

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH No. 2014031081

Valerie C.,

Claimant,

vs.

SAN GABRIEL POMONA REGIONAL
CENTER,

Service Agency.

DECISION

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on June 5, 2014, in Pomona, California.

Valerie C. (Claimant) was represented by her mother, Sonia H. (mother).¹ Claimant and her cousin, Jose, attended the hearing. Victor Ramos, a certified Spanish language interpreter, translated the proceedings.

Daniela Santana, Fair Hearing Manager, represented San Gabriel Pomona Regional Center (SGPRC or Service Agency).

Oral and documentary evidence were received on June 5, 2013. By stipulation of the parties, the record was kept open to allow Claimant to submit Claimant's Exhibit 1, comprised of several articles describing the benefits of aquatic therapy, which were received into evidence. The record was closed and the matter was submitted on June 16, 2013.

¹ Claimant, her mother and her cousin are identified by their first name and last initial to protect their privacy.

ISSUE

Must the Service Agency fund aquatic therapy/swimming lesson services provided by the Rose Bowl Aquatic Center?

FACTUAL FINDINGS

Jurisdictional Facts

1. Claimant is a four-year-old girl who resides with her parents and her younger sister. Claimant is eligible for services under the Lanterman Developmental Disabilities Services Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.) on the basis of severe intellectual disability, cerebral palsy, spastic quadriplegia, and global developmental delays.² She is also legally blind and has a moderate hearing loss.

2. On February 26, 2014, Service Agency sent Claimant's parents a letter informing them that it was denying their request to fund Pediatric Aquatic Therapy/swimming lessons at the Rose Bowl Aquatics Center (the Center). According to Service Agency's Notice of Proposed Action, Claimant's mother requested Service Agency fund services at the Center in order "to meet the needs of 'recreation, socialization, and security' for [Claimant] . . . and . . . [mother's] goal that [Claimant] 'feels secure in a pool near her home, to develop her corporeal movement and social abilities.'" (Exhibit 1.) Service Agency denied Claimant's request on the grounds that Service Agency is prohibited from funding swimming lessons except in limited circumstances as set forth in section 4648.5, none of which Service Agency found applicable to Claimant's request. On March 10, 2014, Claimant's mother filed a Fair Hearing Request (FHR) on behalf of Claimant. Jurisdiction was established and this hearing ensued.

Background

3. In addition to severe intellectual disability, cerebral palsy and spastic quadriplegia, Claimant has microcephaly, asthma, and global developmental delays. As noted above, she is legally blind and has a moderate hearing loss. Claimant takes asthma medication as needed and wears contact lenses. Mother must check her eyes periodically because Claimant will rub her eyes, dislodging the contact lens. Claimant takes medication for asthma as needed. She has a regular physician, Dr. Emil

² All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

Rodriguez, M.D., an ophthalmologist, a neurologist and a dentist and is followed by California Children's Service (CCS). Claimant receives Botox injections to help keep her legs straight. According to mother, Claimant's doctor has told her Claimant may need surgery because of spasticity in her legs. Mother hopes that Claimant will be able to avoid surgery because it will be very painful and recovery will be long and difficult.

4. Claimant requires assistance to sit up. Claimant is unable to walk without support. She wears braces on both legs, has a knee extension splint to keep her legs straight and a hip abduction brace to help to keep her legs open when she is walking. She has a wheelchair at home and at school, as well as a walker. She enjoys being around children but is unable to engage in play activities for a sustained period of time. Mother attends to all of Claimant's self help needs, including grooming, dressing and feeding. Claimant is not potty trained and wears diapers. Claimant has temper tantrums frequently, particularly when transitioning from one activity to another. Respite services provide parents relief from the responsibilities of caring for Claimant.

5. Claimant attends a school district pre-school program three days per week from 8:00 A.M to 11:45 A.M. She also attends the Blind Children's Center in Los Angeles two days per week from 9 A.M. to 2:30 P.M. According to Claimant's Individual Program Plan (IPP) and her Individual Educational Plan (IEP), Claimant receives occupational therapy (OT) and physical therapy (PT) at her pre-school program. CCS is identified in Claimant's IEP as providing Claimant's OT and PT services.

6. At the time of Claimant's December 3, 2013 IEP, Claimant was receiving PT three times per week. Claimant's CCS OT and PT therapists attended the IEP. According to her IEP, Botox injections were helping to relax Claimant's legs. Claimant is able to step on her gait trainer. The IEP also states that Claimant is tolerating her braces more as her legs are relaxed. The IEP further states that Claimant was on a three- month program of "active therapy" which might be extended if she makes progress. The IEP does not specify a start or end date for this therapy. According to the IEP, CCS therapists were going to work with parents and teachers "with things to do with [Claimant]." (Exhibit 5.) Mother testified she stretches and massages Claimant's legs as directed by the CCS therapist. According to mother, the CCS therapist suggested aquatic therapy to loosen Claimant's muscles which would make stretching and massaging easier. Mother understood this may reduce the risk that Claimant will require surgery on her legs. According to mother, the CCS therapist told mother that CCS would not write a prescription for the service.

7. Claimant's 2013 Individual Program Plan (IPP) was developed on January 9, 2014. Claimant's IPP includes long and short term goals and desired outcomes. Desired outcomes are generally stated as objectives for the consumer and include services and supports needed to achieve those outcomes. Several of Claimant's goals address Claimant's medical and mobility needs, including

maintaining good overall health and an increase in her mobility. Support for these desired outcomes include the Medi-Cal and CCS services as were discussed at Claimant's IEP. According to mother, CCS is currently reviewing and consulting on Claimant's case monthly. She testified that CCS is not providing direct OT or PT services. Claimant will be reevaluated by CCS in September 2014 for her ability to use a device to help her stand up. According to mother, she has difficulty making CCS appointments because of the limited availability of appointment times.

8a. According to Alethea Crespo, M.P.T., a pediatric physical therapist, (Crespo) and the Director of the Center, aquatic therapy is not the same as swimming lessons. Aquatic therapy is a form of physical therapy conducted in a pool. Therapy is provided by a trained aquatic therapy aid in a warm pool. The warm water serves to relax the muscles, making stretching much easier and more effective. Water has the added benefit of hydrating, oxygenating and revitalizing an individual's musculoskeletal system, facilitating muscle relaxation, reduced spasticity, improved range of motion, and body awareness. Crespo also testified that aquatic therapy has cognitive and psycho-social benefits because it requires listening, following directions and interacting with peers in the pool. Crespo admitted that aquatic therapy is not always beneficial and that progress should be reviewed in six to twelve months.

8b. Claimant was evaluated by Ana Aguilar (Aguilar), an aquatic physical therapy aide under the supervision of Crespo. Aguilar is also a swimming instructor, but she was adamant that she is not teaching Claimant to swim. Aguilar testified that when she first saw Claimant, her legs were straight and her toes were pointed. She was not observed to bend her legs. As a result, a treatment plan was recommended, including two 60 minute sessions per week. Claimant has had three sessions, including the initial assessment. Aguilar testified that when she carried Claimant into the water, Claimant was tense and red faced. Once in the water her body and face relaxed. Like Crespo, Aguilar testified that the program also has cognitive and psycho-social benefits for Claimant. Although the treatment plan developed by Aguilar and Crespo included twice weekly sessions, Claimant is currently attending once a week, with half the session cost paid for by parents with assistance from other family members and the other half paid for by a Center provided scholarship. The Center has insurance codes for aquatic therapy, but it will not bill insurance because the reimbursement rates are too low.

8c. Mother depends on public transportation or a friend to drive her and Claimant to the Center. Mother reports that Claimant's legs are much easier to stretch and massage after she has aquatic therapy. The benefits last for one day. Mother also discussed aquatic therapy with Dr. Dominguez, Claimant's primary care Doctor. Dr. Dominguez wrote a note stating that Claimant could participate in aquatic therapy.

9. Myrna Pineda Beita-Ayvaz (Beita-Ayvaz), a Family Worker at the Blind Children's Center, testified that mother is very responsible in her care of Claimant, always follows through with instructions and participates fully in the parent

groups. According to Beita-Ayvaz, Claimant's progress is impeded by her gross motor impairments.

10. Daniela Santana (Santana), Service Agency Fair Hearing Manager testified that although the agency initially reviewed Claimant's request as a request for swimming lessons, she subsequently met with mother and reconsidered Claimant's request for aquatic therapy. Despite reconsidering Claimant's request, the agency again denied the request. Santana testifies that the agency typically relies on generic resources to determine a consumer's needs. CCS and Claimant's school district are the generic resources providing Claimant services. Because it relied on CCS and Claimant's school district, Service Agency did not observe Claimant or obtain a clinical consultation to determine Claimant's needs. Service Agency offered no evidence that aquatic therapy is not an appropriate therapeutic service that will help Claimant maintain good health and mobility or that twice a week sessions as recommended by Crespo is not appropriate. Service Agency also offered no evidence that there is funding available for aquatic therapy from a generic resource such as CCS, Claimant's school district, or Medi-Cal. Nor did Service Agency present any evidence that it asked mother to provide documentation showing that a generic resource had denied funding the service or that an appeal would have merit.

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. An administrative hearing to determine the rights and obligations of the parties, if any, is available under the Lanterman Act to appeal a regional center decision. (§§ 4700-4716.)

2. The standard of proof in this case is a preponderance of the evidence, because no applicable law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Because Claimant is requesting a new service, she bears the burden of proof. In seeking government benefits, the burden of proof is on the person asking for the benefits. (See, *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).)

3. The Lanterman Act sets forth a regional center's obligations and responsibilities to provide services to individuals with developmental disabilities. (See §§ 4640 et seq.) As the California Supreme Court explained in *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388, the purpose of the Lanterman Act is twofold: "to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community" and "to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community." In addition to assisting consumer's and their families "in securing those services and supports which maximize opportunities and

choices for living, working, learning, and recreating in the community. . . [e]ach regional center design shall reflect the maximum cost-effectiveness possible and shall be based on a service coordination model.” (§ 4640.7.)

4. Under the Lanterman Act, a consumer’s needs and the services and supports required to achieve the consumer’s goals are identified as part of the individual program planning process. (§§4646 et seq.)

5. The IPP and the provision of supports and services is intended to be “centered on the individual and family [,] . . . take into account the needs and preferences of the individual and family, where appropriate[,] . . . be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.” (§§ 4646, subd. (a), 4646.5.) The IPP “is developed through a process of individual needs determination,” should involve the consumer and her parents, and should be prepared jointly by the planning team. (§ 4646 subd. (b).) “Decisions concerning the consumer’s goals, objectives, and services and supports that will be included in the consumer’s individual program plan and purchased by the regional center or obtained from generic agencies shall be made by agreement between the regional center and the consumer . . . at the program plan meeting.” (§ 4646, subd. (d); see also §§ 4646.7, 4648.) The program planning team may meet again if an agreement is not reached. (§ 4646, subd. (d).) If the parties are unable to reach an agreement, the consumer or her authorized representative may request a fair hearing. (§§ 4700 et seq.)

6. While a consumer and her parents’ preferences and desires regarding goals and objectives and services and supports are to be given consideration in the planning process, regional centers are not authorized to purchase any and all services a consumer or her family may desire. (See §§ 4640.7, 4646, 4646.4, 4646.5, 4659, 4686.2.) Regional center design must “reflect the maximum cost-effectiveness possible . . .” (§ 4640.7, subd. (b).)

7. When purchasing services pursuant to an IPP, regional centers must ensure:

(1) Conformance with the regional center’s purchase of service policies, as approved by the department [of developmental services] pursuant to subdivision (d) of Section 4434.

(2) Utilization of other sources of services and funding as contained in Section 4659.

(3) Consideration of the family’s responsibility for providing similar services and supports for a minor child without disabilities . . . (§ 4646.4, (subd. (a).)

8. Regional Centers are also required to “identify and pursue all possible sources of funding” from governmental entities such as Medi-Cal, and private entities such as insurers. (§ 4659, subd. (a).) Except in certain circumstances not applicable in this case, section 4659 provides that:

(c) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional centers shall not purchase any service that would otherwise be available from Medi-Cal, Medicare, the Civilian Health and Medical Program for Uniform Services, In-Home Support Services, California Children’s Services, private insurance, or a health care service plan when a consumer or a family meets the criteria of this coverage but chooses not to pursue that coverage. . . .

(d) (1) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, a regional center shall not purchase medical or dental services for a consumer three years of age or older unless the regional center is provided with documentation of a Medi-Cal, private insurance, or a health care service plan denial and the regional center determines that an appeal by the consumer or family of the denial does not have merit.

9. Section 4648.5 provides in pertinent part:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers’ 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 costs of providing the following services:

[¶] . . . [¶]

(2) Social recreation activities, except for those activities vendored as community-based day programs.

[¶] . . . [¶]

(4) Nonmedical therapies, including, but not limited to, specialized recreation, art, dance, and music.

[¶] . . . [¶]

(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 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.

10. In light of Factual Findings 1 through 10 and Legal Conclusions 1 through 9, Claimant has met her burden to show that aquatic therapy is an appropriate therapy that will address her desire to improve her mobility by reducing the effects of spasticity related to her cerebral palsy. There is no evidence that there is a generic agency available to fund this service. Consequently, the limitation on Service Agency funding services that are otherwise available from a generic resource, as set for in section 4659, subdivision (d)(1), does not apply.

11. Furthermore, because aquatic therapy is not the same as swimming lessons, it is not a social-recreational activity, and because it is a form of physical therapy, it is a medical therapy rather than a non-medical therapy, such that it is not subject to the limitations set forth in section 4648.5, subdivision (a). Claimant's IPP includes goals directed towards maintaining good health and mobility. Claimant is not receiving direct physical therapy services at school or through CCS. There is no evidence that either CCS or her school district will provide her with aquatics therapy as a part of a physical therapy program. Consequently, given the facts in this case, even if aquatic therapy is subject to section 4648.5 as service agency initially asserted, aquatic therapy is a "critical means for ameliorating the physical . . . effects of the consumer's developmental disability."

12. Claimant has offered unrebutted evidence that she will benefit from twice weekly sessions of aquatic therapy at the Center. Claimant's witness testified that the service should be reviewed in six to twelve months to determine its effectiveness. Consequently, it is reasonable that the aquatic therapy service should be reviewed at the time of Claimant's next IPP to determine its effectiveness. This also affords the Service Agency time to determine whether there is a generic resource available to fund the service.

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ORDER

Claimant's appeal from Service Agency decision to deny funding for Claimant's aquatic therapy provided by the Rose Bowl Aquatic Center is granted. Service Agency shall fund twice weekly aquatic therapy at the Rose Bowl Aquatic Center.

Dated: June 30, 2014

DEBORAH M. GMEINER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

UNDER THE LANTERMAN DEVELOPMENTAL DISABILITIES SERVICES ACT, THIS IS A 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.