

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT

vs.

WESTSIDE REGIONAL CENTER,
Service Agency.

OAH No. 2015010412

DECISION

Administrative Law Judge Angela Villegas, State of California, Office of Administrative Hearings, heard this matter on April 15, 2015, in Culver City, California.

Lisa Basiri, Fair Hearing Specialist, represented Westside Regional Center (WRC).

Claimant's mother represented Claimant.¹ Claimant's father was also present.

Evidence was received, and the matter was submitted on April 15, 2015.

ISSUE

Whether, for safety reasons, WRC must provide Claimant with swim lessons suited to his needs.

EVIDENCE RELIED UPON

Documentary: WRC's exhibits 1 through 6; Claimant's exhibits A through I.
Testimonial: Lisa Basiri, Fair Hearing Specialist, WRC; Claimant's mother and father.

¹ Claimant's name and the names of Claimant's parents are not disclosed, in order to protect their privacy.

FACTUAL FINDINGS

1. Claimant is a three-year-old² male who qualifies for regional center services based on a diagnosis of autism. He lives with his parents.

2. In December 2014, WRC rejected Claimant's request for swim lessons, and formally notified Claimant's parents of its decision on January 8, 2015. Claimant's mother filed a Fair Hearing Request that same day. On February 17, 2015, after an informal meeting, WRC reiterated its decision not to provide swim lessons.

3. Because of Claimant's age and autism, he is attracted to water and does not understand that water can be dangerous. Due to his autism, he is also physically uncoordinated, and lacks body awareness and muscle tone, so that it is easy for him to stumble, trip, and fall. Claimant has behavior issues, including impulsivity and elopement. He has not yet learned to respond consistently to commands such as "stop," "no," and "wait." Claimant sometimes opens the door of his home and wanders outside, or leaves other areas where he is supposed to be. When something catches Claimant's attention, he will often run after it without regard to danger and without heeding instructions to stop.

4. Claimant currently receives services through both WRC and his school district. He attends preschool at Smart Start, where he receives services including occupational and speech therapy. Through WRC, Claimant also receives 54 hours per month of behavior intervention and 10 hours per month of social skills training; Claimant's parents receive 14 hours per month of in-home respite services. Claimant's behavior intervention sessions address safety issues, including compliance with safety commands. Those sessions have included one trip to a local park where there is a stream, and a trip to the Getty Museum, which has a fountain.

5. The family lives in a condominium complex with a pool. The pool area is fenced, but other residents sometimes leave the gate open. The fence around the pool also encloses a patio and a gym.

6. On one occasion while playing with his mother in the pool area, Claimant leaped, without warning and fully clothed, into the pool. When Claimant's mother retrieved him, he found the incident funny, and did not perceive the danger he had been in. On another occasion, Claimant tripped and fell into the Jacuzzi in the pool area. His mother was dangling her feet in the Jacuzzi and was able to retrieve him again. Outside the condominium complex, Claimant has been drawn to rivers, streams, and fountains, and has often gotten close enough to such bodies of water to alarm his parents.

² Claimant's Individual Program Plan (ex. 5) records his age as four, but based on his date of birth (June 23, 2011) and his mother's testimony, he is three years and approximately 10 months old.

7. Claimant's parents are worried that his impulsivity will lead him to enter a body of water, as he did the pool, and that no one will be available to rescue him. Although they try to keep him under constant supervision when they are with him, and equip him with flotation devices when they are near the pool at their complex, they cannot be with him all the time, and he removes the flotation devices because they bother him.

8. Approximately a year ago, Claimant's parents enrolled him in individual swim lessons at Lenny Krayzelburg Swim Academy (Krayzelburg), where he attended once or twice per week for eight weeks. The individual swim lessons were not tailored to meet the needs of autistic children, and the instruction was ineffective. Claimant's mother also took Claimant to one "Mommy and Me" swim class at Krayzelburg, and another such class at the YMCA, but neither was workable. In both instances, the instructors expected Claimant to be able to follow instructions and recognize the danger presented by the water, which Claimant was unable to do.

9. Claimant's parents feel the best way to make him water-safe is to provide him with swim instruction tailored to autistic children. Although Claimant has not learned well in settings tailored to the needs of typically-developing children, he has been able to learn in the specialized setting of his preschool, where the instruction is adapted for children with special needs. Claimant's parents feel he will be able to absorb and generalize enough information from specialized swim instruction to make him safe—or at least safer—around water.

10. Claimant's psychiatrist, occupational therapist, behavior interventionist, and neurologist recommend swim lessons for him, for safety and therapeutic purposes. (Exs. C – E and G.)

LEGAL CONCLUSIONS

1. Claimant met his burden to prove, by a preponderance of the evidence, his entitlement to have swim lessons funded by WRC. (Evid. Code, §§ 115; 500.) WRC must provide him with swim lessons appropriate to his needs, for safety purposes, but only to the extent the cost of the specialized lessons exceeds the cost of ordinary swim lessons.

2. Since July 1, 2009, Welfare and Institutions Code (WIC) section 4648.5 has prohibited regional centers from funding (a) "[s]ocial recreation activities, except for those activities vendored as a community-based day programs"³ and/or (b) "[n]onmedical therapies, including, but not limited to, specialized recreation, art, dance, and music." (WIC, § 4648.5, subds. (a)(2) and (a)(4).)

3. Swimming is typically a recreational activity, though it can also have therapeutic effects, and in this case, Claimant's health care and service providers indicated it

³ Claimant does not seek to access a community-based day program.

would be therapeutic for him. (Factual Finding 10.) Nevertheless, it was not shown to be a medical therapy in Claimant's case. Accordingly, for Claimant, swimming would be a social recreational activity or a nonmedical therapy, and as such, WIC section 4648.5, subdivision (a), presumptively prohibits WRC from funding it.

4. WIC section 4648.5, subdivision (c), however, carves out an exemption to the prohibition against funding social recreational activities and nonmedical therapies, for

extraordinary circumstances . . . 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.

5. This exemption applies in this case. WRC argued the exemption did not apply because the danger water poses to Claimant is similar to the danger it poses to young children generally, and any additional danger Claimant faces due to his autism should be addressed through behavior intervention rather than water-safety training *per se*.

6. WRC's argument was persuasive only in demonstrating that swim lessons are neither necessary to enable Claimant to remain in his home nor the *primary* means of ameliorating the effects of his autism.

(a) Swim lessons are not necessary to enable Claimant to remain at home, because Claimant's access to the pool area near his home can be controlled through measures other than swim lessons, such as the behavior intervention services he currently receives. (Factual Finding 4.) Moreover, even if Claimant were to receive swim lessons, given his age (Factual Finding 1), his access to the pool area would still have to be controlled by those supervising him.

(b) Swim lessons are not a primary means of addressing the effects of Claimant's autism. The primary means of addressing those effects remain the medical attention, behavior intervention, occupational and speech therapy, and specialized classroom instruction he currently receives. (Factual Findings 4 and 10.)

7. Nevertheless, because the exemption also applies if extraordinary circumstances exist, and the service requested is a *critical* means of ameliorating the effects of the disability, WRC's argument was not dispositive.

8. Claimant established that his particular vulnerability to the danger posed by water, the proximity of his home to a pool, and his dangerous encounters with the pool in the past (Factual Findings 3 – 7), constitute extraordinary circumstances, and that swim lessons customized to meet the needs of autistic children are a critical means of ameliorating the effects of his autism.

9. (a) The effects of Claimant’s autism include both his attraction to water and inability to appreciate the danger it poses. (Factual Findings 3 – 7 and 10.) These effects have led Claimant into dangerous proximity with water. (Factual Findings 3 – 7.)

(b) Claimant’s autism also makes him less able to keep from accidentally falling into the water, due to his reduced muscle tone, coordination, and body awareness. (Factual Findings 3 – 7 and 10.) Even if Claimant eventually learns to curtail his elopement and impulsivity, respond to safety commands, and appreciate the danger presented by water (Factual Findings 3 – 7), his ability to control his behavior might remain imperfect, and the physical effects of his autism would, even then, make him particularly vulnerable to falling into the water by accident.

(c) The efforts of Claimant’s parents and service providers to keep him at a distance from water and teach him to heed safety commands have thus far proven insufficient to keep Claimant safe from the dangers presented by water. (Factual Findings 3 – 7.) Ordinary swim programs in which Claimant has participated have also proven ineffective to make Claimant water-safe. (Factual Finding 8.)

(d) Swim lessons tailored to the needs of autistic children would help Claimant achieve water safety, and are therefore critical to address the effects of Claimant’s autism. (Factual Findings 7 – 9.)

10. WRC also argued that, under WIC section 4646.4, subdivision (a)(4), Claimant’s parents are responsible for providing Claimant with swim lessons, because swim lessons are the kind of service typically provided by the family of a child without disabilities. WRC is correct that the cost of ordinary swim lessons is one that parents of any child, disabled or not, should expect to bear.

11. The same section, however, requires that “the consumer’s need for extraordinary care, services, supports and supervision, and the need for timely access to this care” be considered. (WIC, § 4646.4. subd. (a)(4).)

12. Claimant requires extraordinary services—that is, swim lessons adapted to his needs—because ordinary swim lessons available to everyone did not work for him. (Factual Finding 8.) Claimant needs such services timely, because, even as efforts go on to address his underlying behavioral issues and ultimately make him safer overall, water presents, and will continue to present, a particular hazard for him. (Factual Findings 3 – 7.) Consequently, WIC section 4646.4, subdivision (a)(4), does not require Claimant’s parents to pay the additional cost of swim lessons suited to the particular needs Claimant has because of his autism. WRC must fund the additional cost of such swim lessons for Claimant.

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ORDER

1. Claimant's appeal is granted.

2. Westside Regional Center shall provide Claimant with swim lessons targeting water safety and tailored to the needs of autistic children, but shall be required to pay only the difference between the cost of such specialized lessons and the cost of ordinary swim lessons available to all children Claimant's age.

3. If an appropriate vendor is not available, Westside Regional Center may satisfy its obligation under this Order by providing an aide to assist Claimant to participate in ordinary swim lessons.

Dated: April 24, 2015

/s/
ANGELA VILLEGAS
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.