

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CINDY P.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2014050277

DECISION

This matter was heard by Gary M. Bock, Administrative Law Judge, Office of Administrative Hearings, State of California, on June 17, 2014, in Alhambra.

Claimant was present and represented by Edith Fierro (Ms. Fierro), Director of Services of CAPC, Inc. (CPAC). Arturo De La Torre, M.S., M.F.T., represented Eastern Los Angeles Regional Center (ELARC or Service Agency).

The documentary and testimonial evidence described below was received, and argument was heard. The record was closed and the matter was submitted for decision on June 17, 2014.

ISSUE

Should the Service Agency fund a YMCA gym membership for Claimant as an exemption for extraordinary circumstances under Welfare and Institutions Code section 4648.5, subdivision (c)?

///

///

///

EVIDENCE RELIED UPON

Documentary: Service Agency's exhibits 1 through 8; Claimant's exhibits A through L.¹

Testimonial: Arturo De La Torre, Ms. Fierro, Crystal Ordaz, and Claimant.

FACTUAL FINDINGS

1. Claimant is a 39 year old woman. She is a consumer of ELARC and has been a regional center consumer for many years on the basis of her diagnosis of Mild Mental Retardation.

2. By a Notice of Proposed Action dated March 14, 2014, Service Agency notified Claimant of its decision to deny her request for funding a gym membership at the Whittier YMCA.

3. On April 28, 2014, Claimant filed a fair hearing request to appeal ELARC's decision. Claimant stated that a YMCA gym membership was important for her to be healthy. On June 12, 2014, after an informal meeting with Claimant, Ms. Fierro and Crystal Ordaz (Ms. Ordaz), who is the Supported Living Case Manager for CPAC, ELARC upheld its decision not to provide funding for a YMCA gym membership for Claimant. This hearing ensued.

4. Claimant lives independently with 24-hour Supported Living Services (SLS) provided through CAPC. Claimant lives in a two-bedroom apartment in the city of Whittier and is never left alone. At the time of this hearing, Claimant lived with a roommate who is an employee of CAPC and present for approximately one-hour periods between shift changes for other SLS staff. Claimant's roommate was scheduled to move out of her apartment on June 22, 2014.

5. Claimant's SLS are funded by ELARC to assist Claimant in meeting the goal of her Individual Program Plan (IPP) to live on her own. Claimant resumed working part-time in May of this year, approximately four to eight hours a month at an AMC theater.

6. (A) Claimant has type I diabetes. She takes insulin every four hours and tests her blood sugar level every two hours after eating. Claimant's diabetes has been treated by Endocrinologist Dr. Nathan Eitan, M.D. (Dr. Eitan) for approximately eight years. On October 11, 2013, Claimant received emergency medical treatment for high blood sugar.

¹ The parties submitted statutes for which official notice was taken. (Gov. Code, § 11515.) ELARC submitted copies of sections 4648.5 and 4512, subdivision (b), which have been marked for identification as exhibits 7 and 8, respectively. Claimant submitted a two-page photocopy of section 4502, which has been marked for identification as exhibit L.

She was released the same day after her blood sugar stabilized. Claimant was not happy with Dr. Eitan, and CAPC staff assisted her in finding another physician to treat her diabetes. In October 2013, Dr. Lilia Vazquez (Dr. Vazquez) began treating Claimant's diabetes. On December 14, 2013, Claimant received emergency medical care when her blood sugar rose to 462. She was released the same day after her blood sugar stabilized.

(B) On December 19, 2013, Ms. Fierro, on behalf of CAPC, wrote a letter to ELARC, requesting a clinical review for Claimant, stating Claimant's health care needs had changed over the last few years and had become more intense.

(C) In January 2014, a Dr. Zepeda began treating Claimant's diabetes after Dr. Vazquez went on medical leave. On January 15, Claimant received emergency medical care for unstable blood sugar and was released that same day, when her blood sugar stabilized. On January 18, 2014, Claimant received emergency medical care for high blood sugar and was moved to an intensive care unit (ICU). Claimant remained at the hospital until January 24, 2014. In February 2014, Claimant started using an insulin pump. The pump requires 43 steps to change and operate. Claimant had difficulty operating the pump, so nursing staff continued to come to Claimant's apartment and show her how to use it.

(D) On February 6, 2014, Dr. M. Lau, M.D. (Dr. Lau), as part of ELARC's clinical team, made the following recommendations after reviewing Claimant's recent medical history:

1. Maintain close follow-up endocrinologist of choice. Update protocol as necessary with endocrinologist.
2. Ensure that [Claimant] is proficient in performing all the tasks needed (monitor her glucose levels, calculate insulin dose and administer insulin) to treat her diabetes. This can be done at endocrinology clinic.
3. Inquire about education classes in diabetes management at endocrinology clinic. [Claimant] and SLS counselor may benefit from learning more about diabetes and lifestyle changes that can improve glucose control.
4. Ensure that [Claimant] follow up with her other physicians for monitoring of her other health conditions.

7. On March 10, 2014, Claimant's Individual Service Plan (ISP) was completed by CAPC. The ISP identifies no plan for Claimant to engage in any particular physical exercise. To deal with her diabetes, the ISP provides that Claimant will meet with Dr. Eitan every month to monitor her diabetes, to encourage her to modify her diet to eat fewer but larger meals lower in carbohydrates and calories and to help her log her blood sugar and insulin units. At least one social activity is to be planned and engaged in by Claimant once

per week. These social activities are recreational in nature directed toward Claimant acquiring the recreational and social skills appropriate for the environment and not specifically directed toward improving her physical health to ameliorate the effects of her diabetes.

8. (A) On March 11, 2014, a conference was held to determine Claimant's IPP (2014 IPP). Claimant requested that ELARC fund a YMCA membership for use of their facilities and equipment to exercise. Claimant's fees for the unlimited use of two YMCA centers in Whittier would be \$27.50 per month.

(B) Claimant is familiar with one of the centers in Whittier, which she can walk to from her apartment within six to seven minutes. Claimant had a YMCA membership until 2012, funded through a grant from Rose Hills Mortuary. Since then, Claimant has exercised by taking walks at a local park and trail approximately two or three times per week. Claimant also has exercised at home to a work-out video, but no longer has a television. If Claimant is able to use YMCA services again, she will exercise using the treadmill and weight machines and participate in a water aerobics class.

(C) Ms. Fierro testified that Claimant had fewer hospitalizations when she was a member of the YMCA, that her blood sugar seems to rise when she exercises in the heat, and that Claimant requires a closed environment in which to exercise so that she can regularly check her blood sugar and exercise during the very early morning hours, since walking helps bring down her blood sugar. Ms. Fierro also testified that the local trail during the evenings and night is not safe, leaving Claimant, who was stalked and held against her will at about the age of 13, less motivated to exercise. Ms. Ordaz added that it is very hot outside as early as 9:00 a.m., and that exercise classes at Whittier and Pico Rivera Community Centers cost \$40 per month.

9. (A) Claimant's 2014 IPP provides that ELARC will continue to provide case management services and her SLS. In addition to reviewing Dr. Lau's recommendations (Finding 6(D)) with Claimant and CAPC staff, ELARC staff "suggested ... [Claimant] ... speak to Dr. Zepeda and request assistance in attending a nutrition class and/or going to the library and get books that can help her better manage her meal planning" and "explained ... the importance of her having a healthy diet and understanding what are healthy carbohydrates and what carbohydrates that her body does not need are." (Exh. 3.)

(B) Claimant's 2014 IPP does not identify any exercise facilities or services to be separately funded. ELARC considers exercise to be important in maintaining good health but that the primary means of dealing with Claimant's diabetes is to properly manage her glucose levels and insulin administration. Claimant with the support of CPAC staff can locate and utilize generic services such as parks, hiking trails, and air conditioned malls where she may walk. The 2014 IPP notes that Claimant has an active social life, a close group of friends whom she does activities with, and that she likes to go to the mall and likes bowling.

10. On March 18, 2014, Claimant's blood sugar rose to 466, although the pump was working and injecting insulin. Claimant was taken to the hospital and discharged three days later. On March 23, 2014, Claimant received emergency medical care and was sent to an ICU after her blood sugar rose to 479. Claimant was seen by Dr. Eitan and was told she should not be using the insulin pump. On March 27, 2014, Claimant was discharged from the hospital and no longer using the insulin pump. Claimant's blood sugar stabilized after being discharged. In April 2014, Claimant decided she would no longer see Doctors Zepeda and Vazquez and that she would see Dr. Eitan, again, to treat her diabetes.

11. On April 7, 2014, ELARC Service Coordinator Grecia Carbajal sent an email to Ms. Fierro and Ms. Ordaz with the following additional recommendations concerning Claimant's medical problems, coinciding with those of the Clinical Review Team:

1. [Claimant] needs consistency with her care, have CAPC discuss the concerns with all of her doctors and request that they communicate regarding her medical care.
2. Have a plan in place with her doctor's assistance to determine the best hospital for consistency.
3. CAPC staff needs to assist [Claimant] with obtaining a written diet by a medical professional and assist her with following the prescribed diet.
4. Hold an ID team meeting and see if CAPC is in agreement with following through regarding all medical recommendations; if not discuss referrals to other vendors that will follow through with her medical needs.

12. On April 21, 2014, Dr. Eitan made the following recommendation: "Due to [Claimant] being a type 1 diabetic, I am highly recommending that she exercise at least four times a week for one hour at a time. It is very important for [Claimant] to exercise so that she is able to remain healthy." (Exh. B.)

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)² An administrative "fair hearing" to determine the rights and obligations of the parties, if any, is available under the Lanterman Act. (§§ 4700-4716.) Claimant requested a fair hearing to appeal the Service Agency's denial of the request for reimbursement. Jurisdiction in this case was thus established.

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

(Factual Findings 1-3.)

2. The Lanterman Act is a comprehensive statutory scheme to provide "[a]n array of services and supports . . . which is sufficiently complete to meet the needs and choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life and to support their integration into the mainstream life of the community." (§ 4501.) The services and supports should "enable persons with developmental disabilities to approximate the pattern of everyday living available to people without disabilities of the same age." (*Ibid.*)

3. A regional center is required to secure the services and supports that meet the needs of the consumer, as determined in the consumer's IPP. (§ 4646, subd. (a)(1).) The IPP is created after a conference consisting of the consumer and his or her representatives, regional center representatives, and other appropriate participants. (§§ 4646 and 4648.) The planning process relative to an IPP includes, among other things, "[g]athering information and conducting assessments to determine the . . . concerns or problems of the person with developmental disabilities." (§ 4646.5, subd. (a).) The services and supports to be provided to a consumer are determined in the IPP process on the basis of the needs and preferences of the consumer and a consideration of a range of service options proposed by the IPP participants, the effectiveness of each option in meeting the goals stated in the IPP, and the cost-effectiveness of each option. (§ 4512, subd. (b).)

4. The services and supports contemplated under the Lanterman Act are "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).)

5. When providing services, a regional center must serve competing objectives. A regional center must ensure that eligible consumers get the services they need. At the same time, the regional center must secure services that are effective in meeting the consumer's IPP goals and are cost effective, and to the extent possible, reflect the preferences of the consumer and his or her family. (§§ 4512, subd. (b), 4646.) In addition, a regional center shall use generic services and supports when appropriate . . ." (§§ 4646.4, subd. (a)(2), 4648, subd. (a)(8).)

6. Nevertheless, a regional center's authority to purchase services is limited pursuant to section 4648.5, which states, in pertinent part:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional center's 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:

- (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.

[¶] ... [¶]

(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.

7. Where a change in the status quo is sought, the party seeking the change has the burden of proving that a change is necessary. (Evid. Code, §§ 115 and 500.) The standard of proof in this case requires proof to a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute (including the Lanterman Act) requires otherwise. "'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it." (BAJI No. 2.60 (8th ed. 1994).)

8. In this case, Claimant is seeking funding for a new service. Claimant has the burden to prove by a preponderance of the evidence that this service is necessary to meet her needs identified in her IPP, and that ELARC is required to provide funding for the requested service. Claimant has not met this burden.

9. It was established that it is very important that Claimant regularly exercise to remain healthy. The evidence, however, did not establish the nature of the exercise Claimant should engage in or the times of the day she should exercise to remain healthy. Claimant has benefited in the past and may benefit in the future by being able to exercise at local YMCA facilities. Claimant's opportunity to exercise at her local YMCA, however, is not necessary to achieve the goals stated in her IPP or to achieve and maintain her independent, productive and normal life. (§ 4512, subd. (b).) Claimant is receiving SLS for 24-hours per day, and

she is never left alone. Claimant is able to exercise as recommended to remain healthy with the services already funded by ELARC, through CAPC, apart from other free generic services available to her in the community, such as walking in a nearby mall, local park or trail.

10. The gym membership requested by Claimant falls within the category of nonmedical therapies, including specialized recreation, that ELARC is prohibited from purchasing pursuant to section 4648.5, subdivision (a). The exemption provided for in section 4648.5, subdivision (c), does not apply in this case. It was not established that the exercise services and facilities provided by a YMCA gym membership are a primary or critical means to ameliorate the effects of Claimant's developmental disability of Mild Mental Retardation or necessary to enable Claimant to remain in her home. (Factual Findings 1-12.)

ORDER

The appeal of Claimant Cindy P. is denied. Eastern Los Angeles Regional Center is not required to fund Claimant's YMCA gym membership.

DATED: July 1, 2014

GARY M. BOCK
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5, subdivision (a). Both parties are bound by this decision. This decision may be appealed to a court of competent jurisdiction within 90 days of receipt of notice of this decision.