

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLAIMANT,

and

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2014110640

DECISION

Susan J. Boyle, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on January 15, 2015.

Leigh-Ann Pierce, Consumer Services Representative, Fair Hearings and Legal Affairs, represented Inland Regional Center (IRC).

Christopher Russell, Advocate, represented claimant, who was not present at the hearing.

The matter was submitted on January 15, 2015.

ISSUES

1. Should IRC be required to reimburse claimant for the cost of a third session of a swimming program where the request for funding was made after claimant had attended most of the session?
2. Was the swimming program claimant attended an authorized support or service IRC should be required to fund?
3. If the swimming program is an authorized support, should IRC be required to fund a third and fourth session of the program?

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant is a 6-year-old boy who qualifies for regional center services based on a diagnosis of mild mental retardation and autism.

2. To increase claimant's safety skills and awareness around pools, IRC agreed to fund two 8-week sessions of a swimming program. In a Notice of Proposed Action dated October 2, 2014, IRC denied claimant's request to fund two additional (third and fourth) 8-week sessions of the swimming program.

3. Claimant disagreed with IRC's decision to deny funding, and he submitted a fair hearing request on November 14, 2014.

IRC's Prior Funding of Claimant's Swimming Program

4. Claimant is an active young boy who has behavioral challenges: he has tantrums; he exhibits aggressive behavior, including biting, kicking and scratching; he has poor safety awareness; and he has a history of elopement. When claimant has no supervision, he can open doors and windows to get out of his home.

5. The family home has a built-in pool in the backyard. There are alarms on the doors and windows that face the pool, but the pool is not, and cannot be, fenced in. Claimant's mother requested IRC to fund a swimming program that would teach claimant water safety skills in the event he eloped from the home unnoticed and fell into the pool.

6. On March 4, 2014, in accordance with claimant's most recent Individual Program Plan (IPP), IRC agreed to fund "a (sic) 8-week session" (once a week for eight weeks) of a program called "Get Swimming" for claimant to acquire skills that will allow him to be safe when he is in or around the swimming pool. The 8-week session began the week of March 17, 2014, and ended the week of May 5, 2014.

7. Without IRC's prior authorization, claimant's mother enrolled claimant in a second 8-week session of Get Swimming for the period from of May 12, 2014 to July 28, 2014. Claimant did not seek reimbursement for the second session until July 17, 2014. IRC accepted claimant's mother's explanation that she failed to timely request funding for the second session of swimming instruction because there was some confusion regarding when the program started. IRC reminded claimant, however, that all requests for funding must be presented to IRC before a service is provided. With the second session, IRC agreed to waive that requirement and fund the second session of Get Swimming.

Request for Funding of Additional Sessions of Claimant's Swimming Program

8. On September 3, 2014, claimant's mother asked IRC to fund a third session of Get Swimming. The third session began the week of August 11, 2014, and continued until the week of October 6, 2014. On September 26, 2014, claimant's mother asked IRC to fund a fourth session of Get Swimming that was scheduled to begin the week of October 6, 2014. IRC denied both requests.

9. IRC denied the request for funding the third session partly because the request was made after the program had begun and constituted a retroactive request for funding. With retroactive funding, IRC could not monitor claimant's progress and determine if continued participation in the program was warranted. IRC denied the request for funding of the third and fourth sessions because they were deemed to constitute "social recreational/community integration/nonmedical therapies," which are services IRC could not fund unless claimant met the criteria for an exemption. IRC concluded that claimant did not meet the criteria to permit continued funding of the swimming program.

Evidence Presented at the Hearing

SHAWNA TIMMONS

10. Shawna Timmons has been a Consumer Services Coordinator (CSC) with IRC for 12 years. She has known claimant's mother, who is also a CSC employed by IRC, since Ms. Timmons began working for IRC. In her position as a CSC, Ms. Timmons advocates for IRC consumers, such as claimant. Ms. Timmons receives requests for services from her clients, and she presents those requests to the IPP team of professionals who make the determination whether to fund the services requested. Ms. Timmons also monitors her clients' progress and the effectiveness of services provided to them. She provides information to the IPP team, but she does not give recommendations or make decisions about the services requested.

11. Ms. Timmons has served as claimant's CSC for three years. Claimant receives multiple services funded through IRC and private insurance. Ms. Timmons presented claimant's requests for swimming instruction to the IPP team. The IPP team agreed to fund the first and second session of claimant's swimming instruction to increase his ability to be safe around his family pool. Ms. Timmons advised claimant's mother that the authorization for the swimming instruction was for a specific length of time - 8 weeks per session.

Ms. Timmons observed claimant in the Get Swimming program. She saw him easily swim across the length of the pool with supervision. She spoke with the teachers in the program who reported that claimant was doing very well.

In the time she has been claimant's CSC, Ms. Timmons has observed claimant acquire a skill and then lose it. She stated that safety awareness, including safety awareness around the pool, is still an issue for claimant. Claimant's mother is concerned that claimant may get out of the house, fall into the pool, and be unable to get out of the pool on his own.

Ms. Timmons confirmed that claimant receives Applied Behavior Analysis (ABA) services that provide one-on-one training for areas in which claimant is deficient, including behavior challenges, self-care, elopement and safety awareness. Additionally, Ms. Timmons stated that there is an ongoing obligation of a parent to supervise his or her children and to teach them basic safety skills.

MARILEE GRIBBON

12. Marilee Gribbon has been a Program Manager with IRC for 13 years; she has been employed by IRC for 26 years. She is familiar with claimant. When claimant's mother first requested a swimming program for claimant, the stated purpose was to teach claimant to swim. On that basis, Ms. Gribbon denied the request. The next time claimant's mother requested a swimming program it was presented as needed to address safety issues. Because Ms. Gribbon had denied the first request, she referred the new request to IRC's Director. The IRC Director determined that IRC would fund the first and second sessions of Get Swimming, even though the request for the second session was not timely made.

13. In hindsight, Ms. Gribbon believes that authorization of the first and second sessions was in error because the services are recreational, and IRC is not permitted to fund recreational services. IRC, however, is not seeking reimbursement from claimant for the first and second session of swimming instruction.

14. Ms. Gribbon was involved in a prior hearing that involved claimant and his mother. The focus of that hearing was claimant's request for retroactive reimbursement for costs claimant incurred for advocacy services. In that case, on July 17, 2014, an administrative law judge ruled, in accordance with California Code of Regulations section 50612, subdivision (b), that IRC was prohibited from retroactively funding a service or support.

CLAIMANT'S MOTHER

15. Claimant's mother researched a variety of swimming programs and chose Get Swimming because of its emphasis on safety and because it had a professional staff that was trained to work with special needs children. Claimant's mother argued that the swimming program was not comprised of 8-week sessions but was an ongoing program of instruction. She stated she paid 8 weeks at a time because the program offered a \$20 discount when 8 weeks of instruction were paid in advance. She contended, therefore, that IRC funding was not limited to 8-week sessions and that she was not required to obtain authorization for each 8-week session. Her analysis is flawed. Claimant's IPP expressly referred to funding for 8-

week sessions, and the internal documents of the Get Swimming program clearly show that the program is comprised of 8-week sessions.

16. Claimant's mother feels claimant continues to need pool safety instruction. She testified that claimant still needs help to climb out of the pool without a ladder or stairs. Claimant's behavior challenges are ongoing. Although there are safety locks and alarms on the doors and window, claimant has learned how to unlock the locks and get out of the house.

17. Claimant's mother stated that Ms. Timmons did not request a progress report from the swimming program, so claimant's mother understood that funding for the program would be continuous. She contended that Ms. Timmons should have asked for progress reports and made additional requests for funding so that claimant's services would continue.

GET SWIMMING RECORDS

18. Interventions the Get Swimming program provided are "Family/Parent Training; Therapeutic activities: motor skills acquisition; Therapeutic activities: stroke refinement; Therapeutic activities: safety training; Therapeutic activities: buoyancy." Get Swimming's staff includes occupational therapists and speech and language pathologists. Reports from Get Swimming show that claimant has made good progress.

19. Although claimant had completed the fourth session in the latter part of 2014, the most current report from Get Swimming offered at the hearing was from the third session. In that report it was noted that "[Claimant] is a very strong swimmer. With some assistance, he will jump in the deep end." His areas of difficulty included, "bobbing more than once due to water intake through nose. [Unable] to put face in and swim. [Required] tactile assistance (physical) to climb out side of pool and float on back." In the "Pool Safety" portion of the progress report, claimant was rated as "unable" in the categories "Throw, don't go – helps a swimmer in distress by throwing a flotation device to them." and "Think so you don't sink – uses a back float as a rest position." In the category "Exits water at the side of the pool," claimant was rated as able to do this with additional verbal cueing and with physical assistance. He is able to tread water with physical assistance. It was recommended that claimant continue with additional sessions for the further development of skills.

LEGAL CONCLUSIONS

The Burden and Standard of Proof

1. In a proceeding to determine whether an individual is entitled to a specific service, the burden of proof is on the claimant to establish that he or she requires the additional services. The standard of proof required is preponderance of the evidence. (Evid. Code, § 115.) A preponderance of the evidence means that the evidence on one side outweighs or is more than the evidence on the other side, not necessarily in number of

witnesses or quantity, but in its persuasive effect on those to whom it is addressed. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

The Lanterman Act

2. Under the Lanterman Act the State of California accepts responsibility for persons with developmental disabilities. (Welf. & Inst. Code, § 4500, et seq.) The purpose of the Act is to rectify the problem of inadequate treatment and services for the developmentally disabled and to enable developmentally disabled individuals to lead independent and productive lives in the least restrictive setting possible. (Welf. & Inst. Code, §§ 4501, 4502; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.) The Lanterman Act is a remedial statute; as such it must be interpreted broadly. (*California State Restaurant Association v. Whitlow* (1976) 58 Cal.App.3d 340, 347.)

3. The Lanterman Act is intended to provide an array of necessary services and supports 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. (Welf. & Inst. Code, §§ 4501, 4512, subd. (b).) Such services include locating persons with developmental disabilities (§ 4641); assessing their needs (Welf. & Inst. Code, §§ 4642 – 4643); and, on an individual basis, selecting and providing services to meet such needs. (Welf. & Inst. Code, §§ 4646 – 4647.) The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (Welf. & Inst. Code, §§ 4501, 4509, 4685), 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. (Welf. & Inst. Code, §§ 4501, 4750.)

4. Welfare and Institutions Code section 4512, subdivision (b), defines “services and supports” and describes how one should determine which supports are necessary.

“Services and supports for persons with developmental disabilities” means 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, and normal lives. The determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer or, when appropriate, the consumer’s family, and shall include consideration of a range of service options proposed by

individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option. Services and supports listed in the individual program plan may include, but are not limited to . . . recreation, . . . behavior training and behavior modification programs, camping, community integration services, community support, daily living skills training, . . . social skills training, . . . training for parents of children with developmental disabilities, Nothing in this subdivision is intended to expand or authorize a new or different service or support for any consumer unless that service or support is contained in his or her individual program plan.

5. In order to be authorized, a service or support must be included in the consumer's individual program plan (IPP.) (Welf. & Inst. Code, § 4512, subd. (b).)

6. In 2009, the enactment of Welfare and Institutions Code section 4648.5 modified section 4512 and suspended a regional center's authority to purchase certain services, including social recreational activities. Subdivision (c) of section 4685.5 provides that an exemption may be granted "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. In implementing an IPP, regional centers must first consider services and supports in the natural community and home. (Welf. & Inst. Code, § 4648, subd. (a)(2).) Natural supports include family relationships and friendships developed in the community that enhance the quality and security of life. (Welf. & Inst. Code, § 4512, subd. (e).)

8. Pursuant to Welfare and Institutions Code section 4646, subdivision (a), the development of the individual program plan should take into account the needs and preferences of the consumer and his or her family "where appropriate." Services and supports are intended to assist disabled consumers in achieving the greatest amount of self-sufficiency possible. (Welf. & Inst. Code, § 4648, subd. (a)(1).)

9. "Services provided must be cost effective (Welf. & Inst. Code, § 4512, subd. (b), *supra.*), and regional centers are required to control costs as far as possible and to otherwise conserve resources that must be shared by many consumers. (See, e.g., Welf. & Inst. Code, §§ 4640.7, subd. (b), 4651, subd. (a), 4659, and 4697.)

10. California Code of Regulations, title 17, section 50612, subdivision (b), prohibits retroactive funding, with limited exceptions that are inapplicable here.

Evaluation

REQUEST FOR REIMBURSEMENT OF COSTS FOR THE THIRD SESSION OF GET SWIMMING

11. Claimant requested funding of a third session of Get Swimming on September 3, 2014. The third session began the week of August 11, 2014 and finished the week of October 6, 2014. Claimant did not seek the required pre-authorization of funding before committing to the program. By so doing, claimant denied IRC the opportunity to evaluate the program and its costs, determine need, and consider alternative services and supports.

Claimant was fully aware that IRC is not permitted to retroactively fund programs. Claimant requested funding of the second session of Get Swimming after he had enrolled in and completed most of the session. Giving claimant the benefit of the doubt, IRC agreed to fund the second session but advised claimant's mother that all requests and authorization of services needed to be made before the service start date. Additionally, claimant was the subject of an appeal concerning a retroactive request for other services. In July 2014, an administrative law judge denied claimant's request because it sought retroactive funding of services.

Claimant's request for reimbursement for the third session of Get Swimming is denied.

REQUEST FOR FUNDING FOR THE FOURTH SESSION OF GET SWIMMING

12. On September 26, 2014, claimant requested funding for a fourth session of Get Swimming. The fourth session began the week of October 6, 2014. IRC denied funding for a fourth session of Get Swimming based on its determination that the service provided constituted "social recreation activities."

The Get Swimming program is not a social recreation activity. The program is staffed by health care professionals who are trained to work with special needs children. The program's services and interventions are directed towards achieving therapeutic objectives. Pool safety is a specific goal of the program. Get Swimming's report of claimant's progress after the third session provided support for funding a fourth session. It was reported that, while claimant was a strong swimmer, he was unable to put his face in the water to swim. He was also unable to float on his back as a resting position should he be in distress in the water. He was able to get out of the water on the side of the pool only with verbal and physical assistance. He was able to tread water with physical assistance.

Claimant has sustained his burden to establish by the preponderance of the evidence that he is entitled to funding of a fourth session of Get Swimming. Any additional requests for funding of Get Swimming sessions should be made in sufficient time for the IPP team to review claimant's progress, obtain reports from Get Swimming, and reach a determination whether there is a need for additional sessions based upon safety considerations.

