELARC).

Testimonial and documentary evidence was received, the case argued and the matter submitted for decision on July 20, 2011. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUE

Whether the service agency should continue to fund swimming lessons provided to claimant through the Weingart East Los Angeles YMCA (YMCA).

[1] Initials identify claimant to preserve confidentiality.

FACTUAL FINDINGS

1. Claimant is a 12-year-old consumer of ELARC due to his qualifying diagnoses of autism and mental retardation. Claimant has aggressive and self-injurious behaviors requiring monitoring at all times. Claimant bites, scratches, punches and pulls the hair of others. His self-injurious behaviors include hand biting, head banging, and throwing himself on the floor. He screams and yells when he is upset. He uses a Picture Exchange Communication system to communicate. His cognitive skills are estimated to be at the 2.10-year-old level, social-emotional skills are estimated at the 1.6-year-old level, and adaptive behavior at the 2.3-year-old level. Claimant resides with his parents and maternal grandparents in the Los Angeles Unified School District where he receives speech and language therapy, occupational therapy, adaptive physical education, one-to-one behavior intervention aide and transportation with aide. ELARC funds 30 hours per month of in-home respite services, a maximum of 21 days of in-home respite in lieu of out of home respite, and occupational and speech therapy during school breaks.

2. By Notice of Proposed Action, dated March 14, 2011, the service agency notified claimant that "social recreation services provided by Weingart East Los Angeles YMCA will be terminated, effective 7/31/11." As authority for its action, the service agency cited the language in Welfare and Institutions Code section 4648.5, as set forth in Legal Conclusion 4.

3. Claimant filed a Fair Hearing Request on March 24, 2011. Thereafter, these proceedings ensued.

4. Since March 2006, ELARC has been funding swimming lessons for claimant. Initially, the service agency funded 20 lessons per month. Currently, the service agency is funding 10 lessons per month. Claimant's most recent Individual Program Plan (IPP), which is dated September 2, 2010, indicates that the service agency discussed suspending funding for claimant's swim lessons "due to changes in the Lanterman Act and Trailer Bill language" and that his mother requested "an exception for funding."

> Parent stated she would like for the following information be considered for an exception to fund water safety: 1. So that consumer knows how to swim in case he falls into a pool or lake, for safety awareness. 2. Helps with his weight, as a form of exercise. 3. Parent feels it has a therapeutic benefit as it relaxes him.

5. In a February 18, 2011 Occupational Therapist Record Review, the therapist analyzes claimant's progress after five years of swimming lessons as follows:

> [Claimant] . . . demonstrates significantly impaired cognition which would interfere with his ability to learn to sequence the steps needed to learn to swim. His impaired eye contact interferes with his ability to sustain visual attention to watch and imitate motor skills and poor self regulation to inhibit aggressive

> outbursts significantly interfere with his ability to learn the complex skills need [ed] for true water safety both in the water and around it. From the minimal progress in almost 5 years of continuous lessons the main goal therefore is to work on [claimant's] . . . compliance to parent's wishes when he is around water and to work closely with a behaviorist on a water safety behavioral goal. The family does not have a pool in their home and therefore safety is not an issue there. . . .
>
> Parent's primary concern appears to be safety. Use of a life jacket when around water and given his strength, aggressive behaviors and inability to demonstrate sufficient self regulation to follow inhibitory words, not placing him in a place of risk is the most appropriate course of action.

6. Brian Magallanes is the aquatic director at the YMCA. Mr. Magallanes has observed claimant in the swimming pool. Mr. Magallanes along with claimant's instructor prepared a September 9, 2010 progress report. Mr. Magallanes testified that the main goal of claimant's swimming lessons is water safety, which consists of knowing how to float and how to get to the perimeter wall of the pool. Mr. Magallanes testified that water safety is "not necessarily how to swim." Mr. Magallanes testified that swimming at the YMCA means doing "swim laps across the pool to enjoy recreational swimming—to get on the swim team." Claimant did not participate in swimming, as described by Mr. Magallanes.

7. Mr. Magallanes testified that claimant's progress acquiring water safety skills is slow because of difficulty with his aggression. Claimant jumps into the pool when his instructor is demonstrating a skill; the instructor has to stop and remove claimant from the water. One year was required for claimant to learn how to hold his breath under water and how to float in the prone position. Claimant is able to hold his breath for only 10 seconds before he starts panicking. Claimant cannot maneuver himself from the middle of the pool to the side of the pool. Mr. Magallanes testified that "if claimant is not progressing or is at a complete standstill, then he is no longer appropriate for swim lessons."

8. Claimant's mother testified at hearing. Mother testified that claimant does not know the meaning of danger. She wants to take claimant to bodies of water knowing that he will be safe. Mother testified that two or three times monthly claimant's aunt baby-sits for him at her home where there is a gated pool. Mother testified that claimant gets into the water and moves around when "I'm there visiting." Claimant does not go into his aunt's gated pool when mother is not present. Once mother took claimant to the Santa Fe Dam and he ran toward the water and sat at "the beginning of the water." Claimant was upset because he was not permitted to go in the water. Mother testified that at the Santa Fe Dam her control over claimant made him safe.

9. Mother testified that at 49 inches tall and weighing 140 pounds claimant is overweight. Mother testified that claimant's doctor has recommended not increasing claimant's meal portions. Mother testified that she is willing to explore options for working with a nutritionist through her private insurance plan.

10. In a July 15, 2011 letter, claimant's physician, Hasung Lee, M.D., wrote, "I strongly recommend that the swimming service continue to be provided to alleviate . . . [claimant's] obesity. His health condition is at risk and he is in danger of developing diabeties, hypertension and for high cholesterol. If he cannot continue with his swimming service, then I recommend that the regional center provide another similar program for health and fitness." It was not established whether Dr. Lee knows that claimant's "swimming service" amounts to water safety skills as set forth in Factual Finding 6.

11. Claimant's swimming lessons are a social recreational activity and are not critical to the amelioration of the physical, cognitive, or psychosocial characteristics of claimant's autism or mental retardation.

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Services Act (the Lanterman Act), developmentally disabled persons in California have a statutory right to treatment and habilitation services and supports at state expense. (Welf. & Inst. Code, §§ 4502, 4620, 4646-4648; *Association for Retarded Citizens—California v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389.)

2. The Lanterman Act mandates that an "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities. . . and to support their integration into the mainstream of life in the community." (Welf. & Inst. Code, § 4501.) Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Regional centers are responsible for developing and implementing IPPs for consumers, for taking into account individual consumer needs and preferences, and for ensuring service cost effectiveness. (Welf. & Inst. Code, § § 4646, 4646.5, 4647, and 4648.)

3. The services and supports to be funded for a consumer are determined through the IPP process, which involves collaboration with the consumer and service agency representatives. Services and supports for persons with developmental disabilities are defined as "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 rehabilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives." (Welf. & Inst. Code, § 4512, subd. (b).)

4. Section 4648.5 of the Lanterman Act, which was enacted to address a budgetary imbalance in the California 2009-2010 fiscal year, provides as follows:

> (a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers' [*sic*] 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 cost of providing the following services:

(1) Camping services and associated travel expenses.

(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.

(b) For regional center consumers receiving services described in subdivision (a) as part of their individual program plan (IPP) or individualized family service plan (IFSP), the prohibition in subdivision (a) shall take effect on August 1, 2009.

(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 of 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.

5. As the party seeking a modification of an existing service or support, the service agency bears the burden of proving by a preponderance of evidence that a change is warranted. (Evid. Code, § 500.)[2]

6. Claimant bears the burden of establishing his extraordinary circumstances that would warrant an exemption from the state's budget spending reductions. (Evid. Code, § 500.) Claimant has not met that burden.

7. As set forth in Factual Findings 4, 5, 6, and 7, the goal of claimant's swimming lessons is water safety, which has not been achieved because of his aggressive behaviors. Any benefits of swimming lessons for claimant's weight control efforts or relaxation were established as incidentals. Portion control of claimant's meals is a

[2] Evidence Code section 500 provides that "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

recommendation for addressing claimant's weight. (Factual Finding 9.) Such a recommendation is significant in this case where claimant's aggressive behaviors present obstacles to his effective participation in any physical exercise regime, even those his physician prescribes.

8. Claimant's impaired social communication skills have manifested as aggression toward others and his lack of self-regulation has been unaffected by his swimming lessons. Swimming lessons have not resulted in any abatement of claimant's aggression. (Factual Findings 5 and 7.) Swimming lessons are not primary or critical means for ameliorating any physical, cognitive or psychosocial effects of claimant's mental retardation or autism—the developmental disabilities that render claimant eligible for services and supports under the Lanterman Act. Swimming lessons funded for claimant's acquisition of water safety skills are not necessary to enable claimant to remain in his home. Cause does not exist pursuant to section 4648.5, subdivision (c), for the service agency to continue funding swimming lessons for claimant.

ORDER

1. Claimant's appeal is denied.

2. Eastern Los Angeles Regional Center may suspend funding for the swimming lessons provided to claimant through the Weingart East Los Angeles YMCA.

Dated: August 8, 2011

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JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.