

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

COLIN L.,

Claimant,

vs.

EASTERN LOS ANGELES
REGIONAL CENTER,

Service Agency.

OAH No. 2011100972

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 17, 2012, in Alhambra.

Colin L. (claimant) was present; he was represented by his father, Thomas L.¹

Judy Castañeda, Fair Hearing Coordinator, represented Eastern Los Angeles Regional Center (Service Agency or ELARC).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on January 17, 2012.

ISSUE

Whether the Service Agency may suspend funding for claimant's swimming lessons at the AAF-Rose Bowl Aquatic Center.

¹ Initials and family titles are used to protect the privacy of claimant and his family.

EVIDENCE RELIED UPON

Documents: Service Agency's exhibits 1-24; claimant's exhibits A, B.

Testimony: Judy Castañeda; Elizabeth Ornelas; Alethea Crespo; Sandi L.; Hannah L.; Haley L.; Sima Hakobyan

FACTUAL FINDINGS

1. Claimant is a seven-year-old male who is a consumer of ELARC based on his qualifying diagnosis of autism.
2. Claimant lives at home with his parents and two sisters, Hannah, age 10, and Haley, age 9, neither of whom is developmentally disabled. Claimant cannot express himself; he tantrums frequently, engages in injurious behaviors, needs assistance with self-care skills, lacks safety awareness, has no friends, and does not interact with other children, preferring to play video games and read books. Claimant attends Don Benito Elementary School in Pasadena, where he is in second grade; his school district provides claimant with occupational therapy, speech therapy, and a one-to-one aide. Since December 2007, claimant has been receiving funding from the Service Agency for twenty hours per week of discrete trial training (DTT) through Familias First.
3. In accordance with claimant's most recent Individual Program Plan (IPP) dated September 7, 2011, claimant has been receiving Service Agency funding for ten 30-minute swimming lessons per month, which the family has utilized for five one-hour sessions per month, at the AAF-Rose Bowl Aquatics Center (RBAC). The lessons are private. The Service Agency pays \$37 per half-hour session, or \$74 per one-hour session, with a total monthly allowance of \$370. Claimant has received this service for approximately three years.
4. By a Notice of Proposed Action dated October 20, 2011, ELARC notified claimant's parents of its proposed action to terminate the funding for claimant's swimming lessons at RBAC, effective November 19, 2011, on the grounds that the swimming lessons are social recreational services for which funding is suspended under Welfare and Institutions Code sections 4648.5, subdivision (a)(2), 4646, subdivision (d), and 4646.4, subdivision (a).
5. On or about October 27, 2011, claimant's parents submitted to ELARC a Fair Hearing Request on claimant's behalf, appealing the proposed suspension of funding on the grounds that claimant "meets the exemption you have set for this social recreational activity." (Ex. 2.)
6. According to claimant's most recent IPP, dated September 7, 2011, the Service Agency's funding is for "water safety lessons" at RBAC. (Ex. 4.) No earlier IPP was entered in evidence. Claimant is highly attracted to water; he frequently tries, unsuccessfully, to get into the gated pool area at his family home, and is quite eager to attend and participate in the

lessons at RBAC. Claimant's parents want to continue the swimming lessons until claimant is water safe. The September 2011 IPP also notes that claimant's parents believe the lessons to be therapeutic for claimant, and that "ELARC does not fund for swimming services as a recreational services [sic]." (*Id.*)²

7. Ms. Crespo from RBAC testified that claimant is not water safe and that he requires assistance with such tasks as getting out of the pool. Various RBAC reports note that swimming lessons are important for claimant because he has a pool at home. An RBAC report dated September 19, 2010, reflects that as of that date, measuring skills according to the Level One–American Red Cross (Introduction to Water Skills), claimant could submerge himself in the pool, and enter and exit the pool safely using a ladder, steps, or the side of the pool, but could not float on his back or front without support. The report notes that claimant "is far from water safe," though he has made progress; he can swim on his front for 15 yards and can blow bubbles in the water for 10 seconds. (Ex. A.) An RBAC report dated January 4, 2011, measuring skills according to the Level Two–American Red Cross (Fundamental Aquatic Skills), again notes that claimant "is far from water safe," though he could by then go to the bottom of the pool, swim 20 yards, and pick up his head to breathe without stopping; he still required support to float, however. (*Id.*) An RBAC report dated August 12, 2011, repeats that claimant "is far from water safe," but notes further progress, such as his being able to float on his back for three to five seconds without support. "Our continued goal is for him to accomplish a back float for at least 25 seconds and to kick on his back for 10 yards. Our main goal is to build is [sic] confidence enough that he is comfortable floating by himself. With more lessons he will be able to get the fundamental of swimming and be one step closer to being water safe." (*Id.*) All of the reports also discuss the social and behavioral benefits of the swimming lessons.

8. Elizabeth Ornelas, who supervises claimant's service coordinator at ELARC, testified that claimant has acquired water safety skills and has learned how to enter and exit bodies of water, and that funding for the lessons should, therefore, be suspended.

9. Claimant's mother testified that, in addition to teaching claimant water safety, the swimming lessons have great therapeutic value for claimant, and that the only time claimant behaves as a non-developmentally-disabled child is when he is in the pool. His concerning behaviors diminish, he is happy, he giggles, and he waves to and plays with others. These effects also occur in the family swimming pool, the only place where claimant plays with his sisters. Outside the pool, claimant keeps to himself, focusing on video games and books. Claimant's mother testified that the DTT services funded by the Service Agency are very valuable and that claimant has made progress as a result of those services. But

² RBAC is vendored with the Service Agency as a "sports club." RBAC does not use licensed therapists to provide claimant's lessons. Alethea Crespo, the RBAC Director of Therapeutic Programs, testified that RBAC is in the process of modifying its program so that it will qualify for vendoring under a therapeutic code. As of the date of hearing, however, the lessons RBAC provides do not qualify as therapy for purposes of regional center funding.

claimant resists DTT to some degree; the only activity that claimant willingly participates in are those that take place at RBAC or in his family's swimming pool. Claimant's mother testified that the pool at home is not heated and so cannot be used except in summer.

LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)³ An administrative "fair hearing" to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) Claimant's parents requested a fair hearing to appeal the Service Agency's proposed suspension of funding for claimant's swimming lessons at the AAF-Rose Bowl Aquatics Center. Jurisdiction in this case was thus established. (Factual Findings 4 & 5.)

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, the Service Agency bears the burden of proving, by a preponderance of the evidence, that its decision to suspend funding for claimant's swimming lessons is correct. (Evid. Code, § 115.)

Funding for Claimant's Swimming Lessons

3. The Service Agency has proposed to suspend funding for claimant's swimming lessons on the ground that they are a social recreational activity. In this case, however, claimant's swimming classes are not funded as a social recreation activity or non-medical therapy and are therefore not a service for which funding is suspended under section 4648.5, subdivision (a)(2).⁴

4. Despite a good deal of testimony about the swimming lessons' social and behavioral benefits to claimant, a preponderance of the evidence demonstrates that the Service Agency is funding the one-on-one swimming classes as a means of developing

³ All further statutory references are to the California Welfare and Institutions Code unless otherwise stated.

⁴ Section 4648.5, subdivision (a)(2), suspends regional center funding for social recreation activities. Similarly, section 4648.5, subdivision (a)(4), suspends funding for non-medical therapies. Under section 4648.5, subdivision (c), an exemption may be granted to allow funding "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."

claimant's water safety skills, and that claimant has made and continues to make progress toward becoming water safe as a result of those classes. Although RBAC is vendored as a "sports club," claimant's IPP specifically references the need to address claimant's water safety issues. That need derives from the effects of claimant's autism and the dangers posed by the swimming pool at his family home and claimant's lack of regard for his personal safety. Because the Service Agency failed to demonstrate by a preponderance of the evidence either that claimant has become water safe or that the swimming lessons are not likely to continue to help claimant improve his water safety, the necessity for the funding continues.⁵

5. Cause was not established under sections 4648.5, subdivision (a)(2), 4646, subdivision (d), or 4646.4, subdivision (a), to suspend funding for claimant's swimming lessons at RBAC. (Factual Findings 1-9, and Legal Conclusions 1-4.)

ORDER

Claimant Colin L.'s appeal is granted.

Eastern Los Angeles Regional Center may not suspend funding for claimant's swimming lessons at the AAF-Rose Bowl Aquatics Center at this time.

DATE: January 30, 2012

HOWARD W. COHEN
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.

⁵ Funding cannot be expected to continue indefinitely; it may be revisited when the Service Agency can demonstrate that claimant has achieved an acceptable level of water safety or that the continued benefits of swimming lessons with respect to attaining that goal are outweighed by issues of cost-effectiveness. Those issues were not framed by the Notice of Proposed Action, however, nor were they sufficiently demonstrated in this case.