

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

vs.

REGIONAL CENTER OF THE EAST BAY,

Service Agency.

OAH No. 2015030429

DECISION

Administrative Law Judge Perry O. Johnson, Office of Administrative Hearings, heard this matter on August 7, 2015, in San Leandro, California.

Claimant, although present for the entire hearing, was represented by his mother.

Mary Dugan represented the Regional Center of the East Bay (service agency).

On August 7, 2015, the parties were deemed to have submitted the matter and the record closed.

ISSUE

Within the meaning of the Lanterman Act is service agency obligated to fund the cost of an annual pass (\$520) for claimant's use of the swimming facilities at the Silliman Activity and Family Aquatic Center, which is operated by the City of Newark's Recreation and Community Services Department.

FACTUAL FINDINGS

1. Claimant is a 23-year-old consumer of regional center services based on a diagnosis of autism. (Claimant is also impacted by intellectual disability, Marfan's Syndrome and a gastro-intestinal disorder that prevents weight gain.)

2. Claimant resides in the Union City home of his mother. The household also includes claimant's 21-year-old brother, who has no developmental disability.

3. Claimant's mother began claimant's use of the Silliman Activity and Family Aquatic Center (Silliman) in Newark (Alameda County), California during 2009. Silliman is the only indoor public swimming pool within a reasonable proximity to the family home. Initially, claimant's mother paid significant fees for claimant to receive intensive, individualized swimming lessons.

Due to the swimming activities, claimant's mother found that certain prescribed medications to suppress undesirable behaviors could be suspended for claimant's intake.

From 2010 until April 2014, under the provisions of the Special Education laws, the fees associated with claimant's weekly swimming were covered by an Individual Education Plan (IEP). All medication for claimant's "behavior issues" were stopped. But, in April 2014 when claimant attained his 22nd birthday, the IEP and its beneficial funding were terminated as to claimant's use of Silliman.

Because claimant's family did not purchase a swimming pass, claimant could no longer use the swimming pool of Silliman. Claimant's mother advances that claimant experienced insomnia and that aggressive behaviors were manifested in the home setting. Claimant's treating physician prescribed sleeping pills to quell claimant's behaviors.

In approximately October 2014, claimant's mother requested service agency to pay the fees for the purchase of an annual pass for claimant's use of Silliman's pool and gym.

4. On February 24, 2015, service agency sent claimant's mother a letter, by certified mail, along with a Notice of Proposed Action. The documents denied funding of claimant's annual pass to Silliman.

5. On March 6, 2015, claimant's mother filed a Fair Hearing Request. (The document actually requested mediation of the controversy; but, service agency saw no benefit by way of the dispute being sent to mediation.) Through the Fair Hearing Request, Claimant's mother sought service agency to fund an annual pass at Silliman.

Claimant's Evidence

6. Claimant's mother offered poignant testimonial evidence regarding the benefits gained by claimant through the use of Silliman that go beyond social and recreational components. The swimming activities aid the relief of the unacceptable behaviors that claimant has exhibited to the distress of the family household.

7. In support of her testimony, claimant's mother submitted a letter by claimant's treating medical doctor, Eva Weinlander, M.D., of the Stanford University Medical Center. Dr. Weinlander opines that claimant's use of Silliman results in claimant being "much

calmer, cooperative, sleeps much better, has come off sleeping tablets, and his behavior has dramatically improved” And, the letter by claimant’s doctor ends with, “[t]hese changes have been critical in enabling his mother to keep him in their home rather than having to resort to more expensive outside supervised living situations.”

8. Despite Dr. Weinlander’s advocacy, the treating doctor failed to set out in her letter that swimming at Silliman constitutes “a primary or critical means for ameliorating the physical, cognitive or psychosocial effects of [claimant’s] developmental disability. And, Dr. Weinlander was not persuasive that swimming at Silliman “is necessary to enable [claimant] to remain in his . . . home and no alternative service is available to meet [claimant’s] needs.”

9. Claimant’s mother has been the person attending to, or accompanying, claimant in his use of Silliman’s pool. The public swimming pool has no physical therapist or other health care practitioners who provide therapy through swimming activities at Silliman. Rather, it is claimant’s mother who enters the swimming pool to monitor claimant’s swimming activities.

Service Agency’s Evidence

10. Service agency contends that claimant’s swimming activities at Silliman are social and recreational. Accordingly, service agency avers such activities cannot be funded by service agency as prescribed by Welfare and Institutions Code section 4648.5, subdivision (a). In support of its contention, service agency presented the testimony from two witnesses:

A. CASE MANAGEMENT SUPERVISOR MS. GINA ROSE SASS

11. As claimant’s Case Management Supervisor, Ms. Gina Rose Sass established that she is very familiar with the case of claimant as well as the limitations placed on service agency in funding consumers’ activities such as swimming.

12. Although Ms. Sass recognizes that swimming activities have been beneficial for claimant’s health and well being, service agency is barred from funding an annual pass for claimant to use Silliman’s pool and gym by reason Code section 4648.5, subdivision (a). Regarding the denial letter, dated February 24, 2015, Ms. Sass and other service agency personnel closely reviewed claimant’s case and they could not identify a basis for any exemption to permit the funding.

B. SERVICE AGENCY’S ASSOCIATE DIRECTOR FOR ADULT SERVICE MS. MELANIE FOWLER

13. Ms. Melanie Fowler, service agency’s Associate Director for Adult Services, provided persuasive testimony at the hearing of this matter.

14. Ms. Fowler credibly asserted that service agency has a comprehensive plan for the provision of supports and services for claimant that address the negative behavior effects associated with his developmental disability of autism. As either stand-alone services, or as alternatives to swimming at Silliman, that address claimant's behaviors, services agency funds the Morgan Autism Center, which is a behavioral management program, as the primary means for the amelioration of the psychosocial effects (temper tantrums) of the developmental disability affecting claimant. In addition, service agency funds a one-to-one staff aide at the Morgan Autism Center to interact with claimant. And, as a third service to address claimant's behaviors, service agency funds an "after-program" benefit, which is focused on claimant's behaviors.

As is her practice to review all "denial letters" before the mailing of such letter, Ms. Fowler studied the February 2015 letter that informed claimant, and his mother, that Silliman offers claimant a "social recreation" activity for which service agency was barred in funding. Ms. Fowler found no exemption that could provide an exception in claimant's case.

At the hearing of this matter, Ms. Fowler persuasively addressed not only service agency's commitment to follow the law but also the subject regional center's concern with the department's auditors who would not find acceptable the subject regional center's funding the cost of claimant's swimming activities at Silliman.

Ultimate Findings

15. The weight of the evidence establishes that Silliman is a social recreational activity. Even though the swimming may in a sense provide means for ameliorating claimant's behavioral adverse effects of his developmental disability, namely autism, alternative services are being furnished by services agency in the way of funding three distinct behavioral modification programs for which claimant participates.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)¹ 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 (§§ 4501, 4509 and 4685), and to enable them to approximate the pattern of everyday living of non-disabled persons of the same age and to lead more independent and productive lives in the community (§§ 4501 and 4750-4751.) Accordingly, persons with developmental disabilities have certain statutory rights, including the right to treatment and habilitation services and the right to services and supports based upon individual needs and preferences. (§§ 4502, 4512, 4620 and 4646-

¹ All further references are to the Welfare and Institutions Code unless otherwise specified.

4648). Also, consumers have the right to a “fair hearing” to determine the rights and obligations of the parties in the event of a dispute. (§§ 4700-4716.)

2. Notwithstanding the responsibilities imposed on regional centers to ensure that California’s developmentally disabled residents receive the services and supports required under the Lanterman Act, due to the current fiscal and economic crisis in California, the Legislature passed Code section 4648.5 that prohibits the funding of certain services and supports that may be beneficial to a consumer. That statutory provision, which became effective July 1, 2009, suspended the authority of regional centers to purchase certain services. The targeted services include: 1. camping services and associated travel expenses; and, 2. social recreation activities, except for those activities vendored as community-based day programs. (§ 4648.5, subd. (a).) But, the statute provides:

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 psychological 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. (§ 4648.5, subd. (c).)

(Emphasis added.)

3. In this matter, service agency established that claimant’s use of Silliman’s swimming facility falls into the category of services that are characterized “social recreation activities.” Accordingly, funding of such activities is barred under Code section 4648.5, subdivision (a)(2). Although claimant benefits from the use of Silliman’ swimming pool and gym, he did not prove the existence of “extraordinary circumstances” in this case. Nor did he prove that the swimming activities through Silliman, which is a public indoor pool operated by the City of Newark, is a “primary or critical means for ameliorating the physical, cognitive, or psychological effects of the [claimant’s] developmental disability.” The Silliman swimming activities does not employ a health care provider to supervise claimant’s swimming at the public indoor pool; but rather claimant’s mother accompanies claimant to the city owned and operated swimming pool. Hence, the evidence did not establish that claimant’s use of Silliman is a primary or critical means of ameliorating the adverse effects of the developmental disability affecting claimant. And no evidence demonstrates that funding of the annual pass to Silliman, in and of itself, is necessary for the claimant to reside at home as opposed to being housed in a group home for adults having developmental disabilities. Furthermore, the evidence established that several alternative social recreational activities are available to claimant to help him continue to develop socially and physically. Therefore, claimant does not qualify for an exemption from the termination of services.

ORDER

1. Claimant's appeal is denied.
2. Regional Center of the East Bay is not required to fund the costs of an annual pass for claimant's use to engage in swimming activities at the Silliman Activity and Family Aquatic Center.

DATED: August 14, 2015

_____/s/_____
PERRY O. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days.