

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of the Fair Hearing Request of:

JAN A.,

Claimant,

OAH No. 2012070549

and

EASTERN LOS ANGELES
REGIONAL CENTER,

Service Agency.

DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Los Angeles, California on August 30, 2012.

Claimant Jan A.'s parents represented him.¹

Judy Castañeda, HIPAA Coordinator and Fair Hearing Coordinator, represented Eastern Los Angeles Regional Center (service agency or ELARC).

Testimonial and documentary evidence was received, the case was argued, and the matter was submitted for decision on August 30, 2012. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUE

The sole issue for determination is whether the service agency should continue to fund private swimming lessons for claimant at a rate of two hours per week.

FACTUAL FINDINGS

1. Claimant is a 17-year-old consumer of ELARC due to his qualifying diagnosis of mental retardation secondary to Down Syndrome.

¹ Initials are used to preserve confidentiality.

2. Pursuant to a final administrative decision titled *In the Matter of Jan Christian A. v. Eastern Los Angeles Regional Center*, OAH number 2010031332, ELARC has been funding two hours of weekly private swimming lessons for claimant at the Rose Bowl Aquatics Center. In that case, two hours of private swim lessons each week were established as a critical means for ameliorating the physical effects of claimant's developmental disability because it helped to improve the musculo-skeletal deficits accompanying his Down Syndrome.

3. An undated Aquatic Therapy Progress Note indicates that the goal of claimant's aquatic therapy "is to provide adequate exercise for his body's limitations and to prevent secondary complications associated with Down Syndrome." According to the Progress Note, claimant "has issues with joint hyper-mobility which is typical for Down Syndrome but it makes for exercising on land difficult and painful. He does best with exercise that puts limited strain on his joints. The water makes all of the impact on his joints much less severe. [Claimant] is an amazing swimmer. His endurance is growing every week. He is only 10 laps away from swimming a mile in an hour. His arms are now coming out when he does the butterfly, but his endurance on this stroke needs work. Through his dedication and consistent attendance . . . [claimant] is thriving in the water." The Progress Note additionally indicates that "because of . . . [claimant's] major improvements in his stroke development, he is volunteering as a peer coach." (Exhibit 7.)

4. On July 2, 2012, ELARC notified claimant of its proposed action to terminate funding for claimant's two hours of weekly private swimming lessons for the following stated reasons:

ELARC has been receiving progress reports from Rose Bowl Aquatics and they recently stated that . . . [claimant] is water safe and is a "good swimmer." [Claimant] . . . also is a member of the swim team at Rose Bowl Aquatics and it was stating [*sic*] that he acts as a "coach" for the other members of the team. ELARC is offering to fund for [claimant's] . . . monthly membership to a pool in order for him to continue to exercise. Per Dr. Danis, swimming is an "excellent source of exercise for . . . [claimant] as it puts no strain on his joints." Two YMCA membership options have been enclosed, one for the Weingart East Los Angeles YMCA and the South Pasadena San Marino YMCA. If . . . [claimant] prefers to continue to swim at the Rose Bowl Aquatics ELARC will continue to fund for access twice a week.

(Exhibit 1.)

5. Claimant timely filed a Request for Fair Hearing, and thereafter these proceedings ensued.

6. Claimant's mother testified that his developmental pediatrician recommended daily swimming for claimant at a time when claimant was already participating in swim team activities three times weekly. As a consequence, two hours of swimming was added to

claimant's weekly schedule. During swim team activities, there are several coaches in the pool and several others on the pool deck to ensure the safety of team participants. During the service agency-funded, private swim lessons, one-on-one supervision of claimant ensures his safety. Notwithstanding lifeguard supervision for lap swimming, claimant's mother frets that without one-on-one supervision, claimant poses a danger to himself and others. According to claimant's mother's testimony, "the laps are long—50 meters or more—so he cannot be left alone. Constant supervision is necessary." Claimant's mother testified that, "sometimes [claimant] does not follow instructions; he thinks he can do just what he wants to do."

7. Claimant's behavior specialist, Ken Arutyunyan, wrote a letter stating that when experiencing frustration, claimant becomes non-complaint and resistant.

As the behavior specialist assigned to . . . [claimant], I can only comment on observations made during sessions . . . and what has been observed in regards to behaviors displayed by [claimant.] [Claimant] . . . does a great job during sessions and is able to follow along with behavioral therapy however continues to struggle when he is having a bad day or is frustrated for any particular reason. [Claimant] . . . tends to not listen, he does not reply to any questions or commands, and tends to walk away to himself during those times of frustrations. This is where Mother is concerned that . . . [claimant] might cause himself harm especially in a pool setting without a one on one aide.

(Exhibit B.)

8. Claimant's occupational therapist, Steven T. Bates, has also expressed concerns for claimant's safety while swimming without one-to-one supervision.

I have been happy for . . . [claimant] to be participating in swimming lessons at the Rose Bowl Aquatic Center. This occupation is perfect for . . . [claimant] because it gives him physical exercise, but it is low impact to prevent musculo-skeletal injuries that might occur in other sports due to his lower muscle tone. . . .

In my experience, I have led several therapeutic summer programs that involve swimming, and I know first-hand that children with special needs require **CONSTANT AND DIRECT SUPERVISION FROM AN ADULT FOR SAFETY** when they are in the water—especially if they have any mental retardation or physical disabilities. . . .

In addition to . . . [claimant's] cognitive deficits, he has another area of challenge that poses a safety hazard in the pool: he can be extremely stubborn and ignore instructions from adults—even when his safety is at risk. I have had several challenging situations with . . . [claimant] in which he refused to follow instructions from me. For example, on one occasion, [claimant] was using some exercise/fitness equipment in an unsafe manner and he absolutely

refused to stop this behavior. After numerous attempts by the therapist to verbally instruct him to stop and attempts by the therapist to stop the equipment from moving, [claimant] . . . continued to refuse to listen to the therapist. The therapist finally had to physically pick him up off of the equipment to protect his safety, but he struggled, yelled and cried. There have been several such incidents in which . . . [claimant] did not agree with the therapist, so he just sat on the ground (or other similar behavior) and absolutely refused to move. This therapist is in agreement with . . . [claimant's] mother . . . that such behavior could present a safety hazard in the pool if he does not have direct supervision from a swim coach/lifeguard, especially considering that . . . [claimant's] caregivers are not able to swim.

(Emphasis in original; Exhibit A.)

9. Claimant's swim instructor, Kandis Pulliam, wrote a letter explaining claimant's overall progress and advising against unsupervised swimming for claimant as follows:

[Claimant] . . . demonstrates strong skill sets when under the supervision of a coach. He is able to swim all four strokes; butterfly, freestyle, breaststroke, and backstroke. With the current recommendation to have [claimant] . . . transition to lap swimming, I feel this is not a safe or suitable option for him based on the following reasons. [Claimant] . . . tends to become non-compliant and defiant with people that he doesn't know. He also has a hard time following the rules without someone there to help him. He gets confused on what side of the lane he should be on; this is a safety hazard for the other lap swimmers. He doesn't know what to do without a written workout from a coach. Without guidance [claimant] . . . will bounce up and down, swim underwater and disrupt the flow of the lane. This is also unsafe activity while lap swimming. I do not want to put [claimant] . . . or another lap swimmer in an unsafe environment. I strongly advise against a lap swimming pass for [claimant] . . . and recommend continued supervised lessons.

(Exhibit C.)

10. Two hours of private swim lessons each week continues to be a critical means for ameliorating the physical effects of claimant's developmental disability.

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Services Act (Lanterman Act),² claimant has a right to treatment and habilitation services that are a primary or critical

² Welf. & Inst. Code, § 4500 et seq.

means of ameliorating the physical, cognitive, or psychosocial effects of his developmental disability. Section 4648.5 so provides:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers' [*sic*] 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 cost 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.

(b) For regional center consumers receiving services described in subdivision (a) as part of their individual program plan (IPP) or individualized family service plan (IFSP), the prohibition in subdivision (a) shall take effect on August 1, 2009.

(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 of 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.

2. The two hours of private swimming at issue in this case was funded as an exception authorized by section 4648.5, subdivision (c), to ameliorate claimant's musculo-skeletal deficits accompanying his Down Syndrome. There is no evidence that his musculo-skeletal deficits no longer exist or, in the future, will cease to exist. Two hours of private swim lessons each week continues to be a critical means for ameliorating his musculo-skeletal deficits. Improvement in claimant's swim abilities or skills and concomitant opportunities to function as a peer coach are incidental benefits that do not diminish claimant's continuing need for exercise in the form of swimming to ameliorate his joint hyper-mobility. The on-going amelioration of the physical effects accompanying claimant's developmental disability requires claimant to swim without the risk of injury to himself or others. It is established that one-to-one supervision is necessary to maintain a safe

environment in which claimant can engage in the swimming activity necessary to ameliorate the physical effects accompanying his developmental disability. (Factual Findings 6 through 9, inclusive.)

3. As the party seeking a modification of an existing service or support, the service agency bears the burden of proving by a preponderance of evidence that a change is warranted. (Evid. Code §§ 115 and 500.) ELARC has not met its burden.

4. Cause exists pursuant to section 4648.5, subdivision (c), for ELARC to continue funding private swimming lessons for claimant at a rate of two hours weekly.

ORDER

1. Claimant Jan A.'s appeal is granted.

2. Eastern Los Angeles Regional Center shall continue funding claimant Jan A.'s private swimming lessons at the Rose Bowl Aquatics Center at a rate of two hours weekly.

Dated: September 11, 2012

/s/

JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.